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HEALTH AND SAFETY EXECUTIVE

The HSE Board

The Macrory Review of Regulatory Penalties: Application for HSE

A Paper by Jonathan Russell

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Cleared by Jonathan Rees on 28 March 2007

Issue

1. How should HSE act in response to the Macrory recommendations, in particular, whether to do further detailed work on the case for health and safety regulators using restorative justice, or other alternative penalties.
2. Discussion will be informed by a presentation on restorative justice by Sir Charles Pollard QPM and Nigel Whiskin MBE, Chairman and Business Director respectively of *Restorative Solutions CIC* (see annex 1).

Timing

3. Routine.

Recommendation

4. The Board is asked to:
 - a) confirm, in the light of Prof. Macrory's Review, that there are no fundamental enforcement gaps in HSE's and LA's tool kit;
 - b) give a steer on whether it is worth exploring in detail the potential for using restorative justice approaches or other alternative penalties to deal with health and safety offences, as set out in paragraphs 19 and 20, and if so, what degree of priority this work should have, given current resource pressures.

Background

5. Prof. Macrory published a consultative document on regulatory sanctioning in spring 2006 and BRE published his final report in December 2006. (Annex 2 is a one-page summary). This recommends that regulators be offered the option to adopt new measures if these will plug gaps in the enforcer's armoury. The Government accepted

the recommendations, **including that regulators be left to choose whether to take on new powers.**

6. BRE are developing proposals for enabling legislation to allow regulators to take on powers if they choose using secondary legislation. Policy development continues and no conclusions have been reached, but taking on Macrory powers via legislation may be made contingent on a regulator complying with principles and standards such as those to be established under the Legislative and Regulatory Reform Act. BRE plan to consult on legislative proposals in the summer.
7. HSC considered and replied in detail to the Macrory consultation in August 2006 (see HSC/06/30) and considered his final report along with the outcome of the Enforcement Policy Statement evaluation (HSC/06/78) at its meeting in January 2007. On both occasions HSC confirmed:
 1. **Before looking at new penalties** there is a need to ensure the level of fines imposed under current penalties act as an effective deterrent: current levels are too low (as Macrory himself found).
 2. Overall, it welcomed the review, but HSE's work on this topic, including its own public discussion as part of the EPS evaluation, showed that the health and safety regime was mature with **no significant gaps in its powers**. HSE and LAs already effectively enforce the legislation without being driven to excessive use of prosecution through lack of alternatives;
 - HSC concluded that HSE's and local authorities' enforcement options are currently sufficient. There may be a case for **administrative fines in limited situations**, but this was not a priority. However there may be a need for more involvement / acknowledgement of the victim, as found by the EPS evaluation. Accordingly, **the restorative justice (RJ) option was, in principle, worthy of further investigation**, although the government should provide resources. These options are discussed further at paragraphs 12 to 18.
8. HSC's overall view was that where appropriate new arrangements and support for any proposed options for reform should be funded by government and accompanied by guidelines. This is especially the case for Restorative Justice where there is a need for access to competent practitioners in mediation. The criteria on which HSC judged the Macrory proposals and a summary of HSC's detailed views on his key recommendations, together with Bill Callaghan's covering letter, are at annex 3.
9. The **Operations Management Team (OMT)** discussed the Macrory recommendations on 29 January 2007. **They shared HSC's conclusion** that as there is no enforcement gap, health and safety enforcers do not need the new enforcement tools proposed, but considered restorative justice merited further exploration.
10. While Macrory's recommended new enforcement powers for regulators would require legislation to introduce, restorative justice (which can take a number of forms) is essentially a consensual process which would not require a legislative basis. We understand that BRE and CO may, in due course be looking further at Macrory's recommendation that consideration be given to establishing pilots to trial the use of RJ as a pre-court diversion or within the criminal justice system as a pre or post sentencing option. However, it is unlikely that central funds will be available to cover

regulators costs.

11. We have made preliminary inquiries of other key players on their plans. The Environment Agency is supportive of restorative justice in principle, particularly in the sentencing process. DEFRA's review of environmental enforcement concluded there should be a framework of purposes for sentencing, one of which should be making amends to communities. There would be a need to find a mechanism to determine amends. DEFRA and EA feel RJ may be one of a number of options which could be considered to address this. Further work to address the review's conclusions is still in the planning stage.

Argument

12. The Commission has already confirmed its view that health and safety enforcing authorities have a sufficient set of enforcement powers and tools. So pursuing the possibility of using 'alternative penalties' may not be a high priority at present in view of other demands and initiatives. But we would welcome the Board's views on 3 broad areas:

Increased Penalties/Stigma

13. HSE is pursuing this objective as opportunities arise, most recently via the handout Bill to raise health and safety penalties and exploring further engagement with the Sentencing Guidelines Council. On the latter, we have the prospect this year of influencing new guidelines, both in relation to corporate manslaughter and health and safety offences where death has occurred.;
14. In addition, HSC noted the potential value of publicity orders, which could be used to increase the stigma associated with offences. The Corporate Manslaughter and Corporate Homicide Bill includes provision for this; and the Enforcement STEP is looking at the use of publicity to enhance the deterrent effect of formal enforcement action, including notices. **Is there more we should do?**

Admin Fines

15. Administrative fines may be of use in limited cases eg where serious non-compliance has occurred, but prosecution is not in the public interest. At the other end of the scale they could be used for comparatively 'low level' offences (eg 'welfare', paperwork). But consideration to date, including drawing on experience overseas, suggests they would be bureaucratically burdensome, costly to operate, and would risk damaging the relationship with duty holders, impeding our ability to influence by information and advice. There are also some risks to the Sensible Risk message if we fine for apparently trivial gaps in documentation etc. OMT did not judge further examination to be a priority at this stage. **Does the Board agree?**

Restorative Justice

16. Both HSC and OMT consider Restorative Justice has some attractions. The EPS Evaluation identified areas where we currently have room for improvement such as the involvement of victims and workers in enforcement activities. It may therefore be worth considering the possible introduction of RJ as a means to address these issues. This could take a number of forms from low-key inspector driven mediation to facilitate agreed solutions to health or safety issues uncovered during inspections (essentially codification of existing good practice) through to more formal restorative conferences involving external mediation between a victim and the duty holder.
17. Possible benefits from the introduction of RJ in a health and safety context include:
- the increased likelihood of long-term compliance (eg via engaging senior officers);
 - the opportunity for the victim to be heard and understand what is being done to put right any harm, thereby responding to the EPS evaluation findings and enhancing the reputation of HSE/LAs;
 - reducing the potential for conflict in what are often highly sensitive situations;
 - the provision of a structured approach to dealing with issues, such as chronic ill-health, where court action is very unlikely; and
 - links to other initiatives, such as the future options for Workplace Health Connect, (that could advise offenders on how to improve on health and safety) and the sensible risk management campaign (facilitators could take the opportunity to explain HSC's approach).
18. However potential problems have also been raised:
- use of RJ in a regulatory environment is so far limited internationally, so many questions remain to be phrased let alone answered;
 - the resource implications – no central funds are available;
 - achieving consistency in selecting and settling cases; and
 - avoiding diversions into compensation issues.
19. The overall question for the Board is whether in the next operational year we should do more work on alternative penalties in the absence of dedicated government resource (there is some possibility that BRE may consider facilitating RJ pilots at some point in the future, but this is not certain). Although it would be helpful to HSE's wider credibility as a modern regulator to be seen to give serious consideration to the most relevant of Macrory's proposals in the light of the EPS evaluation, it is not yet clear that the benefits will justify the costs to the organisation at a time of many competing pressures. The Board may wish to consider further at a later date, in the light of the outcomes of the Enforcement STEP publicity work and experience of the use of publicity orders, if introduced via the Corporate Manslaughter and Corporate Homicide Bill.

20. If the Board wants further work on RJ, or other alternative penalties, a project would need to be initiated by Enforcement Policy Unit. This could be incorporated within the business plan for the coming year by re-prioritising, though only at the expense of progress on simplification initiatives (although these are not time critical, they are likely to be more difficult to deliver in future with tightening resources). It would also require significant input from colleagues in OPSD operational divisions and legal advisors and commitment of SCS time on a steering group (with the opportunity costs this entails). As an illustration, a project focused on RJ would need to examine a number of fundamental issues, **including**:

- What types of offences / situations might be suitable for an RJ approach, in particular whether it should ever be an alternative to prosecution;
- Who recommends RJ in individual cases: HSE/LAs, the parties themselves, the courts?;
- Who should facilitate the conference (eg. inspectors / admin staff or outside personnel);
- What follow up would be needed, by whom, and what (if any) sanctions for not honoring agreements;

leading to

- A considered assessment of likely costs to enforcing authorities and benefits in relation to health and safety outcomes and stakeholder trust in EAs and the health and safety system more widely

Consultation

21. This paper has been circulated widely within HSE, including OPSD and all operational divisions (including LAU) and HSE business management units. LACORS have also been consulted.

22. Contacts have been made and links established with other regulators and their sponsor departments, particularly DEFRA and the Environment Agency, but also preliminary contact with Office of Fair Trading, Department of Health and HM Customs and Revenue.

Presentation

23. If the Board wishes to proceed with a project on restorative justice, we would keep the work low key at this stage, although clearly some stakeholder engagement would be needed. The EPS evaluation work and findings indicate it is likely to find favour with victims and at least some business stakeholders, while TUs see value in some situations, but are more cautious. There are potential gains for all (better engagement and recognition of workers and victims; improving reputation and enhanced lesson learning for business), but also potential for it to be seen as a soft option. This issue would require careful management even ahead of any formal decision to proceed with implementation. A project on administrative fines would have a somewhat different set of sensitivities with the need for early engagement with business stakeholders and careful attention to administrative burden and sensible risk perceptions. If we do not proceed further, the message would be that we are not considering the issue further at this time.

Costs and Benefits

24. Overall Costs and benefits of introducing RJ, or other alternative penalties, including costs to HSE and LAs would be identified and estimated as key outcomes of the further work set out at paragraph 20.
25. Further scoping work of the type proposed at paragraph 20 would cost HSE an estimated £130K, taken from current resources: £65k from Cross Cutting Interventions Division (XCD), the rest divided between OPSD and Operational Divisions. SCS steering costs would be additional to this.

Financial/Resource Implications for HSE

26. See paragraphs 24 and 25 above.

Environmental Implications

27. None.

Other Implications

28. Enforcement Policy Unit and FOD Director Scotland are due to meet Cabinet Office Officials to discuss their developing plans for Macrory enabling legislation, including clarifying their intentions regarding application to Scotland.

Action

29. The Board is asked to:
- a) confirm, in the light of Prof. Macrory's Review, that there are no fundamental enforcement gaps in HSE's and LA's tool kit;
 - b) consider the preferred position on three broad areas set out at paragraphs 12 to 18; and
 - c) give a steer on whether it is worth exploring in detail the potential for using restorative justice approaches or other alternative penalties to deal with health and safety offences, as set out in paragraphs 19 and 20, and if so, what degree of priority this work should have, given current resource pressures.

Restorative Solutions CIC
Making things better

HSE Board

The potential for introducing Restorative Justice approaches to Health & Safety breaches.

A paper by Sir Charles Pollard QPM & Nigel Whiskin MBE

1. About Restorative Practice

The term Restorative Justice is used to describe a number of different interventions including both direct and shuttle mediation. We are going to concentrate on restorative conferencing because on the basis of its use in the criminal justice system over the last decade in the UK and the evaluations of its effectiveness, conferencing is the most powerful.

Restorative conferencing is a process for resolving conflicts and making things better. It involves bringing the victim and their supporters together with the offender and their supporters to:

- Find out what happened
- Who was harmed
- What can be done to make things better

All parties to the conflict must agree to participate in the conference which is managed by an independent facilitator. The conference takes place after careful preparation by a trained facilitator, preparation that includes a formal risk assessment. The facilitator's role is critical to the effectiveness of the conference.

The conference has the effect of holding the offender to account directly and personally for the harm they have caused to the victim, usually in a very powerful meeting leading to genuine remorse. This leads on to the signing of an Outcome Agreement in which the offender undertakes to make reparation to the victim. In the criminal justice system this may take the form of:

- A formal apology
- Financial compensation
- Service to the victim
- Community service

The Outcome Agreement can be a condition of a court order and monitored by a supervising officer from the Youth Offending Team or the Probation or Police Services; in which case any breach of the outcome agreement is reported to the Courts. In conferences where there is no court order, the Outcome Agreement is overseen by the organisation setting up the conference and any breach dealt with either by taking the case back into formal processes or noting the incident should the offender come to the attention of the authorities in the future.

2. How is Restorative Conferencing being used?

Restorative Conferencing is being used in a variety of settings. These include (in UK):

- Neighbourhood Policing - used in a growing number of police forces to deal with crime, anti-social behaviour hotspots, other local disputes and family conflicts
- Youth Justice System – used in about 25% of cases to reduce re-offending and increase victim satisfaction, either as an alternative to court or as an addition to it
- Adult Criminal Justice System – Home Office and other trials of RJ have shown it can reduce crime more effectively with more, rather than less serious crimes; and that it can significantly reduce post-traumatic stress disorder in victims as well as the 'victim satisfaction' it generally

provides. It can be used following a plea of guilty before sentence; following sentence; as part of a sentence; as part of the process for planning an offender's release from prison; or as an alternative to prosecution.

- Young Offender Institutions – as part of the discipline regime and as part of resettlement plans
- Residential Units in the community for Young People – to deal with conflicts within and without the Unit
- Social housing – to deal with neighbour disputes
- Schools – to deal with bullying, racial abuse and reduce the risks of exclusions
- Police – to deal with complaints against police officers from the public, and in police discipline cases
- Police and other organisations – to deal with internal workplace disputes and grievances

And overseas

- In Australia and Canada to enforce safety and patient care standards in nursing homes.

The use of Restorative Conferencing is catching on. One of the inhibiting factors as far as its use in police work is concerned is the perverse consequences of key performance targets (Sanction-Detections and Offenders Brought to Justice) which are being reviewed.

3. Does Restorative Conferencing Work?

Formal evaluations into victim reactions consistently demonstrate:

- High levels of victim satisfaction with the process of 75% -95%
- Reductions in victim post traumatic stress syndrome
- Reductions in victims wanting revenge

Formal evaluations into re-offending rates demonstrate:

- Substantial reductions in re-offending for many offenders in cases of violent and property crime where there is harm to a personal victim up to 50% (better results than any other intervention to prevent re-offending)
- The more serious the harm the better conferencing appears to work

Formal evaluations demonstrate:

- High levels of satisfaction for all parties involved when conferencing is used to resolve citizen complaints against the police

Empirical evidence demonstrates:

- Reductions of 50% in school exclusions
- Reductions of 35% in calls for police assistance from Residential Units for Young People
- Successful sustained resolution of long standing recurring neighbourhood crime and anti-social behaviour problems – from 30 calls a month for police assistance to a 'hot spot' to zero.

Further support for the widespread mainstreaming of RJ in the CJS has recently come from a major report by Professor Lawrence Sherman, the new Wolfson Professor of Criminology at Cambridge University, following an in-depth review of the evidence in the UK and internationally for and against implementing RJ (*Restorative Justice: The Evidence* published by the Smith Institute on 8 February 2007)

Restorative Conferencing is not a panacea. It doesn't work with every case in every situation but in many cases it works better than the conventional methods for dealing with crime, anti-social behaviour and other conflicts:

In HSE and Local Authority work it could address the needs of victims and reinforce the personal responsibility of the perpetrator for the offence. This would increase the involvement of workers and bring home the responsibilities of directors and managers.

It could also achieve the aims in HSC's enforcement policy statement of dealing with immediate risk (through prohibition or improvement notices), then using RJ to hold failing duty holders to account and ensuring long-term compliance.

4. Why does Restorative Conferencing work?

Three main theories:

- Nils Christie points out that a crime is a conflict with another person as well as an offence against the State. The traditional criminal justice system 'steals' the conflict from the offender and victim – why, Christie says, would you expect the conflict to be 'solved' if those whose conflict it is are excluded from deliberations on what to do about it?
- John Braithwaite suggests that we ask the wrong question about offenders. The right question is why most people do *not* offend. Part of the reason is the shame we would bring on our families, friends, neighbours and colleagues. The Restorative Conference compels the offender to face up to the consequences of his actions directly with the person he has harmed, in the presence of his family, neighbours and friends, causing genuine shame and remorse for what he has done.
- Guy Hall suggests that conferencing has two separate impacts on re-offending: firstly, it tackles an offender's 'neutralisation' techniques (eg 'the crime did not really harm anyone, the victim was insured anyway, the judge and society are all against me' etc, rather than accepting they have done wrong) and, second, it motivates the offender to engage with interventions (eg drug treatment) and to see them through much more than traditional sentencing..

5. Restorative Conferencing in Health & Safety enforcement work

In Canada and Australia, RJ has been successfully used to regulate patient safety and care in nursing homes. Also in Australia an RJ approach has been adopted towards the internal management of health and safety in the mining industry. In the wider consumer protection field, Australia pioneered the use of RJ to put right the mis-selling of insurance policies to aboriginal people. The agreement with community leaders went beyond compensating the victims, to assisting educational programmes to help ensure such disadvantaged groups could not be so easily exploited again. Directors and senior managers from the insurance companies reported that it was at the RJ conferences that they realised how their commercial practices were wrong and they needed to intervene to right the situation.

Corporate bodies have been included in RJ schemes in Thames Valley – although here the corporate body was the victim of crime not the perpetrator - the work indicates that company personnel can take ownership of issues and participate fully in conferences, deriving the maximum benefit for all parties involved with the offence.

There is no reason therefore why Restorative Conferencing would not work with HS work – with both HSE and Local Authority staff - just as it works with other enforcement or disciplinary situations. Indeed Restorative Conferencing principles may be *particularly* suited to the HSE enforcement environment.

[a] Victim perspective

The key element or driver for Restorative Conferencing to be effective is whether the victim has been harmed and *feels* harmed, either physically, emotionally or materially. Interestingly it is the emotional and physical harm that are usually the most significant from the victim's perspective (eg in a burglary it is not usually the value of the property stolen that is of most concern, but the emotional significance of what has been stolen and the fact that the victim's sense of privacy has been violated; similarly in an assault case it is the physical and emotional harm – the shock of what happened, the fear of this happening again – that is most significant).

In HSE work the emotional and physical harm – or potential harm - to the victim will often be substantial. So the power of a restorative conference – in bringing home to the offender the impact of what he has done - should be similar to that in a 'mainline' criminal offence in the CJS.

Equally significant, victims are excluded from the normal criminal or court process so a process that involves and engages them in HSE work (as with the 'mainline' CJS) also provides them with real ownership and inclusion. Inevitably they will feel much more satisfaction: they will be treated as a person with needs to be met from what has happened, rather than being largely ignored; they will be able to see for themselves how the incident occurred, and the human and technical factors involved; they will be able to ask questions; and they are much more likely afterwards to be able to put the incident behind them, move on in their lives, realise this is most unlikely ever to happen again and feel less anger and vengefulness.

In some HSE cases it will no doubt be 'the community' who is the victim, through for example the emission of noxious substances or the increased risk of an accident. But in each of those situations there is a very clear 'harm' that is being caused to local people, and the key to an effective conference would be facing those responsible with local people directly affected or who would have been affected (or even just one person on their behalf). Since this is an emotional harm, one would expect a powerful reaction and a very effective conference.

[b] Offender perspective

The main difference in HS work is that the offenders are often corporate rather than personal offenders. Here the traditional CJ principles enable the people responsible to hide behind the 'corporate curtain'. They are encouraged by 'the system' to see the incident in corporate and financial terms rather than human terms, and the fact that they are involved only through the office they hold enables them to distance themselves from their own personal responsibility. It should be no surprise that many do not take the Health and Safety offence they have committed seriously enough.

Contrast that to where, if faced directly by the person their organisation has harmed, they can see and *feel* the harm that has been caused; they will have to answer for what happened, not just from the corporate perspective but from a personal one too (what was *your* part in the lapse that occurred?); and they will themselves have to consider what would be fair and just to put it right, both from 'paying back' to the person harmed but also to society for the breach of the law?

[c] Health and Safety Cases where it could be used

Restorative Conferencing could in principle be used in HSE and Local Authority HS work

- as an alternative to court, analogous to its use in Adult Cautions and Final Warnings in mainline criminal justice (it could be particularly powerful if used with Enforceable Undertakings if and when these are introduced)
- in conjunction with court, post plea and pre-sentence. The conference would be held following a plea of guilty during an adjournment of (say) 4 weeks, prior to sentence. The sentencing judge could take the results of the restorative conference into account in sentencing the offender.
- as part of the sentence if the judge so determined under the provisions of the Criminal Justice Act (more research needed as to precise circumstances)

This could potentially cover all types of cases that HSE and LAs encounter, from very serious, major accidents to near misses where the potential for harm needs to be put right before someone is hurt.

An area of great potential, to be developed, would be where a significant offence has been identified but not yet investigated. If the offending organisation acknowledged they were responsible – that might be self-evident in a lot of cases – they could be offered the alternative of a Restorative Conference without further investigation. This could save a lot of resources (time spent investigating and the cost of lawyers' advice, in addition to the cost of court) whilst often delivering a more effective outcome than prosecution.

6. Savings and Costs

In general the costs of Restorative Conferencing need not be large particularly when considered against traditional formal enforcement methods, which can create much bureaucracy and paperwork. Depending on how Restorative Conferencing is used, it can produce savings at the same time as greater effectiveness (eg

when used as an alternative to investigation, prosecution or court, as above) - or by bringing improvements in enforcement using Conferencing as an addition, with extra costs.

Of course in HSE work, avoiding prosecution and investigation costs may only apply in limited circumstances as HSE expects to recover full costs for investigating and prosecuting offences, but it could have an impact where costs might not be possible to recover fully.

An area where bigger benefits might accrue is dealing with cases that are hard to prosecute, for example with pesticide offences or other cases of chronic ill-health, where evidence proving causality is hard to obtain and cases rarely get to court, leaving the victim very dissatisfied. Discussion within an RJ conference could help address the real issues surrounding the complaint, instead of focusing on proving or disproving whether accepted practices were followed (often this can only be getting the farmer / employer to admit to bad practice).

The cost of arranging and facilitating a full restorative conference involving 1 or 2 offenders is about £800-£900. A more informal conference organised by an Inspector on the ground for a minor offence might take no more than 20 minutes of his time, possibly no more than how he would deal with the offence under traditional processes.

Costs would also depend on who carried out the conferencing. Training for Inspectors to utilise the principles in their work with minor breaches – analogous to what we call 'street RJ' in policing – requires 1 day's training for each. Training for more serious conferencing work usually takes 3 days. If introduced to scale HSE may find it cost-effective to introduce their own internal training capacity through a small training and support team.

7. About Restorative Solutions CIC

Restorative Solutions CIC is a Community Interest Company established in February 2007 and registered with the Registrar of Companies, following earlier work since September 2004 by Sir Charles Pollard and Nigel Whiskin to develop an organisation specialising in Restorative Justice delivery, support and training. *Restorative Solutions CIC* works on a not-for-profit basis to promote the use of Restorative Conferencing to deal with crime, anti-social behaviour, community conflicts and other disputes.

We are currently working in some 10 police areas, and with social landlords and youth offender institutions. We have just established a three year £500k project in Bristol to reduce the use of exclusions in the schools in the City. Our work is supported by a number of charitable foundations and by Reliance Secure Task Management, a security company providing support services to the police and other agencies in the Criminal Justice System.

All our training and implementation support work is delivered by experienced Restorative Justice Practitioners, many of whom come from a police background and who work for us on an associate trainer basis.

8. Sir Charles Pollard QPM

Chief Constable, Thames Valley Police 1991 – 2002

Founder Member & Vice-Chairman of the Thames Valley Partnership 1992 – 2002

Chairman of Oxford Common Purpose 1994 –1997

Board member of the Centre for Management & Policy Studies, which oversaw training and personal development in the civil service and wider public services as part of the "modernising government" programme, 1999 – 2002.

Chairman, Justice Research Consortium 2002 - 2005

Member, Youth Justice Board for England & Wales Board 1998 – 2006 (Acting Chairman 2004),

Board Member of the Restorative Justice Consortium 2000 – onwards

Director – Restorative Solutions CIC 2007 – onwards

Police Career

1. Charles Pollard joined the Metropolitan Police at the age of 19. After a police career spanning London and Sussex, he became Chief Constable of Thames Valley Police in 1991 until February 2002.
2. He was awarded the Queens Police Medal in June 1989 and appointed Knight Bachelor in January 2001.

Academic Appointments

- Visiting Fellow of Nuffield College, Oxford 1993 – 2001
- Reader of Criminology, Jerry Lee Centre of Criminology, University of Pennsylvania, 2002 – 2005. In this capacity he chaired the Justice Research Consortium in the UK. a multi-agency partnership in which he worked with the criminologist Professor Lawrence Sherman, Director of the Jerry Lee Centre, together with English and Welsh criminal justice agencies, to develop and test new innovations for developing Restorative Justice.
- Doctor of Laws, Honoris Causa, Universities of Bristol and Buckingham 2003

Sir Charles Pollard QPM

Nigel Whiskin MBE
Restorative Solutions

Macrory Review of Regulatory Penalties

1. The final report of the Macrory Review of Regulatory Penalties was published on the 28 November 2006. The report and its recommendations have been accepted in full by the Government.
2. The Review Team published a formal Consultation Document earlier in the year, to which the HSC responded in August (HSC/06/30) in a generally positive way, while making the point that, in health and safety regulation, the range of enforcement tools available leaves no enforcement gaps.
3. The Review considered a broad spectrum of sanctioning tools and considered the major motivations of non-compliance. Its recommendations are intended to allow regulators to sanction in a risk-based, proportionate and appropriate manner, by ensuring regulators have access to a flexible set of modern fit-for-purpose tools that are consistent with the risk-based approach to enforcement outlined by Philip Hampton.
4. The review makes recommendations around the following areas:
 - General principles:
 - A list of Penalties Principles and a framework for regulatory sanctioning;
 - Preserving the importance of criminal prosecution as a regulatory sanction;
 - New enforcement tools for regulators:
 - The introduction of Monetary Administrative Penalties as an intermediate sanction;
 - Strengthening the system of Statutory Notices;
 - The introduction of a new type of sanction: Enforceable Undertakings and Undertakings Plus;
 - Pilot the use of Restorative Justice in regulatory non-compliance;
 - Alternative sentencing options that could be available in criminal courts:
 - Profit Orders – in addition to fines, where gains from non-compliance are clear
 - Corporate Rehabilitation Orders – similar to HSWA S42 Orders
 - Publicity Orders
5. Recommendations for new enforcement tools are based on making such tools available to all regulators if they wish to adopt them, rather than making their adoption mandatory.
6. Some recommendations will require primary legislation to implement – no legislative vehicle has yet been identified by the Cabinet Office, but work is starting on clauses. Other recommendations, such as use of Restorative Justice, **do not** require legislative change.

HSC view on Macrory Options

When considering the possible use of alternative penalties, HSC considered the options with the following criteria in mind -

- the flexibility and discretion currently used in the enforcement process should be maintained
- any new arrangements should not be overly complicated or bureaucratic for the regulator or the regulated
- penalty systems should operate in a way that is fair, clear and transparent to all.

HSC concluded that there were no significant gaps in enforcement powers; that higher penalties were the priority; but that restorative justice was worth further consideration although government should provide funding for any such new initiatives. Bill Callaghan's letter covering HSC's detailed response is at the end of this annex. With regard to Macrory's key penalty opinions, briefly HSC's detailed response set out:

i) Monetary Administrative Penalties (MAPs) - would require a change in primary legislation.

Generally viewed as only appropriate for a very small number of health and safety breaches. Key points:

- Fixed and variable fines imposed by the enforcer, including "on-the-spot" fines.
- These were potentially bureaucratically burdensome.
- Collecting fines, pursuing of defaulters and administering appeals require significant resources – it is anticipated that enforcers would fund this as no extra central government funding is expected.
- The revenue collection nature may damage the relationship between regulator and regulated, limiting HSE's ability to influence by information and advice without recourse to formal enforcement.
- MAPs may not change behaviour; rather duty holders may calculate the cost of the penalty against the economic gain from non-compliance.

ii) Restorative Justice (RJ) - Would not require new legislation.

Would promote HSC's wider aims in key areas, eg directors' duties and worker involvement. HSC felt that that RJ could be worthy of further exploration, but was concerned about costs. Key points:

- All parties voluntarily meet and agree steps to right the wrong, apologise and prevent a recurrence (see annex 1).
- HSC felt that RJ addressed the needs of the victim(s), eg introducing tools to help with rehabilitation issues, giving them reassurance and helping them "come to terms" with an incident.
- Government should centrally fund initiatives in this area and establish common standards.

iii) Enforceable Undertakings (EU) - would require new legislation.

Could be used in conjunction with an RJ approach. Key points include that they are:

- An alternative to prosecution.
- Combine punitive elements of a financial penalty (and possibly publicity) with restorative objectives such as rehabilitation, reparation and restitution,.
- The offender applies to the enforcer, asking that a EU be entered into instead of court action.
- If the enforcer rejects the application, the prosecution proceeds.
- EUs are legally binding and failure to comply is an additional offence.
- EUs are usually restorative in nature and so can be used alongside other RJ processes.

iv) Probation of Companies and Directors - would require changes to legislation.

Problems were foreseen. Key points:

- the complex nature of placing legal entities on probation
- issues around placing individual office holders on probation would be complex
- significant, extra resource would be needed to monitor behaviour during the probationary period.

v) Publicity Orders by the Courts - enabling legislation would be required.

Key points include that:

- HSC saw the utility of these.
- The feelings of the victim must be taken into account.
- The Corporate Manslaughter Bill is likely to introduce a provision for courts to make publicity orders against organisations guilty of that offence, which would provide a useful test bed.

Separately, STEP Enforcement is exploring ways to improve the use of publicising current enforcement to maximise its effect.

Macrory Review Team
Cabinet Office – Better Regulation Executive
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16 August 2006

Dear Colleagues

Thank you for the opportunity to respond on the developing thinking of your review. The Commission are encouraged that serious consideration is being given to the important role of enforcement and effective penalties in tackling non-compliance. We very much hope that this work, and the development of the compliance code, can be brought to a successful conclusion in a way that gives regulators the appropriate level of flexibility, whilst providing the transparency and certainty that business desire.

In considering our response we want you to appreciate that health and safety is unique and is not always readily comparable with other regulatory regimes. HSE regulates in an environment where risks can result in loss of life, limb and cause serious ill health - both to workers and the wider public.

Furthermore, in the context of health and safety, before we can look objectively at alternative penalties there is a need to ensure the current level of penalties, in terms of the level of fines imposed, act as an effective deterrent. It is our belief that the current level of fines is too low, and needs to be increased. Additionally, we support more training for judges and magistrates so that the level of fines imposed for health and safety offences recognises the gravity of breaches and acts as an effective deterrent.

Against this background, key issues we would like to highlight are:

- i) the need for recommendations from the Penalties Review and Cabinet Office work on compliance code to be aligned;
- ii) that regulators preserve flexibility in deciding whether, and if so, how to change their penalties regime;
- iii) all penalties should apply equally across Great Britain; and

- iv) as mentioned above, more priority should be given to addressing how we can increase consistency and level of fines under the existing framework.

Under the Health and Safety at Work Act 1974 (HSW Act) enforcing authorities (mainly HSE and local authorities) already have an effective range of enforcement tools which are applied according to the principles and approach set out in the HSC enforcement policy statement. This policy reflects to a large extent, the key penalties principles and framework for applying penalties proposed in your review.

These enforcement tools are used to deal with non-compliance in a range of hazardous environments, including the higher risk end of the regulatory spectrum, and where non-compliance can result in fatalities, serious injury and ill-health.

We understand from the review that any new tools would be used in accordance with a new compliance code but that existing tools currently used under the HSW Act would operate under HSC's current enforcement policy. HSC welcomes that: it should be for the individual regulators to decide, within their own timeframe what, if any, alternative penalties should be used. In the case of health and safety the Commission, as the body with responsibility for health and safety in Great Britain, would wish to decide in conjunction with others, such as the Office of the Rail Regulator and Local Authorities, what, if any, penalties should be adopted under health and safety legislation.

It is also essential that the regulator should be able to apply any proposed penalty throughout England, Scotland and Wales. National regulators, such as the Health and Safety Executive, and the regulated, may be placed in a difficult position if penalty options could not be applied equally across Great Britain. This may well jeopardize a regulator's willingness to explore the use of those penalties and cut across the very principles of consistency we are trying to address.

We agree it is important that the review considers the current effectiveness of criminal courts in dealing with and deterring non-compliance. We find the proposal to review the maximum level of penalties for criminal offences highly desirable. Fines handed down by courts should aim to eliminate the financial gain made as a result of regulatory non-compliance, ensure that fines act as a deterrent and reflect the seriousness of the crime. As mentioned before, it is worth making the point again that we feel addressing the currently low level of fines would go a long way to improving compliance by acting as a motivator for those currently disinclined to comply. Your Consultation Document says little on how in practice this will be achieved.

We do however welcome the opportunity to evaluate the benefits of additional tools which may complement the existing health and safety framework.

Attached is a general response on the main points of review together with a detailed response of specific questions asked in the document.

In considering the possible use of the alternative penalties, we have considered the options with the following criteria in mind -

- the flexibility and discretion currently used in the enforcement process should be maintained
- any new arrangements should not be overly complicated or bureaucratic for the regulator or the regulated
- penalty systems should operate in a way that is fair, clear and transparent to all.

It is our view that where appropriate new arrangements and support for any proposed options for reform should be funded by government and accompanied by guidelines. This is especially the case for Restorative Justice where there is a need for access to competent practitioners in mediation, and other alternative penalties such as Enforceable Undertakings where it should help ensure consistency.

Obtaining the right enforcement tools, that can be applied in the right manner where they are appropriate, is essential in bringing about the positive changes we all desire to reduce the levels of death, injury and ill-health in the workplace. Throughout the review process HSC/E has worked closely with the BRE and we look forward to continuing dialogue as the review progresses.



Bill Callaghan
Chair, Health & Safety Commission

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