

REPORT TO: HOUSING, DUNDEE CONTRACT SERVICES AND ENVIRONMENT SERVICES (27TH AUGUST 2007)

REPORT ON: BETTER REGULATION UPDATE

REPORT BY: HEAD OF ENVIRONMENTAL HEALTH & TRADING STANDARDS

REPORT NO: 414-2007

1.0 PURPOSE OF REPORT

- 1.1 This report updates the Committee on developments associated with the Better Regulation Executive and legislative moves to improve the way local authorities carry out regulatory duties with business. A response is also appended in relation to a consultation on a draft Regulatory Enforcement and Sanctions Bill for approval by the Committee.

2.0 RECOMMENDATIONS

- 2.1 It is recommended that the Committee notes the update and approves the consultation response from Dundee City Council.

3.0 FINANCIAL IMPLICATIONS

- 3.1 None.

4.0 SUSTAINABILITY POLICY IMPLICATIONS

- 4.1 None.

5.0 EQUAL OPPORTUNITIES IMPLICATIONS

- 5.1 None.

6.0 BACKGROUND

- 6.1 In 2004 Philip Hampton, the Chairman of Sainsbury plc was commissioned by the Chancellor of the Exchequer, to undertake a review to assess the scope for reducing administrative burdens on business by promoting more efficient approaches to regulatory inspection and enforcement. The Hampton review of regulatory inspection and enforcement was published in March 2005, with an agenda of reducing burdens on business, but importantly without compromising regulatory standards or outcomes. The review and the principles it set out have been widely accepted by Government and regulators.
- 6.2 Proposals arising from the review have resulted in the establishment of a national body for improving local authority regulation. A new public body, the Local Better Regulation Office (LBRO) is taking shape, led by the Better Regulation Executive

(BRE), now within the new Department for Business, Enterprise and Regulatory Reform. The LBRO has five core functions outlined below, but essentially the policy intention is for central government to assume some measure of control over the activities and priorities of local authority environmental health and trading standards services.

- 6.3 The LBRO aims to:
- improve the coordination and consistency of local authority regulatory functions through the Primary Authority Principle.
 - issue guidance to local authorities in respect of regulatory services.
 - provide advice to Government on enforcement and regulatory issues.
 - review and revise a list of national priorities for local authority regulatory services.
 - encourage best practice and innovative approaches to the provision of local authority regulatory services.
- 6.4 On 15 May 2007, Cabinet Office issued the Draft Regulatory Enforcement and Sanctions Bill. This draft legislation proposes that LBRO become a Non-Departmental Public Body (NDPB) covering England and Wales only. While Scotland has been initially excluded for ease of drafting, COSLA has been heavily involved in influencing Ministers in the UK government to refrain from bringing LBRO into Scotland, pressing the case that the regulatory environment in Scotland is different from the rest of the UK. There is a desire, however, for at least some of the functions of LBRO to extend to Scotland, especially in respect of reserved matters and views are being sought from Scottish local authorities.
- 6.5 Nonetheless, COSLA recognised that the LBRO initiative represented an opportunity to review the regulatory environment in Scotland and to bring forward proposals to achieve meaningful improvement, as part of the broader public sector transformation agenda.
- 6.6 In support of its position COSLA commissioned the Improvement Service to undertake a scoping exercise in relation to the regulatory environment in Scotland. This incorporated the key policy objectives proposed for LBRO but with a wider scope, to consider what was required to establish a 'world class regulatory environment' in Scotland, without the need for Westminster or Holyrood to legislate in this area. The report from this exercise is due to be published in August 2007, and officers from Dundee City Council have been involved in the study working groups.

7.0 CONSULTATIONS

- 7.1 The Chief Executive
Depute Chief Executive (Support Services)
Depute Chief Executive (Finance)

8.0 BACKGROUND PAPERS

- 8.1 None

Albert Oswald
Head of Environmental Health & Trading Standards

August 2007



Regulatory Enforcement and Sanctions Bill – Consultation

Instructions for completion			
<p>You can move between questions by pressing the 'Tab'/'Shift-Tab' or 'Page Up' / 'Page Down' keys or by clicking on the grey boxes with a mouse. Please type your replies within the grey boxes or click on the grey boxes labelled 'Please select' to reveal a drop down list to select an answer. Once you have completed the form please return it by email to: resbill@cabinet-office.x.gsi.gov.uk</p>			
<p>Please provide background information about yourself and your organisation.</p> <p>Fields marked with an * are optional.</p>			
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Sector: (mandatory field)		Details of 'Other'	
Local Authority			
<p>Responding to this consultation:</p> <p>Are you responding as:</p> <p>An individual <input type="checkbox"/> or on behalf of an organisation <input checked="" type="checkbox"/></p> <p>If you are responding on behalf of an organisation did you consult others within your organisation? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If you represent a business, what size is it? Please select from list</p> <p>Does your business have sites in more than one local authority area?</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>			
Confidentiality:			

We will respect requests for confidentiality. Please indicate which option you would prefer:

Responses can be published with respondent's details ☒

Responses can be published, but without respondent's details ☐

Responses cannot be published ☐

If you do not put a cross in the box they may be made public. This takes precedence over any automatic notes on e-mails that indicate that the contents are confidential.

Alternatively, to have your comments on a particular section treated as confidential, please insert bracketed text '(Treat as confidential)' within that section response.

QUESTION 1: Do you agree with LBRO's role in helping to facilitate new Primary Authority Partnerships? (*Para 3.16 Consultation Document*)

☐ Yes ☐ No

If not, please specify reasons why

Dundee City Council agrees that Home and Lead Authority arrangements are sensible and we have several with local multi-site businesses that work well. We would support measures which strengthen existing systems so long as local authorities are adequately resourced for any additional burden. We would not support the re-direction of existing resources to Primary Authority Partnerships, where current voluntary arrangements exist, and we do not believe that there is sufficient evidence of any failure in the existing arrangements in Scotland. We also have concerns around a two tier partnership regime with the continuing existence of voluntary HAP and LOPP schemes which may create confusion and greater bureaucracy for businesses and enforcers. We have concerns around the ability of LBRO to 'nominate' local authorities as Primary Authorities perhaps against their wishes, as it will place an undue burden on a few authorities, unless those authorities were resourced, or would be able to charge a fee for their business support role.

QUESTION 2: Do you agree with the way the Bill handles the communication between primary and enforcing authorities, including the definition of 'enforcement action'? (*Para 3.25 Consultation Document*)

☐ Yes ☒ No

If not, what alternatives do you propose?

We do not agree with the requirement to obtain consent as currently drafted. The definition of enforcement action is far too wide, and would severely hamper the ability of local authorities to act in accordance with local problems and priorities. As a minimum subsection 7(a) should be deleted, and it should be clear that only very high level sanctions such as prosecutions will be caught by the provisions. Nothing should be introduced that purports to restrict the ability of local authorities to take appropriate enforcement action, and in Scotland our relationship with the Crown Office Procurator Fiscal Service underlines that view, should proposals be extended to Scotland. We would prefer a due diligence system where enforcing authorities must 'have regard to' advice given by Primary authorities, before taking any enforcement action. This would be far less burdensome and provide as

effective a solution. In fact we believe that the existing voluntary HAP arrangements already provide sufficient material for judicial review and the whole consent regime may be a disproportionate mechanism to what it seeks to achieve.

QUESTION 3: Do you agree that LBRO should consider every case referred to it by a Primary or Enforcing Authority? (*Para 3.27 Consultation Document*)

☒ Yes ☐ No

If not, please specify reasons why

Yes - although if the consent regime is removed or reduced in complexity it is likely that there will be very few cases if any that go to arbitration.

QUESTION 4: Do you agree that LBRO should be obliged to consider evidence from national bodies when resolving enforcement action disputes? (*Para 3.32 Consultation Document*)

☒ Yes ☐ No

If not, please specify reasons why

It will be sensible to consider evidence from all relevant sources in the case of disputes, and there may be several interested parties to disputes depending on the scope of the issue. We do have concerns however with any dispute resolution process that adds delay to any enforcement process. In Scotland it will be unacceptable to the prosecuting authority - the Procurator Fiscal Services if any undue delay is incurred - even if time bar limits can be extended.

QUESTION 5: Is the duty to have regard to inspection plans strong enough, or should local authorities be obliged to "act in accordance with" plans drawn up between a business and a Primary Authority? (*Para 3.35 Consultation Document*)

☒ Have Regard to... ☐ Act in accordance with...

Please comment

If the intention is to result in an environment where there exists greater knowledge and intelligence around the activities of regulated persons, then we would support local authorities having regard to such plans.
We could not support any prescriptive planning from a third party as to how an authority should carry out its business locally, and in particular we feel subsections 13(2) and 13(5) are unworkable.

QUESTION 6: a) Do you agree with this approach? (*Para 3.42 Consultation Document*)

☒ Yes ☐ No

b) Or, should a stronger requirement be placed on local authorities to comply with LBRO guidance? (*Para 3.42 Consultation Document*)

☐ Yes ☒ No

If so, what is your argument?

A well established framework already exists for providing legislative guidance to local authorities, both from local and national sources. Presuming LBRO will only add to this resource it should be a given that local authorities will seek the most appropriate guidance they can before commencing any enforcement action. This will only be in their best interests.

QUESTION 7: a) Do you agree with the process set out in the Bill, for evidence gathering and publication? (*Para 3.52 Consultation Document*)

☒ Yes ☐ No

If not, please specify reasons why?

It seems a sensible approach, and appropriate duty for LBRO to have, to better organise the competing priorities of central government, so long as it does not interfere with local authorities' ability to determine and work to their own local priorities.

Neither this Part of the Bill as drafted, nor the Roger Review, has any application to Scotland, but we would expect to see Scottish Ministers consulted on matters of national priority, especially for reserved matters.

In Scotland this role could be satisfied by a National Regulatory Board, which may emerge as a recommendation from an exercise carried out by the Improvement Service on the regulatory framework in Scotland.

b) Should LBRO be required in the Bill to consult with specific stakeholder groups? (*Para 3.52 Consultation Document*)

☒ Yes ☒ No

Please specify reasons why?

The LBRO should be required to consult but it could be limiting to specify particular groups in statute.

QUESTION 8: Should local authorities be put under a duty to have regard to the list when they plan their own priorities? (*Para 3.52 Consultation Document*)

☒ Yes ☐ No

Please specify reasons why?

Local authorities should have regard to national priorities, so long as it does not go beyond that. It is likely that this would happen in any case without any statutory imposition.

QUESTION 9: Do you agree that LBRO should have this advisory role? (*Para 3.57 Consultation Document*)

☒ Yes ☐ No

Please specify reasons why?

LBRO can play a useful role in ensuring that central government departments and agencies understand the implications of regulatory policy, but it is unclear from the draft Bill exactly where LBRO will fit in the hierarchy, for

example with the OFT and LACORS.

QUESTION 10: Do you agree with this approach to LBRO's structure and legal powers? (*Para 4.7 Consultation Document*)

☒ Yes ☐ No

If not, please specify reasons why?

QUESTION 11: Are there any pieces of legislation on trading standards and environmental health that are enforced by local authorities, and should be added to this list? (*Para 4.11 Consultation Document*)

☒ Yes ☐ No

Please specify

There are discrepancies in the list at Annex D but we understand this is being taken care of on a continuing basis

QUESTION 12: Should anything be removed from this list? (*Para 4.11 Consultation Document*)

☒ Yes ☐ No

Please specify

See above

QUESTION 13: Are there other areas that you believe LBRO's work should extend to, and why? (*Para 4.11 Consultation Document*)

☒ Yes ☐ No

Please specify

There is little evidence to suggest that trading standards and environmental health place a particularly onerous burden on business, in fact in many ways the reverse is true. There seems therefore little reason to single out these services to the exception of other local authority, or non local authority regulatory services.

QUESTION 14: To what extent should the Local Better Regulation Office operate across the UK, with respect to the following functions? (*Para 4.19 Consultation Document*)

a) improving co-ordination and consistency

☒ Yes ☐ No

b) guidance to local authorities

☒ Yes ☐ No

c) work on regulatory priorities

☐ Yes ☐ No

d) advice to Government

☐ Yes ☐ No

e) awarding grants

☐ Yes ☐ No

Please comment

Any initiatives aimed at improving consistency and coordination are to be supported, and guidance to local authorities will always be welcomed. However any approach in Scotland should be led by the Scottish Executive and COSLA, with the agreement of Scottish Ministers, and work has already been done by the Improvement Service, taking a wider more holistic view of the regulatory framework, with Hampton principles in mind. In terms of grants we would want to see monies allocated as appropriate for regulatory burdens, but ultimately it must be for the local authority to use its grant allocation in accordance with its local priorities.

QUESTION 15: How should its work be tailored to the different national contexts? *(Para 4.19 Consultation Document)*

The current scoping exercise and report on Scotlands regulatory framework carried out by the Improvement Service should be taken into account in terms of any application of the LBRO in Scotland, as should current public sector agendas of efficiency and joined up government.

QUESTION 16: Are the lists contained in Schedules 3 and 4, and Clause 35(3) accurate? *(Para 6.7 Consultation Document)*

☐ Yes ☐ No

Please specify omissions or errors

QUESTION 17: a) Is the mechanism for awarding powers appropriate? *(Para 6.13 Consultation Document)*

☒ Yes ☐ No

b) Are there other options or processes you would like to suggest?

QUESTION 18: Do you believe that there should be a process to withdraw or suspend powers? *(Para 6.14 Consultation Document)*

☐ Yes ☐ No

If so, what triggers do you believe could be used as a decision basis for withdrawing or suspending powers?

QUESTION 19: Do you feel that the balance of safeguards and appeals is appropriate to this process? *(Para 7.8 Consultation Document)*

☒ Yes ☐ No

If not, please specify reasons why not

QUESTION 20: Is the procedure for issuing Discretionary Requirements appropriate for all types of regulatory non-compliance? *(Para 8.10 Consultation Document)*

☐ Yes ☐ No

If not, is there another way of issuing Discretionary Requirements and, if so, under what circumstances?

QUESTION 21: Do you agree with the proposed enforcement of Discretionary Requirements? *(Para 8.12 Consultation Document)*

☒ Yes ☐ No

If not, please specify reasons why not

QUESTION 22: a) Should all Discretionary Requirements be enforceable by criminal prosecution for the original offence? *(Para 8.12 Consultation Document)*

☒ Yes ☐ No

b) Do you agree that breach of a discretionary requirement should not be in itself a criminal offence?

☒ Yes ☐ No

If not, please specify reasons why not

Care would need to be taken that criminal prosecutions would still be competent after any delay in seeking a discretionary requirement. If undue delay were to prevent procurators fiscal from accepting cases then in Scotland there would need to be a criminal sanction for the breach of requirement.

QUESTION 23: Do you agree that there should be stricter tests for the issue of cessation notices? *(Para 8.18 Consultation Document)*

☐ Yes ☐ No

If not, please specify reasons why not

QUESTION 24: Do you agree with the criteria for temporary cessation notices (harm to human health, the environment, or consumer interests)? *(Para 8.18 Consultation Document)*

☐ Yes ☐ No

If not, please specify reasons why not

QUESTION 25: Should there be further criteria in the temporary cessation notice test? (*Para 8.18 Consultation Document*)

☐ Yes ☐ No

If so could you suggest further criteria?

QUESTION 26: (*For regulators*) Would temporary or permanent cessation notices be a power that you would use? (*Para 8.18 Consultation Document*)

☐ Yes ☐ No

Please give examples of how you would use them.

QUESTION 27: Given the safeguards available before imposing a permanent or temporary cessation notice, is it reasonable to have a compensation scheme? (*Para 8.18 Consultation Document*)

☐ Yes ☐ No

If not, please specify reasons why not

QUESTION 28: Are preventative notices a necessary addition to the regulatory sanctioning toolkit? (*Para 8.21 Consultation Document*)

☐ Yes ☐ No

Please give reasons for your answer.

QUESTION 29: Do you think that the test proposed is appropriate for preventative notices? (*Para 8.21 Consultation Document*)

☐ Yes ☐ No

If not, please provide further detail.

QUESTION 30: Do you think that there should be further safeguards around the use of preventative notices? (*Para 8.21 Consultation Document*)

☐ Yes ☐ No

If so, please provide further detail.

QUESTION 31: Do you think that the publication of Enforcement Undertakings on a regulator's website is an appropriate step? (*Para 9.8 Consultation Document*)

☒ Yes ☐ No

Please comment

QUESTION 32: Do you think that this could be tied with certification of Enforcement Undertakings by also publishing the fact that the Enforcement Undertakings have been successfully completed? (*Para 9.8 Consultation Document*)

☒ Yes ☐ No

Please provide further detail

QUESTION 33: Are you satisfied with the proposed approach of allowing Voluntary Undertakings to be offered with a VMP? (*Para 9.11 Consultation Document*)

☒ Yes ☐ No

Please provide further detail

QUESTION 34: (a) Would the financial implications to a regulators' enforcement budget be a significant factor in deciding if a regulator would want to use these alternative sanctions? (*Para 10.5 Consultation Document*)

☒ Yes ☐ No

(b) Would the recovery of cost for administering sanctions mitigate this?

☒ Yes ☐ No

Please comment

At the moment local authorities in Scotland incur no court costs since prosecutions are taken by the Crown, any alternative sanctions used would have a significant effect on budgets unless they were offset by retaining penalties. An effective framework for collecting penalties and recovering administrative costs is therefore a pre-requisite.

QUESTION 35: Are there other guidance documents that should also be published such as guidance on prosecution? (*Para 11.3 Consultation Document*)

☒ Yes ☐ No

If so, please provide further detail

COPFS publish guidance on reporting cases to the procurator fiscal in Scotland, which is very helpful to enforcement officers.

QUESTION 36: Do you believe the assessment of costs and benefits in the Impact Assessment is realistic? (*Impact Assessment – Annex B*)

☐ Yes ☒ No

If not, is there any further evidence that you can provide that should be taken into account?

See below, we feel the figures upon which the impact assessment are based are unreliable, and the purported benefits to business artificially high. In Scotland in particular there will be far fewer prosecutions and court appearances to take into account.

Thank you for completing this questionnaire. Please add any other comments you have in the box below.

We have concerns over the assumptions made in the impact assessment and the figures quoted as annual savings to business ie 'in the region of £23-£46 million', and the figures quoted for costs of local authority enforcement.

It is simply unclear how these figures have been reached and we would question how reliable they are. The research quoted is based upon informal interviews with seven UK based businesses and to extrapolate this to the much wider business community is unreliable.

The assumption that it takes an average of 2 hours to carry out an enforcement inspection is a substantial overestimation of time, even taking into account factors such as pre-planning, travel and recording. In an urban environment Officers can use their time productively to visit many traders within a single day and thus have minimal impact on the business whilst ensuring they meet their regulatory obligations.