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Macrory Penalties Review  
Cabinet Office – Better Regulation Executive  
Kirkland House  
22 Whitehall  
London SW1A 2WH

Dear Sir,

The Society of Chief Officers of Trading Standards in Scotland, is the professional body representing the lead officers for Trading Standards in Scottish local authorities, and I welcome the opportunity to respond to the regulatory justice consultation document.

We were pleased to respond to your earlier consultation on this matter and I note your intention to continue to consult with key stakeholders. I hope that, despite Scottish Trading Standards services operating within a devolved administration, you would continue to seek our views, since much of our work is concerned with reserved matters.

I know there are issues of scope, however it is a concern that the review does not deal adequately with Scots Law and Practice. For a consistent penalties regime to operate across the UK to extend the Hampton principles, there needs to be an extensive examination of how it will work within the Scottish Legal System, which delivers for many regulators dealing with reserved matters.

I trust you will find this response constructive, and stress our willingness to continue dialogue with the review of the current penalties regime.

Yours faithfully

Ken Daly  
Chairman SCOTSS

## **Regulatory Justice: Sanctioning in a post-Hampton World.**

### **Questions**

**1. Do you agree that criminal prosecution and the criminal courts should be reserved for the truly egregious offenders or where regulatory breach leads to severe actual or potential external consequences?**

There are examples when criminal prosecution can be argued to be in the public interest. In Scotland it is up to the discretion of the Procurator Fiscal to decide whether this is the case in a matter of individual breach. The factors they take into account are virtually identical to those laid out in "The Macrory Penalties Principles" laid out in Box E2. We would follow this argument by stating that if a move to consistency and clarity of approach is to be paramount in the acquittal of trading standards duties then it cannot additionally be our role to make value judgments about which breaches of legislation are "truly egregious".

**2. Do you agree with the vision that is laid out in Figure 1.3 of a contemporary regulatory enforcement toolkit?**

Yes, this appears to be a sensible framework.

**5. Do you agree that a regulator must ensure the following characteristics....?**

Yes, SCOTSS members' authorities are signatory to the Cabinet Office Enforcement Concordat, (note impending Regulator's Code of Compliance), which covers many of these issues. In most instances prosecution will be used as a last resort and every effort is made to work with business on compliance issues. It is also standard practice to follow up Enforcement Notices that are issued by officers and this in fact used to be a publicly reported Statutory Performance Indicator required by Audit-Scotland. The DTI has also designed a National Performance Framework (NPF) for Trading Standards to annually report their activities including notices issued and actions taken. Scottish Authorities have a good history of returning statistics demonstrating vigilance in follow up action. Members also adhere to the LACORS (Local Authority Coordinators of Regulatory Services) Home Authority Principle when dealing with local trader enforcement issues.

There are issues of governance that may need to be further considered by the review. Trading Standards Services are based in individual local authorities with enforcement responsibilities to both the Scottish and UK Government, and very local governance arrangements. Agencies such as the OFT and Food Standards Agency all set their own distinct policies, procedures and goals which may be difficult to reconcile with some of the recommendations in the review such as publication of a (single) enforcement policy. Further definition may be needed of what would constitute "Regulators" as is mentioned in the Framework for applying penalties in Box E2. (pg 8)

**11. Would more training be appropriate for judges in the area of regulatory non-compliance and appropriate sentencing?**

Yes, and we would extend this suggestion to training for Procurators Fiscal in Scotland as they are responsible for presenting cases in the Scottish Courts following evidence provided by Trading Standards as well as Police and other non police reporting agencies.

**15. Should the profits gained from non-compliance be subject to separate profits order....?**

Yes, and the Review should consider building on the successes in the use of the Proceeds of Crime Act by regulatory bodies to achieve additional financial penalties following prosecution. Glasgow City Council Trading Standards services have already assisted the Confiscation and Recovery Units of the Crown Office in Scotland to seize significant sums from traders.

**16. In general, do you agree that regulators should have Monetary Administrative Penalties available to them as an additional sanction option in their enforcement toolkits? If no, then please elaborate on your views.**

Subject to detailed consultation SCOTSS would agree with the introduction of MAP's

**17. Do you prefer Model # 1 (paragraphs 3.40 – 3.44), Model # 2 (paragraphs 3.45 – 3.47) or Model # 3 (paragraphs 3.48 – 3.51). Please explain why you would prefer one particular model?**

SCOTSS would suggest that Model #3 is the best option. However setting up such a tribunal body will represent a massive change in practice and will require considerable ongoing resourcing.

**18. Should regulators have FMAs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate? What level of financial penalty would be appropriate for FMAs?  
19. Should regulators have VMAs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate?**

There is an argument to be made that in simplifying the procedure there should only be VMA's with recommendations for local authorities to fix some penalties at a particular rate.

In relation to the statement in Para 3.62 There is an argument to be made for the regulator being allowed to retain all or some of the proceeds of penalties. This is the case with fines imposed by the Financial Services Authority and with the outcomes from some Proceeds of Crime Investigation in England and Wales and Fixed Penalty Notices Issued by the police for Road Traffic Act offences. This incentivises the regulator to enforce diligently and effectively, and will may lessen the burden on the taxpayer of maintaining the service.

**26. If a statutory notice is not complied with, should regulators be able to apply a Monetary Administrative Penalty for non-compliance with an Enforcement Notice?**

Fixed or recommended penalty notices will be used by Trading Standards Services in Scotland for the enforcement of Home Information Packs (from 2007/8) and are already used by Environmental Services for some offences, for example dog fouling.

It should be recognised that collection of fines does place a burden on the regulator and in some cases pursuance of non-payment can lead to a greater financial outlay. Issues around non payment should be considered as part of the review,

**28. Do you think Enforceable Undertakings are a good alternative sanction to have available to regulators?**

These present good additional sanctions rather than an alternative. It should be at the discretion of the regulator subject to local policy to apply this and resourcing must also be directed to following up. The LACORS Home Authority Principle already provides a framework for cooperation between regulators and business to tackle long term compliance.

The Enterprise Act 2002 has provided an 'undertaking' alternative to enforcement for some forms of civil penalties, used by Trading Standards services and the Office of Fair Trading. However some of the early problems with investigations and imposing sanctions following breach through the Scottish Courts system may bear further examination before they could be adopted as a straightforward model for other sanctions. Difficulties in enforcing undertakings and additional costs on local authorities has meant that this route has not been as effective an alternative to prosecution as was hoped.

**35. Do you agree that Restorative Justice is something that can be applied to the area of regulatory non-compliance? Please elaborate on your views.**

Yes, the Scottish Courts already have a mechanism to make Financial Compensation Orders although this is seldom used in practice. Trading Standards could ask for an order in cases where there is clear consumer detriment.

**52. Are financial penalties alone sufficient to deter companies from not complying with regulatory obligations?**

No; given the evidence in the report that the financial benefits of non compliance outweigh fines imposed. This would be the case with e.g. large scale counterfeiting cases prosecuted by Trading Standards.

**54. Would the following potential extended sanctioning options be appropriate for sentencing in cases of regulatory non-compliance?**

a. *Publicity orders*

This is something SCOTSS would recommend for further investigation. Consideration should be given to when this is an appropriate sanction, how to determine the financial liability for publishing and where publication would be most effective

*d. Mandatory audits*

This is something SCOTSS would support. Action has already been taken by South Ayrshire Council Trading Standards to enact such a penalty against a retail car dealer.

**57. Do you have any suggestions for other types of sanctions that should be considered, not mentioned on the above list?**

Consideration should also be given to negative licensing penalties as in the Estates Agents Act 1979 to be imposed in relation to appropriate breaches.

Where the breach relates to a trader already operating under a licence probationary licensing may be an effective sanction. Regulators should have a right of audience with licensing boards

**58. Should judges seek to remove all of the financial benefit obtained as a result of regulatory non-compliance in their sentencing through a profits order plus a fine?**

This process already exists under the Proceeds of Crime Act used by a number of agencies. There is a saving to be made to the public purse in having effective orders made by Sheriffs, Magistrates and Judges at the point of prosecution. That is not to say that this system cannot be improved upon but a mandatory consideration of this at court stage would help to improve the effectiveness of the regulatory regime and increase the deterrence element against potential breaches.