



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' | |
| Professional Body | | | |
| Responding to this consultation: | | | |
| Are you responding as: | | | |
| An individual <input type="checkbox"/> or on behalf of an organisation <input checked="" type="checkbox"/> | | | |
| 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 | | | |
| If you represent a business, what size is it? Please select from list | | | |
| Does your business have sites in more than one local authority area? | | | |
| <input type="checkbox"/> Yes <input type="checkbox"/> No | | | |
| Confidentiality: | | | |
| We will respect requests for confidentiality. Please indicate which option you would prefer: | | | |
| Responses can be published with respondent's details <input checked="" type="checkbox"/> | | | |

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

SCOTSS would agree that a Home Authority arrangement is sensible and we would support measures which strengthen systems that have been shown to work. However we would be reluctant to endorse substantial direction of resources to companies which operate inside the law as seems to be the aim of the Primary Authority Partnerships. Further evidence needs to be supplied of the benefits of the new system on SMEs who evidence have shown benefit from current risk assessed visits and also clarification on the "parallel" continuing existence of the LACORS HAP which may create confusion and greater bureaucracy for businesses and enforcers. SCOTSS would not want to see PAP as proposed in this document adopted in Scotland as we can see no benefit for Scottish Local Authorities.

Once the views of the Scottish Executive and COSLA on an equivalent regime to the PAP are established a practicable arrangement through the development of MOUs between the administrations might be a possible way forward.

The lack of consistency that will arise if an equivalent to the PAP is not adopted in Scotland is a substantial cause for concern. Most large businesses operate on both sides of the border and in particular some of the most important financial institutions within the UK have their home authorities within Scotland.

Another workable alternative applicable UK wide might see continued support for HAP coupled with creating a statutory defence for a business if they have complied with written HA guidance provided it was reasonable of them to do so. That way, enforcing authorities will have a clear incentive to talk to the HA before taking any "out-of-the-ordinary" enforcement action to avoid embarrassment where the legal action fails due to the enforcing authority acting contrary to HA guidance. That would still need an arbitration mechanism to be in place to resolve those situations where an enforcing authority believes that the HA has got it wrong, but at least any such disagreements will be resolved outwith the courts and therefore not burdensome on businesses.

This system would not place any bureaucratic and burdensome barriers (e.g. the 'consent' regime) in the way of enforcing authorities continuing to take action for fairly non-contentious breaches.

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?

From the information in the consultation document this seems overly complicated and open to misunderstanding between authorities. There is also an unidentified resource implication in educating businesses about the changeover to the new regime. We would favour a strengthened Home Authority Principle and perhaps a regional approach to dealing with major businesses that create an undue burden for their home authority.

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

We agree that having a central body to consider authoritatively how to resolve disputes could be a key area for improving services to business. A better approach might see an extension of the LACORS HAP which works on a consent regime. This would avoid "petty" or inconsequential matters being subject to dispute.

SCOTSS would also respectfully request that there be better and more diverse examples of inconsistent enforcement that have caused specific losses to business. These could be used as part of training modules or written guidance. There is no consideration of the possibility that inconsistency may be down to ambiguous or ill-defined legislation. On this basis the society has concerns that the wide discretion open to local authorities inherent in the Unfair Commercial Practice Directive's adoption into UK statute may be viewed by business interests as subject to inconsistency.

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

There needs to be consideration of who would be the appropriate national body for Trading Standards Services. The Office of Fair Trading may have a role here but it is not specified in the consultation if they would be considered or if they would wish to take that on. Further issues creating disputes may concern regulatory issues that are "out of scope" for the OFT including Feedstuffs and metrology matters. There are also issues that may concern regulatory services in general that cross over professional specialisms.

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 PAPs want to make recommendations on local authority visits to premises it can do so but ultimate authority will rest with the LAs on when and how these should be conducted.

That said this is one of the stronger elements proposed in the consultation and SCOTSS would support that all local authorities have regard to risk assessments conducted by the primary authority and also access to any relevant intelligence that the primary authority holds on the company that will inform enforcement practice, for example their training records for staff in relation to age restricted products. Again the resource burden placed on primary authorities that produce risk assessments would need to be accounted for and there would need to be safeguards that such documentation is secure and properly maintained.

Whilst LAs would welcome centrally-provided info about the systems in place within a business in order to inform our own risk assessments, it is simply not realistic to expect that a primary authority can with any accuracy predict that local branches will be compliant. For example, we have found that despite large supermarket chains having due diligence systems in place, it is still possible for a checkout operator to sell cigarettes to an underage person. Although the company may even have a good defence, a sale has still taken place and that sort of thing needs to be uncovered so that the company can further tighten its procedures in the wider interests of consumer protection, not simply in the interests of their own compliance with the law. Therefore local training and local store managers have a big impact on due diligence. The only way to identify this is by local action based on previous experience and local priorities. Also there is the situation when a local authority seeks to target a particular sector in line with its local priorities or under projects like "operation liberal". SCOTSS would object to any intervention by the PAP on such measures.

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?

Before the RE&S Bill is enacted in law it is fundamental to resolve the respective roles that LBRO and LACORS have in providing guidance for local authorities in relation to enforcing specific pieces of legislation. The Devolved approach proposes informal partnerships with local authorities and businesses and there will be fewer TS prosecutions as a result of this. The approach favoured in the consultation may formalise current relationships at the expense of greater mutual understanding. The proposal in 3.42 that "if LBRO were to propose ways of offering better outreach services to business to support compliance" would not collide with "established high quality

services" seems contradictory given that the aim of the new principle is to offer consistency and certainty across the regulatory sector.

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?

This aspect of the RE&S will not apply in statute in Scotland however this is an area where SCOTSS would see great potential for an authoritative body that will assist local authorities to provide a better service to businesses and serve the needs of consumers. There is an urgent need to prioritise the competing workloads that the trading standards service faces through its obligations to report to multiple national and devolved bodies, including BERR, OFT, Food Standards Agency, Scottish Executive, UK IPO, NWML, etc.

We would ask the respondents to note for example that the outcomes of the Rodgers Review have no statutory force in Scotland and yet these central priorities will inevitably impact upon central government departments with UK wide remits. The Society would refer to the "Outcome Report of the Better Regulation and Safe and Successful Communities" produced on behalf of COSLA (July 2007) as presenting workable alternatives to those recommended in the consultation. What is therefore urgently required is the development of distinctly Scottish priorities and we would also argue UK wide that the LBRO could provide guidance for local authority managers that will allow responsive regional service planning. Finally SCOTSS would encourage the LBRO to work with the OFT Regional Intelligence network which is developing a national picture of risk for trading standards.

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?

It is critical for the LBRO to consult but it would seem a limiting exercise to specify this 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?

For Scotland it is unlikely that local authorities will be bound by statutory priority planning. However as proposed in the answer to 7a guidance that will work to serve their strategic planning remit could be effective.

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

Yes No

Please specify reasons why?

The OFT and LACORS already have a respected role providing advice on

enforcement a more appropriate role for the LBRO would be to support and champion their findings to central government. The Society could not question the LBRO's authority within central government but they must not be seen to speak on behalf of trading standards or local authority institutions.

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

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

Yes No

Please specify

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

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 | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| b) guidance to local authorities | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| c) work on regulatory priorities | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| d) advice to Government | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |
| e) awarding grants | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No |

Please comment

The Scottish Executive must be seen to take the lead in organising its own regulatory sector. There may be a role for the LBRO as a recognised expert providing some overview of regulation. SCOTSS would again point to the document BETTER REGULATION

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SAFE AND SUCCESSFUL COMMUNITIES published by COSLA as providing a more practicable blueprint for improving coordination and providing guidance to regulatory services in local authorities. This is welcomed in the context of the SCOTSS responses to earlier questions within the consultation document.

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

SCOTSS would want the Scottish Executive and COSLA to work in context with the LBRO to achieve better joined up working between local authorities and to improve current issues with capacity and service delivery.

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

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

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

It would be a productive and progressive step for the LBRO if they could provide authoritative guidance on product recall procedures as this unregulated area can be subject to delay and difficulties between local authorities and businesses.

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?

There are serious discrepancies in the Impact assessment. The figures quoted on page 70, para 18 of the document refer to annual savings in the region of £23-£46 million. Disregarding the huge gulf between those figures it is simply unclear how this figure is reached. The research quoted is based upon informal interviews with 7 UK based businesses and to extrapolate this to the much wider business community seems reckless. The Impact assessment must also consider the catastrophic effects if businesses of whatever side choose to disregard the advice endorsed by them as a statutory body which will inevitably lead to a greater recourse to enforcement sanctions by regulatory bodies.

The Impact assessment also shows little practical knowledge of the daily duties undertaken by trading standards in local authorities. This is particularly disappointing given the effort taken to create the retail enforcement pilot. On page IA12 an assumption is made that it takes 2 hours to carry out an enforcement inspection. This 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 multiple traders within a single day and thus have minimal impact on the business whilst ensuring they meet their regulatory obligations and answer any outstanding issues. It is the ability of current service delivery to be flexible in relation to business requirements that is a definite strength.

The possible intention for the LBRO to nominate local authorities as PAPs as suggested in guidance potentially places a heavy burden on individual local authorities. Resource allocation must be sensitive to this eventuality. Also SCOTSS would ask that where appropriate a regional solution to providing support to businesses is considered. Involvement of the Crown Office and Procurator Fiscal

Service is also critical here.

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

As the professional body representing Trading Standards Services in all 32 Scottish Local Authorities SCOTSS welcomes the outline proposals for the LBRO if not the practice prescribed in the consultation and we would want to ensure that there is not a "lopsided" delivery of its goals due to lack of parallel enforcement in Scotland and the rest of the UK.

SCOTSS has already used the principles behind the bill to argue within their role in the Improvement Services steering group on the future of regulatory services for greater consistency in delivery across regulatory services and for improved focus on prioritisation. We would be happy to work with the Office on a non-statutory basis alongside our primary stakeholders based in Scotland.

Before this can be achieved there is a substantial role for the LBRO to demonstrate how they can bring concrete benefits for consumers and traders through their existence rather than just formalising already recognised relationships.

In relation to paragraph 6.1 of the consultation SCOTSS support the development of an alternative sanctioning regime. The Society is pleased to note that discussions have commenced with the Scottish Executive in relation to the use of alternative civil sanctions.