Chartered
Institute of
Environmental
Health

Proposed policy statement for Part 2 of the Localism Act 2011

Response to the Department for Communities and Local Government consultation

April 2012

The Chartered Institute of Environmental Health

As a **professional body**, we set standards and accredit courses and qualifications for the education of our professional members and other environmental health practitioners.

As a **knowledge centre**, we provide information, evidence and policy advice to local and national government, environmental and public health practitioners, industry and other stakeholders. We publish books and magazines; run educational events and commission research.

As an **awarding body**, we provide qualifications, events, and trainer and candidate support materials on topics relevant to health, wellbeing and safety to develop workplace skills and best practice in volunteers, employees, business managers and business owners.

As a **campaigning organisation**, we work to push environmental health further up the public agenda and to promote improvements in environmental and public health policy.

We are a **registered charity** with over 10,500 members across England, Wales and Northern Ireland.

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Summary of the CIEH's response

Part 2 of the Localism Act 2011 is a worrying development for local authorities replacing a fair, impartial and reasonably predictable legal process with a Ministerial discretion to off-load onto them EU fines incurred by the UK Government.

The Government's draft policy for applying the new policy does not rule out retrospective liability for fines for existing facts that are later ruled to be an infraction. Nor does the draft statement state that the new policy will only be applied in exceptional circumstances, even though the Government has stated this elsewhere.

Fairness ought to be a key principle expressed in the Government's policy statement (not limited, as in the current draft, to a fair process).

The arrangements for an independent advisory panel are mostly reasonable, although the CIEH has some suggestions for improvements. The CIEH is willing to participate in the processes for local authorities' representation described in the consultation document and to make nominations for membership of independent advisory panels.

Introduction

It is curious to see a closing date for the consultation that is a **Sunday**.

As the consultation document states, the UK has never had a financial sanction imposed in relation to an infraction. Presumably, when the document explains that local authorities must accept their responsibilities, we can conclude that the absence of any financial sanction until now demonstrates that local authorities have indeed behaved responsibly with regard to EU obligations. Indeed, no example is given in the consultation document of any local authorities failing to *"meet their obligations"* to help the UK avoid financial sanctions.

It is intended that the Minister's discretionary power will be exercised where a local authority has, or more than one local authorities have, *"demonstrably caused or contributed to"* the financial sanction. There is no qualification stated that such an exercise will be in exceptional circumstances only. However, the Government did state that "*Part 2 of the Act will only be used in exceptional circumstances"* in its response to a recent report of the House of Commons Environmental Audit Committee.[1]

The consultation document's Executive Summary similarly makes no reference to exceptional circumstances. Perhaps it would be helpful for the proposed *"key principles"* to be amended to state that the Minister's discretion will indeed only be exercised in exceptional circumstances.

Chapter 1

The nation state is legally responsible for ensuring compliance with EU legislation. Any infraction proceedings would be conducted against the UK Government.

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[1] Air quality: A follow up report: Government Response to the Committee's Ninth Report of Session 2010–12. Seventh Special Report of Session 2010–12. *Ordered by the House of Commons to be printed 8 February 2012* *http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/1820/1820.pdf*

According to the consultation document, the Minister's discretionary power to apportion financial sanctions to local authorities will be decided on a case-by-case basis. Chapter 1 refers to EU financial sanctions being *"recouped"* from local authorities (paragraph 8). This language is a long way away from the exercise of a power in exceptional circumstances and this language ought to be reconsidered.

According to paragraph 8, EU financial sanctions could be recouped where the financial sanction is imposed on or after the day that Part 2 of the Act comes into force. However, this leaves open the ability of a Minister to recoup an EU financial sanction from one or more local authorities in a situation where the facts already exist before Part 2 comes into force, which facts are subsequently ruled to constitute an infraction. This is by no means a hypothetical situation.

Air quality – a sorry tale of Government failure

In court proceedings brought by Client Earth on 13 December 2011, the Government admitted breaching EU pollution legislation. [2] Subsequently, an organisation, Clean Air in London sent a formal complaint that the UK Government has failed to meet EU particulate standards to EU Environment Commissioner Janez Potocnik on 15 January 2012. In addition, Clean Air in London has requested infraction proceedings against the UK for failing to comply with the NO2 limit values in London and 16 other zones in 2010.

In its report on Air Quality, the House of Commons Environmental Audit Committee stated that poor air quality is shortening the life expectancy of people in the UK by an average of seven or eight months, contributed to the deaths of over 29,000 people in the UK in 2008 and is costing society up to "20 billion per year. The report goes on to state that *"The Government has failed to get to grips with this issue"*. [3]

Air quality is instructive as an illustration. Circumstances already exist (see box) which may or may not lead to infraction proceedings against the UK Government. The facts relating to these circumstances pre-date the coming into force of Part 2 but, given that any proceedings might take a long time to come to a conclusion, any EU financial sanction arising out of such proceedings would be after Part 2 comes into force.

Will the Government make clear in the policy statement that the Minister's discretion would not be exercised against local authorities so as to apply retrospectively to circumstances where the facts existed before Part 2 comes into force?

The Government gives examples of subjects where EU financial sanctions have recently been imposed on other nation states. Bathing water and fisheries are examples. These settings demonstrate some of the potential difficulties for local authorities to have sufficient control over events such that fixing them with payment of part of a financial sanction might be grossly unfair.

In each of these settings, the decisions and actions of a range of other participants, in the public and private sectors, would impinge on what might subsequently be ruled to constitute an infraction. An after-the-event requirement by a Minister for the local authority to remedy the

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[2] BBC News report http://www.bbc.co.uk/news/uk-16171548

[3] The Environmental Audit Committee reported to the House on *Air Quality: a follow up report* in its Ninth Report of Session 2010-12, published on 14 November 2011 (HC1024).

infraction would have the effect of putting more responsibility on the local authority ex post facto than it had the power and resources to do anything about beforehand.

Air quality offers another good example of this problem:

- Air quality does not respect local government boundaries – it can be blown in from anywhere. This is an issue for central, not local government.

- Local government still lacks teeth to deal with exceedences.

- Most exceedences in the UK are related to traffic and in many settings local authorities do not have the power to control the traffic, which may be passing through or over its area. Many local authorities have motorways or major transport hubs – for example an airport - within their boundaries. This is a national issue, not a local one.

- New Euro standards for emissions from motor vehicles are not delivering the expected reductions in emissions. Responsibility for this can hardly be attributed to local authorities.

Looking ahead, it is foreseeable that greater impacts of climate change will emerge. The EU has enacted a great deal of environmental legislation in recent years. There may well be questions about breaches, infraction and financial sanctions in a variety of settings. Again, this will throw up problems of attributing responsibility to local authorities for situations beyond their control.

Chapter 2

In the case of the devolved administrations, most situations will be covered by the existing arrangements, including the agreement between them and the UK Government for responsibility for bearing the cost of EU financial sanctions. Local government has no such agreement with the UK Government and evidently the Government prefers a legislative and Ministerial discretion arrangement to a voluntary agreement in the case of local authorities.

The commitment to involve local government in the process of negotiating new EU legislation and subsequently the transposition of EU law into domestic legislation is a necessary element of these new arrangements. The CIEH would welcome involvement in these processes.

Chapter 3

This chapter explains the Government's thinking in respect of the proposed key principles of:

- Working in partnership
- Transparency and no surprises
- A fair, reasonable and proportionate process
- Ability to pay

Removing a fair, impartial system of legal proceedings and replacing it with Ministerial discretion to apportion financial sanctions to local authorities is described as "working in partnership".

The CIEH would instead regard this aspect of the new settlement as unfair to local authorities.

The CIEH would prefer to see a first key principle of fairness to be applied in the new arrangement (not limiting fairness, as currently proposed, to simply an aspect of the new process). The CIEH also believes that there should be a key principle that the Minister's discretion will only be exercised against local authorities in exceptional circumstances.

As regards transparency and no surprises, a process is described, which is laid down by the Act requiring formal notice, a designation order (by affirmative resolution in Parliament) followed by a warning notice. However, it is surprising that designation could be effected after the EU financial sanction has been imposed. Obviously there will have been a good deal of activity long before the stage of a financial sanction being imposed – and the consultation document proposes that Government will involve local authorities potentially affected by this activity in its own response.

Nevertheless, the designation order when it relates to a financial sanction already in existence could certainly come as a surprise to a local authority. In this respect, the consultation document's statement that *"This is likely to mean that it would be unfair for the Minister to pass on any of the lump sum financial sanction or the first tranche of any periodic penalties..."* is not reassuring. Rather, the policy statement should make clear that there will be no financial liability on a local authority for the period preceding the making of the designation order.

As regards the process and the ability to pay, the process suggested is reasonable except that the fifth bullet point recognises that some representations to the Minister may by-pass the independent advisory panel. There ought to be a commitment to a full sharing of all information between the Minister and the panel.

The CIEH is willing to be involved in helping to make a success of the independent advisory panel arrangements. Under paragraph 54, the CIEH would wish to be recognised as a "representative body" in respect of local authorities' environmental and public health responsibilities.

Once a panel is set up, it ought to remain in place until the Part 2 process has come to a complete end, including, as appears to be envisaged, remaining involved when an issue of ability to pay is under consideration.

As regards paragraph 59, the issue under discussion is ability to pay but a much more general issue of principle is raised. The Government states that *"As a minimum, the Government would need to pay for the proportion of the financial sanction that equates to their proportion of responsibility"*. In fact, the CIEH believes that the minimum should be that *"the Government would need to pay for all but the designated authority's or authorities' proportion"*?

In paragraph 61, the heavily value-laden wording is used about the Minister not suspending payment by a local authority where it is *"clear upfront that the evidence* [provided by the local authority in support of a request for suspension] *was significantly flawed or insufficient"*. This smacks of summary judgement by the Minister and it would be better even in this situation for the independent advisory panel to be consulted first.

As a general rule, it would be more helpful for the Government to give a commitment in the policy statement to involving the independent advisory panel in all issues relating to questions of compliance.

On the face of it, the offer in paragraph 65 that the Minister might reduce a local authority's contribution even when the local authority has not made a request is fair and reasonable. However, this offer ought to be qualified in a case where any such decision might have a consequential adverse effect on another local authority's liability. This should include making clear

that what is offered to one local authority may be offered also to other authorities in the same situation.

Annex A

Membership of a panel is not open to a current member of the Government or a current civil servant who is serving the Government. This is right and proper.

However, in the case of business appointments after ceasing to be a Minister or senior civil servant, there are safeguards for 2 years. There ought to be some assurance that members of panels will not include Ministers and civil servants who were until recently serving the Government.

In the case of single member panels, membership of an ex-Minister or former civil servant ought not to be permitted at all.