Chartered Institute of Environmental Health

Response by Chartered Institute of Environmental Health

The Regulatory Enforcement and Sanctions Act 2008: Consultation on the Primary Authority Scheme

2 December 2008

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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Our initial statement

1.0 CIEH are pleased that many of the issues about which we had concerns on the proposed Primary Authority Scheme have been addressed, especially the definition of enforcement action and exclusions from the requirement to consult the PA. However we retain some fundamental reservations about whether or not the project is a proportionate response to perceived problems and we await detailed guidance on practical implementation with interest. Formalising the current arrangements provides an opportunity to achieve greater consistency, however flexibility to allow action based on local situations must be included. This will be critical to ensuring that an appropriate balance between economic success and public protection can be achieved.

1.1 We will of course continue to work with LBRO on the Primary Authorities project with the aim of achieving better regulatory outcomes. Of particular importance will be the framing by LBRO of guidance for regulators, including that on Inspection Plans, as this could significantly influence the resources that will need to be channelled into decision making. Enforcement covers a range of actions from inspection forward, and but formal prosecution is usually an action of last resort for local authorities, but it nevertheless remains a vitally important part of the regulators' toolkit. The enforcement process should not become so burdensome and complex that it becomes rarely pursued. In this regard, LBRO will need to monitor enforcement patterns once the primary authority scheme is operational to ensure that there is net benefit accruing for the regulatory framework. Similarly, there needs to be consistency of advice and application across regulatory regimes.

1.2 We have previously expressed our concerns about the resource capacity and capability of LBRO, especially in relation to its referral and determination role. There is nothing to reassure us in the consultation paper. Who within the LBRO will be undertaking the task (since it has to remain in-house)? This task will require a great deal of specific knowledge and experience in enforcement, something which the LBRO by its own admission currently lack.

Our comments on the consultation document

2.0 Questions:

2.1 Is there any legislation on these lists that you believe relates to matters which are not reserved matters in relation to Scotland or transferred to Northern Ireland or should for any other reason not be included?

2.2 Is there any legislation or are there any functions that are not on these lists that you believe should be included? This may include Acts of Parliament, statutory instruments or European obligations. Please be as specific as possible.

Questions taken together:

The CIEH believes that the legislation should be consistently enforced across the UK, since that is the way many businesses that local authority regulators deal with so operate – after all, the stated purpose of the RES Act 2008 is to secure consistency in the quality of enforcement legislation.

There are two issues concerning the scope of the legislation to which we would like to draw attention. Firstly, in reference to the Housing Act 2004, it is inconsistent that Part 1 of the Act, relating to the enforcement of the Housing Health and Safety Rating system, should be excluded from the scope of the Act, while Parts 2-5 of the Act - those relating to the regulation of houses in multiple-occupation - are included. We raised this matter during the RES Bill's passage through Parliament on several occasions, yet still the inconsistency remains. We have yet to receive any explanation for the thinking behind the current position.

We are of the view that Parts 1 *and* 2-5 of the Housing Act 2004 should fall within the purview of the primary authority scheme. In order for a Registered Social Landlord and other landlords to qualify as a "business" for the purposes of the PA scheme, they should own properties in more than one local authority area and also have a minimum number of properties in their portfolio, perhaps 10 as an example.

The second issue concerns clause 2(d) of the draft Order, in respect of the service of a notice (an "abatement notice") under section 80 of the Environmental Protection Act 1990, and their inclusion as an enforcement action for the purposes of the Primary Authority scheme. The proposals explain why the Primary Authority scheme will not cover interventions under the Licensing Act and Gambling Act, which are underwritten by local policies, yet section 80 of the EPA also involves the local opinion of an environmental health practitioner and includes a *duty* to serve an abatement notice – so there is effectively no choice. Surely the primary authority scheme is not meant to displace professional discretion in one off events, nor is there anything in the debates on the RES Bill that suggests it should.

We had not anticipated that nuisance law would be embraced as actions taken by local authorities for the purposes of the Primary Authority scheme, as these are taken on very specific local issues and can be very wide ranging by virtue of the broad definition of nuisance. The essence of a nuisance is that it is defined by its effect, and that is necessarily site specific. In addition, as underlined by the changes made in the Environmental Protection Act (from the Public Health Act before it), Parliament intends that they should be dealt with expeditiously.

Similar arguments of principle could be mounted against the inclusion of clause 2 C (ii) relating to the Safety at Sports Grounds Act 1975, which generally also only involves specific local issues and is also enforced by Building Control Officers. We wonder what the Primary Authority could usefully add to the enforcement process in these circumstances and their involvement would surely only add to the regulatory burden of local authorities.

Further consideration probably needs to be given to the way that the primary authority scheme works in relation to franchised operations, where problems may be unique on a shop by shop basis and where a franchisee may hold a number of shops within (and across) areas.

2.3 Do you agree that sanctions listed in the draft statutory instrument at Annex D should be regarded as enforcement action for the purposes of the Primary Authority scheme?

We note that the sanctions listed at Clause 2 (c) (i) and 2 (c) (e), relating to section 22 of the Health and Safety Act 1974, the Food Safety Act 1990, the Feed (Hygiene and Enforcement) Regulations and the Food Hygiene Regulations, are emergency prohibition notices, only to be issued where there is an imminent risk to public health. In these circumstances they should be exempt from the need to consult the Primary Authority under the urgency provisions.

2.4 Are there other sanctions that should be included in this list?

No.

2.5 Do you agree that oral advice should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

This issue was the focus of much of the CIEH lobbying on the RES Bill in Parliament. We were concerned that oral advice, of the kind routinely given by environmental health practitioners and generally welcomed by business, should not be caught by the need to consult with the Primary Authority. We are therefore pleased that it has been excluded from the definition of enforcement action for the purposes of the Primary Authority scheme.

2.6 Do you agree that written advice, even where it includes a warning regarding the possibility of a sanction, should not be considered enforcement action for the purposes of the Primary Authority scheme? If not, how might this be done without causing unnecessary bureaucracy?

Generally speaking, we support the distinction outlined in the consultation paper, i.e. only letters that indicate that a specific compliance requirement should be taken within or at the end of a specified time period and that failure on the part of business to comply would result in enforcement action are to be considered within the definition of an enforcement action. We believe that a clear distinction should be made between letters, such as described above, that explicitly propose enforcement action and others that only identify remedial actions to be taken within a reasonable timescale, thus providing a clear and transparent compliance objective. These latter should not require consultation with the PA and therefore should not be regarded as an enforcement action.

2.7 Do you agree that the investigative actions listed in paragraph 46 should not be considered enforcement action for the purposes of the Primary Authority scheme?

Yes; the use of investigatory powers is a vital tool for local authorities in their regulatory role, but they are the not the same as taking enforcement action and should not be within the remit of the Primary Authority scheme.

2.8 If so, can you specify any statutory powers under which such investigative action can be taken?

No comment.

2.9 Are there any other actions that you believe should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

No.

2.10 Do you agree with the proposed approach to removing licensing under the Licensing Act 2003 and the Gambling Act 2005, and fire safety under the Regulatory Reform (Fire Safety Order) 2005, from the definition of enforcement action to be used for the purposes of the Primary Authority scheme?

We support the rationale for their removal, but would point out that the same rationale can be applied to other premises-based licensing and in other regulatory regimes; for example, as we have argued in our response to Question 2.2. Other current or future licensing functions that might be mentioned include skin piercing, tattooists etc. Another example is that environmental health practitioners may license pet shops, animal boarding and riding establishments and other establishments

where animals are kept, as well as dangerous wild animals and zoo premises, where local considerations are paramount in the licensing process.

2.11 Do you agree with this approach to defining emergencies in the statutory instrument?

This was another concern for the CIEH at an earlier stage on the RES Bill, so we are now content with the proposed definition as outlined.

2.12 Are there other forms of enforcement action that you believe should be excluded so as to allow urgent action to prevent significant risk of serious harm? Please include full references to the relevant legislation if possible.

We believe that the definition provides the necessary cover for the circumstances likely to be encountered by environmental health practitioners in their enforcement role.

2.13 What enforcement actions do you believe should be excluded, on the grounds of proportionality, from the requirement to consult the Primary Authority before taking action?

We believe these matters would be more appropriately covered in detailed guidance, to be drawn up by LBRO in collaboration with national and local regulators and partners. It is difficult and inadvisable to prescribe circumstances, even in the most general terms, in a statutory instrument, since the decision as to proportionality has to be made on a case by case basis, according to the local circumstances.

Actions against multi-site businesses usually become necessary when there have been persistent or blatant failures at local level that have not been addressed despite notification to head office and local management of the problem. Examples that might illustrate this could be the frequent occurrence of manual handling accidents despite centrally determined safe systems of work or poor stock control resulting in food beyond its sell by date being sold and failure to cordon off or dry areas that have been subject to spillage or chiller leaks. In neither case is it likely that a primary authority would condone such local non compliance and these are absolute and prima facie offences; so the question arises why the enforcement authority would need to consult them before taking enforcement action. Perhaps a way forward in these circumstances would be to warn the business of such contraventions in writing with a requirement to copy the primary authority in, but if the business did not take remedial action the enforcement authority could take legal action against them without further reference to the PA.

2.14 What should enforcement officers take into account when taking a decision as to whether a pre-notification of enforcement action would be wholly disproportionate?

See 2.13 above.

2.15 Do you agree that exclusions should be made where enforcement action is required urgently to prevent or stop relatively minor harm? If so, which enforcement actions should be excluded on this basis?

Yes - the example used in the consultation paper of a security alarm going off late at night clearly falls into this category.

2.16 Do you agree that where an organisation enters into an enforcement undertaking there should be no requirement placed on the enforcing authority to contact the Primary Authority prior to taking the enforcement action?

Since formal and informal undertakings have been agreed between the business and the local authority following discussions, they should be excluded. Any action taken by the local authority would be consistent with previous advice given to the business.

2.17 Do you agree with our proposed approach to excluding Part 8 of the Enterprise Act from the requirement to consult a Primary Authority before taking enforcement action?

Environmental health practitioners, especially in unitary authorities, may enforce certain Part 8 provisions of the Enterprise Act, despite this legislation being about trading standards issues. We agree that that Part 8 of the Act should be excluded.

2.18 Do you consider there should be other occasions where undertakings may be given, for example voluntarily, which should also be excluded from the requirement to consult the Primary Authority?

Voluntary arrangements by definition would be agreed between the parties concerned, so the intervention of the primary authority would not be necessary. They should therefore be excluded.

2.19 Do you agree that 10 working days is a reasonable amount of time for a proposed enforcement action to be referred to LBRO? If not, how many days do you think would be reasonable?

More thought needs to be given to timing issues. For example, summary only cases require that information is laid within 6 months of the offence being committed or the matter coming to the attention of the prosecutor, whichever is the shorter. If one follows the progress of a case where the enforcement authority feels there has been an actionable breach, which is then referred to the primary authority, which does not object or fails to respond (5 days); the enforcement authority then refers as required to the regulated person who has 10 days to refer it to the LBRO (total 15 days), which then has 28 days to reach a decision (total 43 days), which may then consent to the proposed action. If all parties take the maximum time allowed over 6 weeks will have elapsed. This is after the enforcement authority has completed their investigation. There is a very real danger that summary-only matters will be pushed out of time even though there is agreement that they should be prosecuted. This seems to be an unfair balance in the regulatory relationship between business and regulators.

2.20 Do you agree that relevant information should be provided to LBRO when a proposed enforcement action is referred to it? If so, what information do you believe LBRO should be given?

We fail to understand how LBRO could reach a determination without the relevant information – that listed in the Annex seems appropriate.

2.21 Do you agree that the information we have specified should be given to LBRO before it consents to a referral? Is there any other information that you believe should be provided?

See above.

2.22 Do you agree that LBRO should be able to take consistency with its own guidance into account when making a decision on an enforcement action referred to it?

We do not believe that LBRO should take its own guidance into account in reaching a determination – LBRO have stated previously that there is no duty to follow it and forms guidance only. Determination should be based on the consistency and accuracy of advice previously given by the PA.

Where an enforcing authority proposes enforcement action to a primary authority and the PA refuses consent on the grounds of conflict with advice it has previously given (and the advice has been properly given), and the enforcing authority then refers the conflict to the LBRO, we cannot see how the LBRO will not be required to make a judgement on the validity of the advice. Only a court should be doing that. It would seem that only judicial review could be used as a mechanism to challenge a decision of the LBRO. This cannot be done quickly or cheaply and, we would suggest, is not the best way for such matters to be resolved.

2.23 Are there any other matters relating to the statutory instrument at Annex E that you want to raise? Please give details, and where possible, specify any alternative approach that you believe should be explored.

We have nothing further to raise.

2.24 Do you believe that the assessment of costs and benefits in the Impact Assessment is realistic? If not, is there any further evidence that you can provide that should be taken into account?

No. For the Primary Authority scheme, it must be recognised that much enforcement action is taken by enforcing authorities where local management has failed and not where central policies are inadequate. The legislation is unlikely to affect this in the short to medium term and businesses with Primary Authority Partnerships will continue to be subjected to enforcement actions where central policies are in place, but failings occur locally, when a Primary Authority will have no good reason to decline consent for enforcement. Savings will therefore not be as significant as proposed, and will certainly not outweigh the costs to local authorities.

The provision to charge for primary authority will assist in this regard, but will need to be done on a full cost recovery basis and will need to assess the resources required to service arbitration processes.

The estimates included in the Impact Assessment are, we fear, optimistic in the extreme, especially those suggesting that the costs borne by enforcing authorities will be balanced by the benefits. Such authorities will have additional costs associated with the preparation of cases and information for arbitrations, costs not previously incurred.