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Regulatory Enforcement and Sanctions Bill [HL] 2007-08

Bill 103 of 2007-08

The Bill is part of the Government's 'Better Regulation' policy agenda which aims to improve and simplify the way legislation (on any subject) is made and enforced with a view to reducing unnecessary burdens on business. One aspect of this policy is a general principle that enforcement should be focussed where the risks are greatest. This was the main proposal of the Hampton Review in 2005.

The Bill converts the Local Better Regulation Office into a statutory non–departmental public body with various functions such as issuing guidance and supporting best practice by local authorities.

The Bill will also allow provision for a wider range of administrative sanctions to be applied for various criminal breaches, in order to give regulators more options and greater flexibility when imposing sanctions.

The final part of the Bill provides a power to require regulators not to impose or maintain unnecessary regulatory burdens.

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Summary of main points

The Bill covers three broad areas: local regulatory activities; sanctioning powers; and the culture of regulatory enforcement. It extends to England and Wales, Scotland and Northern Ireland, with reservations.

Part 1 creates the Local Better Regulation Office, a statutory body to improve consistency of approach between central government, regulators and local authorities in enforcing regulations. Part 2 provides a statutory framework for coordinating the treatment by local authority regulators of businesses operating across local authority boundaries by giving one single "primary authority" oversight of guidance and enforcement action that may be taken against them.

Part 3 introduces powers to give some regulators access to a novel suite of civil sanctions as an alternative to criminal prosecution in courts. These are intended to promote better compliance by allowing regulators to adopt a more flexible and proportionate approach through restorative measures as well as punishing non compliance.

Part 4 provides a power to require regulators not to impose or maintain unnecessary burdens. This is intended to increase effectiveness and accountability in the work of regulators by promoting risk based principles and strategies.

An emphasis on risk based approaches to enforcing regulations was the key recommendation of the Hampton Review of inspection and enforcement. This report looked at areas of improvement for regulatory practice. It included recommendations for mechanisms that would allow central government to set priorities, greater coordination between government departments and local regulators and the consistent use of risk assessment in regulatory activities.

Following on from this the Rogers Review set national enforcement priorities for local regulatory services in England; and the Macrory Review recommended that a new flexible "toolkit" of punitive and restorative sanctions be created to be available to regulators who abide by the principles of good regulation outlined in the Hampton Review. Some of these recommendations are being implemented already.

The Pre–Budget Report of December 2005 announced a Local Better Regulation Office (LBRO) to implement the Hampton recommendations in particular to bring consistency to local authority enforcement. LBRO was established as a company limited by guarantee on 4 May 2007 having appointed its first chair in April 2007 heading an Independent Board. The Bill will convert LBRO into a statutory Non–Departmental Public Body and confer on it functions such as issuing guidance to local authorities; supporting best practice; advising ministers; and reviewing the list of national regulatory priorities.

At the same time there are various other measures parallel to the Bill that are aimed at implementing the recommendations of the Hampton Review. For example, the Government is merging various national regulators and is also introducing a Regulators Compliance Code which will require regulators to focus their work on the areas of highest risk, to minimise administrative burdens, and support economic progress.

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I The Hampton Review

The Hampton Review of regulatory inspection and enforcement was commissioned by the Government in 2004 to consider how the administrative burden of regulation on businesses could be reduced, at the same time as preserving regulatory outcomes.[1] It looked at the work of 63 national regulators and 468 local authorities. Publication of the final report in March 2005 coincided with the Better Regulation Task Force's report entitled, *Less is More*, which complemented Hampton and considered general legislative and policy measures which might reduce administrative burdens on business.[2]

The administrative burden of regulation is to be distinguished from the intended benefits of regulation which necessarily impose a burden on business to achieve the regulatory objectives. In Hampton the administrative burden is defined as "the cost [to business] in time or money of regulators' inspection and enforcement activities". The review looked at a range of administrative burdens:

> The review has considered the burden imposed by licensing, form filling, inspections, and enforcement activity including prosecutions. It has also looked at how the structure of the UK's regulatory system affects the ability of regulators to minimise administrative burdens when interacting with, and encouraging compliance from businesses.

The main concerns raised by businesses in the course of the review were as follows:

- multiple inspections
- overlapping data requirements
- inconsistent practice and decision-making between regulators
- cumulative burden of forms, particularly for small businesses

The most significant theme in the recommendations of the review was to call for a risk based approach to regulatory enforcement, involving greater and more consistent use of risk assessment techniques, for example "an explicit element of earned autonomy, where good performers are visited less often, or have less onerous reporting requirements". The benefits of this risk based approach were stated as follows:

> Risk assessment is an essential means of directing regulatory resources where they can have the maximum impact on outcomes. Undertaking risk assessment makes regulators take proper account of the nature of businesses, and all external factors affecting the risk the business poses to regulatory outcomes. On the basis of this information, regulators can direct their resources where they can do most good. They can end unnecessary inspections or data requirements on less risky businesses, identify businesses who need more inspection, and release resources to improve broader advice services.[3]

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1 HM Treasury, Philip Hampton's report: *Reducing Administrative Burdens: Effective Inspection and Enforcement*, 16 March 2005

2 Better Regulation Task Force, *Less is more*, March 2005

3 Hampton Review, page 4

Section II(C) below contains a more detailed discussion of the benefits and criticisms of these principles. There were some practical examples of failings which the review identified as calling for better risk assessment:

> The lack of comprehensive risk assessment also creates over-inspection at local level. During 2002-03, local authority trading standards officers only inspected 60 per cent of high risk premises in Great Britain, in 35,000 inspections, yet still inspected 10 per cent of businesses classified as low-risk, in over 72,000 inspections. The practical consequence of this is not only that unnecessary inspections are carried out, but also that necessary inspections may not be carried out. For example, in 2002-03 trading standards officers inspected 22 per cent of alcohol measures, with two per cent found to be erroneous. In the same year, only 10 per cent of traders' weights were inspected, even though six per cent were discovered to be inaccurate. Had activity been focussed on the area of greater concern, and 20 per cent of traders' weights inspected and five per cent of alcohol measures – a ratio of inspections more in line with the error rate – they would have undertaken a quarter of a million fewer inspections. However, given the low error rate and the low level of risk in error (most alcohol measures are designed to fail in the customer's favour) even five per cent is a very high inspection rate.[4]

As a general guide, the review outlined ten principles of inspection and enforcement:

- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most;
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take;
- All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted;
- No inspection should take place without a reason;
- Businesses should not have to give unnecessary information, nor give the same piece of information twice;
- The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions;
- Regulators should provide authoritative, accessible advice easily and cheaply;
- When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed;
- Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work; and
- Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.[5]

The core objectives behind the various recommendations were given as follows:

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4 Hampton Review, pages 4 - 5
5 Hampton Review, page 7

> 24. The review's central objective is to raise both the quality and the effectiveness of our regulatory system. If anything, the review believes it should be possible to achieve greater excellence in regulatory outcomes – but to do so substantially more efficiently, by:
>
> - entrenching the principle of risk assessment throughout the regulatory system, so that the burden of enforcement falls most on highest-risk businesses, and least on those with the best records of compliance;
>
> - in particular, ensuring that inspection activity is better focused, reduced where possible but, if necessary, enhanced where there is good cause; at present, not only are unnecessary inspections carried out but necessary inspections are not carried out;
>
> - making much more use of advice, again applying the principle of risk assessment;
>
> - substantially reducing the need for form filling – in practice, most businesses' most frequent and direct experience of regulatory enforcement – and other regulatory information requirements; and
>
> - applying tougher and more consistent penalties where these are deserved.[6]

The principle of the independence of regulators was strongly supported by Hampton. At the same time proposals were made to strengthen the accountability of regulators for implementing the report's recommendations such as a more prominent role for the National Audit Office and Parliament:

> 4.118 Monitoring of regulators' performance should be against set standards, including the goals set out in the principles of inspection and enforcement in Box 2.2. The National Audit Office, whose work on regulation has been cited at several points through this report, would be the ideal body to carry out this task.
>
> 4.119 As part of the greater accountability proposed in this report, the review believes that there is a role for Parliament in scrutinising the work and performance of regulators. The House of Lords Constitution Committee recommended in its report the Accountability of Regulators, that a Joint Committee of both houses should be established to monitor the work of regulators. The review would welcome such a move.[7]

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6 Hampton Review, page 8
7 Hampton Review, Page 77

II Regulatory Reform

A. The Bill

The duties in part 4 of the Bill, requiring certain regulators not to impose or maintain unnecessary burdens, can be compared to the public sector duties found in discrimination law. They are essentially a discipline imposed by government on government. Unlike the public sector duties in discrimination law there is no independent commission charged with enforcing these duties. There is a requirement, however, to publish a statement detailing actions that are being taken to reduce or remove burdens and plans for future such actions. What will be considered a necessary or unnecessary burden will be left to the respective regulators to decide. Given the statutory footing being given in the Bill to the principles of good regulation these will almost certainly feature as criteria for assessing regulatory necessity. The duty provides a means for government to entrench the risk-based approach to regulation recommended by the Hampton Review.

Clause 5 (2) gives statutory footing to a set of general principles of better regulation that have existed for some time in regulation policy:[8]

> (a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;
>
> (b) regulatory activities should be targeted only at cases in which action is needed.

These principles apply as the general objective of the Local Better Regulation Office, but are also referred to in clause 66 with regard to conferring power on a regulator to impose a civil sanction; and clause 68(2)(c) with regard to suspension of such powers.

The Impact Assessment for the Bill estimates annual net benefits of the Bill as a whole will be £61-£146 million.[9]

B. Better Regulation

a. From "deregulation" to "better regulation"

Successive governments have sought to deal with the regulatory burden on business in a number of ways: clarifying the likely costs to business of regulatory initiatives, making efforts to improve the drafting of legislation before it reaches the statute book, and revising or removing existing regulations.[10]

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8 Similar provision is made by section 21 of the *Legislative and Regulatory Reform Act 2006*

9 Regulatory Enforcement and Sanctions Bill Impact Assessment

10 A good summary of the key developments in regulatory control since the 1980s is given in, National Audit Office, *Better regulation: making good use of regulatory impact assessments*, 15 November 2001 HC 329 2001-02: Appendix One p 40

During the 1980s Conservative Governments published a series of papers on measures to lift burdens on business.[11] Despite that and in the face of criticism of the 'burgeoning maze of regulations' there was a renewed effort in the early 1990s by government to quantify the regulatory burden.[12] This took the form of a 'Doomsday book' of those regulations imposing costs on business.[13] This included, first, a survey to determine those areas of the law in most need of reform, and secondly, with the help of a series of business task forces and the introduction of a new statutory power ("deregulation orders"), to provide a streamlined method of removing existing regulations. [14]

The latter was implemented by the *Deregulation and Contracting-out Act 1994* (DCOA) which introduced a special type of statutory instrument which gave Ministers the power to remove or reduce certain statutory burdens on businesses or individuals. Through them Ministers were able to amend or repeal primary legislation. In addition, the Act repealed a number of regulations in areas ranging from competition policy to the licensing of public service vehicles.[15]

Following the 1997 General Election the Labour Government announced its approach, summarised by David Clark, then Chancellor of the Duchy of Lancaster:

> Some regulation is necessary for public and consumer protection, for example to ensure food safety, and to carry out the functions of Government. 'Deregulation' implies that regulation is not needed. In fact good regulation can benefit us all – it is only bad regulation that is a burden. That is why the Government's new regulatory policy will concentrate on ensuring that regulations are necessary, fair to all parties, properly costed, practical to enforce and straightforward to comply with.[16]

Since then this emphasis on better regulation – rather than deregulation per se – has marked the Government's policy of regulatory reform, as noted in the 2002 Pre-Budget Report:

> Whereas effective and well-focused regulation can help to correct market failures, promote fairness and ensure public safety, unnecessary or poorly enforced regulation can restrict competition, stifle innovation and deter investment. The Government is therefore committed to regulatory reform in the UK and EU.[17]

The *Regulatory Reform Act 2001,* which received Royal Assent on 10 April 2001, repealed the 1994 Act, replacing deregulation orders with a new category of related

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11 For example, *Lifting the Burden* Cmnd 9571 July 1985; *Building Businesses Not Barriers*, Cmnd 9794, May 1986; *Releasing Enterprise* Cmnd 512 November 1988.

12 John Major's words (the then Prime Minister) in a speech he gave to the Conservative party conference in October 1992.

13 DTI, *Consolidated list of regulations and forms having an impact on business*, 20 April 1993 (Deposited paper Dep 9123).

14 A final report listed 605 proposals for regulatory change (DTI, *Deregulation: Task Forces proposals for reform*, January 1994).

15 The background to the Act is discussed in: *Deregulation and Contracting Out Bill*, Library Research paper 94/16, 28 January 1994.

16 Cabinet Office News release CBA 46/97, *Better regulation not deregulation*, 3 July 1997

17 *Pre Budget Report* Cm 5664 November 2002 paragraph 3.28.

statutory instruments known as "Regulatory Reform Orders".[18] The Act also made provision to replace the little used enforcement procedures in section 5 of the DCOA with a reserve power for Ministers to introduce a code of good enforcement practice.

Regulatory Reform Orders were somewhat wider in scope than deregulation orders in that they could:

- impose 'burdens' as well as remove them, as long as those burdens are proportionate to the benefits expected to result, and a fair balance is struck between the public interest and the interests of those on whom those burdens fall;
- repeal and re-enact previous legislation with amendments. This, along with the first point above, enables the reform of whole regulatory regimes, instead of merely the removal or reduction of individual 'burdens';
- extend the statutory powers of a person or body (to relieve a burdensome situation caused by the lack of a statutory power to do something);
- remove 'burdens' from public bodies as well as the private sector;
- include power to allow further amendment by way of subordinate legislation — a kind of sub-delegated legislation;
- apply to the provisions of any Act not less than two years old, or which have not been 'substantially' amended in the previous two years.[19]

These types of order are considered in the House of Commons by the Regulatory Reform Committee.[20] The relevant changes to the House's Standing Orders were agreed on 2 May 2001.[21] The Government provided an overview of the first year's operation of the *Regulatory Reform Act 2001* to the Regulatory Reform Committee in May 2002.[22] Despite anticipating 50 regulatory reform orders when the Bill was going through Parliament in 2000-01, only 27 Orders had been made by the end of 2005. The Government put forward a number of reasons for this, including the inflexibility of the parliamentary process, the requirement that an order removes a legal burden and the need for the order to be finalised before it comes before Parliament, unlike a bill which can be amended as it proceeds.

The Regulatory Reform Committee, which scrutinises Government proposals for regulatory reform orders, expressed concern about both the under-utilisation of the procedure and about departments' poor understanding of the process. In 2005, the Government undertook a review of the Act and consulted on a new "Bill for Better Regulation".

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18 Two Library papers may be recommended: the first focusing on the *Regulatory Reform Bill* itself (Library Research paper 01/27, 14 March 2001), the second setting this reform in the context of the broader issue of the regulatory burden on business (Library Research paper 01/26, 14 March 2001).

19 The Act received Royal Assent on 10 April 2001 (Cabinet Office press notice CAB102/01, 10 April 2001).

20 This summary is based on, Paul Evans, *Handbook of House of Commons Procedure 3rd ed*, 2002 pp 150-1. Section 12.4 of this book sets out the parliamentary procedure for dealing with these orders in detail.

21 HC Deb 2 May 2001 cc 869-904. These changes are set out in a standard note: "Regulatory Reform Act: revised Standing Orders", SN/PC/848 30 April 2001.

22 This is reproduced in Regulatory Reform Committee, *Second special report*, 24 July 2002 HC 1029 2001-02 pp 14-24.

Following this the *Regulatory Reform Act 2001* was replaced by the *Legislative and Regulatory Reform Act 2006* which is intended to enable delivery of a number of the reforms announced in the *Better Regulation Action Plan* in May 2005. The Act received Royal Assent on 8 November 2006.[23] Part 1 of the Act replaces the order-making power in the *Regulatory Reform Act 2001* with powers to remove or reduce burdens and to promote regulatory principles. Part 2 requires regulators to have regard to the five principles of good regulation, and creates a power to put on a statutory footing a code of practice for regulators. Part 3 of the Act concerns the transposition of EU obligations into UK law.

When the *Legislative and Regulatory Reform Bill* was published on 11 January 2006 there was some concern expressed in Parliament about the constitutional questions raised, particularly the extent of the executive powers to make orders in connection with any legislation (with few limitations) and the level of parliamentary involvement. It was the subject of inquiries by two Committees in the House of Lords – the Delegated Powers and Regulatory Reform and the Constitution Committees – before its second reading on 13 June 2006.[24] Those concerns grew as the Bill made its way through the House of Commons and resulted in substantial amendments in the House of Lords.

b. Principles of better regulation

The application of the principle of "better regulation" can take many forms. The Government acknowledge that "classic" or "prescriptive" regulation is not always the best option. There has been a succession of deregulatory initiatives and organisations within government charged with tackling regulation issues:

1980-85	Conservative Government's successive deregulatory initiatives
1992	Re-launch of deregulatory initiatives after failure of 1985 wave failed to effect changes [25]
1994	*Deregulation and Contracting Out Act 1994* Establishment of Deregulation Task Force
3 July 1997	Labour Government launched the new policy initiative 'Better Regulation'. The Better Regulation Task Force replaced the Deregulation Task Force
1 January 2006	The Better Regulation Task Force was replaced by the Better Regulation Commission
16 January 2008	Risk and Regulation Advisory Council established by the Prime Minister replaced Better Regulation Commission

The role of the Better Regulation Task Force was to make specific recommendations for better regulation to the Government and to advise government departments more generally. The Task Force published a checklist for policy makers on how to design

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[23] *Legislative and Regulatory Reform Act 2006*

[24] Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06 p3

[25] See: LSE Centre for Analysis of Risk and Regulation, Bridget Hutter, *The attractions of risk based regulation: accounting for the emergence of risk ideas in regulation*, March 2005

better, simpler regulation. This included a list of principles of better regulation which have since been widely adopted within government. The Better Regulation Task Force suggested that good regulations and their enforcement should be measured against five principles:

> In summary, the five principles are that good regulation should be:
>
> **Proportionate**: Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
> **Accountable**: Regulators must be able to justify decisions, and be subject to public scrutiny.
> **Consistent**: Government rules and standards must be joined up and implemented fairly.
> **Transparent**: Regulators should be open, and keep regulations simple and user friendly.
> **Targeted**: Regulation should be focused on the problem, and minimise side effects.

A prominent aspect of the new approach relates to the process of regulatory simplification:

> **Simplification**
>
> Government departments are developing rolling programmes of simplification following the recommendations made in the Better Regulation Task Force report 'Less is More'. An important part of this process is for business and other stakeholders to make submissions to support reforms they would like to see taken forward as part of departmental simplification plans. The aim is to reduce regulatory burdens wherever possible without removing necessary protections.
>
> The Better Regulation Executive (BRE) has worked with business and other stakeholders to develop a process for submitting regulatory simplification proposals to government. This delivers the second recommendation of the BRTF report Less is More
>
> Full details of the process, including extensive guidance on simplification and a web-based tool for making regulatory reform suggestions to government can be found on the www.betterregulation.gov.uk.[26]

c. Alternatives to regulation

The Cabinet Office published guidance in 1998 which set out the following examples of alternatives to state regulation:

- do nothing/no intervention;
- incentives From Imaginative Thinking for Better Regulation
  - Creating Markets
  - Price Caps
  - Targets

[26] BERR, Better Regulation Executive

  - Taxes as a regulatory device
  - Rewarding desirable behaviour;
- information and education (eg product labelling or media campaigns);
- self-regulation;
  - codes of practice;
- co-regulation;
- quasi regulation;
- Regulatory Reform Orders;
- standards (eg voluntary or regulatory);
- market-based instruments (taxes, subsidies and user charges);
- tradable property rights;
- financial incentives (eg disincentives or price control);
- tradable permit schemes;
- guarantee arrangements (eg the Association of British Travel Agents scheme);
- mediation services;
- quality marks;
- recommendation schemes;
- representative bodies (eg Community Health Councils);
- pre-market assessment schemes (eg listing, certification and licensing);
- post-market exclusion measures (eg bans, recalls, licence revocation provisions and 'negative' licensing);
- service charters;
- other mechanisms (eg public information registers, mandatory audits and quality assurance schemes); and
- ombudsmen[27]

Where regulation appears necessary, legislators are encouraged "to ensure that everything necessary for compliance, monitoring and enforcement is in place, that monitoring costs are minimised and enforcement is adequately resourced."[28] There are also various steps that can be taken to reduce the burden of regulation or its disproportionate impact on small business. An example of one particular initiative is the arrangement of common commencement dates for regulations affecting enterprise whereby new regulation is timed to commence either in October or April of each year, making it easier for employers to adjust to changes in the law.[29]

Another approach is to allow more flexibility in achieving regulatory ends, such as the "comply or explain" option, whereby companies can choose not to comply with a particular requirement, but must describe and explain in their annual reports how they are achieving the Government's objectives. Flexibility can also be achieved by allowing voluntary opt-out of certain provisions.

The OECD has published a book entitled *From Red Tape to Smart Tape: Administrative Simplification in OECD Countries* on the various tools and measures that have been used by various countries to reduce red tape and make regulations more efficient.

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27 Cabinet Office, *The Better Regulation Guide*, 1998

28 Better Regulation Taskforce *Imaginative Thinking for Better Regulation* September 2003

29 DTI Press Release, *Government consults on common commencement dates for new regulations,* 30 April 2004

d. Impact Assessments

During the 1980s concerns that the costs of new legislation on business were being ignored led to efforts to encourage government departments to assess the compliance costs of any regulatory proposals.[30] In April 1993 departments were formally required to publish an assessment of the likely costs to business of complying with any proposed legislation presented to Parliament which would have an impact on business.[31] Lists of all these compliance cost assessments (CCAs) were published regularly,[32] although no attempt was made to consolidate this information into some overall measure of the costs, and benefits, of new regulations. In August 1998 CCAs were replaced by Regulatory Impact Assessments (RIAs) as explained in a report by the National Audit Office:

> As part of their Better Regulation Initiative, the Government introduced regulatory impact assessments in August 1998, to replace compliance cost assessments. The intention was to broaden the focus of regulatory appraisal to make regulatory considerations an integral part of policy making. In addition to explaining the purpose of regulation and examining the risks and the financial costs which regulation imposed on business, departments are also required to analyse benefits, and to consider the overall impact on society. There is also much more emphasis on the impact on small businesses.
>
> The main factors that a RIA is now expected to cover are set out [below] …
>
> **What a full regulatory impact assessment is expected to cover**

Purpose and intended effect	Identifies the objectives of the regulatory proposal
Risks	Assesses the risks that the proposed regulations are addressing
Benefits	Identifies the benefits of each option including the "do nothing" option
Costs	Looks at all costs including indirect costs
Securing compliance	Identifies options for action
Impact on small business	Using advice from the Small Business Service
Public consultation	Takes the views of those affected, and is clear about assumptions and options for discussion
Monitoring and evaluation	Establishes criteria for monitoring and evaluation

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30 *Lifting the Burden* Cmnd 9571 July 1985 para 8.3; *Releasing Enterprise* Cmnd 512 November 1988 paras 1.5-1.7

31 Formal arrangements for the publication of CCAs were confirmed in written answers, both in relation to European legislation (HC Deb 19 July 1993 c 24W), and domestic legislation (HC Deb 19 October 1993 c 202W; revised HC Deb 19 July 1994 cc 182-3W).

32 The first of these lists was issued in December 1994 (Cm 2719).

Recommendation	Summarises and makes recommendations to Ministers, having regard to the views expressed in public consultation[33]

In April 2007 RIAs were replaced by IAs (Impact Assessments). A BERR press release explained the change as follows:

> This improves on the previous Regulatory Impact Assessment (RIA) with a simpler, more transparent process that will be embedded in the earliest stage of policy making. The new arrangements will begin from mid–May and all IAs will be available from an online database making them easily available for public scrutiny.
>
> Impact Assessments are a key tool for making modern regulation that is proportionate to the issue it is designed to tackle. In some cases RIAs have been very successful at achieving this, but weaknesses in the process have led to inconsistency in its application. Following a public consultation, the new IAs will have a more prominent role in policy–making, be more transparent and build on the successes of RIAs.
>
> […]
>
> The key features of the revised Impact Assessment are:
>
> - A revised template to improve clarity and transparency including new requirements to summarise both the rationale for government intervention and evidence supporting the final proposal.
> - An online database of all Impact Assessments to allow greater public scrutiny.
> - A strengthened Ministerial declaration to bolster the quality of the analysis in IAs, supported by improved arrangements within departments.
> - Revised guidance for policy makers to make it easier for them to produce high quality IAs focused on the burden of the regulations they are developing.
> - There will be an increased emphasis on post–implementation review. The new Impact Assessment will be more transparent to stakeholders and policy–makers.[34]

e. Risk and Regulation Advisory Council

The Risk and Regulation Advisory Council arises on a recommendation in the final report of its predecessor Better Regulation Commission. This report was in consequence of a request made by the Prime Minister to consider the social policy question of "public risk" (the risks to citizens of harm and disadvantage).[35] The report suggested the use of risk assessment in social policy given the "continuous pressure from an adversarial parliamentary system, sophisticated lobby groups, an aggressive media, short-term

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[33] *Better regulation: making good use of regulatory impact assessments*, 15 November 2001 HC 329 2001-02 p 16, p 3

[34] BERR, *New Impact Assessments will increase transparency and improve regulation*, 2 April 2007 CAB/030/07

[35] Better Regulation Commission, *Public Risk – the Next Frontier for Better Regulation*, January 2008

career considerations and so on". These pressures are seen to intensify "in the wake of tragic events such as Lyme Bay, Morecambe Bay and Hatfield":

> The temptation to move prematurely from problem to solution to intervention is understandable and ever present. The consequences of succumbing to such temptation are, all too often, ineffective policies, unnecessary regulatory burden and unwelcome curtailment of civil liberties. In other words, many symptoms that are broadly referred to as 'red tape' or poor regulation can be traced back to a root cause of poorly handled public risk and, more generally, the culture of policy-making. The BRC is pleased that the Government has committed resource and political backing to the reduction of administrative burden as recommended in its report, 'Less is More'. It believes, as argued in its more recent report, 'Risk, Regulation and Responsibility' ('The Risk Report'), that the key to delivering fully on the burden reduction targets and accelerating realisation of the broader Better Regulation agenda critically depends on tackling this root cause. It depends not only on tackling specific policy consequences but on effecting a fundamental, sustainable improvement in the culture of policy-making.
>
> 1.1 Intervention in matters of public risk, whether in Whitehall or Brussels, often involves systems with many, sometimes hidden, interdependencies and complex behavioural challenges e.g. climate change, obesity in children, security, shifting roles in healthcare, child safety. This complicates not only targeting and devising the counter-measures – the policy choices – but also managing the delivery of the intervention. Good risk assessment and management is vital in both the policy-making and the implementation. The policy-making process is often made all the more demanding by the need to seek views from and build consensus amongst a broad and diverse group of stakeholders and to understand fully options and trade-offs. Such interventions require a rigour and breadth of consultation and consideration that are rarely displayed in the face of such pressure.
>
> 1.2 And to what extent is the same pressure driving endemic risk aversion, inconsistent risk appetite across departments, and misunderstanding of public tolerance of and capacity to handle risk? How can we move away from an approach based on trying to control people to an approach that seeks more to influence behaviours when a quick reaction to a crisis wholly assumes that the answer is within the state's power to compel?

C. Risk-based regulation

a. Risk management

Regulatory policy has been significantly influenced by the perennial complaints of business that the burden of compliance with regulations of all kinds has worsened, and that this acts as an impediment to competitiveness, especially for the small business sector. There are also wider issues about the modernisation of government.[36] The cornerstone of the Government's better regulation agenda has become the

[36] See for example: Anthony Giddens, *Risk and Responsibility*, Modern Law Review 62 (1) 1999, 1–10

implementation of the Hampton Review.[37] At the heart of these proposals is the policy concept of "risk-based regulation". As the BERR guide to the Bill puts it, this means "regulating only when necessary and doing so in a light-touch way that is proportionate to the risk". Accordingly, the Bill seeks "to advance Hampton's vision of a regulatory system, at both a national and local level, that is risk-based, consistent, proportionate and effective".[38]

The Bill is by no means the only vehicle for advancing this set of policies but does provide much of the necessary framework and powers for doing so comprehensively across government. The principles of risk based approaches to regulatory enforcement are already being pursued within various departments and public bodies, most notably the Financial Services Authority (FSA) and the Health and Safety Executive (HSE). For example the FSA describe their regulatory approach as a "principles-based approach delivering a lighter regulatory touch for those firms that pose less risk".[39]

An academic article by Bridget Hutter in 2005 locates the origins of the management of risk within government in the acceptance of private sector management ideas applied to public sector activities referred to as the "New Public Management" or sometimes pejoratively as "managerialism".[40] These included:

- Explicit standards and measures of performance
- Private sector styles of management and practice
- Professional management roles in the public sector
- Discipline and efficiency in the use of resources

Influential in the general process of adopting risk ideas from the private sector was a National Audit Office Report in 2000 on managing risk in government departments.[41]

In terms of the application of risk concepts to regulatory activities Hutter cites the importance of developments in corporate governance codes that advanced concepts of risk management. For example, the Turnbull Report was a voluntary code issued in September 1999 by the Institute of Chartered Accountants in England and Wales. It consisted of guidance on appropriate standards in 'internal control' and was produced to assist in the interpretation of requirements on internal control set out in corporate governance standards for listed companies in the UK. The Code stated that "the board should maintain a sound system of internal control to safeguard shareholders' investment and the company's assets." Provision D.2.1 of the Code stated that:

> D.2.1 The directors should, at least annually, conduct a review of the effectiveness of the group's system of internal control and should report to

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37 Philip Hampton, HM Treasury, *Reducing administrative burdens: effective inspection and enforcement*, March 2005

38 BERR, *A Guide the Regulatory Enforcement and Sanctions Bill*, November 2007

39 FSA, Regulatory approach

40 LSE Centre for Analysis of Risk and Regulation, Bridget Hutter, *The attractions of risk based regulation: accounting for the emergence of risk ideas in regulation*, March 2005

41 NAO, *Supporting innovation: Managing risk in government departments*, HC 864 Session 1999-2000, 17 August 2000

> shareholders that they have done so. The review should cover all controls, including financial, operational and compliance controls and risk management.

Risk management involves a systematic assessment and treatment of risks, whereby risks may be avoided, mitigated, accepted or transferred/insured. This has become an increasingly important feature of the better regulation agenda as it is seen as a way in which the regulatory burdens on business can be reduced without at the same time eroding the protections from harm and disadvantage ('public risk') that regulation is intended to deliver. This is often stated by government representatives in terms of a rejection of a "one size fits all" approach or alternatives to "command and control" regulation.

In light of these developments Hutter describes the attractions for government of adopting risk management principles from the private sector as follows:

> Such a climate arguably created and sustained an environment which favoured the adoption of approaches which incorporated costs benefit analysis, were apparently 'objective' and apparently transparent. Risk based approaches appear to satisfy these criteria with the added bonus of coming from the business sector. Risk based tools came to be seen as efficient instruments for making policy choices and aiding in decision-making. They were well regarded as particularly helpful in resolving any 'conflict' between differing interests groups when determining appropriate levels of risk management. Their apparent objectivity and transparency could be used to explain the allocation of resources, in a way which was well tested and trusted by the business community.

b. Benefits

The benefits of a risk-based approach to regulation are generally advocated in the following terms:

- Risk based approaches allow regulators to systematically allocate resources, increasing the efficiency and effectiveness of regulation at the same time as reducing the burdens on those with a good history of compliance.

- They give regulatory agencies and governments a way of managing their own legal and political risks.

- A unifying approach can be developed across government increasing consistency and fairness which in turn leads to higher levels of trust and compliance.

- There is increased accountability and transparency in the decision making process of regulators.

- A unifying approach allows a fragmentary regulatory system involving a large number of regulatory agencies to be rationalised into fewer bigger agencies resulting in costs savings, information sharing which faces business with a more consistent administration of compliance.

- An objective balance can be struck in government policy between risk-averse public pressure to regulate and resistance to increasing the regulatory burdens on business.

- A systematic and transparent process of policy development can force a more serious and sustained focus on regulatory problems

- An objective procedure facilitates the necessary evolution of regulatory strategies since it allows for methodical assessment of feedback and the lessons of significant failures with a reduced need to apportion blame.

- Having a clearly worked out strategy for dealing with risk is a way of demonstrating to a concerned public and business that regulatory issues are being taken seriously.

c. Failures

The most sustained criticisms of applying risk-based principles to regulation come from debates about the regulation of financial markets. These have been intensified by the recent problems surrounding the supply of credit in global markets.

In general, an understanding of the limits of risk based methodology most frequently concerns risk assessment. The assessment of risks calls for a basis on which to conduct such assessment (typically past events). This also requires a system for organising this information and producing a plan detailing how risks that have been identified are to be treated (often called the "risk model"). In this regard, two fundamental problems are identified:

- Information about what has taken place in the past may not be a reliable way of predicting what may take place in the future where conditions affecting risks have changed (for example so called "black swans" in markets).[42]

- Risk models, to avoid becoming unintelligibly complex, inevitably contain assumptions about the conditioning factors in assessing risk which may not apply universally at all times.

There may be a failure to monitor the underlying assumptions in a risk model being deployed in a given instance. One of the principle benefits of risk based systems of assessment is the conservation of resources. In real terms, what is in effect being conserved is human attention to the various possible sources of risk. A tendency to trust the model uncritically may arise driven by demands on resources or aversion on the part of an individual regulator to taking on personal risks through the exercise of personal judgement. This problem may extend vertically up organisational hierarchies.

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[42] The metaphor of a black swan is taken from "the shock that Europeans experienced when they discovered black swans in Australia. Until then, their data told them that all swan were white, so the discovery was unexpected. A black swan in markets is an event that has not occurred in the past, thus rendering useless risk management models based on historical data." John Authers, "The Short View", *Financial Times*, 14 May 2008

A more complex criticism derives from monetary economics and what has been termed "Goodhart's law" which states "that any observed statistical regularity will tend to collapse once pressure is placed upon it for control purposes".[43]

A corollary of this rule has been used to question risk models as an appropriate foundation for regulatory design. It is claimed that a risk model breaks down when used for regulatory purposes.[44] In the context of financial markets the reliance of supervisors on bank risk models was recently described by Professor Avinash Persaud as being like "seat belts that stop working whenever you press hard on the accelerator".[45] This is because "market-sensitive risk models used by thousands of market participants work on the assumption that each user is the only person using them". As a result a kind of "herding" occurs. He comments more generally that:

> Paradoxically, the observation of areas of safety in risk models, creates risks and the observation of risk, creates safety

Applying this principle more generally, a risk based approach could impede regulators if it imposed an evidential requirement before an investigation can be pursued. Non-compliant businesses may be given the opportunity to exploit evidential blind-spots where there will be a low perception of risk and thus operate insulated from the oversight of regulators. Evidence about where the areas of non-compliance lie may be difficult to obtain.[46] The relevant Hampton principle is that "no inspection should take place without a reason".[47]

Where risk is seen to be low there may be an effective delegation of regulatory functions to the business sector. In light of the reputation concerns of business this may not work in the interests of transparency. For example, the balance of interests settled in whistleblowing law may be affected making it harder for individuals to persuade regulators of the existence of problems where they work in an enterprise seen to be in an area of low risk.[48] These kinds of criticism of risk based regulation can be related to wider concerns about managerialism and democratic accountability:

> How trusting can be governments of the 'open corporation' and its permeability to wider notions of democratic accountability and social responsibility? To what extent, and in what ways, do key management and professional groups at the interface of the regulatory process modify, adapt and suborn external regulatory objectives, and how are these processes played out in varying circumstances?[49]

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43 K. Alec Chrystal and Paul D. Mizen, *Goodhart's Law: Its Origins, Meaning and Implications for Monetary Policy*, 12 November 2001

44 Jón Daníelsson, *The Emperor Has No Clothes: Limits to Risk Modelling*, Journal of Banking and Finance, 2002, 26, pp. 1273-96

45 FT.com, *Why Bank Risk Models Failed and the Implications for what Policy Makers Have to Do Now*, 31 March 2008

46 Lord Lyell of Markyate: HL Deb 19 March 2008, c350

47 Philip Hampton, HM Treasury, *Reducing administrative burdens: effective inspection and enforcement*, March 2005

48 Public Concern at Work has information on whistleblowing and the *Public Interest Disclosure Act 1998*

49 Roger King, *The Regulatory State in an Age of Governance*, Palgrave MacMillan, 2007, page 83

D. Small Firms

In the UK small enterprises currently account for 99% of all enterprises, 47% of enterprise employment and 36% of total turnover.[50] There are particular concerns about burden of regulation which may sometimes fall disproportionately on them. Regulation places burdens on small businesses in a variety of ways, for example:

- There are added costs in terms of insurance and possibly litigation.
- More management time will be taken up in understanding and complying with legal requirements.
- Employment regulation can drive up staff costs by requiring that certain employees are paid more than if market forces were allowed a free reign.
- A number of regulations require employers to administer benefits (for example statutory sick pay) or collect tax via payroll.
- Regulations may have unintended or unforeseen negative consequences, such as causing damage to particular markets or employment and training opportunities.

During the passage of the Bill through the House of Lords a number of concerns were raised by Lord Cope of Berkeley about the position of small business in relation to various of the Bill's proposals. These concerns included the disproportionate regulatory burden on small firms from the total amount of regulations and regulators and their complexity:

> Regulation for large firms takes up the time of specialists. They may be accountants like me; they may be health and safety or human resources specialists and so on—it is another overhead that the large business has to carry. For small firms, however, regulations take up the time of the boss, who after all is the dynamo of the business.
>
> […]
>
> We have new regulations at about the rate of 14 every working day. The British Chambers of Commerce has an excellent "burdens barometer", which estimated the cost of regulations to business as more than £55 billion since 1997. I believe that that was the figure to which my noble friend just referred.

He also raised questions about the way the proposals for local authority enforcement would work in practice for small firms:

> A large chain of centrally owned sandwich bars […] may have hundreds of outlets in the UK. Presumably it will sit down in headquarters and work out which local authority it regards as the easiest to work with and then try to get that local authority established as its primary authority. Then all its sandwich bars all over the country will be regulated in effect by that one authority, which may be in a distant part of the country. I do not think that the LBRO will want to designate only London authorities; it will designate them to ensure a neat pattern all over the

[50] Small Business Service, *SME Statistics 2005*

> country. On the other hand, a local sandwich bar with only one or two outlets will have no such choice. Its regulator, by definition regarded as more difficult to deal with by the big boys, will be in sole charge. Similarly, local independent convenience shops will not have the advantages of the new small shops that the supermarkets are setting up in various places. The Federation of Small Businesses has made those points.

There might also be relative differences between small and large firms in terms of resources to take appeals following civil sanctions:

> Part 3 contains the enforcement power to fine businesses in private rather than in public in the courts—the parking-fine approach to regulation—and other ways of giving regulators more teeth. These, too, are in danger of hitting small businesses harder. For example, larger businesses will have greater opportunity when fined, for example, to appeal to the new tribunals, looking up the precedents and studying the annual reports about burdens, whereas small businesses are much less likely to be able to reach for their lawyers and advisers. I therefore believe that, in practice, appeals will come much more often and effectively from the larger companies. The noble Viscount, Lord Colville of Culross, gave an example of the delays in enforcement that might occur in cases involving a chain of outlets. By contrast, as I read the provision, enforcement of the Bill's provisions on a small local business could, subject to the appeal provisions in the procedure set out by the noble Viscount, bite much more quickly or almost immediately.[51]

The Government's response to these and other issues was given by Lord Bach:

> **Lord Bach**: My Lords, the noble Lord, Lord Cope, has made clear since Second Reading his concern to ensure that the Bill does not work against the interests of independent businesses and, sometimes, smaller businesses. I am confident that, far from doing so, the Bill will bring better and more consistent standards of enforcement for all businesses. We know that local authorities are under a duty to have regard to the principles of good regulation, under the Legislative and Regulatory Reform Act. Clause 5 of this Bill would require that LBRO works to ensure that local authorities carry out their regulatory activities in the same way.
>
> Part 2 will work to bring greater consistency to the treatment of businesses operating across more than one local authority. Consistency in other respects is also important, not least consistency between businesses. Promoting consistency between businesses, in this sense, will be just as much a part of LBRO's work. Its power of giving guidance to which local authorities must have regard will be its most effective tool in this instance. The primary authority scheme will not interfere with those areas where local discretion is necessary. It will promote consistency in areas where there is simply no good reason why standards should not be the same across the country.
>
> Businesses have spoken to us about the very substantial costs they face where standards differ. In such cases as the brand name on a line of clothing, a method of preparing rice for cooking, or the kind of footwear necessary for staff working in a specific type of warehouse, an approach that was unproblematic from the home authority's point of view was challenged elsewhere. There is no good reason why,

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[51] HL Deb 8 November 2007 c1260-2

in cases like these, standards that are acceptable in one part of the country should not be equally acceptable in another. That is why businesses, including the Federation of Small Businesses, so overwhelmingly support the aims of the Bill.

The main issue put to us by smaller businesses during the consultation was not that they disliked the primary authority scheme in principle. In fact, many smaller businesses operating over a handful of local authorities, face problems of consistency themselves, and will benefit from it directly. Their concern was that local authority resources would be diverted away from them. We included a cost-recovery clause in the Bill, which we believe has removed that risk completely.

The Bill foresees, and deals in paragraph 7 of Schedule 4, with the risk that enforcement practice may diverge between businesses as primary authorities give subtly different advice on compliance by conferring on LBRO the right to give guidance and, if need be, directions relating to specific actions which have been subject to arbitration. That is, lessons learnt from particular arbitration cases can be disseminated more widely to all businesses and local authorities if necessary. The noble Lord and others who have spoken are concerned that local authorities must be even-handed. I ask the House to remember that local authorities are under a duty to be proportionate under the Legislative and Regulatory Reform (Regulatory Functions) Order 2007. We referred to levels of inspection for independent and multi-site businesses. The accusation is that inspection plans will somehow give multi-site businesses an unfair advantage. The inspection plans will not mean that multi-site businesses will somehow get less inspection; they mean that their inspection will be focused on known strategic problems for that business. We believe that they will improve the level of service that local authority enforcers will be able to give their communities just by improving the information available to inspectors.[52]

[52] HL Deb 19 March 2008 c341-2

III Local Authority Enforcement[53]

A. Background

Local government is a substantial player in the field of business regulation. The Cabinet Office notes in its 2007 Departmental report and elsewhere that 80% of regulatory inspections of businesses are carried out by local authorities.[54] Wilson and Game have written:

> So extensive are councils' environmental health and consumer protection responsibilities that in the second edition of this book we produced an A-Z of these services alone – from abandoned vehicles via dog fouling and tree preservation to zoo licensing...The full list involves all those functions of inspection, regulation, registration, licensing and certification that tend to be relatively unnoticed until there is a food contamination crisis, a dangerous dogs scare, a massage parlour scandal, or a threatened avian flu pandemic.[55]

The main regulatory functions, and the distribution of responsibility by type of council, has been summarised as follows:-

Main enforcement functions	District	County	Single tier
Alcohol and entertainment licensing	√		√
Animal and public health		√	√
Environmental protection (air pollution, noise pollution, nuisance)	√		√
Fair trading		√	√
Food labelling		√	√
Food safety	√		√
Health and safety	√		√
Infectious disease control	√		√
Pest control	√		√
Pricing		√	√
Private rented housing standards	√		√
Product safety		√	√
Taxi licensing	√		√
Weights and measures		√	√

Source: The Rogers Review: National enforcement priorities for local authority regulatory services, March 2007, p22

A council's regulatory work is not normally viewed as part of its policies but rather as a necessary background activity which helps to ensure an acceptable quality of life for local residents. Nevertheless, the elected membership of an authority is responsible for

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53 This section with contributions by Keith Parry, Parliament and Constitution Centre

54 Cabinet Office, *Departmental Report 2007*, p39, "Getting regulation right"

55 David Wilson and Chris Game, *Local government in the United Kingdom*, Palgrave Macmillan, 4th ed, 2006, p134

determining their regulatory policies and priorities, and the share of the available resources that will be allocated to it. The precise role of the council in any given regulatory activity, and the amount of influence exerted on it by central government agencies, varies with the activity. For example, local authorities are the primary enforcement mechanism for food standards legislation, and the Food Standards Agency has wide powers in relation to council performance in this area. In health and safety matters, on the other hand, councils tend to work in partnership with the Health and Safety Commission.

An important mechanism through which local authorities co-ordinate their regulatory duties in the trading standards and environmental health spheres is the **Primary Authority Principle** (also known as the Home Authority Principle) which has developed on a voluntary basis over the years and is administered by LACORS.[56] An authority which houses the head office of a multi-site business might well act as the 'home authority', establishing contacts with the company, advising the company on regulatory procedures, and in turn providing information and advice *about* company-wide practices and procedures to authorities with outlets in their areas. The Government's consultation paper on the Draft Bill explained the benefits of the Primary Authority Principle as follows:-

> The Primary Authority Principle is based on the core idea that a business operating across the UK should be able to rely on a single local authority for regulatory advice and support. For example, a multi-site retailer who seeks guidance from one local authority on product labelling, should feel assured that if the guidance is followed, it will not be challenged in any of its individual outlets by other local authorities.[57]

B. Hampton and local authority regulation

Hampton surveyed the work of trading standards and environmental health departments in local councils, noting that (a) they were well placed to understand and reflect local needs and (b) their approach, which involved seeking compliance through the provision of good advice rather than punishing businesses for non-compliance, was an effective one. But the small size of departments and the diffuse structure of local authority regulation allowed "wide variations and inconsistencies in the application of national standards" even though the aim of the legislation was to provide a similar level of protection to all citizens.

Hampton recommended:-

- The establishment of a new **Consumer and Trading Standards Agency (CTSA)** to coordinate all trading standards work [other than that covered by the Food Standards Agency. It should also take responsibility for

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[56] LACORS - Local Authorities Coordinators of Regulatory Services, a local government representative body created by the Local Government Association, Welsh LGA, Convention of Scottish Local Authorities and Northern Ireland LGA.

[57] Better Regulation Executive, *Consultation on the Draft Regulatory Enforcement and Sanctions Bill*, May 2007, paragraph 3.7,

improving the consistency of regulation experienced by businesses which trade in several local authorities. It would take over the consumer enforcement functions of the OFT as well as incorporating the National Weights and Measures Laboratory, British Hallmarking Council and the Hearing Aid Council.

- That the Better Regulation Executive should establish a **National Regulatory Forum** comprising local authority, national regulator and policy department representation. The Forum should lead a programme of work to improve coordination of local and national regulatory services, secure agreement on common services, agree risk assessment arrangements and monitor their application locally.

In the event, the Chancellor announced in the Pre-Budget Report of December 2005 that the Government would establish a new body, the Local Better Regulation Office (LBRO), to drive through consistency and coordination matters including some of the functions envisaged for the CTSA. The OFT would take on the rest of the CTSA's proposed functions:

> The LBRO will not be a new regulator. It will have a clear central mission to minimise burdens on business and work in partnership with local authorities and the national regulators to deliver a risk-based approach to business inspection and enforcement, driving up performance standards within the wider local government performance framework. The LBRO, working with the national regulators, will ensure a single coordinated set of priorities for local authority regulatory services covering trading standards and environmental health. It will secure improved consistency and coordination for all businesses, particularly those that operate across local authority boundaries, building on the Home Authority principle. **The OFT will take on the other roles envisaged for the CTSA building by Hampton**, and will work with LBRO and other national regulators to drive through the Hampton principles.[58]

The Government published an assessment of progress made on its implementation of the Hampton recommendations in November 2006.[59] This placed significant emphasis on reform of local regulation and included the following commitments:-

- Immediate establishment of a LBRO and legislation to put it on a statutory footing;
- Provide a statutory basis to the Home Authority principle for multi-site businesses;
- Ensure that local authority regulatory services are included within the scope of the Hampton *Code of Practice for Regulators*;
- Ask a respected member of the local government community to examine the approximately 60 areas of legislation that local authorities enforce and recommend around five specific high-risk priorities so that they do not waste

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58 HM Treasury, *Pre-Budget Report 2005*, Chapter 3: "Meeting the productivity challenge", p48,
59 HM Treasury et al, *Implementing Hampton: from enforcement to compliance*, November 2006,

businesses' time on low risk areas of enforcement. Local authorities would be free to add their own local priorities (See next section).

C. The Rogers Review: National enforcement priorities

Peter Rogers, Chief Executive of Westminster City Council, was asked to conduct the review of national enforcement priorities and his report was published alongside the Budget on 21 March 2007.[60] The Government accepted the recommendations in full in May 2007.[61] The Rogers Review was concerned with prioritising areas for local authority regulation and set out national enforcement priorities for local regulatory services in England. It also made recommendations concerning how the priorities should be delivered. This involved publication of evidence of policy areas judged to have high priority in order to assist local authorities planning regulatory services. The BERR website explains this as follows:

> **Priorities for local authority enforcement**
>
> The review team – led by Peter Rogers, chief executive of Westminster City Council – identified more than 60 policy areas enforced by local authorities.
>
> They considered the views of government departments, local authorities, the public and businesses, before deciding which areas to prioritise. The areas they identified were:
>
> - **Air quality** – reducing air pollution - Covers air quality regulations, including regulation of pollution from factories and homes.
> - **Alcohol licensing** – protecting people from the effects of the misuse of alcohol through licensing - Covers alcohol, entertainment and late night refreshment licensing and its enforcement.
> - **Hygiene of food businesses** – preventing food poisoning - Covers hygiene of businesses, selling, distributing and manufacturing food, and the safety and fitness of food in premises.
> - **Improving health in the workplace**
> - **Fair trading** – protecting the vulnerable from scams and rogue traders - Covers trade description, trade marking, mislabelling and doorstep selling.
> - **Animal and public health** - Covers animal and public health, animal movements and identification
>
> The team's recommendations were accepted in full by the Government as part of the March 2007 budget. The Local Better Regulation Office will be reviewing the priorities in three years as part of the Government's ongoing commitment to improve communication and discussion with local authorities.

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60 Peter Rogers, *National enforcement priorities for local authority regulatory services*, Cabinet Office, March 2007

61 Joint letter from Hilary Armstrong, Cabinet Office Minister, and Peter Rogers, 2 May 2007

> Another key aim of the Review was to promote best practice across all local authorities, and this is already starting to happen as different areas discuss the most effective way to tackle each of the priority areas.[62]

Rogers explained the choice of priorities as follows:

> The five priorities were reasonably simple to identify after reviewing the evidence, if they were not the ones you might expect. The evidence clearly shows the areas of greatest risk: air pollution costs between £9 billion and £21 billion in healthcare each year; alcohol licensing is crucial to reducing the 22,000 alcohol-related deaths annually; poor hygiene in food businesses causes almost one death a day and creates enormous costs for the NHS; work-related health problems affect 560,000 workers a year; and violation of fair trading rules causes some £8 billion harm to consumers each year, many of whom are the most vulnerable in our society.[63]

Derek Allen, Executive Director of LACORS, welcomed the principle of a smaller number of national priorities which would allow councils to better use their resources to "...more effectively meet the needs and expectations of their local communities as well as contribute to national priorities." The LACORS response did, however, express surprise at the exclusion of private sector housing (unfit housing, licensing of HMOs etc) from this initial list of priorities.

D. The Bill: Local Better Regulation Office

Part one of the Bill deals with the Local Better Regulation Office (LBRO). This is currently incorporated as a non-departmental public body operating as a company limited by guarantee. The Bill would put it on a statutory footing. There are various provisions to ensure continuity between the current company and the statutory company, such as applying the transfer of undertakings regulations in respect of employees. The Bill contains a provision for dissolution of LBRO in clause 18. The scope of part one of the Bill is limited to certain regulatory functions defined in clause 4 and schedule 3; and specified areas of EU law.

The general objective of LBRO will be to reduce unnecessary burdens on business and implement the principles of better regulation.

Most of the provisions in part one create a framework for centralised control of regulatory enforcement. This will allow central government to set national priorities for regulatory activity at the local level. They amount to an extensive rationalisation of regulatory activities with a clear hierarchy extending up from local to national government, taking in national regulators. The specific provisions for this centralisation are as follows:

- LBRO will issue guidance which local authorities must "have regard" to. Such guidance will do more than exercise general oversight. LBRO will be able to

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62 BERR, Prioritising Areas for Local Authority Regulation (Rogers Review)

63 Peter Rogers, "Government has shown a willingness to take positive steps along the road to devolution", *The Times*, 3 April 2007, Public agenda supplement p3

make detailed and specific guidelines affecting individual companies, local authorities and particular enforcement actions.

- Whilst local authorities will not be under any general obligation to obey these guidelines, LBRO will be able to issue directions to local authorities enforcing particular guidance that has been issued. Such directions will require the approval of the Secretary of State.

- LBRO will be under an obligation to advise ministers if required to do so.

- LBRO will be responsible for reviewing and revising a list of national enforcement priorities. Initially these will be the enforcement priorities set out in the Rogers Review.

- Ministers will have powers to issue guidance and directions to LBRO. The Secretary of State will be prohibited from "issuing a direction to LBRO requiring it to direct two or more local authorities to comply with guidance it has given under clause 6 or guidance issued by another national body (such as a national regulator)."[64]

- Clause 17 provides for ministerial review of LBRO.

In addition to these provisions for a centralised system there are also extensive provisions for coordination. Most of these are in part 2, but clause 12 in part 1 provides for coordination between LBRO and other national regulators, specifically: the Environment Agency, the Food Standards Authority, the Gambling Commission, the Health and Safety Executive, and the Office of Fair Trading. This will be by way of a memorandum of understanding with each of these regulators.

E. The Bill: Primary Authority scheme

Part two of the Bill provides for the coordination of regulatory enforcement among local authorities by entrenching a "primary authority" scheme. The key to this will be an inspection plan, involving a risk assessment, of each "regulated person" – who could be a company, partnership or individual faced by two or more local authorities for the same regulatory purposes.

This scheme will be administrated through a nomination procedure which will pair a regulated person with a local authority which will be their "primary authority". LBRO will be able to nominate local authorities who agree in writing to be the primary authority for a given regulated person. The primary authority will be able to charge fees to the regulated person in respect of its coordinating activities. The nomination procedure will be flexible; different local authorities can be nominated as primary authorities for different regulatory functions.

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64 Explanatory notes to Bill 103, paragraph 49

The main function of the primary authority will be to give advice and guidance:

> **Clause 27: Advice and guidance**
> 73. This clause charges the primary authority with the task of giving advice and guidance both to the regulated person in respect of the relevant function, and to other local authorities regarding how they should exercise the relevant function in relation to the regulated person. The primary authority and regulated person may make such arrangements as they see fit in order to manage their relationship. This might include entering into an agreement or memorandum of understanding which sets out the rights and obligations of each party. Such agreement or memorandum might supplement any inspection plan approved by LBRO under clause 30. [65]

The primary authority scheme has various implications for enforcement. Firstly any local authority wishing to take enforcement action must notify the primary authority where a primary authority partnership is in place. The primary authority must then decide within a defined timescale whether or not the proposed action is consistent with advice or guidance it has previously given. It may then stop the action being taken. The scope of the action which comes within the notification requirements will be capable of variation by the Secretary of State by order. There is also provision for exclusions to be created by order, in particular where such consultation requirements would be disproportionate; or where urgent action is required. Exclusions might also be applied where the issue has specifically local characteristic or where consultation would be simply impractical.

This system clearly has the potential for disagreements between local authorities; and between local authorities and those regulated by them. Accordingly the LBRO is given the task of adjudicating on various disputes:

- Where the local authority wishes to pursue enforcement action and the primary authority disagrees; either the local authority or the regulated person may seek a decision from the LBRO on such action proceeding.

- Where the local authority wishes to pursue enforcement action and the primary authority does not know whether to agree or not it may submit the matter to the LBRO.

F. Issues for local authorities

The *Regulatory, Enforcement and Sanctions Draft Bill* and accompanying consultation paper were published on 15 May 2007.[66] Among the more contentious provisions, at least from the local authority perspective, were those which appeared to constrain the freedom of action of local authorities. These provisions survived consultation and appeared in the published Bill. They included:

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65 Explanatory Notes to the Regulatory Enforcement and Sanctions Bill [HL] as brought from the House of Lords on 29th April 2008 [Bill 103]

66 Better Regulation Executive, (1) *Regulatory, Enforcement and Sanctions Draft Bill*, Cm 7083, May 2007, (2) *Consultation on the Draft Regulatory Enforcement and Sanctions Bill*, May 2007,

- The powers of the LBRO to secure compliance with its guidance;
- The requirement that local authorities observe national enforcement priorities;
- The right of a council to decline nomination as a primary authority;
- The right of a council to take enforcement action locally if not authorised to do so by the primary authority.

The Bill empowers the LBRO, an unelected non-departmental public body, to direct a locally elected council to comply with its guidance. Further, the LBRO may require a council to act as the primary authority for a business, whether or not it wishes to do so, and it may direct an authority not to take enforcement action. The Minister, Lord Jones of Birmingham, acknowledged at second reading the difficulty of finding a balance between the interests of business and the legitimacy of councils:

> How do you achieve a balance between the maintenance of local, democratic connection and at the same time provide, in a society and commercial world that must be globally competitive or die, a degree of predictability—a level playing field across the land?[67]

1. Local authority autonomy

a. Obligation to comply with LBRO guidance

The draft Bill proposed that local authorities be placed under a duty to "have regard" to guidance issued by the LBRO. However, the consultation questions asked whether a stronger obligation of compliance should be introduced. There was some dismay among councils at this suggestion. Manchester City Council, for example, said:

> This suggests a shift from local priorities and direction to a central govt controlled programme of when and how work should be done. This is not something we support.[68]

The Government's response indicated that a duty to have regard to guidance would apply in the majority of cases, but that a stronger reserve power to ensure compliance with *certain* guidance was under consideration (with appropriate safeguards).

The power to direct an authority to comply duly appeared in the Bill. Its use requires the consent of the Secretary of State and consultation with others including the appropriate regulator. The House of Lords Delegated Powers and Regulatory Reform Select Committee drew attention to the legislative character of mandatory guidance to local authorities.[69] The Bill was amended by ministers at Lords committee stage along the lines recommended by the Committee. As a result, LBRO directions to two or more

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67 HL Deb 28 November 2007 c1282

68 Manchester City Council, *Response to the Consultation on the Draft Regulatory Enforcement and Sanctions Bill from Head of Regulatory and Enforcement Services*, undated,

69 House of Lords Delegated Powers and Regulatory Reform Committee, Second Report of session 2007-08. HL 21 2007-08

authorities to comply with its guidance must be sanctioned by ministerial order subject to negative resolution procedure in Parliament (clauses 7 and 15).

The Minister, Lord Bach, stressed at committee stage that the power to direct was a "backstop power" and would not be used routinely.[70] Lord Borrie, a Labour Peer and former Director General of the Office of Fair Trading, said at report stage that the LBRO would be effectively impotent if it had no backup power to rein in an authority which persistently ignored advice.[71] Nevertheless, Conservative Peers attacked the power. Lord Cope of Berkeley asked:

> What is the point of being elected to carry it out if you are answerable not to the people who elected you for those responsibilities but to the LBRO and, above that, to the Secretary of State? All you can do is follow what *they* think is good practice, whether or not it seems to work in your particular local authority area.[72]

The issue of whether or not there was a precedent for a non-departmental public body to have such a power of direction was discussed at Committee and Report stages and third reading.[73] The Minister argued that the closest precedent was the power of the Food Standards Agency under the *Food Safety Act 1990* to direct that a local authority comply with a code of practice.[74] Viscount Eccles (Con) contended at Third Reading that the code of practice documents dealt with the implementation of EU and UK food law. "Law is often enforced " he said "but guidance, in this way, never before."[75]

An amendment moved by Viscount Eccles at Report Stage, which would have transferred the power of direction from the LBRO to the Secretary of State, attracted Liberal Democrat support but was defeated by 109 votes to 52.[76] Conservatives and Liberal Democrats also supported an amendment at third reading that would have deferred use of the power of direction until one year after publication of the relevant guidance. This was defeated by 133 votes to 115.[77] However, Government amendments carried at third reading gave effect to Liberal Democrat demands that councils subject to a direction should first be consulted by the LBRO (clause 7(5)(a)).[78]

b. National regulatory priorities

The Bill provides for the LBRO to publish, and to keep under review, the list of national enforcement priorities (Rogers had recommended that the list be "refreshed" at least every three years). The list consisted of matters to which a local authority "...should give priority when allocating resources to its relevant functions." The Government had said in

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70 HL Deb 23 January 2008 cGC111

71 HL Deb 19 March 2008 c299. The National Consumer Council had said in its December 2007 briefing that this measure was necessary if the LBRO was to secure consistency of practice. The Minister also cited similar comments by the CBI and Trading Standards Institute at c301

72 HL Deb 23 January 2008 cGC118.

73 HL Deb 23 January 2008 ccGC107-125; 19 March 2008cc296-304

74 HL Deb 19 March 2008 c300

75 HL Deb 28 April 2008 c12

76 HL Deb 19 March 2008 cc296-304

77 HL Deb 28 April 2008 cc11-21

78 HL Deb 28 April 2008 cc22-5

its consultation document that publication of the list would not prevent local authorities from pursuing their own local priorities in parallel:

> On the contrary, it is expected that an increasingly evidence-based and focused framework from Government will free up resources for a more strategic approach. This should allow local authorities to target the work of regulatory services on those areas which matter most to local people.[79]

Local authorities were to be required to "have regard" to this list of enforcement priorities, and there was, reportedly, overwhelming support among consultees for a duty of this nature.[80] The OFT argued that it would allow local authorities the flexibility "...to decide which of the national priorities are relevant to their particular circumstances."[81] Nevertheless, the Liberal Democrat Spokesperson, Baroness Hamwee, queried at second reading whether the need by businesses for certainty should outweigh "almost to the point of elimination" local assessments of priorities. She suggested that achieving greater uniformity in enforcement nationally might lead to reduced regulatory standards overall – the lowest common denominator.[82]

The Government's guide to the Bill states:

> The requirement to have regard to the list will not prevent councils giving due weight to their own local priorities. In addition, local authorities will still have to meet with minimum levels of enforcement or any reporting requirements set by relevant domestic or European legislation.[83]

2. The Primary Authority Principle (PAP)

The consultation paper described the benefits of the PAP but gave examples of shortcomings in its operation, including instances where businesses were unable to find willing partner authorities and where authorities provided inconsistent advice which could be costly to the business concerned. The Government proposed that:

- Any business operating across more than one local authority must have the option of having a PAP;
- Where an authority is not willing to take on the role of primary authority, the LBRO would be able to nominate one;
- The consent of the primary authority must be obtained before another authority can take enforcement action against a business.
- LBRO to arbitrate on disagreements between primary and enforcing authorities;
- Primary authorities to produce written inspection plans; enforcing authorities to be required to have regard to those plans.

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79 Consultation document (*op cit*) p30

80 Better Regulation Executive, *Government response to the consultation on the draft...Bill*, 28 September 2007, p22

81 Office of Fair Trading, *Regulatory Enforcement and Sanctions Bill: the OFT's response*..., August 2007,

82 HL Deb 28 November 2007 c1275

83 BERR, *A guide to the Regulatory Enforcement and Sanctions Bill*, November 2007, p15

Lord Cope of Berkeley raised questions about the position of the citizen under this aspect of the Bill's proposals:

> I agree with those who have said that we must always think of the consumers in these matters. Many high streets and industrial estates will before long have a variety of different local authority regulators covering the same aspects of the various businesses along the high street or in the estate, particularly as each high street now contains a similar menu to some degree of national chain shops. The citizen may complain to the town hall about something or other, and the town hall will reply that it regulates only the locally owned shops and that is what it is responsible for. The nationals are regulated by other authorities over the country, miles away—authorities for which the citizen did not vote. The local authority will say that of course it is tougher, which is why the national chains have avoided it, and that it may argue with the primary authority but the primary authority can overrule the local authority and stop it enforcing regulations on national chains. However, the local authority will say that it can enforce the regulations on the small businesses and it will jolly well do so, to prove that it is a tough authority on the side of consumers. But as far as the branches of the national chains are concerned, the Pontius Pilate district council will wash its hands of responsibility. Meanwhile, the distant authority will collect more money and hire more regulators. I am concerned that, in practice, these clauses could work against small business of all kinds. I want to see how we can protect them. [84]

a. Right to refuse nomination

LACORS protested that an authority could be nominated as a primary authority without, apparently, any right of refusal. This, it said, could undermine a "...council's ability to decide on its own service provision."[85] A number of councils and representative bodies protested at the consultation stage against the idea of imposing a partnership on an unwilling authority. On the other hand, the Trading Standards Institute argued pragmatically that the LBRO would need to develop a range of mechanisms for securing voluntary arrangements but that, ultimately, the power to nominate would be needed if maximum take-up were to be achieved.[86]

The Bill provides for nomination of a primary authority where there is no agreement. An amendment that would have removed the power to nominate without consent was discussed in grand committee.[87] The Minister argued that it was "…critical that all relevant businesses have access to the scheme." But he added that:

> …it is intended that in the vast majority of cases the primary authority scheme will be consensual. The LBRO will make nominations only after careful consideration.[88]

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84 HL Deb 8 November 2007 c1260-2

85 LACORS et al, *Response to the Consultation on Draft Regulatory Enforcement and Sanctions Bill*, 14 August 2007

86 Trading Standards Institute, *Response to the...Consultation*, August 2007,

87 HL Deb 28 January 2008 ccGC215-219

88 *Ibid* cGC217

b. Right to take enforcement action

Even more contentious was the proposed requirement that the consent of the primary authority be obtained before enforcement action could be taken by another authority. Reading BC, for example, said in its response to consultation:

> ...we vehemently disagree that the Primary Authority should have the right to veto the appropriate enforcement action which a LA seeks to take to protect its local stakeholders. We are already held accountable by our local stakeholders, by the courts and by a local government ombudsman for those decisions.[89]

The Bill provides for an enforcing authority to notify a primary authority of intended enforcement action. If this is judged to be inconsistent with advice or guidance previously given, the primary authority may direct that the action must not be taken. Schedule 4 allows for referrals to LBRO by (a) the enforcing authority (if prevented from taking action) (b) the business (if the primary authority has not directed that enforcement action may not be taken), and (c) the primary authority (if it does not wish to make a direction itself). LBRO may then arbitrate in the matter and either consent to the proposed action or direct that it should not be taken. LACORS, which has argued against giving statutory force to the PAP, said in its briefing on Lords second reading:

> For one council, or LBRO, to direct another council not to take enforcement action is undemocratic, and an interference in the principles of the judicial system. In the case of LBRO directing a council not to take action this also amounts to a centralisation of power.[90]

Baroness Turner of Camden (Lab) moved a LACORS-inspired amendment in grand committee which proposed an alternative enforcement scheme. This was based broadly on existing arrangements and omitted any power to direct that enforcement action should not be taken. The Minister responded that the approach would be less systematic than the scheme in the Bill and would "not deliver the certainty that businesses have a right to expect."[91] The amendment was withdrawn.

3. Other issues

a. Board representation

Ministers are to be responsible for appointing the Chair of LBRO and the other Board members after consultation with the Chair and Welsh ministers (schedule 1). The Government's expectation, as set out in the consultation document, was that membership would reflect a "range of experience from local government and national regulation, business and consumer groups."[92] Some respondents to consultation stressed the importance of specifying in the Bill the sectors from which board

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89 Reading Borough Council, *Consultation on the Draft Regulatory, Enforcement and Sanctions Bill: report by Director of Environment, Culture and Sport*, 9 July 2007

90 LACORS, *Regulatory, Enforcement and Sanctions Bill, House of Lords second reading*, 28 November 2007

91 HL Deb 28 January 2008 cGC235

92 Consultation document (*op cit*) p32

representatives should be drawn. Trading Standards East Midlands, for example, remarked that the Secretary of State should have regard to the desirability of appointing one or more persons with experience of local authority regulation.[93] Baroness Wilcox, Conservative Shadow Minister, said at second reading that consumer representation was essential and must be written into the Bill.[94] Baroness Hamwee, Liberal Democrat Spokesperson, moved an amendment at committee stage specifying that at least 25% of board members should have direct experience of local government. The Minister replied that "…frankly, the LBRO has too many stakeholder groups" but emphasised the Government's belief that the LBRO could not function "without a lot of input from the sector." The amendment was withdrawn.[95]

b. Resources

LACORS had pointed out in its response to consultation that PAP arrangements could be financially burdensome and that, typically, the equivalent of one or two full-time officers would be required for dealing with a large firm.[96] The Government's summary of responses to consultation stated that many local authorities had agreed with the proposed role of LBRO in facilitating PAPs provided there were adequate resources available.[97] It agreed in its response that "...adequate resources must be made available to primary authorities if they are to effectively carry out their role." A separate clause (clause 31) empowers a primary authority to cover costs through fees charged on the regulated business. Authorities must have regard to LBRO guidance on the matter (clause 33). The CBI has said that it "fundamentally disagrees" with the introduction of these charges on businesses. It adds:

> Businesses already make significant contributions through business rates which facilitate the operation of the primary authority; we do not see a compelling argument why business should pay additional sums.[98]

IV Civil Sanctions[99]

A. The Macrory Review

In September 2005 the Government asked Professor Richard Macrory to conduct a review of the entire system of regulatory sanctions. His final recommendations were published in November 2006 and are aimed at balancing the needs of workers, consumers, the environment and compliant businesses with the need to take effective action against "those businesses that intentionally and knowingly fail to comply with regulatory obligations on time".[100] The Government's position in accepting the review's

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93 Trading Standards East Midlands, *Regulatory Enforcement and Sanctions Bill – Consultation*, undated,
94 HL Deb 28 November 2007 c1247
95 HL Deb 21 January 2008 ccGC5-11
96 LACORS et al, Response to consultation (*op cit)*
97 Better Regulation Executive, *Government response to the consultation on the draft...Bill*, 28 September 2007, p11
98 CBI, *Business summary: Regulatory Enforcement and Sanctions Bill*, 2 April 2008
99 Co-written with Sally Broadbridge, Home Affairs Section
100 Professor Richard Macrory, *Regulatory justice: making sanctions effective*, November 2006

recommendations was summarised as follows in the course of the response to consultation on the draft Bill:

> The Government remains committed to the vision set out in the Macrory Report of a modernised system of regulatory sanctions that are proportionate, flexible and effective. We believe it is vital that these new powers do not, however, replace ongoing advice from the regulator to business. There will be circumstances where regulators will need powers to tackle breaches of the law where a criminal prosecution may not be the most appropriate or proportionate response. With the appropriate safeguards in place, we consider that giving responsible regulators access to the new sanctions is appropriate.[101]

The approach taken by Macrory is influenced by the concept of "restorative justice" which seeks to change behaviour and restore harm caused as much as to simply punish wrongdoing. Accordingly a set of principles was outlined to guide policy in this area:

> **Six Penalties Principles**
>
> A sanction should:
>
> 1. Aim to change the behaviour of the offender;
> 2. Aim to eliminate any financial gain or benefit from non-compliance;
> 3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
> 4. Be proportionate to the nature of the offence and the harm caused;
> 5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
> 6. Aim to deter future non-compliance

The BERR Better Regulation website summarised the review's recommendations and the implementing measures in the Bill as follows:

> Macrory recommended:
>
> - that the Government review the drafting and formulation of any criminal offences relating to regulatory non-compliance
> - the design of sanctions in line with the penalty principles and characteristics outlined in the review
> - giving criminal courts new powers to punish regulatory offences
> - introducing new financial penalties as an intermediate sanction
> - improving the system of statutory notices
> - introducing a new type of sanction: enforceable undertakings and undertakings plus
> - considering pilot schemes to gain restorative justice for regulatory non-compliance
> - making available alternative sentencing options in criminal courts

[101] BERR, *Government response to the consultation on the Draft Regulatory Enforcement & Sanctions Bill*, 28 September 2007

- introducing new measures to improve transparency and accountability, including:
- a working group of regulators to share best practice
- enforcement activities on a regular basis.

The Government accepted the report's nine recommendations in full, some of which are being taken forward by the Regulatory Enforcement and Sanctions Bill:

- fixed monetary penalties
- discretionary requirements including:
  - variable monetary penalties
  - compliance notices
  - restoration notices
  - variable monetary penalties with voluntary undertakings
- cessation notices
- enforcement undertakings.[102]

The Macrory Review outlined a number of problems with the current system of regulatory sanctions, in particular the absence of risk based "sanctioning tools" that would allow the application of principles or restorative justice to bring businesses into compliance:

> E.9 Evidence submitted to the review suggests that many regulators are heavily reliant on one tool, namely criminal prosecution, as the main sanction should industry or individuals be unwilling or unable to follow advice and comply with legal obligations. Criminal prosecution may not be, in all circumstances, the most appropriate sanction to ensure that non-compliance is addressed, any damage caused is remedied or behaviour is changed. The availability of other more flexible and risk based tools may result in achieving better regulatory outcomes.
>
> E.10 Many of the review's recommendations are a continuation of current Government proposals and reforms. The Home Office is exploring the role of restorative justice in areas such as corporate manslaughter and youth offending; whilst Defra is currently consulting on the introduction of administrative penalties in the area of fishing and marine activities.
>
> E.11 Whilst the UK has a leading position in the area of regulatory reform and we have made advances in the development of sanctioning regimes in some areas of regulation, little has been done to evolve the sanctioning toolkit across all regulatory bodies. Across the board, we have failed to keep pace with the innovations being introduced in other leading OECD nations such as Australia and Canada, countries which share some of our legal tradition. The review believes that the UK must address this area in order to ensure that the Government's better regulation agenda, including the recommendations of the Hampton Review and the Better Regulation Task Force's report Less is More, is realised.[103]

An important goal identified by the review was need the to remove circumstances where the benefits to the perpetrator of breaking the law outweigh the possible sanctions:

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[102] BERR, Improving Compliance among Businesses (Macrory Review)
[103] Macrory Review, Page 7

> 1.18 Evidence presented to me over the course of the review has demonstrated that, in some instances, the fines handed down in court often do not reflect the financial gain a firm may have made by failing to comply with an obligation. This means that these penalties do not act as a deterrent and, in effect, give businesses an incentive to continue to fail to comply in return for a profit. In some cases fines do not fully reflect the harm done to society.
>
> **Examples of fines that do not reflect the financial benefit or seriousness of the offence (environment regulation)**
>
> - An Oxfordshire man was fined £30,000 for abandoning 184 drums of toxic waste. The man received £58,000 for disposing of the material, and the Waste Authorities had costs of £167,000 to incinerate the waste properly.
>
> - A fine of £25,000 was handed down to a small waste disposal company which was operating without a licence. The company saved £250,000 by operating illegally over a 2 year period.[104]

Equally, where the breech in question is not deliberate the lack of flexibility in the range of sanctions available may make a criminal prosecution a disproportionate response:

> In instances where there has been no intent or wilfulness relating to regulatory non-compliance a criminal prosecution may be a disproportionate response, although a formal sanction rather than simply advice or a warning, may still be appropriate and justified. However, regulators may not have any alternative available to them in their toolkit and so must prosecute, even where a different type of sanction may be more effective.[105]

The review also outlined what has come to be called the "compliance deficit" where enforcement action is not taken due to the disproportionate costs involved:[106]

> Heavy reliance on criminal sanctions leads to some non-compliance not being addressed at all. Criminal sanctions are costly and time-consuming for both businesses and regulators. In many instances, although non-compliance has occurred, the cost or expense of bringing criminal proceedings deters regulators from using their limited resources to take action.[107]

The review set out the current sanctions available to regulators under their relevant legislation:

> The sanctions that the majority of regulators have access to are either a warning letter at the informal end of the spectrum or a criminal prosecution at the other. In some cases, they have access to civil injunctions. Most regulators have limited

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[104] Macrory Review, Page 20
[105] Macrory Review, Page 16
[106] Although the question of whether satisfactory evidence exists of a compliance deficit has been rained by Lord Lyell during debates on the Bill in the House of Lords (HL Deb 19 March 2008, c350)
[107] Macrory Review, Page 16

> access to administrative penalties and other intermediate sanctions as a further step before escalating to prosecution or licence suspension or withdrawal. [108]

B. The Bill

Part 3 of the Bill provides a framework under which a wide range of regulators will be able to impose "civil sanctions" for regulatory non-compliance instead of taking criminal proceedings in the courts. The powers are to be available to any person having an enforcement function in relation to any offence in 142 statutes listed in Schedule 6, as well as to the 27 regulators designated in Schedule 5. This includes 62 regulators identified by Hampton and 56 identified by Macrory, as well as more than 400 local authorities with regulatory responsibility and:

> adds up to tens of thousands of regulators.[109]

The civil sanctions comprise Monetary Administrative Penalties (MAPs) and non-financial sanctions and alternatives to criminal prosecution. These are summarised in the explanatory notes:

- Fixed monetary penalties - it is envisaged that such fines will be imposed by a regulator in respect of low-level instances of non-compliance;
- Discretionary requirements which include:
  - Variable monetary penalties - requiring a person to pay a monetary penalty the value of which will be determined by the regulator;
  - Compliance notices - requiring a non-compliant business to undertake certain actions to bring themselves back into compliance; and
  - Restoration notices - requiring a person to undertake certain actions to restore the position, as far as possible, to the way it would have been had regulatory non-compliance not occurred.
- Stop notices - requiring a person to cease an activity that is causing serious harm or presents a significant risk of causing serious harm and has given rise, or is likely to give rise to regulatory non-compliance; and
- Enforcement undertakings - an agreement offered by a person to a regulator to take specific actions related to what the regulator suspects to be an offence.[110]

Under clause 36 ministers will be able to confer on regulators a range of powers (by order subject to affirmative procedure):

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[108] Macrory Review, Page 19
[109] HL Deb 28 April 2008 c26
[110] Explanatory Notes to the Regulatory Enforcement and Sanctions Bill [HL] as brought from the House of Lords on 29th April 2008 [Bill 103]

- to impose fixed monetary penalties (clause 39);
- to impose discretionary requirements (clause 42);
- to prohibit the carrying on of activities until specified steps have been taken (clause 46);
- to accept undertakings to take action to secure that an offence does not continue or recur etc. (clause 50).

In each case it will be for the regulator to take a view on whether an offence has, or might be, committed. This will involve the innovative use of concepts normally applied to assessing evidence in legal proceedings known as "the standard of proof". The standard of proof is the level of proof required in a legal action to convince the court or tribunal that a given proposition is true. The form of words for the standard of proof in civil proceedings is "on the balance of probabilities". In criminal proceedings it is "beyond reasonable doubt".

In the case of the sanctions proposed in the Bill the regulator will ask themselves these questions in relation to their own collation of the evidence:

- In the case of fixed monetary penalties and discretionary requirements the regulator will need to be satisfied "beyond reasonable doubt";
- in the case of stop notices that the activity "involves or is likely to involve the commission of an offence";
- in the case of enforcement undertakings that there are "reasonable grounds to suspect that an offence has been committed".

The term "discretionary" applied to the decisions of agents of government has a specific meaning in public law which is slightly different from its use in the Bill. The new sanctions will all be "discretionary" in the normal legal sense that they are administrative decisions as opposed to independent judicial decisions after hearing evidence and argument. The "discretionary requirements" provided for in clauses 42 – 45 further allow regulators flexibility to address non-compliance through both punitive and restorative measures.

C. Rights of appeal

Under the scheme proposed in the Bill, the regulator will have the choice whether to use the newly available civil sanctions, or to prosecute for non-compliance, although the Government envisages that prosecution will be the choice only in the more egregious cases, while the individual or company facing the new sanctions will not have the option of insisting on being prosecuted instead.

It follows that the rights of appeal are of fundamental importance to the fairness of the scheme. The appeal from the regulator's decision will be the first independent examination of the case. The burden will be on the defaulter to show that the regulator's view was wrong, on one or more specified grounds of appeal. This is to be contrasted with what would happen where a criminal prosecution is pursued. Normally, on a prosecution it would be for the regulator to prove the case to the court beyond reasonable doubt. Accordingly the House of Lords Constitution Committee said that:

> The scheme envisaged in the bill will enable the transfer, on an unprecedented scale, of responsibilities for deciding guilt and imposing financial sanctions (with no upper limit) away from independent and impartial judges to officials.[111]

The use of the term "civil sanction" to describe the range of sanctions provided in the Bill requires clarification in terms of the kinds of arrangements that are currently described as such. As the House of Lords Delegated Powers and Regulatory Reform Committee noted in their 2nd report of 2007-08:

> 49. The scheme under Part 3 must be distinguished from the two types of "civil sanctions" scheme which are more commonly to be found in existing legislation:
>
> (a) the system under which the offender is given the option of paying a fixed penalty as an alternative to being prosecuted and being heard in the criminal courts, but under which he may always choose to proceed to the criminal courts (e.g. selling alcohol to children);
>
> (b) the system under which the behaviour in question is decriminalised altogether, i.e. the behaviour is no longer a criminal offence and it can no longer be prosecuted in the criminal courts at all, but penalties are payable if the offender is found to have contravened the statutory provision concerned (e.g. parking contraventions in London and some other parts of the country).[112]

There are two categories of regulator on whom powers may be conferred:

- The "designated regulators" (listed in Schedule 5). Powers can be conferred for any offence (under any Act) for which they have enforcement functions existing when the bill is passed.

- The other regulators that have enforcement functions relating to offences existing when the Bill is passed and created by an enactment specified in Schedule 6. Since the Crown Prosecution Service, the police and the others specified in clause 37(3) are excluded, this category will comprise mainly ministers and local authorities.

It is intended that future legislation creating new offences will make specific provision as to the availability or otherwise of civil sanctions.[113]

D. Article 6 ECHR

These provisions, particularly those relating to fixed monetary penalties, gave rise to a number of concerns during the early Lords stages of the Bill, and underwent substantial modification.

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[111] House of Lords Select Committee on the Constitution, 1st Report of Session 2007–08, *Regulatory Enforcement and Sanctions Bill*, HL Paper 16, 4 December 2007

[112] House of Lords Delegated Powers & Regulatory Reform Committee, 2nd Report of Session 2007-08, HL Paper 21, 6 December 2007

[113] Explanatory Notes (to Bill No. 103) , paragraph 109

It was generally recognised that the concept of civil sanctions as an alternative to prosecution for offences is by no means new, and in some everyday situations has become a familiar alternative as well as "an established part of the regulatory enforcement landscape".[114] Lord Lyell of Markyate commented that -

> we are learning to have to live with the smaller penalties, where court procedures would indeed be too cumbersome and expensive[115]

Lord Eccles suggested that it might be perceived as "rough justice" which the public was willing "in a rather gloomy sense" to accept.[116] As the Delegated Powers & Regulatory Reform Committee noted, the Bill will change the settled position in criminal law that:

> … in all contested cases the current situation is that the guilt of the alleged offender must be proved beyond reasonable doubt and the sentence given will be imposed by the court in the light of the circumstances of the case and of the offender. The maximum penalty on conviction is specified in the legislation creating the offence. [117]

The Joint Committee on Human Rights expressed concern "that the imposition of regulatory penalties, which imply guilt in relation to a criminal offence, may lead to a risk of incompatibility with Article 6(2) ECHR".[118] In a letter to BERR Minister Lord Jones of Birmingham dated 20 December 2007, the JCHR put a number of questions to the Government on this issue. [119]

In response various changes were made to the Bill, summarised by Baroness Vadera for the Government as follows:

> We have taken these [concerns] into account and significantly improved the Bill. We added details on the grounds for appeal, a requirement on the Minister to review the effectiveness of any order conferring powers after three years, a power for the Minister to suspend the use of new sanctions where they are persistently misused and to specify that a regulator must be satisfied to the criminal standard of proof prior to issuing a fixed monetary penalty or discretionary requirement—which is why the analogy with the traffic warden really does not apply. We have also added, during the Bill's progress through this House, a proposed notice of intent stage in the imposition of fixed monetary penalties, restricted the level of fixed monetary penalties and variable monetary penalties and how they can be set, and simplified the method of setting them, requiring regulators to publicise details of enforcement activity.[120]

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114 HL Deb 30 January 2008 cGC340
115 HL Deb 28 April 2008 c27
116 HL Deb 30 January 2008 cGC359
117 House of Lords Delegated Powers & Regulatory Reform Committee, 2nd Report of Session 2007-08, HL Paper 21, 6 December 2007
118 Joint Committee on Human Rights, Second Report of Session 2006-07, *Legislative Scrutiny: First Progress Report*, paragraphs 4.15 - 4.21
119 Joint Committee on Human Rights, Seventeenth Report of Session 2007-08, HL Paper 95; HC 501, 28 April 2008: Appendix 6: Letter to Lord Jones of Birmingham, Minister of State for Trade and Investment, Department for Business Enterprise and Regulatory Reform, dated 20 December 2007
120 HL Deb 19 March 2008 c357

E. Other issues

Under the Bill as introduced in the Lords:

- the amount of the fixed penalty would have been either a prescribed amount or calculated solely by reference to prescribed "criteria" laid down, not in the primary legislation, but in secondary legislation, and
- there would have been no statutory requirement for the regulator to give notice of intent to impose the fixed penalty or provide an opportunity for the affected company or individual to make representations.

a. Criteria

In answer to a number of searching questions about what criteria for fixed monetary penalties would be used, whether they would be the same for everybody and whether distinctions would be made Lord Bach said:

> Fixed monetary penalties can and will vary depending on prescribed criteria. For example, a penalty may vary depending on the size of the business—which the noble and learned Lord was asking about—and may therefore take account at a general level of the circumstances of the offender. The Minister may of course determine the criteria when conferring powers by an order debated in Parliament. The process is to be found on page 29 of the guide.[121]

He explained that the regulator would have no discretion in setting the level of a fixed penalty, but must calculate it on the basis of the criteria which applied to the case. He said that it was a disadvantage for the House not to have the criteria before it, the criteria would come much later.

In introducing a Government amendment on Report, to remove a regulator's ability to calculate fixed monetary penalties by reference to "prescribed" criteria, Baroness Vadera explained:

> The reference to prescribed criteria caused some confusion when the issue was debated in Committee, and on reflection we accept that the provision could overcomplicate the sanction and are happy to remove it.
>
> The amendment would mean that fixed monetary penalties would simply be of a prescribed amount or amounts, set out in the order made under Part 3. That process will be transparent, as the level of penalty will be specified in both the order and the penalty guidance that the regulator will be required to publish under Clause 62. That will still allow fixed monetary penalties to be set at different levels if appropriate. For example, a sole trader may be given a £50 penalty, whereas a company might receive a £100 penalty, or the penalty for carrying out an activity without a licence may be £50 for one week or £100 for two weeks.[122]

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[121] 30 January 2008 cGC341
[122] HL Deb 31 March 2008 c796

b. Notice of intent

The House of Lords Select Committee on Constitution was critical of the procedure proposed for imposing fixed penalties, saying:

> 11. It is a basic principle of administrative justice that administrative decisions should be made fairly. Procedural propriety generally requires that a person charged with an offence, or against whom administrative action is proposed to be taken, should be told the case against him and be afforded an opportunity to make representations. Where a regulator proposes to impose a variable monetary penalty, the regulations under which the regulator acts must require that a "notice of intent" be served and that the person may make written representations and objections. But there will be no requirement for a notice of intent or an opportunity to make representations where a regulator wishes to impose a fixed monetary penalty. We are unconvinced that this meets the minimum standards of procedural fairness an accused person ought to have in relation to what are ostensibly criminal offences. The bill as currently drafted risks excluding a basic common law principle of natural justice: audi alteram partem (hear both sides before making a decision). The onus will be placed on the individual or company to seek first an internal review and then an appeal to the First-tier Tribunal (the new general purpose tribunal established by the Tribunals, Courts and Enforcement Act 2007).

Lord Lyell said:

> The fixed penalty system that is proposed seems to come largely out of the blue to the alleged wrongdoer. One hopes that in practice he would get a letter of warning beforehand, but it certainly is not required.[123]

In a letter to the Joint Committee on Human Rights, the Minister for Employment Relations & Postal Affairs, Pat McFadden said:

> In the case of fixed monetary penalties and stop notices, we recognise that sanctions may be imposed before the person liable has had a formal opportunity to make representations. However, firstly, we believe context is important. Regulators are expected to behave in accordance with Hampton and Macrory principles of better regulation and should thus take action only when necessary and appropriate. In practice, we would also expect regulators to have been in communication with those they regulate before proposing to impose a sanction. Against this background, although there is no specific procedure in the Bill under which a person would make representations or objections before a fixed monetary penalty or stop notice is imposed, this may in practice occur. Secondly, in any event, there is no breach of the presumption of innocence under Article 6(2). This is because the burden of proof lies with the regulator; the sanction cannot be lawfully imposed unless and until the burden has been met. This determination is then subject to scrutiny by an independent and impartial tribunal.[124]

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[123] HL Deb 30 January 2008 cGC329

[124] Letter from Pat McFadden MP, Minister for Employment Relations & Postal Affairs, Department for Business Enterprise and Regulatory Reform, dated 14 January 2008

Lord Goodlad, the Chairman of the Constitution Committee, pursued the point in Grand Committee, saying it was:

> simply not good enough to say, as the Minister does, that this may in practice occur. People should have a right to make representations before the penalty is imposed. The effect of [my] amendments would be to require the regulators to serve a notice of intent before imposing a fixed monetary penalty and to allow the implicated party to make written representations and objections to the regulator.[125]

The amendments attracted wide support. In responding for the Government, Lord Bach said:

> The noble Lord's amendments are unnecessary and I will explain why. It would not be appropriate to add a "notice of intent" stage to the process for imposing fixed monetary penalties as this would unnecessarily lengthen the process for imposing such penalties and would undermine one of the key benefits of the notice, which is the swiftness with which the sanction can be imposed. Of course, it can be appealed against once it has been imposed, but for the type of case being considered for fixed monetary penalties there is a strong argument in everyone's interests for it to happen quickly rather than slowly.
>
> …We think that there will be a consensual approach to fixed monetary penalties. In the real world, there will in many cases be conversations between the regulator and those who are regulated before a fixed monetary penalty emerges. It is not that the process will somehow become extraordinarily formal, but there is an advantage in swiftness in the kind of cases we are dealing with under fixed monetary penalties. However, the need for a notice of intent is, on balance, appropriate for the other discretionary elements of variable monetary penalties.

Lord Goodlad withdrew his amendment but feared that the Minister had

> not succeeded in meeting the point about hearing both sides of a case before making a decision, which is a basic principle of common law.[126]

Nevertheless, during a somewhat muddled debate on Report, Baroness Vadera explained how the Government was supporting Lord Goodlad's amendment and supplementing it. She said:

> We understand the concerns that the noble Lord and others have expressed about the fairness of the procedure for imposing fixed monetary penalties. We are happy to accept Amendment No. 56.
>
> I wish to talk further on Amendment No. 57. The amendment and Amendment No. 58 would add a notice-of-intent stage to the procedure for imposing fixed monetary penalties and would allow a person an opportunity to make representations before the final penalty can be imposed. We believe that this

[125] HL Deb 30 January 2008 cGC364
[126] HL Deb 30 January 2008 cGC369

> addresses the concerns about procedural fairness that the noble Lord and others have raised.
>
> Amendment No. 57 is, however, slightly different from Amendment No. 58. In particular, Amendment No. 57 would allow a business to discharge its liability after the notice of intent has been served by paying a discharge payment of a prescribed amount straight away, without the need for going through the procedural stages of representations and final notice. Where a business admits liability, we believe that it should be allowed to discharge its liability as soon as possible, without the need to go through the whole process.
>
> If a person chooses not to pay the discharge payment because he challenges the proposed imposition of the penalty, he will go on to make representations and objections against the sanction to the regulator. Obviously, if the regulator still thinks that person is liable to a fixed monetary penalty, it will impose it by way of a final notice. The person can appeal against the fixed monetary penalty by going to a tribunal and arguing that the decision was based on an error of fact, was wrong in law or was unreasonable. I would stress that this procedure is fully compliant with our obligations under Article 6 of the European Convention on Human Rights.
>
> The discharge payment will be set out in the order and could be the same amount as the penalty or set at a lower rate to reflect the procedural savings of an early admission of liability. Similarly, a person may not have to pay the full penalty when a fixed monetary penalty is imposed by final notice, as the regulator could offer an early payment discount under the power in Clause 51(1)(a). Both provisions could encourage early compliance.
>
> The level of discharge payment or any early payment discount will be set out in the order made under Part 3 and subject to the affirmative resolution procedure.[127]

The amendments were agreed.

c. Outstanding concerns

Lord Razzall, who is a member of the Delegated Powers Committee, indicated that although the Committee had a number of reservations which were expressed to the Government, so far as the members were aware, all the Committee's recommendations had been implemented in the Bill, and he understood that the Constitution Committee was also satisfied with the implementation of the recommendations.

The Conservatives continued to be concerned that the scheme does not provide an option for the business or individual to elect to be prosecuted rather than accept a civil penalty. Lord Lyell said:

> If the Government were as joined up as they rightly exhort themselves to be, they would realise that they are concurrently in this House bringing forward just such legislation in Clause 82 of the Health and Social Care Bill, where the regulator

[127] HL Deb 31 March 2008 c800

> can impose a fixed penalty of a maximum of 50 per cent of the potential fine, which the citizen has a right either to accept or to choose to be taken to court. We in the Opposition are suggesting that this method could be improved by introducing the same initial notice that the Government have kindly accepted in this Bill; and I welcome that aspect. This is a constructive way ahead. My proposals—although at this stage I cannot rewrite their Bill for them—are intended to be constructive and proportionate.[128]

[128] HL Deb 28 April 2008 c34

Appendix 1: Related developments not in the Bill

Statutory Regulators' Compliance Code

In 1998 the Cabinet Office published a voluntary "Enforcement Concordat" for local government organisations with an enforcement function, with the aim that businesses faced with enforcement action should be treated equitably and to reduce the variability in the quality of enforcement, in particular between different branches of local government.[129] The Concordat is a voluntary, non-statutory code aimed at helping compliance, describing what business and others can expect from enforcement officers. The vast majority of local authorities and central agencies adopted the Concordat. The Concordat stated Principles of Good Enforcement aimed at helping businesses to comply with regulations, and helping enforcers to achieve higher levels of voluntary compliance:

- Standards: setting clear standards
- Openness: clear and open provision of information
- Helpfulness: helping business by advising on and assisting with compliance
- Complaints: having a clear complaints procedure
- Proportionality: ensuring that enforcement action is proportionate to the risks involved
- Consistency: ensuring consistent enforcement practice.[130]

Following the Hampton Review the Government decided to place the Hampton Principles on a statutory footing in the form of a statutory Regulators' Compliance Code. It was thought that a voluntary arrangement would not have the necessary weight to bring about sufficient change in regulatory behaviour and that the Concordat did not place sufficient weight on risk-based enforcement. Implementation was patchy and inconsistent across the country.

An order making power in the *Legislative and Regulatory Reform Act 2006* allows a code of practice relating to the exercise of regulatory functions to be issued. An initial draft of the Compliance Code appeared in March 2006. The consultation described the requirements set out in the code as follows:[131]

> **Section 3: Supporting Economic Progress**
>
> 27. The Compliance Code requires regulators to give consideration to how their regulatory activities can support economic progress. Specifically, they should ensure that the benefits of any regulatory tool they adopt justify the costs of such a tool both to the regulators and to regulated entities. Any regulatory tool should entail the minimum burden compatible with achieving desired regulatory outcomes.

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[129] DTI, Small Business Service, *Enforcement Concordat: Good Practice Guide for England and Wales* URN 03/998, June 2003

[130] BERR, Enforcement Concordat

[131] Better Regulation Executive, *Consultation on the Draft Regulators' Compliance Code and Listing Order*, May 2007

Section 4: Risk Assessment

28. This section states that an assessment of risk should precede all activities that regulators undertake. Risk assessment is described as an explicit consideration of the potential impact on regulatory outcomes of non-compliance with regulation, and the likelihood that non-compliance will occur. Regulators should then focus their activity on those regulated entities which are higher-risk.

Section 5: Information and Advice

29. This section seeks to have regulators provide advice promptly and clearly, and in a way that enables businesses to understand what the law requires of them.

Section 6: Inspections

30. This section sets out the principle that inspections should only occur as a result of the regulator's risk assessment (with some exceptions). Greatest effort should be focused on those who pose serious risks and on those who are most likely to fail to comply.

Section 7: Data Requirements

31. This section requires that regulators consider how data requests (including through forms) impact upon business and whether more can be done to collaborate with other regulators, for example, through datasharing to reduce unnecessary collection of data.

Section 8: Compliance and Enforcement actions

32. This section looks at how formal enforcement actions, including sanctions and penalties, should be applied. Following a recommendation in the Hampton report, the Government asked Richard Macrory to examine the penalties and sanctions regime in the UK.
33. Macrory reported in 2006, setting out some Penalties Principles and Characteristics, and the Government accepted all the recommendations. This section incorporates the Macrory Principles and Characteristics, and provides that regulators should ensure that their enforcement policies are consistent with these principles and take account of the characteristics.

Section 9: Accountability

34. This section seeks to increase the transparency of regulatory organizations. In particular, it provides that regulators should articulate and measure their regulatory outcomes, the costs they impose and how their enforcement approach is perceived. It also states that they should set up independent complaints procedures.
35. However, we are keen that local authorities do not have to undertake unnecessary additional reporting requirements to meet sections 9.2 and 9.3 of the Compliance Code. Local authorities are likely to meet these requirements through their existing service and enforcement plans, and through their reporting of the Hampton performance indicators announced in the 2006 pre-Budget report that are currently being developed. Because of

this, section 9.4 exempts local authorities from the need to comply with the provisions of sections 9.2 and 9.3.

Mergers of Public Sector Regulators

The Hampton Review recommended structural reform of the national regulators whereby various regulators would be merged to reduce the total number in the UK to seven by April 2009. The benefits of doing this were summarised as follows:

> 4.36 The case study above demonstrates some of the benefits of reducing the number of regulators. The review believes that, if carried out correctly, the benefits of structural consolidation could be considerable, and could come through:
>
> • fewer business-regulator and regulator-regulator interfaces;
> • more complete risk assessment;
> • consolidation of forms and data;
> • fewer inspecting agencies, and hence fewer multiple inspections;
> • internalising conflicting regulations;
> • more strategic regulation; and
> • more flexible regulation. [132]

Mergers have already starting taking place in the public sector. The BERR website gives details about how these proposals are being progressed:[133]

> In the public sector, the mergers form a key part of a strategy to streamline the inspection process. This strategy is also being overseen by the Better Regulation Executive.
>
> Public sector inspections provide the public and ministers with independent assurance on the quality of services they receive. The cost of these inspections doubled between 1999 and 2003, at which point the Government began work to rationalize and reform practices.
>
> Initially, three departments presented plans which would reduce the total cost of their inspectorates by 31%:
>
> - The (then) Department for Education and Skills delivered legislation allowing for the merger of the Office of Standards in Education (Ofsted) with the Adult Learning Inspectorate in 2007.
> - The Department of Communities and Local Government (DCLG) is putting legislation through Parliament to merge the Care Quality Commission with the Audit Commission.
> - The Department of Health is introducing legislation to merge the Health and Social Care Inspectorates, which should be delivered in the 2007-8 Parliamentary session.

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[132] HM Treasury, Philip Hampton's report: *Reducing Administrative Burdens: Effective Inspection and Enforcement*, 16 March 2005, page 64

[133] BERR, Mergers of Public Sector Regulators

> Based on the recommendations of the Hampton Review, other departments will build on this work by examining any possibilities to merge regulators in their area.
>
> **The gatekeeper role**
> Additional new legislation will give departments a 'gatekeeper' role in the inspection process.
>
> Working together, they have developed clear guidelines that mean public sector regulators must consult each other on any inspections. Departments will be responsible for ensuring this happens.
>
> They will also help manage the burden that the new cross-cutting inspections place on regulatory bodies within their areas of responsibility.

External Review of Regulators

In the pre-Budget report of November 2006, the Chancellor announced that

> the National Audit Office will work with the Better Regulation Executive, regulators and business to develop a process of external review of regulatory performance[134]

Hampton Implementation Reviews are assessing the extent to which regulators are performing in line with the principles outlined in the Hampton review and the characteristics outlined by the Macrory review to provide regulators with a structured check on performance against these criteria. They are being conducted by representatives from other regulators with the National Audit Office (NAO) and the Better Regulation Executive.

The Macrory review recommended that the expanded toolkit of sanctions which are provided for in the Bill should only be available to regulators that are acting in line with the principles of good regulation. The Hampton Implementation Reviews will provide part of the evidence base that will inform the Government's decision in this regard. Whilst the reviews are being conducted with the NAO, it will not be involved in any decision made by Government in relation to the new sanctioning powers.

The Hampton Implementation Reviews are initially focussing on five national regulators:

- Health and Safety Executive,
- Food Standards Agency,
- Financial Services Authority,
- Environment Agency
- Office of Fair Trading

The intention is to increase openness and transparency; improve perceptions of regulators where they are performing well; to indicate areas for development; and spread good practice in the regulatory community.

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[134] BERR, Reviewing the Regulators

Appendix 2: Selected Sources

The Bill: Related documents

Explanatory Notes to the Regulatory Enforcement and Sanctions Bill [HL] as brought from the House of Lords on 29th April 2008 [Bill 103]

Regulatory Enforcement and Sanctions Bill Impact Assessment

BERR, *A Guide the Regulatory Enforcement and Sanctions Bill*, November 2007

Key documents

Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement*, 16 March 2005

Richard Macrory, *Regulatory justice: making sanctions effective*, November 2006

Peter Rogers, *National enforcement priorities for local authority regulatory services*, March 2007

Policy development

Consultation on the draft Bill ran from 15 May 2007 to 15 August 2007.

HM Treasury, *Implementing Hampton: from enforcement to compliance*, November 2006

Better Regulation Executive, *Consultation on the Draft Regulatory Enforcement and Sanctions Bill: Implementing the Hampton Vision*, May 2007

Better Regulation Executive, *Regulatory, Enforcement and Sanctions Draft Bill*, Cm 7083, May 2007

BERR, *Government response to the consultation on the Draft Regulatory Enforcement & Sanctions Bill*, 28 September 2007

Better regulation

Better Regulation Task Force, *Less is more*, March 2005

BERR, Better Regulation Executive

Better Regulation Commission, *Public Risk – the Next Frontier for Better Regulation*, January 2008

Local Authority Enforcement

BERR, Prioritising Areas for Local Authority Regulation (Rogers Review)

Civil sanctions

BERR, Improving Compliance among Businesses (Macrory Review)

Parliamentary material

House of Lords Select Committee on the Constitution, 1st Report of Session 2007–08, *Regulatory Enforcement and Sanctions Bill*, HL Paper 16, 4 December 2007

House of Lords Delegated Powers & Regulatory Reform Committee, 2nd Report of Session 2007-08, HL Paper 21, 6 December 2007

Joint Committee on Human Rights, Seventeenth Report of Session 2007-08, HL Paper 95; HC 501, 28 April 2008:

Appendix 6: Letter to Lord Jones of Birmingham, Minister of State for Trade and Investment, Department for Business Enterprise and Regulatory Reform, dated 20 December 2007

Appendix 7: Letter from Pat McFadden MP, Minister for Employment Relations & Postal Affairs, Department for Business Enterprise and Regulatory Reform, dated 14 January 2008