Chartered Institute of Environmental Health

Reducing Administrative Burdens: Effective Inspection and Enforcement

Consultation on the Interim Report of the Review by Philip Hampton for HM Treasury

Response of the Chartered Institute of Environmental Health

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THE CHARTERED INSTITUTE OF ENVIRONMENTAL HEALTH

Founded in 1883, the Chartered Institute of Environmental Health (CIEH) is a professional and education body, dedicated to the promotion of environmental health and to encouraging the highest possible standards in the training and the work of environmental health professionals.

The Chartered Institute has approximately 10,000 members, most of who work for local authorities in England, Wales and Northern Ireland. As well as providing services and information to its members, the Chartered Institute provides information to government departments and evidence to them on proposed legislation relevant to environmental health.

In 1993 the Chartered Institute became the World Health Organisation (EURO) Collaborating Centre for Environmental Health Management in Europe.

EXECUTIVE SUMMARY

1. The CIEH regards the Hampton Review as a welcome opportunity to focus debate on the role and purpose of regulation. The interim report of the Review identifies many of the key issues of concern to the Chartered Institute, but also underplays several factors. The CIEH is pleased to have the opportunity to comment on the report and looks forward to a constructive, continuing dialogue with the review.

2. The concern of the CIEH is the role regulation plays in creating the conditions for the continued improvement and enhancement of public health; we are less concerned with the structures of regulation, than with ensuring that environmental and public health is always critical to the central purpose. The issue for the Chartered Institute is not primarily about who does things and how, but of how priorities are set and co-ordinated and what underpins those priorities. We would greatly regret however the diminution of the local dimension from environmental health; it is a fundamental part of the broad spectrum of regulatory activity undertaken at local level.

3. We support the overall objective of the review, to consider the scope for reducing the administrative burden on business by promoting more efficient approaches to regulatory inspection and enforcement without reducing regulatory outcomes. The CIEH believes that the review should give as much attention to reducing the administrative burden on *regulators* too – a reduction in the administrative burden should not in effect become a shift in that burden from business to regulators.

4. We strongly endorse the Review report's contention that there should be a more joined-up approach amongst regulators, at both national and local level. The CIEH believes that local government's track record in this respect is superior to that of national government. Many of the problems local regulators face are caused by having to work within an uncoordinated national regulatory framework, without a clear hierarchy of priorities and where local conditions have to be set against national objectives and targets. The CIEH urges the Hampton Review to address the lack of a clear central government focus on environmental health and its regulatory role, for instance there is no clear "sponsor" or "champion" department for environmental within the government machinery.

5. The Chartered Institute welcomes the review's emphasis on the role of advice and education to assist businesses to comply with regulatory requirements; we believe that local regulators would prefer to prioritise this approach over enforcement. The review has failed to fully appreciate however that in allocating scarce resources, local authorities will inevitably focus on the enforcement side, since the regulators themselves need to meet performance targets on inspection set externally. This is a further example of how the lack of coherence at national level impacts "on the ground".

6. The report underestimates the task involved in cross-training local authority regulators. In our view the proposals for routine cross-training and merging of professional groups demonstrate a lack of "ground truth" evaluation of the extent of the task. Research carried out by the CIEH suggests that the issue is not one of skills shortage but one of under-recruitment, which will not be solved by simply doubling up the tasks that individual regulators are expected to undertake. Where this approach has been trialled, it has been found that businesses that would usually require multiple inspections have in fact have been overwhelmed. Cross training of staff might work for

inspection of lower risk premises, but these can probably be dealt with more effectively in other ways.

7. CIEH supports the review's proposals to extend sanctions that affect the reputation of a business. Measures of this type could prove effective since they would affect business profitability and are a useful alternative tool in improving standards. The CIEH "Scores on the Doors" initiative seeks to harness consumer power in this way. For any such scheme it would be essential however that judgements made are transparent, consistent and fully justifiable.

8. The Chartered Institute commends to the Review the work of the Planning and Regulatory Services On-Line (PARSOL) e-government project. The project is developing a range of products (including guidelines, benchmarks, schemas, systems and toolkits) to assist local authorities in building effective and transparent online planning and regulatory systems. It is currently developing a set of standards and targets for e-delivery of environmental health information and processes. All of the PARSOL products seek to standardise information – about regulation to businesses and simplifying and reducing the administrative burden.

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“Reducing Administrative Burdens: Effective Inspection and Enforcement”

CIEH responses to Questions posed in consultation paper

Question 1: Is a standard methodology for calculating the administrative costs of regulation possible?

Question 2: Is it desirable to have, and use, such a single methodology?

Combined response to questions 1 and 2

We support the logic behind a standard or single methodology, but feel that it would be too complex a model to embrace all of the issues facing businesses.

Question 3: Should regulators make a commitment not to prosecute businesses that have followed simple guidance, except in the most serious of cases?

It is our view that local authority regulators generally only have recourse to prosecution as a last resort, since they recognise that greater compliance is achieved by working with businesses by providing appropriate advice and guidance. Prosecution can be a time consuming and costly exercise for local authorities and is not of course without risk itself. It is the CIEH view that making such a commitment would undermine the sovereignty and judgement of the regulator and this concept is therefore not supported. Evidence from the introduction of the Enforcement Concordat suggests that such quasi-legal documents and arrangements whilst improving clarity between the regulator and the regulated overall, are also used by less scrupulous businesses to over-burden the regulator with spurious legal challenges to the detriment of the system overall.

Question 4: Should regulators give greater emphasis to their advice services?

Whilst research has shown that education and advice can lead to sustained improvement over time, such investigation has also shown that “formal” enforcement action and where necessary prosecution is essential to back up the educative approach. Whilst education and advice can be very effective, the decision about the approach to take must be based on a case-by-case assessment.

The CIEH would emphasise that whilst it is appropriate that regulators give advice to those regulated, there is a necessary line to be drawn between advice to explain the requirements of the statutory instrument and the giving of free business consultancy.

In order for regulators to provide more comprehensive advisory services would require a fundamental shift in the nature and levels of resourcing provided by central government.

Advice given by regulators must be based on best practice and as far as possible be standardised and generally applicable. Regulators must make clear in their advice the distinction between that based on best practice and what is required by the law, which is a minimum standard.

Question 5: Should regulators evaluate their advice services on the basis of outcomes?

As we have already indicated in our response, we regard the role of education and advice as vital. As in other aspects of regulation, evaluation of that advice is essential to demonstrate the effectiveness of interventions. However, with regard to environmental health many of the outcomes that the CIEH would wish to see arising from effective enforcement are very long-term in nature and have many other variables impacting on their achievement. To secure effective environmental health outcomes both central and local government will need to radically review the policy and resourcing strategies relevant to environmental health.

We would again make the general point however that if government wishes to see local regulators put greater emphasis of advice and education provision, then there must also be an acceptance that there might be a consequential reduction in other regulation and enforcement activities, especially without a reassessment of local authority funding needs in this area.

Question 6: How should inspection be targeted?

Question 7: Should regulators eliminate routine inspection for low-risk premises?

Question 8: Should businesses with a good compliance record have inspection holidays?

Question 9: Should risk assessment calculations include external factors such as accreditation or performance in other regulated areas?

Question 10: Should regulators consult on their risk assessment methodologies?

Combined response to questions 6-10

Any regulatory regime must have a number of characteristics in-built to promote compliance. One of these is the possibility that a regulator will check compliance from time to time on a generally unannounced basis.

Risk rating is already a feature of practically every aspect of environmental health and the CIEH supports this concept. Inspections must of course be targeted according to the risks posed, but we feel that the report seems to equate low risk with no risk.

There should be an assumption that all businesses need visiting occasionally, and of course it makes sense that those posing the greatest risk, whether because of a poor compliance history or, despite a good record, the potential consequences of a breach of standards etc is serious, should receive the most attention. Moreover, inspecting only according to risk implies a pattern of inspection which, to be effective, needs to be supplemented by occasional random visits, and not just to validate the risk rating. This point is in fact made in the Review report at paragraph 3.21. CIEH experience from many regulatory regimes is that often businesses actually complain that they are not visited regularly, especially in circumstances where a fee has been levied to cover the costs of a regulatory regime.

The Food Standards Agency has recently proposed alternative surveillance mechanisms for lower risk premises. These would appear appropriate but they must allow the

opportunity to bring a business back into the inspection regime should the situation change or problems occur.

We do not feel that there should be specific “inspection holidays” for businesses with a good compliance record, rather the frequency of inspection should be reduced in accordance with the reduced risk posed.

Risk assessment calculations already do take into account external factors such as accreditation, as these issues would generally help to support the regulators ‘confidence in the management’ of a particular undertaking. In all cases the external system being advocated must be demonstrably robust and reliable. Organisations such as the United Kingdom Accreditation Service and the European Food Safety Inspection Service would seem appropriate to demonstrate this in the food area.

Whilst consultation in principle is good, one difficulty that is likely to be encountered is differences in risk perception. There is considerable research showing that an inspector’s perception of risk is generally very different to that of the average consumer. Penalty regimes should be designed to prevent recurrence of adverse activities. The use of administrative penalties is commonplace in other European Member States and these might be used as a tool to improve compliance. However, they are only effective in “black and white” cases e.g. where an item such as a wash hand basin that is required by law is not provided. Most cases however are not black and white but rather are based upon subjective judgements. In this case, administrative penalties would probably not be appropriate.

Question 11: Should the penalty regime be reformed to make penalties quicker and tougher?

Fines are subject to a scale set by Parliament and we do not feel, even with prosecution as a last resort, that fines should be higher; they reflect Parliament’s view of the comparative seriousness of the nature of the offence, moderated by the courts’ view of the particular circumstances. There are certain areas however where the penalties imposed do not appear to be sufficient to deter criminal activities. A particular example would be in the case of large-scale meat crime where penalties levied are not in proportion to the gains to be made. In some cases the discretion given to Magistrates is such that even where it has been proved that a significant impact on public and environmental health has occurred the level of penalty is derisory. Much more consistency and central direction is required to Magistrates to ensure that for the regulator having taken a prosecution as a last resort that position is reflected in the ultimate level of penalty.

Question 12: Should businesses get prior notice of an enforcement action?

Question 13: Should regulators discuss with business the potential application of a penalty before it is applied to allow the business to correct the infraction?

Combined response

We do not feel that there are any circumstances, outside of emergency or an incident of deliberate (criminal) action, where a local authority would not notify a business prior to formal action. The Central/Local Enforcement Concordat that the majority of local and central regulators have signed makes this an explicit requirement on the basis of natural justice. There are some specific legislative provisions requiring such action by

environmental health regulators; for example at the end of a food inspection for instance, inspectors are required to discuss the next steps with the business. In certain circumstances, this will be advising them of enforcement action, allowing the business to seek to address the issues at an early stage and providing transparency to the process.

In some circumstances, discussion of potential applications of penalties might be warranted. Judgements would need to be made on a case-by-case basis. If the problem was the lack of a piece of required equipment, e.g. a missing wash hand basin, then this might be appropriate but it would not work in areas such as illegal meat trading.

Question 14: Should regulators be held accountable for enforcement actions that are later reversed?

This is already the situation. Where a successful appeal is mounted by a business if the regulator is found to have acted incompetently or unreasonably then that will be considered as part of the appeal. All regulators must be able to justify their actions but any judgements about that action should be made on the basis of reasonable professional judgements being made at the time of the decision. Local authorities are already fully accountable for their decisions; either through the courts where they could face significant legal bills; through the council's own complaints procedure or also to the Local Government Ombudsman.

Question 15: Should a business' past performance affect the level of a penalty?

This would depend very much on the severity of the issue under consideration, certainly good past performance should not be allowed to override a serious offence. This type of approach is supported by the new European Food Hygiene Regulations (e.g. 854/2004)

Question 16: Should there be more administrative penalties?

As we have pointed out in our response to Question 11, administrative penalties are a useful additional tool for the regulator and are in widespread use in other member states of the European Community, but they are only effective in "black and white" cases.

Question 17: Should personal criminal sanctions be used more often?

Question 18: Should company directors be held liable for serious infractions for which they are currently exempt?

Combined response

Most sanctions imposed by local authority regulators are personal in any event, for instance, prohibition orders on individuals managing a food business and we think consideration should be given to extending such penalties into other areas.

In much legislation concerned with regulation there is an existing ability to take action against the directors or officers of a company if they are shown to be directly complicit in an offence. Experience however has shown that this is extremely difficult to prove – recent examples in the health and safety field demonstrate the difficulties inherent in this respect.

CIEH would support greater clarity around the ability to sanction company directors for the very gravest of offences for which they are without 'common-sense' doubt responsible but nevertheless fail the current legal test.

Question 19: Should penalties be set as a proportion of company turnover?

Though proportionately small penalties may provide little incentive against re-offending, this should be dealt with only if and when there is a re-offence. The punishment should fit the crime – it is fundamentally unjust to penalise two businesses differently for the same infringement because one is more successful than another. In these circumstances it is not a penalty, but a tax. Courts should be able to take into consideration the relative capacity of companies to correct recurring problems however – larger companies are better placed to address deficiencies in their operations.

Question 20: Should there be greater use of reputational sanctions?

CIEH supports the review's proposals to extend so-called "reputational" sanctions – measures of this type could prove effective since they would affect a business' profitability and are a useful alternative tool in improving standards. The CIEH "Scores on the Doors" initiative seeks to harness consumer power in this way. For any such scheme it would be essential however that judgements made are transparent, consistent and fully justifiable.

Question 21: Should there be restitutive penalties, where companies are required to remediate damage caused, or to fund improvements elsewhere?

Such an approach is inconsistent with the current basis of English criminal law and would fundamentally change the legal system should this become the norm. Presently therefore, it would be difficult to apply this type of penalty across the board; they would probably only be effective against larger businesses. Enforcement of such penalties could be problematical.

Question 22: Should there be more positive outcomes for businesses to comply with regulation?

Motivational factors for each type of business would need to be identified for these to work effectively, but in general we support the proposals in the report. There are a number of schemes where this model is already applied, for instance in various food hygiene awards. Lessons should be learned from these good practice models and funding allocated to disseminate the model further.

However, CIEH would advocate once again that business must be in no doubt that compliance with the law of United Kingdom is the expected norm. Any undertaking that chooses to operate in a business sector does so on the full understanding that the UK has outlined legal conditions for the business that need to be complied with and that the full responsibility for achieving compliance rests with the business.

Question 23: Are the criteria for appeal mechanisms set out in Chapter 4 the right ones?

Local regulators already operate within a variety of appeal mechanisms; some, we would suggest, require reform, for instance those in relation to food and health and safety

enforcement actions tend to be slow and cumbersome for both the business and the regulator. However, CIEH would argue that much of the blame for the cumbersome nature of the legal appeals process rests not with the business nor with the regulator but with the legal profession who have an interest in prolonging the appeals process.

Question 24: Should there be a central reporting point for conflicting regulations?

This proposal has logic but we would point out that there are likely to be difficulties in determining the relative weighting of conflicting legislative requirements and decisions again would need to be related to the relative risks posed.

Question 25: Should regulators share information to improve their risk profiling?

We agree that effective information sharing is essential to improved working and we are aware that this already takes place in many local authorities. Existing barriers, whether actual or perceived, need to be removed however and a reasonable degree of protection for personal information must be maintained. We are aware that many local authority environmental health teams are struggling to interpret the requirements of the Data Protection Act, the Human Rights Act and the recently enacted Freedom of Information Act. A consistent approach to tackling these issues would be most welcome and the mechanism proposed in the Review report is certainly worthy of consideration.

Question 26: Should regulators establish common reporting frameworks to minimise duplication of the data that businesses have to submit?

Common reporting frameworks are logical but it is likely they would be extremely cumbersome and might well compromise the quality of the information available, unless there was a huge investment in IT by government. Any system that was to be introduced would need to have the functionality to replace existing databases, in order not to be an extra administrative burden.

Question 27: Should local authorities cross-train their staff, so that they can advise and inspect on a wider range of regulations?

We believe that the report considerably underestimates the task involved in cross-training local authority regulators - in our view the proposals for routine cross-training and merging of professional groups demonstrate a lack of “ground truth” evaluation of the extent of the task. Research carried out by the CIEH suggests that the issue is not one of skills shortage but one of under-recruitment, which will not be solved by simply doubling up the tasks that individual regulators are expected to undertake.

Cross training of staff might work for inspection of lower risk premises, but these can probably be dealt with more effectively in other ways (see for instance LACORS guidance on alternative enforcement strategies for low risk premises outside the planned inspection programme).

Cross training would also considerably increase the costs of qualification if standards of public health were not to be reduced. Currently if a Trading Standards Officer wished to be qualified to undertake the inspection of food premises he/she would need to study an accredited higher level Food Premises Inspection course, undergo a professional interview, undertake 6 months training with a Local Authority and complete a professional practice log book. Such courses are offered by a number of Universities and

generally require up to 2 years of study although adjustments to the course might be made as a result of Assessed Prior Learning. Such a course of study would only qualify an individual to inspect premises and not to determine quality or fitness of food. At present this would require a further in-depth qualification but investigation into providing a course that would combine these two elements is currently being led by the Food Standards Agency.

Where the combined inspection approach has been trialled, it has been found that businesses can be seriously overloaded. Furthermore, businesses often prefer to deal with specialist rather than general inspectors, who may be less able to provide detailed advice and support. Rather than try to produce one super inspector, co-ordination of inspections, based on specific risks, would be a better approach.

Question 28: Should there be a single number or code to identify businesses?

This would certainly assist with data recording and is entirely consistent with the approach being adopted in for instance the PARSOL e-government programme (see Executive Summary for further detail).

Question 29: Should there be a structural consolidation of regulators where appropriate synergies could be realised?

Question 30: If so, what changes should be made?

Combined response

The costs of structural consolidation would need to be carefully weighed against the benefits. Examining structures in reviews of this kind is always tempting since they are relatively simple to assess and offer the opportunity to make specific proposals for short-term reform. The proliferation of regulatory bodies is a function of the failure of successive governments to establish the underlying role and purpose of regulation. The lack of a central, unified policy focus on regulation has brought about the structure that exists today.

There have been many proposals to consolidate regulators; recently, Government proposed the creation of a single agency to control imports but they were persuaded by the Food Standards Agency that a better approach would be to invest in better co-ordinating and improving the existing structures. The “step change project” has now been operating for some eighteen months and has been judged to be a significant success. This might be a better model to pursue.

In regard to a specific comment in the report on consolidation, the Drinking Water Inspectorate is a very small unit within Defra and we doubt if there would be any real savings arising from its merger with the Food Standards Agency. In any case, the logic behind this proposal needs to be examined: though water is consumed like food, consumers have no choice about their supplier, it comes from a small number of highly regulated companies and its production and transport is more akin to an engineering process than one of food manufacture.

Question 31: What is the right level for inspection and policy setting in trading standards and environmental health?

The local dimension to service delivery is critical and local delivery allows the building of relationships with businesses. The problem appears to be the inability of local authorities to devote the necessary funding to realise the potential of these relationships. For example, we are aware of recent cases where food officers have been made redundant to allow local authorities to concentrate resources in other areas of higher local priority. If such cases became the norm, or a continuing trend, then alternative funding for the regulatory functions may need to be considered – for example, there might be a case for regional funding.

Question 32: How should regulators join up their local activities across boundaries?

Co-ordination already exists in some areas, which allows sharing of specialist expertise. Inter-authority auditing across regions also seeks to improve standards of consistency. Such initiatives can and do encourage partnership working yet allow the local focus to continue.

We would greatly regret the diminution of the local dimension from environmental health; it is a fundamental part of the broad spectrum of regulatory activity undertaken at local level. We are not particularly wedded to any given structure at local level, although we regard the unitary authority as being particularly favourable to joint working and coordination. Developing synergies in information sharing and through joint working does not come about automatically as the result of the creation of unitary local government; great effort has to be put into inculcating these approaches.

Question 33: Should regulators be required to gain approval from a relevant business reference group before introducing a new form?

Question 34: Should regulators merge forms, with the aim of creating a single form for each business or in each sector?

Question 35: Should the review set out a long-term ambition of a single electronic form?

Question 36: Should the review set out the ambition to collect and examine all of the current forms to identify areas of duplicate information?

Question 37: Should regulators information on businesses to reduce the form-filling burden?

Question 38: Should regulators provide business with pre-populated "check and sign" forms?

Combined response to Questions 33-38

We support the objective of rationalising the number of forms that businesses have to complete and indeed, a single electronic form. We would not however underestimate the problems in achieving this. SMEs as a group are the largest customer base for local authority regulators. It is not uncommon for the smallest of these businesses not to routinely use computers.

Information sharing assists effective working. A single database across a local authority, with a unique reference number for a business, possibly based on the GIS system, and could reduce duplication of input considerably, but the costs of achieving this should not be underestimated.

Question 39: Are the functions listed in paragraph 4.44 the right ones to secure an improvement in the inspection and enforcement activities of regulators?

Question 40: How could these new functions best be delivered without creating duplication and overlap?

The best way to minimise duplication and overlap is to encourage better joined-up working at national level. At present different government departments project their requirements on local government without little co-ordination or regard for one-another. Different monitoring schemes are one cause of local authorities' activities being skewed.

Statistics on regulatory activity are currently collected by the Food Standards Agency but the picture they paint depends on the indicators measured. Finding true measures of overall performance is a great problem and the Food Standards Agency has been working on addressing this issue for some time. Indicators are particularly difficult where outcomes are sought. The proposals therefore are somewhat simplistic. Whilst joined up working is essential for holistic activity to occur, it is easier to say than to do. Actions to improve joining up should be taken and once again the Food Standards Agency's Step Change project for imported food control is cited as an example of good practice in this area.