

Regulatory Enforcement and Sanctions (RES) Act 2008 Presentation by Philip Preece, Local Better Regulation Office (LBRO)



Philip Preece, LBRO

Phil introduced himself by describing his career progression over the years from HSE, to Team Leader for enforcement with Birmingham City Council, prior to his present appointment as **Health and Safety Lead for the LBRO**.

Phil went on to say that the RES Act came into force on 1st October 2008, with the exception of Part 2, which comes into force on 6th April 2009. He added that the LBRO guidance on Part 2 was currently out for public consultation. The RES Act is designed to implement many of the recommendations in the Hampton report, which criticised regulation regimes for wide variations and inconsistency, lack of co-ordination on the ground and penalties that were cumbersome and ineffective.

Phil said that his presentation would deal with: -

- Part 1 The LBRO
- Part 2 Co-ordination of Regulatory Enforcement, AND
- Part 3 Civil Sanctions (Both by National and Local Regulators)

He said that the LBRO's focus would be: -

“To secure the more effective performance of local authority regulatory services in accordance with the principles of better regulation”. The services covered Environmental Health Offices, Food Safety, Trading Standards, Licensing, Fire and Rescue and environmental protection. The LBRO remit extends over England and Wales, with a staff of 25 and a budget of £4.4 million.

The underpinning principles of Better Regulation are that they should be carried out in a way that is: -

- Proportionate
- Accountable
- Consistent
- Targeted
- Transparent

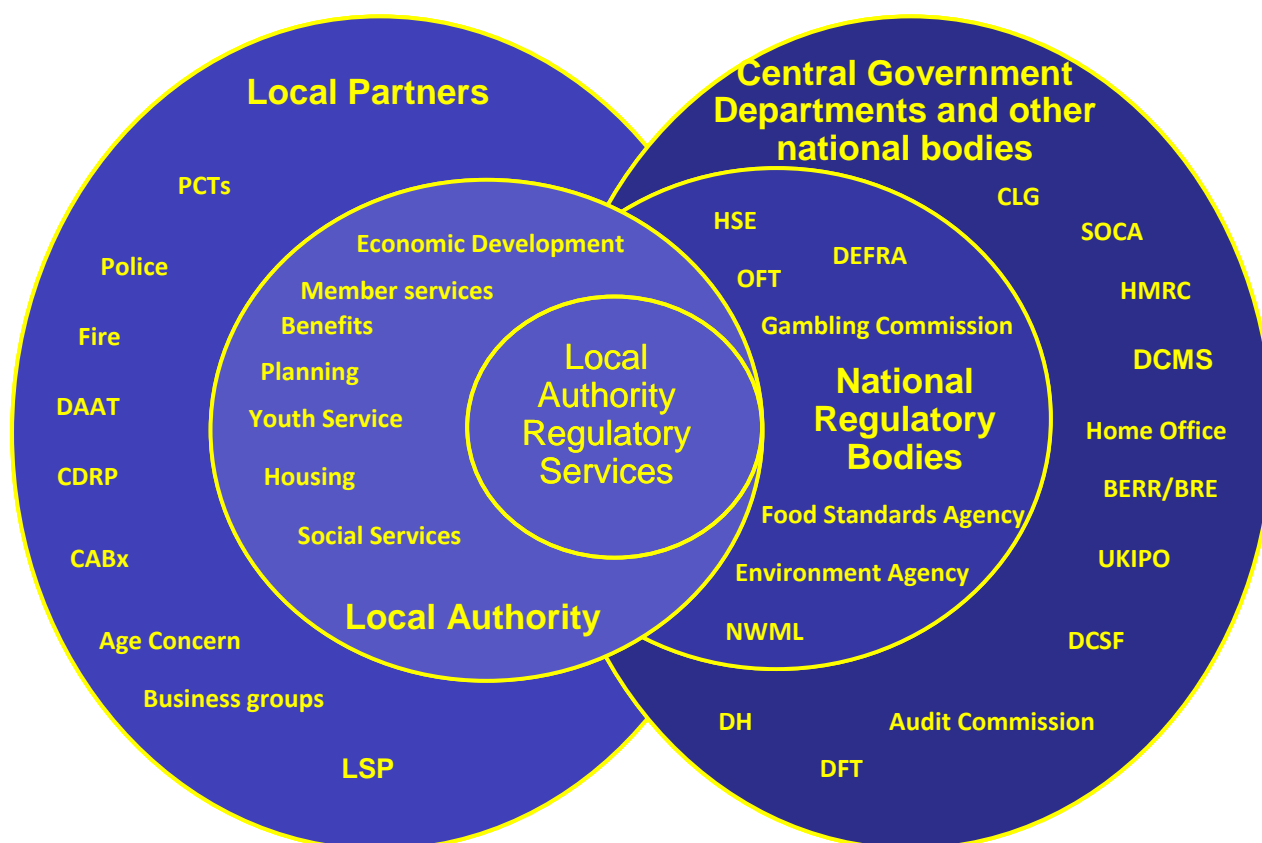
Whilst these principles are not new, having been recognised for around for 15 – 20 years, their implementation was rather patchy. Now it will be more consistent by following these objectives: -

- ***Support service improvement and change*** in local authority regulatory services (LAs), by means of new guidance.
- Directly ***deliver consistency***, principally through the primary authority scheme.
- Act to ***improve*** the local regulatory services more generally.

The LBRO can issue guidance to LAs in England and Wales on how to exercise their statutory functions. This takes the form of dissemination of information on ‘best practice’, whilst HSE still has the final authority on the technical implementation of the law. On the question of National enforcement Priorities, LBRO must prepare and publish a list of matters to which LAs should give priority when allocating enforcement resources. LAs must then have regard to this list in order to give statutory weight to a main Hampton recommendation.

Another important Hampton recommendation was that there needed to be better co-ordination of Government enforcement and, so, the LBRO has another function to advise on local regulation. In practical terms, this means that all regulations must be written so that they are easily understood, easily implemented and easily enforced! Thus the LBRO has the function of advising the government on the ways in which LAs exercise their functions, the effectiveness of legislation (or proposed legislation) enforced by LAs and whether other regulatory functions could be exercised by LAs.

Phil illustrated a little of the complexity of this task with this diagram, which showed the key organisations in different parts of the System of Government.



One of the best functions given to LBRO, Phil added, was to encourage innovation and best practice in local authorities by ensuring that it is recognised and used. It was also important to ensure that best practice shapes improvement in services and LBRO can provide financial support to LAs and other organisations in order to facilitate these functions.

Another key function, Phil said, was the operation of a **Primary Authority Scheme (PAS)**, which is set out in Part 2 of the Act. It is available to any business operating across more than one LA, where one LA only (the Primary Authority [PA]) agrees the enforcement regimen for that business. It can cover multi sites or just one site with multiple outlets and can also encompass one function, or multi-functions. It is a significant change in enforcement and provides a business with a single source of advice and consistency in implementation.

Before taking enforcement action under a PAS, the Enforcement Authority (EA) must notify the PA, which can direct the former not to take the proposed action if it inconsistent with guidance already given to the business. Either the EA or the business can refer the matter to the LBRO for a determination. There might be exemptions from the requirement to pre-notify where urgent action is needed in the case, say, where a “Stop Notice” is necessary.

The PA may make an **Inspection Plan**, recommending how EAs should go about inspecting businesses, communicating to EAs those issues that warrant attention and those that do not. As an example, Phil cited a bakery, which might involve HSE, whereas the shops would involve a PA and several EAs. This avoids a multiplicity of priority conflicts, will improve targeting and will allow EAs to benefit from the strategic, national view provided by the PA. Essentially, this is the PA’s plan, but it must consult the business as it is being drawn up and the LBRO must give consent for it to go ahead. If any EA wished to deviate from the plan, it must notify the PA in advance, giving reasons. Phil also mentioned the proposed practice of flexible warranting, whereby HSE Inspectors would transfer some of their customary inspection visitover to LA Inspectors to make on their behalf.

The RES Act Part 3 also introduces different Civil Sanctions to remedy criticisms made in 2006 by Professor Richard McCrory that many of the present sanctioning regimes were ineffective, over-reliant on prosecution and lacked flexibility. There is now to be available to the EA, a low, fixed financial penalty, at a level to be decided by a Ministerial Order. This will reflect the size of the company and is intended for the less serious offences. Businesses will receive a “notice of intent”, will have the opportunity to make representations to the regulator and can appeal to a Tribunal. No courts will be involved and the financial penalties will go to Central Funds.

There is also a system of Discretionary Requirements, which may be imposed, as follows: -

- A **Variable Monetary Penalty**, for an amount to be determined by and applied by the regulator.
- **Compliance Notice**, where a business must take specified steps within a specified period (like an Improvement Notice)
- **Restoration Notice**, is a requirement to restore a position, as far as possible, to what it would have been, had no offence been committed. A example is where toxic waste is spilt and the clean up operation has to be paid for by the polluter. Similarly, it might be used where a trading Standards Office requires a trader to reimburse a customer’s money.

These are intended for more serious offences than those covered by fixed penalties, and there is provision for representations to the Regulator, with an appeal to a Tribunal.

Another Enforcement Action that could be taken is to serve a **Stop Notice**, which is rather like a Prohibition Notice, when a business is required to cease an activity until it has taken steps to remove or reduce harm or risk of harm (to health, environment or financial loss). It is intended to be used where activities are causing serious harm, or are likely so to do. Appeals against a Stop Notice are allowed to a Tribunal.

Finally, there are **Enforcement Undertakings**, where a business may opt to make an undertaking to a Regulator, to take a specified action, within a specified period. This occurs where the Regulator has reasonable grounds to suspect that an offence has been committed. The business decides whether to offer an undertaking and the Regulator is not obliged to accept it. The matter of an appeal, therefore, does not arise.

Phil concluded by saying that the sanctions under the Health and Safety at Work Act and subordinate legislation were considered 'fit for purpose', but other Regulators were considering changes.

Further Reading:

Regulatory Enforcement and Sanctions Act 2008

http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080013_en.pdf

RES ACT Explanatory Note

http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen_20080013_en.pdf

Members' Questions

Chairman, Bob Cole, of Morgan EST asked what powers the LBRO had and Phil replied that they gave Statutory Guidance to Local Authorities and could direct that this was followed, through a Ministerial Order, or equivalent for the Welsh Assembly.

Tim Prestage, of Tim Prestage Ltd. asked to whom the LBRO reported and Phil answered that this was Baroness Vadera, in the Department for Business, Enterprise and Regulatory Reform. Tim commented that he was accredited for BS EN ISO 14001 and OHSAS 18001 and went on to ask why the British Standard Institute had not been used to develop the systems for the LBRO. Phil answered that he had been in discussion with BSI over the possible development of standards for part of their work but that existing standards were not thought to be applicable for all aspects of their statutory duties. Tim went on to ask if accreditation of Local Authorities would be considered and Phil commented that it may be possible if standards were available to give full coverage to all Regulators' work, particularly waste disposal.

The Secretary asked if an organisation, with a head office in Birmingham, had to accept Birmingham as its Primary Authority, or could it 'shop around' to get a more amenable arrangement. Phil responded by saying that 'shopping around' should not, necessarily, result in any benefits, as the LBRO would be monitoring to ensure consistent standards, anyway! He added, though, that there might be occasions where the head office was in a small local authority with limited resources, or lacking certain specialist expertise and he agreed that a more suitable allocation could be made elsewhere.

John Wood of the Fire Protection Association asked if the Fire Authority was part of the Primary Authority approach and Philip replied that it was not, although he would like to see it included. This situation was to be reviewed and it may be brought within these arrangements.

Tony Hall of Inspace Partnerships enquired if the Primary Authority scheme was voluntary and Phil said that if a Company volunteers, it would become part of the Statutory Scheme after consultation, unlike the previous Lead Authority Scheme. Phil added that the target was to have 200 Primary Authority Schemes in the first year, rising to 1000 after three to four years.

Mark Hoare, of Birmingham University asked what levels of fixed fines would be handed down and Philip said that he was not certain but they would probably be about £50 - £100 for low level offences. The precise level will be determined by the Minister and the regulator will not be able to vary it, for any particular case. There would also be a sliding scale, as well, although he guessed that even these would appear small to a big supermarket chain.

George Allcock enquired if a record of these fines would be kept, similar to the convictions in the courts, so that a company's performance could be verified. Phil replied that the new penalty system would not result in a criminal record so that entries would not be made on the same system. However, Phil added, enquiries could be made under the Freedom of Information Act, to obtain the same information.

Ed Friend asked how far it was feasible to carry out this degree of monitoring, to which Phil replied that the BERR monitored the National Regulators. **Alan Phelps of Birmingham City Council** suggested that there might be an obstacle to placing identities in the public domain, because of the interest of Insurance Companies.

David Lilley of National Grid Metering suggested that small traders might be tempted to ignore fines, as they would be a large impact on their business, whilst being a small sum of money to the enforcement authority. He added that this might rise to the same extent as parking fines and/or traffic offences and could lead to a widespread contempt of the law. Phil replied that the Local authority would have to obtain civil redress in such situations.

Ed Friend enquired if the LBRO could raise the level of penalties imposed by enforcement authorities? Phil responded that the LBRO is very unlikely to get

involved in individual cases, but would monitor general standards and possible take action if these were seen to be low.

Rob Molson of Radway Group thought that there could be a tendency for the enforcement authorities to hit the 'easy targets' of reputable firms, rather than the 'rogue traders'! Phil said that if the pattern of enforcement actions developed in that way then the LBRO take corrective action.

As there were no more questions, the Chairman asked the members to show their appreciation for a very thought-provoking presentation.