

Implementing Hampton

**Response to the Better Regulation Executive consultations on the Draft
Regulatory Enforcement and Sanctions Bill and the Regulators'
Compliance Code**

by the National Consumer Council, Scottish Consumer Council and
Welsh Consumer Council

About the National Consumer Council

The National Consumer Council (NCC) makes a practical difference to the lives of consumers around the UK.

With changes in provision of services by government and companies, there is apparently more choice, and more talk about meeting consumers' needs. Yet, the rhetoric does not always match people's experience: markets can operate in ways that act against consumer interests; and consumers who are disadvantaged or inarticulate can be ignored.

The NCC uses its insight into consumer needs to advocate change. We conduct rigorous research and policy analysis to investigate key consumer issues, and use this to influence organisations and people that make change happen. We don't just respond to policy discussions, but shape future debate through our groundbreaking thinking.

An open and collaborative organisation, we seek to work with public service providers, businesses and regulators. We hold regular policy forums which provide us with a unique opportunity to exchange views and test our thinking.

Our relationship with the Department for Business, Enterprise and Regulatory Reform – our main funder – gives us a strong connection within government. But we are ready to challenge any organisation, public or private, that does not give consumers a fair deal.

The National Consumer Council encompasses organisations in England, Scotland and Wales. We also have a close relationship with colleagues in Northern Ireland. We play a leading role within European and worldwide consumer groups, ensuring that cross-border consumer issues are tackled and the consumer voice is heard within global institutions.

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Summary

Local Better Regulation Office

There is an apparent mismatch between the purpose of Local Better Regulation Office (LBRO) as described in the consultation document and that defined in the Draft Bill. The first implies LBRO is a coordinating organisation, while the second suggests it will have a policing role. If the latter, we are concerned LBRO will not have all the powers it will need to achieve its objectives. LBRO could have a role to develop a simplified, joined-up and strategic approach to performance monitoring for local authority regulatory services (LARS). Further, LBRO should have reserve powers to intervene if LARS are consistently ignoring guidance.

We make a number of points relating to the detailed proposals:

- The Draft Bill currently restricts LBRO's role to England and Wales. The Scottish Consumer Council is not asking for the role to be extended to Scotland, due to the different political accountability and public service scrutiny arrangements operating in Scotland compared to other parts of the UK.
- The concept of Primary Authority Partnerships is welcome, but the requirement for an enforcing authority to obtain the consent of the Primary Authority on every occasion is onerous. The resulting delay could cause harm to consumers and it is unclear whether both local authority regulatory services (LARS) and LBRO will have the necessary resources to cope with the demands placed on them.
- The priority setting process must strike the right balance between securing the effective delivery of centrally-determined interests and priorities and responding to the specific needs of local consumers. The mechanisms used must properly relate to and respect devolved government. LBRO should be required to consult consumer groups and consumers directly when revising the priorities.
- The LBRO Board should include consumer representatives.

Regulatory sanctions

We share the finding of the Macrory Review that the existing penalties system is not adequate to ensure business compliance and welcome plans for its modernisation.

We call for two additional sanctions to be included within the legislation:

- A requirement on regulators to publish a list on a regular basis of their completed enforcement actions and against whom such actions have been taken – implementing the ninth Macrory recommendation
- A provision enabling regulators to raise a levy, where there is a demonstrable need for additional enforcement activity that cannot be accommodated within existing resources.

In addition, we make a number of points about the detailed proposals:

- We agree regulators should demonstrate they are enforcing in a Hampton-like manner before being given access to the sanctioning powers, but raise concerns about smaller regulators and the timescale for awarding powers.
- Businesses should not be able to appeal against Fixed Monetary Penalties.
- With respect to temporary cessation notices, the definition of consumer interests should be widened; consumer interests should also be included within the scope of permanent cessation notices. Further, the threshold for issuing cessation notices is set too high.
- The expanded sanctions toolkit should be available for civil offences as well as criminal offences unless there is a good reason otherwise.

Compliance code

We welcome the introduction of a statutory compliance code for central and local regulators. Our key comments are as follows:

- The code should apply to individual functions as well as general functions.
- The code should be linked to performance management mechanisms.
- The connection between consumer interests and regulatory outcomes is given insufficient weight throughout the code. Consumers lose out from unnecessary regulation and excessive enforcement, but effective laws and enforcement activity is needed to enable them to fulfil their economic role successfully.
- A requirement on regulators to publish a list on a regular basis of their completed enforcement actions and against whom such actions have been taken should be set out explicitly in the code.

Explanatory note

The National Consumer Council (NCC), Scottish Consumer Council (SCC) and Welsh Consumer Council (WCC) welcome the opportunity to respond to consultations on the Draft Regulatory Enforcement and Sanctions Bill and the Regulators' Compliance Code.

Although the Better Regulation Executive has published two separate consultation documents, the three issues they cover – the establishment of the Local Better Regulation Office, a reformed sanctioning regime, a statutory code setting out how regulators should conduct their inspection and enforcement activity – are closely intertwined. These initiatives represent the toolkit, the instruction manual, and, at a local level, the oversight structure needed to deliver regulation in a Hampton-like manner. The policy implications these raise inevitably overlap, so we have chosen to submit our response in a single document.

Local Better Regulation Office

Local authority regulatory services (LARS) play a pivotal role in maintaining a fair trading environment in which consumers can act with confidence. Overall, LARS across the country are performing this role well on limited resources, but issues around fragmentation and inconsistency are widely recognised. We hope the Local Better Regulation Office (LBRO) will give LARS more strategic direction, and support a more coherent and consistent service able to respond effectively to consumer problems that span local, national and international markets.

Below we comment on the objectives of the new framework and identify weaknesses in some of the detailed proposals which need to be resolved.

Objectives and powers

There is an apparent mismatch between the purpose of LBRO as described in the consultation document and that defined in the Draft Bill. The consultation document says the role of LBRO is to ‘support local authorities to regulate more effectively’, whereas the Bill states that its purpose is: ‘securing that local authorities exercise their relevant functions more effectively’. The first implies LBRO is a coordinating organisation, while the second suggests it will have a policing role. If the purpose of LBRO is truly to secure the improvements in LARS identified by Hampton, then we are doubtful that LBRO has all the powers it will need to achieve its objectives.

A gap in the proposed framework is mechanisms to monitor and report on the performance of LARS. It will be difficult to determine how well LBRO is meeting its objectives, for example to improve coordination and consistency of LARS, unless there is sound data on which to base an assessment. The Local Authority Better Regulation Group (LABREG) concluded that LARS already must meet a substantial number of performance requirements, but these lack coherence and the focus is on outputs rather than outcomes. Therefore, a useful role for LBRO could be to develop a simplified, joined-up and strategic approach to performance monitoring for LARS.

It is not currently envisaged that LBRO will have any of the powers proposed for the Consumer and Trading Standards Agency, such as requiring information and issuing directions, to ensure the effective performance of local authorities. The consumer interest demands that LARS should be held accountable for their performance, and that effective mechanisms should be available to drive improvement in authorities which are performing poorly. The overall emphasis should be to achieve change through guidance and advice, but having a set of powers is a useful backstop should these methods fail. If this principle is accepted, careful consideration will need to be

given to the appropriate range of powers that should be available to LBRO and what checks and balances should be in place to ensure they are not abused.

Primary Authority Partnerships

We agree LBRO should have a role to help facilitate new Primary Authority Partnerships (PAPs). Consumers should receive the same level of protection wherever they live, so we are as keen as business to see consistency in inspection and enforcement. Further, business inefficiencies that may result from conflicting local authority advice will also have a detrimental impact on consumers.

We have concerns about the requirement for an enforcing authority to consult and obtain the consent of a Primary Authority before taking **any** enforcement action against a business in a PAP:

- As drafted, this procedure would apply even if the business was clearly non-compliant, which seems onerous. There need to be clearly defined boundaries beyond which the procedure is triggered, for example linked to the seriousness of the offence, the type of action planned or whether there is a clear breach of the law. LBRO could intervene retrospectively in the event of a dispute.
- Considerable financial harm or distress to consumers might result whilst the communication between the enforcing authority and Primary Authority takes place. We acknowledge the exemption for imminent risk of serious harm to human health or the environment, but this is too narrow. PAPs will be available to a wide range of multi-site businesses, including building firms or garages, which do could cause substantial financial and emotional harm to consumers. Therefore, we recommend the exemption is widened to include serious financial loss or distress.
- We welcome the role of LBRO to act as an arbitrator in the event of a dispute between the enforcing authority and Primary Authority. However, by vetoing the activities of an enforcing authority, LBRO is effectively making judgements about potential breaches of consumer legislation which should properly be left to the courts. To resolve this, the Bill could include an exemption on matters of law. Further, it is possible that LBRO could become swamped with disputes, resulting in delay for consumers and business. A mechanism is needed to allow LBRO to prioritise and manage its workload, for example the Bill could require LBRO to publish criteria for it to use in deciding whether to take on a referral.

If they achieve their objective, PAPs have the potential to become very popular among multi-site businesses. One potential problem is that local authorities will have insufficient resources to deal with every large business that wishes to have a PAP.

Some local authorities host a significant number of large businesses. These local authorities may be unable to cope with the volume of work the PAPs involve. Further, the PAPs may divert resources from other areas of work. The Draft Bill suggests that LBRO will have powers to nominate a PAP, but must have regard to the resources available to it. However, it is unclear what would happen should demand for PAPs exceed available resources. Although LBRO will have grant-making powers, there is no guarantee that the government will provide sufficient resources for it to meet this commitment.

Guidance to Local Authorities

We agree LBRO should have a function to issue guidance to local authorities in respect of regulatory services. This will help LBRO to achieve its objective to improve the coordination and consistency of local enforcement.

The role of issuing guidance on enforcing specific pieces of legislation has clear overlaps with roles currently undertaken by the Office of Fair Trading and LACORS. These overlaps need to be resolved to avoid duplication of work and conflicting messages. Further, the areas listed could conceivably cover any aspect of LARS. It is important that LBRO only issues guidance when necessary, otherwise there is a risk that local authorities will become overwhelmed by too much guidance and ignore it.

We agree with the status of the guidance envisaged in the consultation document, i.e. local authorities should 'have regard to' guidance. However, if outcomes suffer because guidance is being consistently ignored, then in line with our earlier comments, LBRO should have appropriate reserve powers to remedy this.

The Government's Regulatory Priorities

We agree LBRO should have a role to review and revise a list of centrally-determined priorities for LARS. Enforcement needs to be delivered internationally, nationally, regionally or locally depending on the issues at hand. The challenges facing enforcers today ranges from sophisticated global scams to loan sharks operating on a single estate. The priority setting process must strike the right balance between securing the effective delivery of centrally-determined interests and priorities and responding to the specific needs of local consumers. By providing strategic direction for LARS, LBRO can help enforcers operating locally to tackle consumer problems on whatever level they occur.

It is crucially important that the priority-setting process properly relates to and respects devolved government. There is a need for mechanisms that are sensitive to the needs of Scottish and Welsh stakeholders (depending on the eventual territorial

scope of LBRO). For example, if the territorial scope is limited to England and Wales, LBRO will need to have a clear relationship and direct liaison with the National Assembly for Wales and the Welsh Assembly Government, to ensure that the priorities which are relevant to consumers in Wales are addressed.

Local authorities should have a duty to have regard to the list of centrally-determined priorities when planning their own priorities. If local authorities had complete freedom to disregard the centrally-determined priorities, then these priority-setting exercises could quickly become irrelevant. However, there should also be a legislative brake to prevent LBRO in future from setting central priorities on a scale that prevents local authorities from setting their own priorities in a meaningful way.

LBRO should be required in the Bill to consult with stakeholder groups, and in a way that fully embraces the devolved context. The activities of LARS should be driven by consumer concerns, as well as government policies. The Draft Bill could be improved by listing the types of person, including representatives of consumers, whom LBRO must consult.

As well as consulting with stakeholder groups, LBRO should consult with consumers directly through surveys and other research techniques. This will help to ensure that priorities are designed around people's real needs. It also makes priority setting more open and accountable and so enhances consumer confidence and increases the legitimacy of the process.

Advice to Government and central regulators

We agree LBRO should have the ability to provide advice to Government on issues affecting local authority regulatory enforcement. With respect to giving advice to Ministers, the consultation paper refers to 'advice about the way in which a current regulation is enforced by local authorities' whereas the Draft Bill refers to 'the way in which local authorities exercise any one or more of their relevant functions'. In line with our earlier comments around performance monitoring, it is important that LBRO has a function to advise Ministers on the overall effectiveness of LARS.

The work of some central regulators has a key impact on LARS and vice versa. However, the Draft Bill is silent on how these relationships should be managed. The legislation could make provision for LARS to give advice to central regulators, using the same criteria as that proposed for Ministers. Further, it will be desirable to develop successful working relationships between LBRO and central regulators, for example to enable information sharing, to avoid duplication of activity and to ensure cooperation for the priority setting exercise and on enforcement approaches. In order

to facilitate this, the Bill could include a duty on LBRO to establish and maintain memoranda of understanding with relevant central regulators.

Structure and scope

We support the proposed structure and scope for LBRO. We are pleased to see it is intended that the Board will include consumer representation, but it is disappointing this is not set out explicitly in the Draft Bill. The Draft Bill could be improved by requiring LBRO to have regard to the desirability of securing that the Board includes members who (between them) have experience in or knowledge of a range of areas, including consumer affairs.

Territorial scope

The draft Bill currently restricts LBRO's role to England and Wales. The Scottish Consumer Council (SCC) is not asking for the role to be extended to Scotland. However, the SCC agrees that consumers across the UK (and indeed across the single European market) should receive the same level of protection wherever they live.

There are different political accountability and public service scrutiny arrangements operating in Scotland compared to other parts of the UK and, because of these, a centralised UK LBRO would not be an effective answer to the challenge of meeting the consumer interest in Scottish LARS.

The SCC has been in discussion with Scottish stakeholders to find a workable solution to the dilemma of ensuring consistency and effectiveness of LARS while respecting the divergent political accountability and scrutiny arrangements in Scotland.

There are serious issues concerning the capacity of trading standards services in Scotland and the response to the Accounts Commission report 'Made to measure' (2002) has not been adequate from neither local government nor the Scottish Executive.

The Convention of Scottish Local Authorities (COSLA) is due to publish a report on the matter of better regulation of LARS in the near future. The SCC will consider that report and respond to it when it is published.

Regulatory sanctions

We share the finding of the Macrory Review that the existing penalties system is not adequate to ensure business compliance and we support plans to modernise the sanctioning toolkit.

Overall, we support the approach proposed in the consultation document to implement four of the Macrory recommendations. Below we make some detailed comments on the proposals before setting out two additional sanctions that we would like to see included in the legislation.

Detailed comments

The list of regulators

The rationale for the list of regulators in Schedule 3 is unclear. Some of the major regulators in the consumer arena are excluded, such as Ofcom, Ofgem and Ofwat. These regulators would no doubt benefit from having these sanctions in their toolkits, so the presumption should be to include them unless there is good reason not to.

We are surprised that the Bill does not currently contain a power to add to the list of regulators in Schedule 3 or the list of enactments at Schedule 4. We hope it is planned to add such a provision, otherwise the legislation will not be future-proof. One option could be to utilise the proposed procedure for granting existing regulators access to powers outlined later in the consultation document.

Awarding and withdrawing powers

We agree regulators should demonstrate they are enforcing in a Hampton-like manner before being granted the powers. It is also appropriate that regulators should seek the powers if they want them, rather than having unwanted sanctions forced upon them. However, there is a risk that the Hampton Implementation Reviews will not get around to the smaller regulators for a while and they will find it difficult to gather the necessary evidence. It is important to adopt a flexible and proportionate approach so all stakeholders are not denied the benefits of these measures.

We agree there should be a process to withdraw or suspend powers. This should be a ministerial decision, based on evidence, with opportunities for relevant parties to make representations.

Fixed monetary penalties

We support the introduction of fixed monetary penalties, but consider the defaulter should not have a right of appeal. Fixed monetary penalties are intended to be a relatively light-touch sanctioning option, involving small amounts of money as a sanction for low-level non-compliance. It would be disproportionate to introduce a formal right of appeal in these circumstances. Further, there is a risk that regulators will be dissuaded from using this sanction if they face the prospect of a formal appeal hearing, the costs of which may well exceed the value of the penalty.

Cessation notices

We support the introduction of cessation notices. We are pleased that temporary cessation notices will be available where consumer interests are being harmed, but we would like consumer interests to be brought within the scope of permanent cessation orders as well. The activities of non-compliant businesses can have a severe impact on consumer welfare and on UK economic interests. Further, we are unclear why the provision is limited to the financial interests of consumers; businesses might cause people considerable stress but not financial loss.

We are concerned that the threshold for issuing both types of cessation notice, especially temporary cessation notices, is set too high. In the Legal Services Bill, the government has rejected opposition amendments on the use of words such as ‘serious’ and ‘significant’ in relation to sanctions, on the grounds that they can be interpreted differently and are difficult to prove. Further, consumers should not have to wait until their interests have been seriously harmed before a regulator is able to intervene. A better approach could be to make the threshold an ‘adverse impact’ and accompany this with guidance. The requirement on regulators to act proportionately, the existence of an appeals procedure, the possibility of powers being withdrawn and the availability of judicial review, should act as a sufficient brake on regulators abusing these powers.

Relationship of the proposals to civil enforcement

We support the comments made by the Office of Fair Trading with respect to limiting the expanded toolkit of sanctions to criminal offences. We agree this could perpetuate the bias towards the use of criminal process criticised by Macrory. The presumption should be to make each sanction available for civil offences as well as criminal offences unless there is a good reason otherwise.

Additional sanctions

It is not clear why the government has chosen to implement only four out of the nine Macrory recommendations in this Bill. Unless regulators have access to the full sanctions toolkit proposed in the review, the benefits of a flexible and broad

sanctioning regime, such as encouraging compliance, protecting consumers from harm and supporting competitive markets, will not be fully realised.

Below we discuss two areas that we would like to see included in the legislation.

Transparent enforcement

We were particularly disappointed that the final Macrory recommendation – each regulator should publish a list on a regular basis of its completed enforcement actions and against whom such actions have been taken – is currently not being implemented through the Draft Bill.

The subject of reputational information is attracting growing interest among policy makers. A recent NCC pamphlet, *Reputation and regulation*, examined the potential for partners in the regulatory framework to publish the information they collect about the compliance records of businesses. We are keen to encourage a more open regulatory culture, which harnesses the power of reputation to inform consumer choice and discipline markets. The potential for reputational regulation to change market practices which harm consumers is also discussed in an interim report by the NCC and BRE, *Warning: Too much information can harm*. Finally, the Power of Information Review, conducted by Ed Mayo and Tom Steinberg, developed a set of proposals for how Government could work with new developments on the Internet in using citizen-generated and public sector information.

We suggest a clause is added to the Bill to require each regulator listed in Schedule 3 to publish details of all enforcement actions under the legislation listed in Schedule 4. This would be consistent with the approach recommended by Macrory.

Levies to fund enforcement in problem sectors

We propose giving regulators listed in Schedule 3 the right to raise a levy, where there is a demonstrable need for additional enforcement activity that cannot be accommodated within existing resources. We highlighted this in our consultation response on the Consumer and Trading Standards Agency.

This power would be particularly useful to local regulators. LARS have responsibility for ensuring business compliance in a wide range of consumer markets. However, there are some failing markets that cause substantial consumer detriment and require a disproportionate degree of intervention. In the regulated sectors enforcement activity is funded by regulated institutions, but in other sectors there is no funding and hence limited enforcement. The Trading Standards Service is ill equipped to tackle such markets on a systematic basis, due in the most part to inadequate financial resources.

The recent investigation of the UK car servicing and repair sector carried out by the NCC provides a good case study of a market where an industry levy may be appropriate in future, should current self-regulatory initiatives fail. The car servicing and repair sector experiences persistent and substantial levels of consumer detriment, estimated at £4 billion annually. The industry has failed over a long period of time, and despite several initiatives, to implement a credible system of self-regulation. A sufficiently comprehensive programme of mystery shopping and enforcement work would be expensive to operate, and would need to be resourced from an additional funding stream outside of the public purse.

A levy-raising power would give regulators the flexibility to respond to such areas of consumer detriment, on a short-term basis, as they arise. It is not introducing more regulation, but is instead providing the means to enforce existing laws.

Should the concept of a power to seek levy in defined circumstances be approved, the mechanics of such a system could be worked out in detail. We envisage that the Bill could establish the principle of a levy and require government to seek secondary legislation to impose levies on individual sectors as the need arises. A range of appropriate checks and balances would need to be built into such a system. For example, any application for imposing a levy should be assessed against clear and agreed criteria and there should be opportunity for representations.

We would be pleased to discuss these ideas in more detail with you.

Compliance code

We welcome the opportunity to comment on the latest version of the regulators' compliance code and proposals for its application. The NCC has fed into previous iterations of the code through our membership of LABREG and subsequent informal discussions with officials.

Comments on overall approach and application

We welcome the introduction of a statutory compliance code for central and local regulators. We support the overall approach to the code, which sets out some general principles whilst avoiding a large degree of prescription. This allows a range of regulatory situations to be covered and facilitates innovation. Given this degree of freedom, it is important that regulators are required to demonstrate how they are applying the code in their published enforcement strategies.

In similar vein to our comments on LBRO, a number of important regulators whose activities affect consumer welfare, such as Ofcom and Ofgem, are excluded from the code by virtue of their exemption in the Legislative and Regulatory Reform Act 2006. It is important there are alternative mechanisms to ensure these regulators follow best practice in regulation.

It is unfortunate that section 22 of the Legislative and Regulatory Reform Act 2006 limits the applicability of the compliance code to general level functions, such as policy making and standard setting. We recommend the Government use the Listing Order to extend the section 21 duty (the five regulatory principles: transparent, accountable, proportionate, consistent, targeted) to the individual level functions of carrying out inspections, investigations, prosecution and other enforcement activities. If practice on the ground fails to follow policy, then the policy becomes irrelevant. Unless both general and individual level functions are covered, there is insufficient incentive for those who set the policies to ensure they are being followed. The prospect of a successful legal challenge is unlikely to create such an incentive. Further, in respect to local enforcement, trading standards officers are not employed by the Office of Fair Trading. This makes it difficult for these regulators to be held accountable for the performance of individual level functions.

In order to establish a firmer connection between policy and practice, adherence to the compliance code should be linked to performance management mechanisms. The Hampton Implementation Reviews offer one option for central regulators. At local level, as we highlight earlier, we would like to see a role for the LBRO to develop a simplified, joined-up and strategic approach to performance management for LARS.

Comments on the code

The connection between consumer interests and regulatory outcomes is given insufficient weight throughout the code, which the section on ‘supporting economic progress’ illustrates well. The interests of consumers and business in regulatory policy should normally be aligned, but this section of the code refers only to costs to regulated entities. At the heart of the Government’s consumer strategy, is the concept that empowered consumers drive competitive markets and, hence, economic progress. Unnecessary regulation and excessive enforcement harms consumers as well as business, since consumers pick up the bill and innovation can be stifled. At the same time, however, when businesses are non-compliant and markets fail, effective laws and enforcement activity are essential to enable consumers to fulfil their economic role successfully.

Consistent with our earlier comments about transparent enforcement, the final Macrory recommendation – each regulator should publish a list on a regular basis of its completed enforcement actions and against whom such actions have been taken – should be explicitly set out in the code. We suggest this is simply included word-for-word as new paragraph 8.7.