



Chartered
Institute of
Environmental
Health

Consultation on Primary Authority Guidance

Response by Chartered Institute of Environmental
Health

27 February 2009

The Chartered Institute of Environmental Health

As a **professional body**, we set standards and accredit courses and qualifications for the education of our professional members and other environmental health practitioners.

As a **knowledge centre**, we provide information, evidence and policy advice to local and national government, environmental and public health practitioners, industry and other stakeholders. We publish books and magazines; run educational events and commission research.

As an **awarding body**, we provide qualifications, events, and trainer and candidate support materials on topics relevant to health, wellbeing and safety to develop workplace skills and best practice in volunteers, employees, business managers and business owners.

As a **campaigning organisation**, we work to push environmental health further up the public agenda and to promote improvements in environmental and public health policy.

We are a **registered charity** with over 10,500 members across England, Wales and Northern Ireland.

Any enquiries about this response should be directed in the first instance to:

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Our initial statement

- 1.0 Although in overall terms we believe that the information provided in the draft is as clear as it could be at this stage about the requirements of the scheme, we are of the view that the level of clarity or quantity of information provided is unlikely to be the key to the successful implementation of the scheme.
- 1.1 We have previously argued that the primary authority scheme is a disproportionate response to the perceived problem of inconsistency of enforcement. We feel that the success or otherwise of the scheme will depend upon the degree to which local authorities and business decide to participate. At present, we believe that major barriers to the scheme's success exist in terms of questions over the statutory processes involved in providing advice and guidance as a primary authority and level of fees that may be charged on a business in a primary authority partnership by a local authority.
- 1.2 We support the power in the Act for local authorities to be able to charge for this service, since we believe that the costs of providing the service could be considerable and the local authority must have the power to recoup, but with home and lead authority arrangements set to continue to run alongside the new PA scheme, businesses may decide not to pay for a service when they might consider they can get much of the support and advice they need on compliance issues through the existing home and lead authority arrangements. We also believe that the potential additional costs for enforcing authorities have been underestimated and at present, there is no provision for these to be met.
- 1.3 For larger scale, multi-operation businesses, it is possible they might want or need several primary authority partnerships, which could lead to considerable costs being levied on them.
- 1.4 We are concerned to see that sufficient flexibility to allow action based on local situations and professional discretion and experience must be included and we are wary of the "one size fits all" approach. This will be critical to ensuring that an appropriate balance between economic success and public protection can be achieved. The enforcement process should not become so burdensome and complex that it is rarely pursued. In this regard, LBRO will need to monitor enforcement patterns once the primary authority scheme is operational to ensure that there is net benefit accruing for the regulatory framework. Similarly, there needs to be consistency of advice and application across regulatory regimes.
- 1.5 We have some comments on specific aspects of the consultation document (see below).

Our comments on the consultation document

2.0 General questions:

2.1 Do you believe that the information in the draft guidance is sufficiently clear about what the requirements of the scheme are; and sufficiently detailed to enable the scheme to be successfully implemented?

In overall terms, we feel that there is sufficient clarity and quantity of information about the requirements of the scheme, but have the following questions:

Paragraph 28: Will LBRO be required to explain, and in what level of detail, why an LA might not be suitable as a PA?

In respect of proposing enforcement action (paragraphs 55-60) – will notification be valid *only* if it is made via the secure web site? The web site does not feature in the procedure depicted in Figure 1.

Paragraph 67: why, if the Act allows it and the LA has good reason not so to do?

Paragraph 68: is the response valid if NOT made via the web site? We note that in paragraph 57 a notification “should” be made via web site, while in paragraph 68 a response “must” be.

2.2 Are there any other aspects of the scheme that you would like to see further guidance on?

Paragraphs 15-16: There is a case for specific guidance on the way that the primary authority scheme might work in relation to franchised operations, where problems may be unique on a shop by shop basis and where a franchisee may hold a number of shops within (and across) areas.

Paragraph 34: The decision making procedure by which a local authority exercises its primary authority role needs to reflect local circumstances and organisational culture, for instance, whether a local authority delegates the powers to (nominated) officers, or whether those powers are exercised by a cabinet member, committee or panel of elected members. Will the LBRO web site provide a means by which decisions, advice and guidance can be systematically recorded?

3.0 Specific questions:

3.1 To enable the partnerships to be implemented in a consistent way, the relevant functions have been organised in 17 categories. Do you believe that the proposed categories provide the basis of workable partnerships?

In broad terms, we agree. However, we have a couple of questions. In Annex A re. Housing category “overcrowding” relates to a category 1 hazard under the Housing Health and Safety Rating System, yet it is our understanding that Part 1 of the Housing Act 2006 has not previously been regarded as a relevant enactment for the purposes of the Primary Authority scheme (we have previously referred to the inconsistency of Part 1 of the Housing Act 2006 not being included, yet Parts 2-5 relating to the licensing of houses in multiple occupation are included).

Annex A also includes Environmental Protection as a category. In our response to the consultation on the primary authority scheme we expressed our concern about the inclusion of clause 2(d) of the draft Order, in respect of the service of a notice (an “abatement notice”) under section 80 of the Environmental Protection Act 1990,

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

We continue to hold this position. We had not anticipated that nuisance law would be embraced as actions taken by local authorities for the purposes of the Primary Authority scheme, as these are taken on very specific local issues and can be very wide ranging by virtue of the broad definition of nuisance.

3.2 Is the proposed scope of the inspection plans appropriate? How might it be improved?

We are content with the proposed scope of the Inspection Plans.

3.3 How might the template agreement be improved?

No comment.

3.4 Is the proposed process for resolving disputes appropriate? How might it be improved?

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

3.5 Is the guidance regarding the application of the Primary Authority scheme to Scotland, Wales and Northern Ireland sufficient?

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