

A Code of Practice for Regulators – A Consultation

CIEH response to the consultation on the Regulators'
Compliance Code and the Principles of Good Regulation

August 2007

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.

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1.0 Summary of CIEH views

The Chartered Institute has consistently opposed the Code having statutory force, although we accept that this is the Government's intention and we will do all we can to assist our members in adhering to, and implementing it.

Our view is based on the concern that every word in a statutory Code could be challenged in law and that this was potentially a recipe for legal gridlock. This is still our concern having now had the opportunity to comment on the formal draft. Although we were pleased to read in paragraph 24 of the consultation paper that regulators are to have regard to the Code when determining policies, setting standards or giving guidance in relation to the exercise of functions, but that the Code shall not apply directly to the individual level functions or carrying out inspections etc., we were dismayed to read in paragraphs 42-44 of the consultation paper, that the Government intended, through the Listing Order, to extend the duty of regulators to have regard to the Code in determining policies etc to individual level regulatory functions as well. Although the Government may consider exemptions from this, it is clear that they intend that the Code should apply at both the general and individual level of regulatory functions. We are strongly opposed to this, although would be happy for the Code to apply at the general level of policy making.

The draft Code must be seen in the context of the Government's purpose to relieve the "burden" of regulation on business, as expressed in the Hampton and Macrory reports and Legislative and Regulatory Reform Act 2006. The CIEH, whilst supporting this aim, has also been keen not to see a shift in that burden from the regulated to the regulator. Our fear is that the extremely detailed nature of the Code, coupled with its statutory foundation will increase the burden on regulators. The draft Impact Assessment (in particular see paragraphs 32-33 and 51-55) is by its own admission, short on reliable estimates of possible increased costs for local authorities and other regulators. The draft IA is also in our view somewhat glib in its assessment of the capacity for additional savings within EH services.

We have concerns about the Code's requirement of regulators to give consideration to how their regulatory activities can support economic progress and to ensure that the benefits of any regulatory tool adopted justify the costs of such a tool both to the regulators and the regulated. We are unclear as to what "economic progress" regulators should be supporting: does this refer to the economic progress of for instance, the regulated premises, the business as a whole, the economy of the locality, the region, that of the nation? This issue would be of lesser concern of course but for the fact that the Code will have statutory force and individual regulators' decisions could be much more closely scrutinised. Might regulators' actions be challenged on the basis that the action "hindered economic progress"? At the very least, we would expect Government to issue guidance to regulators on their interpretation of this clause in the draft Code.

2.0 Responses to consultation questions on the Compliance Code

1. Is there anything that should be added to or removed from the draft Compliance Code?

In previous correspondence on early drafts of the Code, the CIEH made clear our opposition to the Code having a statutory basis. Our fear was that this would provide abundant opportunity for regulated entities to delay and or avoid perfectly sensible enforcement actions to the detriment of the public good. As such we were relieved to read in the formal draft Code that it would only apply at the general level of policy making.

We believe that the Code should mainly apply at the general level, although we feel that most Environmental Health Practitioners (EHPs) would not object in principle to the application of the Hampton principles to individual enforcement actions.

We are strongly of the view however that the Code needs to be changed to make clear how it applies. The draft Code clearly states, both in the introduction and in the impact assessment (and in the consultation paper) that it only applies at the general level of policy making and regulatory strategy and not to individual functions – with no caveat. We were dismayed to read elsewhere in the draft that the Government in effect intends to apply it at the individual level of regulatory function by having the Hampton principles apply to individual functions, by means of the Listing Order. This is contradictory and confusing – giving the impression of reassurance in one place, while introducing “small print” conditions in another. If the Compliance Code is to be successful in achieving its aim of improving the regulatory relationship; it must be clear and unambiguous in its intent and language.

2. Is the Code clearly written and easy to understand? If not, please indicate where it could be made clearer

The most glaring ambiguity is as described above; in general terms it suffers from having been written with too many regulators in mind, so being prolonged and over-detailed.

3. Our intention is that regulators use risk assessment to prioritise their work more systematically. Do you think the Code will achieve that?

Local authorities are politically accountable entities where local political priorities sit alongside those of national governmental priorities; this is the reality of the situation for EHPs working for local authorities. Good authorities respond effectively to this mix of local and national priorities and plan accordingly; there is nothing in the Code that enhances the ability of local authorities to achieve the correct balance.

4. The Code seeks to strike the right balance between regulators achieving their regulatory outcomes and eliminating unnecessary burdens on regulated entities. We would welcome your views on whether the Code strikes this balance.

We are very supportive of the Government's stated aim of reducing the administrative burden of regulation, but we feel that this reduction should be both for the regulated and the regulator. We have been wary of many of the post-Hampton reforms which appear to simply shift the burden of regulation from the regulated to the regulator. We fear that the Code will continue this trend.

There will be additional burdens for local authority EH teams in proving that they comply with the Code and in re-writing enforcement policies, documents and procedural material where this is necessary. There is little or benefit to business in this respect. Some of this burden may be relieved by the expected reduction in "routine" inspection activity although we believe that the Government has over stated the extent to which such inspections exist. We do not share the view that a move to a more risk-based approach will produce outputs and outcomes that are more readily measured.

5. Our intention is to ensure that regulators place emphasis on providing information, advice and guidance to help encourage compliance, within relevant constraints, such as resources. We would welcome your views on whether the section on advice is likely to achieve this objective.

Local authorities have to apply and interpret national regulations. In some cases, such as with Houses in Multiple Occupations (HMOs), national legislation has been poorly drafted and there has never been any national guidance. It is therefore sometimes difficult to give advice when none exists at the centre and legislation is unclear. We are also of the view that EHPs are well-versed in providing advice and guidance to business and whilst this might vary between authorities, short of national direction, this is the inevitable consequence of local autonomy. The problem for local authority regulators is that they have to operate within a regulatory structure determined by a wide variety of national regulators and agencies which demand certain levels of performance and advice is often not taken into account in measuring performance.

6. Our intention is to ensure that regulators base their data requests on risk assessment and share data to reduce burdens on regulated entities, within relevant constraints, such as resources and legal requirements. We would welcome your views on whether the sections on risk assessment and data requirements can achieve this policy intention.

We have some reservations about the contention that regulatory activity can be assessed and measured purely in risk-assessed, cost/benefit terms. At the macro level, assessment is more readily achieved but interventions by EHPs can only be properly measured in public health terms over long periods. Requiring greater precision and detail in data requirements is therefore only part of the picture; local authorities are increasingly looking to liaise at and aim for consistency at the regional level. We do not believe that the Code will assist this trend in any way.

7. We would welcome your views on the proposal to exempt local authorities from sections 9.2 and 9.3 regarding measurement of performance standards on the grounds that they meet the requirements under the existing reporting framework for local authorities.

We agree with the proposal; local authorities already publish and report under the existing reporting framework and often go further than this in reporting on regulatory performance.

8. Are there any other comments you would like the Government consider in relation to the draft Code?

We wish to comment on the requirement under the Code for a regulator to take account of the need to support "economic progress". We are unclear as to what economic progress regulators should be supporting: does it refer to the economic progress of, for instance, the regulated premises, the business as a whole, that of the locality, the region or the nation? Might regulators' actions be challenged on the basis that the enforcement action "hindered economic progress"?

We find it difficult to foresee how an individual regulator can take this into account. If the law is there, it is there for a purpose and economic issues have been taken into account when the legislation was first drafted and approved by Parliament; it is an onerous responsibility to foist that requirement onto regulators. At the very least, we would expect Government to issue guidance to regulators on their interpretation of the Code in this respect. It should also be made clear that this cannot be used as a defence in court, by businesses that are prosecuted, on the basis that prosecution is against the interests of their economic progress.

3.0 Responses to consultation questions on the Listing Order for the Compliance Code

1. We would welcome your comments on the coverage of the Compliance Code, i.e. the regulatory functions that it applies to. Are there regulators or regulatory functions carried out by any regulator that should be included or excluded from the scope of the Code?

We wish to reiterate our point that the Code should not be made, in effect, to apply to the individual enforcement function level by reference of the five Principles in the Listing Order (see answer to Question 1 in the section on the Code itself).

Under the Environmental Health section of the draft Listing Order no mention is made of the Housing Act 2004, Parts I and II of which are enforced by EHPs, although the Act is referred to in the Trading standards section. This inclusion probably refers to the Housing Information pack provisions. Is this an intentional omission as far as environmental health is concerned, given the comprehensive nature of the rest of the list or an error that could exclude Part I of the 2004 Act and HMO licensing from the

provisions of the Compliance Code? If the omission is intentional then this should be made explicit and reasons given.

We also do not agree that the Code should be differently applied in the United Kingdom. The principles of good administration and regulation apply equally regardless country. If the aims of the legislation are to safeguard public health and to regulate effectively and proportionately, then the approach should be the same throughout the UK – the Code should either apply or not apply to all countries in the UK.

2. If you think certain regulators or functions should be excluded from the scope of the Code or brought within it, please give reasons for your view.

No comment

4.0 Responses to consultation questions on the application of the five principles

1. Do you agree that the five principles should apply to the same regulators as the Compliance Code? Please support your answer with reasons.

Yes; this is the only way to ensure commonality of approach and an overall improvement in regulatory standards.

2. Do you think the five Principles should apply at the general and individual levels or at the general level only?

Only at the general level, for the reasons expressed previously in our response.

3. If you think the Principles should apply at the general level only, should this be in respect of all or some of the regulators listed; if to some, please tell us which and why.

To all

4. If any regulator seeks an exemption from the duty to have regard to the Section 21 duty in respect of any individual level function, we would welcome evidence that supports the case for making that exemption.

N/A

5.0 Responses to consultation questions on Impact Assessment

1. Do you think the assumptions made in the impact assessment are realistic? If not, please be specific about you think they are not.

We believe that the costs quoted in the IA in respect of local authority regulation are not realistic, mainly because they start from the assumption that local authorities already carry out too many "routine inspections", from which basis the potential savings offered in the IA are predicated. We

believe that the number of such inspections is much lower and at any rate no "routine" inspections are without purpose. Local authorities will rarely embark upon costly enforcement actions, most do so as a last resort.

2. Does it reflect a reasonable estimate of the costs and benefits of complying with the Compliance Code and the five Principles? If not, please set out the specific data that you feel we should consider in developing our final analysis.

See above

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