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Select Committee on the Constitution

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1st Report of Session 2007–08

# Regulatory Enforcement and Sanctions Bill

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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# Regulatory Enforcement and Sanctions Bill

## Introduction

1. The Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we regard our main task as being to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution. This report draws to the attention of the House three constitutional issues in respect of Part 3 of the Regulatory Enforcement and Sanctions Bill.
2. There is undoubtedly a need for an effective system of regulatory enforcement. In March 2005, the Hampton review, commissioned by the Chancellor of the Duchy of Lancaster, found that the existing range of penalties did not provide effective deterrence<sup>1</sup> and recommended that “Administrative penalties should be introduced as an extra tool for all regulators”.<sup>2</sup> In 2006, the Macrory Review of Regulatory Penalties noted that “Criminal prosecution may not be, in all circumstances, the most appropriate sanction to ensure that non-compliance is addressed, any damage caused is remedied or behaviour is changed. The availability of other more flexible and risk based tools may result in achieving better regulatory outcomes”.<sup>3</sup> It will be for the House as a whole to assess the merits of the Government’s proposals to establish a system of alternative civil sanctioning powers. Our role is the more limited one of considering whether the reforms contained in the bill are made in accordance with constitutional principle. In doing so, we accept that effective sanctions must be proportionate to the alleged offence. There are no doubt cases in which a criminal prosecution would be too heavy-handed; equally there are cases where fines imposed by courts have been insufficient to deter wrong-doing. Proportionality is however also important in another sense: in designing a new system of sanction powers, a balance must be struck between the desire for effectiveness and safeguards needed to ensure constitutional propriety.
3. Part 3 of the bill will allow ministers (by order subject to the affirmative resolution procedure) to introduce schemes empowering some or all of 28 regulatory authorities,<sup>4</sup> along with ministers and local authorities, to punish individuals and companies determined to have committed criminal offences

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<sup>1</sup> HM Treasury, *Reducing administrative burdens: effective inspection and enforcement* (March 2005), paragraph 2.74.

<sup>2</sup> *Ibid*, Recommendation 8.

<sup>3</sup> Better Regulation Executive, *Regulatory Justice: Making Sanctions Effective, Final Report* (November 2006), p 7.

<sup>4</sup> British Hallmarking Council; Charity Commission for England and Wales; Civil Aviation Authority; Coal Authority; Competition Commission; Countryside Council for Wales; Environment Agency; Financial Services Authority; Food Standards Agency; Football Licensing Authority; Forestry Commissioners; Gambling Commission; Gangmasters Licensing Authority; Health and Safety Executive; Hearing Aid Council; Historic Buildings and Monuments Commission for England (“English Heritage”); Housing Corporation; Human Fertilisation and Embryology Authority; Human Tissue Authority; Information Commissioner; Local fisheries committees; Natural England; Office of Communications; Office of Fair Trading; Office of Rail Regulation; Pensions Regulator; Security Industry Authority; Statistics Board.

under one or more of 144 Acts of Parliament. Punishment may be in the form of a fixed monetary penalty (clause 37) or a “variable monetary penalty”, which is the imposition of “a requirement to pay a monetary penalty to a regulator of such amount as the regulator may determine” (clause 40). If a fixed or variable monetary penalty is imposed, the person subject to that penalty may not subsequently be convicted of the relevant offence in respect of the act or omission giving rise to the penalty (clauses 39 and 42). Sums received by way of penalty will be paid into the Consolidated Fund (clause 65). If a person fails to pay a penalty, the regulator may enforce payment through the civil courts (clause 50).

4. Part 3 of the bill also makes provision for other sanctions: imposition of a requirement that a criminal offence does not recur (clause 40(3)(b)); a requirement that the position is restored to what it would have been if the criminal offence had not been committed (clause 40(3)(c)); stop notices (clause 44); and provision in relation to regulators accepting undertakings (clause 48).
5. We draw to the attention of the House three issues which are discussed in more detail below. First, the complex nature of the schemes proposed by the bill, which include powers for ministers by means of “directions” to suspend and revoke suspensions of regulators’ powers to impose sanctions. Second, the extent to which it is constitutionally appropriate for regulatory authorities—rather than the ordinary courts—to make determinations as to whether a person has committed a criminal offence and to impose unlimited financial penalties. Third, whether the procedural protections provided in the bill—which include the application of the criminal standard of proof and a right to make representations in some (but not all) situations—match up to the minimum standards of procedural fairness that a person accused of a criminal offence ought to have.

### Complexity and Ministerial Powers

6. The schemes established under the bill will result in a less-than-straightforward legal position. Numerous criminal offences (contained in the 144 Acts listed in schedule 6) will remain ostensibly on the statute book, but a patchwork of statutory instruments will be made by ministers empowering some regulators to impose sanctions in relation to some of those offences (effectively ousting the jurisdiction of the ordinary courts where regulators choose to impose those sanctions rather than bringing prosecutions). Ministers may at a later time suspend a regulator’s powers to impose sanctions by issuing “directions” and may later still revoke that suspension by further directions (clauses 63 and 64). At any given time, primary and delegated legislation ought to show clearly which institutions—courts or regulators—may exercise sanctioning power in relation to criminal offences. **The arrangements in the bill risk being too complex and inaccessible to conform to one of the most basic facets of the rule of law, namely that laws ought to be reasonably certain and accessible. Particularly in the context of regulation and criminal offences, the law should be as simple as possible. Moreover, if ministers wish to suspend legal powers conferred on regulators they should do so by operation of law subject to parliamentary oversight—by order—rather than by giving directions.**

### Civil sanctions v. Prosecutions in the Ordinary Criminal Courts

7. Permitting officials and public authorities other than the courts to impose penalties is not a new phenomenon in the United Kingdom. For example, the Competition Act 1998 gives the Competition Commission powers to impose financial sanctions on businesses which infringe prohibitions on anti-competitive agreements and abuse of dominant position. The Financial Services Authority may, under the Financial Services and Markets Act 2000, impose monetary penalties. Local authority officers and others have powers under several enactments to issue penalty notices in respect of a range of criminal offences (including truancy, making noise, graffiti and fly-posting, abandoning vehicles and offences relating to litter and waste).
8. These developments are part of a more general retreat from reliance on the criminal justice system alone as a means to control wrongdoing. This Committee noted in relation to the Serious Crime Bill last year that “Over the past 20 years, public policy has increasingly reflected the view that criminal prosecutions and sentences alone may be an inadequate legal response to criminal and other unacceptable behaviour” (Second Report of Session 2006–07, HL Paper 41). In respect of the Serious Crime Bill our concern related to the use of injunctive orders to constrain the day-to-day activities of those suspected of—but not convicted of—criminal behaviour.
9. An element of the core meaning of the rule of law is, in the words of A.V. Dicey:

“that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”.<sup>5</sup>

Although many aspects of Dicey’s account of the rule of law are now contested, this passage in our view continues to provide a powerful reminder of the importance of the role of ordinary courts, rather than the executive, in dispensing justice and punishment. **The scheme envisaged in the bill will enable the transfer, on an unprecedented scale, of responsibilities for deciding guilt and imposing financial sanctions (with no upper limit) away from independent and impartial judges to officials.**

### Minimum Requirements of Procedural Fairness

10. The bill provides that regulators may impose fixed and discretionary monetary penalties only where the regulator “is satisfied beyond reasonable doubt that the person has committed the relevant offence” (clauses 37(2) and 40(2)). The inclusion of the criminal standard of proof does offer greater protection than was provided in the Draft Regulatory Enforcement and Sanctions Bill published by the Cabinet Office in May 2007—but it does not alter the fact that it will be officials not judges who are making the decision.
11. It is a basic principle of administrative justice that administrative decisions should be made fairly. Procedural propriety generally requires that a person charged with an offence, or against whom administrative action is proposed

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<sup>5</sup> *Introduction to the Study of the Law of the Constitution*, 10th edition, London: Macmillan, 1959, with an introduction by E.C.S. Wade, p 188.

to be taken, should be told the case against him and be afforded an opportunity to make representations. Where a regulator proposes to impose a variable monetary penalty, the regulations under which the regulator acts must require that a “notice of intent” be served and that the person may make written representations and objections. **But there will be no requirement for a notice of intent or an opportunity to make representations where a regulator wishes to impose a fixed monetary penalty. We are unconvinced that this meets the minimum standards of procedural fairness an accused person ought to have in relation to what are ostensibly criminal offences. The bill as currently drafted risks excluding a basic common law principle of natural justice: *audi alteram partem* (hear both sides before making a decision).** The onus will be placed on the individual or company to seek first an internal review and then an appeal to the First-tier Tribunal (the new general purpose tribunal established by the Tribunals, Courts and Enforcement Act 2007).

12. It is also unsatisfactory that the bill places no upper limit on the size of the variable monetary penalty that may be imposed, nor requires orders made by ministers conferring sanctioning powers to include such a limit. We note that within the criminal justice system, magistrates’ courts may not impose fines of more than £5,000; and under the Competition Act 1998, a ceiling of 10 per cent of turnover is the maximum penalty that may be imposed by the Competition Commission. It is not for this Committee to suggest what ought to be the maximum penalty but in a context where officials rather than the higher judiciary are deciding guilt and imposing sanctions, there ought to be some constraint. If such a constraint is set, it will be open to the regulators to decide to bring a prosecution before the ordinary courts if it is thought that their powers are insufficient.