



## RAC Foundation response to ORR consultation - the exercise of enforcement powers

**1. Do you have any general comments on the policy, for example, comments on how ORR can improve the format and style of the document to make it a more practical reference document?**

The format of the document is clear and logical. We welcome the recognition given to the scope for non-statutory action. As explained below, we think this will be particularly important as Highways England and the framework in which it sits matures from their current state of infancy.

The trick that is missing is that in setting out a clear and logical approach to the exercise of enforcement powers - as required by the Secretary of State's guidance - it does not set out the compliance strategy into which enforcement slots. Even in abbreviated form, the executive summary takes several pages to set out the stages and steps ORR expects to go through. Could ORR, in *addition*, generate something that on one sheet of paper explains how it will seek to exercise its functions in a way that will seek to deliver Highways England's compliance with its obligations, such that a Highways England manager could pin that page to the staff notice board? Without that story the publication of an enforcement policy risks giving undue prominence to the prospect of failure.

It would be helpful to annex the Secretary of State's guidance on enforcement, rather than just hyperlinking it, so that all the relevant information is in one place.

**2. Do you agree that ORR's enforcement role should also be forward-looking and identify potential non-compliance with the RIS and/or Statutory Directions and Guidance before there is a contravention?**

We agree very strongly with this approach. The ORR's mission should be to help Highways England to succeed, rather than to be punishing it for failure.

We are in the very early months of the new framework that has enabled the creation of Highways England. In the months to come a record will start to emerge of quite how well the components of that framework function. It is highly likely that there will be room for improvement e.g. to improve clarity or remove perverse incentives. All parties - Highways England, ORR, Transport Focus and DfT - need to be working together in a joined-up way focused on securing the best outcome for Highways England's customers (including the taxpayer), and avoid the risk of sliding toward an overly 'contractual' mindset bound by strict legal interpretation of documents such as the licence. It would be quite shocking for ORR to feel the need to go beyond non-statutory enforcement activity near term.

**3. Do you agree with ORR's staged approach to enforcement and whether we have captured all relevant and necessary activities and action? Should anything else be listed?**

We welcome the concept of a clear process of escalation. However, the distinction between Stage 1 and Stage 2 might be rather more clearly drawn if Stage 1 was confined to being 'internal' i.e. that ORR would not at this stage expect to be putting the issue in the public domain, and to some extent 'informal' i.e. the ORR might seek to alert the Chief Executive to an issue through a conversation rather than more formally through a letter demanding a formal response. Stage 2 then allows for escalation to a more formal process where the issue of a letter might itself be published in the expectation that the Highways England response would similarly be a public document. This might still allow for further escalation into statutory enforcement through issue of a notice.

**4. Do you think the policy should allow for consideration of an offer of reparations by Highways England to be taken into account? If yes, do you think the policy should provide for an offer of reparations to be taken into account in the following situations on a flexible basis depending on the circumstances of each case?**

- During consideration of whether to issue a fine;
- As a mitigating factor once it has been decided that a fine is appropriate when determining the amount of the fine.

**5. Do you consider there are any other situations where an offer of reparations should be taken into account?**

**6. Do you think the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy are appropriate and helpful to England and stakeholders? Do you agree with our approach to assessing the seriousness of non-compliance?**

**7. Do you agree with our indicative scale of fines set out in Chapter 5 of the policy and our expectation that fines imposed on Highways England will generally be set at a level to have a reputational as opposed to punitive impact?**

**8. Do you agree that fines should be a last resort and, as a general rule, intended to be used infrequently and for serious and very serious breaches as per the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy?**

Taking questions 4, 5, 6, 7 and 8 together, we find it incredibly hard to see how it makes sense to contemplate taking money from a company that is wholly funded by the taxpayer, funded to deliver the performance specification road users need in support of national economic performance, with no ability to generate a profit or obligation to pay dividends.

In the case of extreme failure it is conceivable that the Government could seek to commission works from another supplier, but this would presumably only be done through a recasting of the Road Investment Strategy rather than through fines. Hence road users might reasonably wonder who is supposed to feel the pain of fines being

imposed that presumably track through into the postponement or even the cancellation of work needed to operate, maintain or enhance the network on which they depend.

Perhaps, given the Chancellor's recent decision to allocate the income from Vehicle Excise Duty to roads funding, fine income should be used to offset VED rates, in recognition of the likelihood that Highways England's customers would not have been enjoying the level of service for which they have 'paid'. Perhaps money taken from Highways England could be redistributed to local government for highway expenditure - a £25m fine would pay for over 438,000 potholes to be repaired.<sup>1</sup>

The logic of fining a company would generally be to hurt that company's owners - in this instance that would be the Secretary of State. A fine on Highways England would not necessarily hurt the senior management, though we would expect the performance failure or failures in question to be taken into account in the performance management of individuals.

Given the nature of Highways England, we would be more supportive of an approach that was explicitly aimed at incentivising individuals. Although it is not in ORR's gift to create or impose a link between the imposition of enforcement measures and senior executive remuneration, it is only through such a link that the imposition of a fine would start to make sense as a genuine sanction/performance incentive. For example, if Highways England created a 'performance fund' from which bonuses were paid, fines could relate to the sums available or could even be drawn down directly from that fund.

It follows that, without such a direct and explicit link, we are sceptical of the value of fines over and above the issue of an enforcement notice.

Fundamentally, the imposition of a fine should be regarded as badge of collective failure, with the real focus of everyone's attention going into recovery or 'reparation' as expressed in the draft policy. We welcome the sense in the draft policy that the imposition of a fine is something of a last resort, we would like that sense to be even clearer.

**RAC Foundation**

**September 2015**

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<sup>1</sup> Based on the £57 cost cited in the 2015 ALARM report