



Department  
for Work &  
Pensions

# A review of powers of entry by the Department for Work and Pensions

Presented to Parliament  
pursuant to Section 42(1)(c) of the  
Protection of Freedoms Act 2012

November 2014



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## Contents

<b>Chapter 1</b>	<b>Introduction</b>	<b>4</b>
<b>Chapter 2</b>	<b>Executive summary</b>	<b>6</b>
<b>Chapter 3</b>	<b>Next steps</b>	<b>12</b>
<b>Annex A</b>	<b>Detailed report of the powers of entry relating to the Pensions Regulator and the Pension Protection Fund</b>	<b>14</b>
<b>Annex B</b>	<b>Detailed report of the powers of entry relating to the Child Maintenance Group</b>	<b>22</b>
<b>Annex C</b>	<b>Detailed report of the powers of entry relating to the Fraud and Error Service</b>	<b>23</b>
<b>Annex D</b>	<b>Detailed report of the powers of entry relating to the Health and Safety Executive</b>	<b>26</b>

# Introduction

# 1

- 1.1 Section 42 of the Protection of Freedoms Act 2012 (the Act) requires each Secretary of State to conduct a review of the relevant powers of entry (PoE) and relevant associated powers, for which they are responsible with a view to deciding whether to make an order to repeal any power of entry or associated power considered to be unnecessary or inappropriate. The Act also requires each Secretary of State to prepare a report of its findings and present that report before Parliament within two years of the Act coming into force.
- 1.2 In addition, as required under Section 47 of the Act, the Government will be issuing a code of practice containing guidance about the exercise of powers of entry and associated powers. The code will set out considerations that apply before, during and after PoE are exercised, to provide greater consistency in the exercise of these powers and clarity for those affected by them, while upholding effective enforcement.
- 1.3 The Department for Work and Pensions (including those Non-Departmental Public Bodies accountable to the Secretary of State for Work and Pensions) has 15 powers to enter premises without a warrant and, in accordance with the requirements placed upon it under the Act, has considered each of those powers, including the safeguards within them and whether it would be appropriate to amalgamate, amend, repeal or increase the safeguards within the powers. The relevant powers and the areas responsible for them are as follows:
  - the Child Maintenance Group has one power, contained in Section 15 of the Child Support Act 1991;
  - the Fraud and Error Service has one power, contained in Section 109C of the Social Security Administration Act 1992;
  - the Pensions Regulator (TPR) has six powers, contained in Sections 73 and 74 of the Pensions Act 2004;
  - the Pension Protection Fund (PPF) has one power, contained in Section 192 of the Pensions Act 2004;

- the Health and Safety Executive (HSE) has six powers within scope of the review: the Health and Safety at Work Act (HSWA) 1974, the Gas Safety (Rights of Entry) Regulations 1996, the Explosives Act 1875, the Biocidal Products Regulations 2001, the Submarine Pipelines (Inspectors etc) Regulations 1977 and the Petroleum (Consolidation) Act 1928.

1.4 This report sets out details of the powers reviewed, the outcomes of each review and the next steps to be taken. A more detailed analysis relating to each power and explanation of the decisions taken, for example, why they are being repealed, amended or retained by Government can be found in **Annexes A to D**.

# Executive summary

# 2

## 2.1 The Pensions Regulator and Pension Protection Fund

- 2.1.1 Both the Pensions Regulator (TPR) and the Pension Protection Fund (PPF) are Non-Departmental Public Bodies established under the Pensions Act 2004 and accountable to the Secretary of State for Work and Pensions and to Parliament.
- 2.1.2 TPR regulates over 46,000 United Kingdom (UK) pension schemes with combined assets of some £1.5 trillion. Its statutory objectives are to protect members' benefits (the membership of these schemes exceeds 18 million), promote good administration of workplace schemes, and to reduce the risk of compensation being paid by the PPF. TPR is also responsible for maximising employer compliance with the new employer duties (including automatic enrolment) introduced by the Pensions Act 2008; and will be responsible for regulating the governance and administration of public service pension schemes from 2015. From July 2014, TPR has a new statutory objective (in relation to defined benefit scheme funding only), to minimise adverse effects on the sustainable growth of an employer.
- 2.1.3 TPR has six powers to enter premises without a warrant, each for a different purpose, contained in Sections 73 and 74 of the Pensions Act 2004. Each of these powers cannot be used in respect of premises which are private dwellings not used for business purposes, and the powers do not permit the regulator to gain entry by force. TPR may gain entry by force, if this is considered appropriate, by obtaining a warrant under the power at Section 78 of the 2004 Act.
- 2.1.4 In addition there are a number of safeguards contained in the legislation, including a requirement for an inspection to take place at a reasonable time; for the inspector to produce a certificate of appointment; and restrictions on the period within which documents obtained may be retained. TPR also has a number of internal controls which comply with other safeguards to be covered by the Government's code of practice, although there is no legal requirement for the regulator to provide advanced notification of an inspection (although this is the regulator's normal practice).

- 2.1.5 The PPF protects members of eligible defined benefit occupational pension schemes (and the defined element of hybrid schemes) by paying compensation where an employer has a qualifying insolvency event and there are insufficient assets in the scheme to pay benefits at PPF compensation levels.
- 2.1.6 Currently the PPF protects the pensions of 11.4 million members of occupational defined benefit schemes. It is paying compensation to over 104,000 people and, at the end of August 2014, had £17.1 billion of assets, and had paid out over £1.4 billion in compensation.
- 2.1.7 PPF has one power to enter premises without a warrant, at Section 192 of the Pensions Act 2004. Similar restrictions and safeguards apply to this power as apply to the regulator's power, and the PPF also has the ability to obtain a warrant to enter premises (using reasonable force if necessary) as apply to TPR (Section 194 of the Pensions Act 2004).
- 2.1.8 As with TPR's powers, the Pensions Act 2004 sets out what the PPF may do when using its inspection powers and this covers a range of information gathering provisions, such as obtaining documents, making enquiries, copying documents etc.
- 2.1.9 Having considered the regulator's powers of entry without a warrant, the review concluded that:
- three of the regulator's powers of entry in respect of stakeholder pensions (at Sections 73(3), 73(4) and 74(1) of the Pensions Act 2004) should be revoked, as this was not, and was unlikely to become, a high priority area for the regulator;
  - whilst two of the regulator's powers of entry, at Sections 73(1) and 74(4) of the 2004 Act, were considered to be essential to its functions, these powers could be consolidated into a single power of entry;
  - the sixth power, at Section 74(A1), which relates to the regulator's objective to ensure that UK employers comply with their legal requirements to auto enrol their employees into a pension scheme, should be retained, but that this power should be reviewed in 2017 in the light of the regulator's experience in ensuring that employers comply with the auto-enrolment duties; and
  - the legislation covering the regulator's remaining powers of entry without a warrant should be amended so that reasonable notice of a visit must be given, unless such notice would defeat the purpose of the visit.
- 2.1.10 Taken together these changes will strengthen the safeguards covering TPR's powers of entry, and streamline them by reducing the number of powers from six to two (with the possibility of a further reduction following the review in 2017) whilst ensuring the regulator retains the powers needed to effectively fulfil its statutory objectives.
- 2.1.11 Having considered the PPF's power of entry without a warrant, the review concluded that:
- the PPF's power at Section 192 of the Pensions Act 2004 should be revoked; and
  - the Department for Work and Pensions (DWP) will work with the PPF to consider whether, as a result of the loss of its power of entry at Section 192, the PPF's remaining powers to obtain information in the 2004 Act need amending to ensure that it is able to obtain the information it needs to function effectively.

## 2.2 The Child Maintenance Group

- 2.2.1 The Child Maintenance Service, launched in November 2012, will ultimately replace the Child Support Agency. The Child Support Agency currently administers the 1993 and 2003 Child Support Schemes while the Child Maintenance Service is responsible for managing the 2012 statutory scheme.
- 2.2.2 There are 2.5 million separated families in Great Britain, and current estimates suggest that just under 50 per cent of these have child maintenance arrangements in place where money is flowing. More than half of this is arranged through the Child Support Agency.
- 2.2.3 The overall objective of the Child Maintenance Group (CMG) is ‘to maximise the number of those children who live apart from one or both parents for whom effective child maintenance arrangements are in place’. CMG has three core functions to deliver this objective through the new system of child maintenance:
- promoting child maintenance;
  - providing information and support about the different child maintenance options available to parents; and
  - providing an efficient statutory maintenance service with effective enforcement.
- 2.2.4 The Child Maintenance Group has one power of entry to an occupier’s premises when investigating a child maintenance case and this is provided for under Section 15 of the Child Support Act 1991. Section 15 provides for the Secretary of State to appoint persons to act as Inspectors for the function of acquiring information about a non-resident parent for any of the purposes specified under the Child Support Act 1991. There are numerous safeguards already provided for within this existing power which include:
- An inspector must show their Certificate of Appointment if required to do so when applying for admission to any premises when exercising powers of inspection.
  - An inspector shall have the power to enter at any reasonable time any premises which are liable to inspection and are premises to which it is reasonable for them to require entry in order to undertake the function specified by the power. The inspector may make such examination and inquiry there as he considers appropriate.
  - Premises which may be inspected are those not used wholly as a dwelling house and which an inspector has reasonable grounds for suspecting are:
    - i) premises at which the non-resident parent is or has been employed,
    - ii) premises where the person carries out or has carried out a vocation, trade, profession or business
    - iii) premises where there is information held by a person whom the inspector reasonably suspects has information about the non-resident parent acquired through that persons own vocation, trade, profession or business
  - An inspector exercising his powers may question any person aged 18 or over whom he finds on the premises.
  - No person shall be required under this power to answer any question or to give any evidence tending to incriminate himself or, in the case of a person who is married or is a civil partner, his or her spouse or civil partner.
  - If required to do so by an inspector exercising his powers, a person shall furnish to the inspector all such information and documents as the inspector may reasonably require.

Additionally Inspectors only access premises where consent has been given by the occupier and must leave where consent has been withdrawn. Inspectors do not force entry and instead, where the occupier refuses access and is regarded as having deliberately delayed or obstructed the inspector, prosecution will be considered

2.2.5 Having considered the Child Maintenance Group's power of entry without a warrant, the review concluded that:

- Section 15 is a necessary and critical power, particularly when dealing with more challenging and contentious cases. The self-employed, including company directors, present greater difficulties in the gathering of all necessary information and the achievement of payment compliance than any other client group. The need for powers of entry and inspection are crucial to enabling DWP to accurately calculate child maintenance and collect arrears timeously.
- As a further safeguard, ensuring that the power is exercised in a way that is fully compliant with the terms of the Act the Child Maintenance Group's intention is to amend Section 15 of the Child Support Act 1991 to include that, in England and Wales a judicial warrant from the Magistrates' Court will be sought where an occupier refuses to allow access to premises to an officer utilising their powers of inspection to gain access to acquire the necessary information. The Child Maintenance Group will also confer with the devolved administrations in relation to its proposals to extend the changes through the normal consultation process.

## 2.3 The Fraud and Error Service

2.3.1 The Fraud and Error Service (FES) helps DWP to further sharpen its focus on ensuring that the correct benefits are paid to the right people. It has been designed to help DWP deliver further service improvements and cutting edge capability to prevent, detect and correct fraud and error in the future. The latest published statistics (the 2013/14 estimates) estimate overpayments as a result of fraud and error at £3.3 billion, 2.0 per cent of all benefit expenditure.

2.3.2 FES has one power of entry to an occupier's premises when investigating suspected benefit fraud. This power is provided for under Section 109C of the Social Security Administration Act 1992 (the Administration Act). Section 109A provides for the Secretary of State to authorise individuals to exercise any of the powers conferred on an authorised officer by Section 109C of the Administration Act. This power allows an authorised officer the power to enter certain premises for the purposes of examination and inquiry in connection with any of the matters detailed at Section 109A(2) of the Administration Act (generally speaking for the prevention, detection and securing evidence of social security benefit fraud).

2.3.3 There are numerous safeguards already provided for within this existing power which include:

- Only officers authorised to do so by the Secretary of State and who have received the appropriate training shall be entitled to enter any premises which are liable to inspection.
- An authorised officer shall have power to enter at all reasonable times any premises (including those consisting in the whole or a part of a dwelling-house) which he has reasonable grounds for suspecting are premises:
  - (a) which is a person's place of employment;
  - (b) from which a trade or business is being carried on, or where documents relating to a trade or business are kept;

- (c) from which a personal or occupational pension scheme is being administered;
- (d) where documents relating to the administration of such a scheme are kept;
- (e) where a person who is the compensator in relation to any such accident, injury or disease is to be found (as is referred to in Section 109(A)(2)(b) of the Administration Act);  
or
- (f) where a person on whose behalf any such compensator has made, may have made or may make a compensation payment is to be found.

He or she may be accompanied by other persons as he or she thinks fit.

- An authorised officer may make such examination and enquiry there as he considers appropriate.
- An authorised officer exercising his powers may question any person whom he finds on the premises or ask them to produce documents as he may reasonably require.
- An authorised officer may take possession of and either remove or copy any documents as appear to contain relevant information.
- No person shall be required under this power to answer any question or to give any evidence tending to incriminate himself or, his or her spouse or civil partner.
- When applying for admission to any premises, if required to do so, an authorised officer will produce his or her certificate of authorisation. Additionally they provide the occupier with an information leaflet and offer to show them the Code of Practice.
- Entry to premises is by consent only and an authorised officer will never try to force an entry where entry is refused as they have no legal powers to do so.
- Where an authorised officer(s) considers that the decision to refuse entry has been taken to obstruct their enquiries or to conceal evidence, they will consider criminal proceedings under Section 111 of the Social Security Administration Act 1992 for intentionally delaying or obstructing authorised officer(s) in exercising their powers.
- In these circumstances the occupier should be reminded of their statutory duty to provide the information and documentation requested and the consequences of their continuing failure to do so, that is, prosecution under Section 111 of the Social Security Administration Act 1992.

2.3.4 Having considered FES powers of entry without a warrant, the review concluded that:

- Section 109C of the Social Security Administration Act 1992 provides for a necessary and critical power for the prevention and detection of social security benefit fraud, and there is a clear and specific justification for retaining the power in its existing form and no changes will be made to the Act under this review.

## 2.4 The Health and Safety Executive

2.4.1 The Health and Safety Executive (HSE) is the national independent watchdog for work-related health, safety and illness. As an independent regulator, HSE acts in the public interest to reduce work-related death and serious injury across Great Britain's workplaces. Under this review it has also had the responsibility for considering the use of powers of entry provisions in health and safety legislation where this is exercised by other regulators

2.4.2 HSE uses a range of intervention techniques to secure compliance with the law and investigates the most serious kinds of accidents in the workplace to ensure action has been taken to prevent recurrence and to secure justice for the victim.

2.4.3 HSE considered there to be six pieces of legislation within scope of this review. Of these, four have either been repealed or are due to be repealed as part of HSE's actions on the Löfstedt report<sup>1</sup> to consolidate and improve existing legislation in certain sectors or in response to the Government's Red Tape Challenge<sup>2</sup>. The two remaining powers are contained in the Health and Safety at Work Act 1974 (HSWA) and the Gas Safety (Rights of Entry) Regulations 1996 (GSRER):

- HSWA provides the vires and powers for the properly appointed inspectors of HSE, Office for Nuclear Regulation (ONR), Office of Rail Regulation (ORR), Department for Transport (DfT), Vehicle and Operator Services Agency (VOSA), Home Office (HO) and local authority (LA) inspectors to investigate accidents, incidents and undertake inspections, where appropriate. Inspectors have powers to enter work premises and collect evidence. If these powers were lost, the ability of these regulators to protect those at work and members of the public would be significantly compromised. In particular, it would hamper its ability to enter work premises to enforce the law and deal with serious risk.
- The GSRER power of entry is used by staff from the gas distribution networks to allow them to enter domestic and commercial premises to ensure that the public is safeguarded against the risks posed by gas emergencies. These includes attending to and making safe all gas escapes, for example, gas leaks, emissions of carbon monoxide fumes or other hazardous situations. HSE received views from the gas companies that these regulations are therefore necessary for the proper protection of life and property.

2.4.4 Having considered these two powers the review has concluded that:

- The powers of entry provided by HSWA and GSRER are necessary and critical to worker and public protection, and no changes should be made to either of these pieces of legislation.
- The safeguards currently in place to ensure that these powers are appropriate, effective and commensurate with relevant enforcement activities, are fit for purpose.

<sup>1</sup> Prof R E Löfstedt. *Reclaiming health and safety for all: An independent review of health and safety regulation*. Nov 2011. Cm8219.

<sup>2</sup> See: <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>

# Next steps

# 3

## 3.1 The Pensions Regulator and Pension Protection Fund

- 3.1.1 The power at Section 74(A1) of the Pensions Act 2004 will be reviewed in 2017 in the light of the regulator's experience in ensuring that employers comply with the auto-enrolment duties. The Department for Work and Pensions (DWP) will implement all of the changes set out in respect of Sections 73(1), (3) and (4) and Sections 74(A1), (1) and (4) of the Pensions Act 2004 at the earliest appropriate opportunity.
- 3.1.2 In considering the consequences of the loss of the power at Section 192 of the Pensions Act 2004, DWP and Pension Protection Fund (PPF) officials will look at the wording of Sections 191 and 194 of the Pensions Act 2004 to see if either need amending to ensure that the PPF retains the ability to obtain the information it needs to function effectively, and will take forward these changes at the same time as the changes to TPR's powers.

## 3.2 The Child Maintenance Group

- 3.2.1 The Child Maintenance Group (CMG) will consult with the devolved administrations in relation to its intended changes to its power of entry. CMG aims to publish an implementation plan by summer 2015, setting out a clear timetable detailing the milestones and target dates relating to their proposed changes to the powers contained in Section 15 of the Child Support Act 1991. Amendments to the Section 15 powers are intended to be made by spring 2016.

### 3.3 The Health and Safety Executive

3.3.1 The Health and Safety Executive (HSE) has identified four pieces of legislation which contain powers of entry provisions that are no longer necessary or that are already part of a wider ongoing review. Action is to be taken, or has been taken, as follows:

- The Explosives Act 1875: This was revoked on 1 October 2014.
- The Biocidal Products Regulations 2001: these regulations have been revoked and consolidated with other regulations into a single set of regulations called the Biocidal Products and Chemicals (Appointment of Authorities and Enforcement Regulations) 2013;
- The Submarine Pipelines (Inspectors etc) Regulations 1977: the majority of these regulations have been revoked and the remainder are currently being considered as part of the Red Tape Challenge to establish whether they are still necessary; and
- The Petroleum (Consolidation) Act 1928: Powers of entry under this Act were revoked on 01 October 2014 by the introduction of the Petroleum (Consolidation) Regulations 2014.

# Annex A

## Detailed report of the powers of entry relating to the Pensions Regulator and the Pension Protection Fund

### Context of the review: The Pensions Regulator

The Pensions Regulator (TPR) is a Non-Departmental Public Body established under Part 1 of the Pensions Act 2004 which regulates over 46,000 United Kingdom (UK) work-based pension schemes with combined assets of some £1.5 trillion. It came into being in April 2005, taking over from the previous regulatory body, the Occupational Pensions Regulatory Authority.

Its powers are set out in pension legislation, especially the Pensions Act 2004 which sets out its six statutory objectives, to:

- protect the benefits of members of occupational pension schemes (with total memberships in excess of 15 million in private sector trust based pension schemes in the UK, and it is estimated that there will be a further six to nine million new members by 2018 who have joined due to auto-enrolment);
- protect the benefits of members of personal pension schemes where direct payment arrangements are in place (with over 2.7 million memberships of work-based personal pensions);
- reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (PPF);
- In relation to defined benefit scheme funding only, minimise any adverse impact on the sustainable growth of an employer;
- promote, and to improve understanding of, the good administration of work-based pension schemes;
- maximise employer compliance with employer duties, including auto-enrolment, and the employment safeguards (introduced by the Pensions Act 2008).

In addition, TPR will become responsible for regulating the governance and administration of public service pension schemes (with 12 million memberships) from 2015.

TPR is funded from two sources: a levy on pension funds; and general taxation. A grant from DWP funds TPR's responsibilities arising from the Pensions Acts of 2004 and 2008, which is recoverable through a levy paid by eligible pension schemes. General taxation funds compliance activity under the 2008 Act in respect of the new duties on employers to enrol their employees into a pension scheme.

TPR's operation approach is to 'educate, enable and enforce'. A key emphasis is on educating key audiences with regard to their pension obligations and the regulator's expectations, and enabling those responsible to comply with these obligations, which it does through the production of a range of material and tools, including codes of practice, guidance, toolkits, information and campaigns.

Where education and enablement fail to drive behaviours to the appropriate standards, TPR have a number of enforcement options available as set out in pension legislation and its core powers include:

- requiring employers to automatically enrol eligible job holders into a pension scheme and comply with their other employer duties and safeguards;
- requiring employers to fulfil their role in maintaining the flow of contributions into pension schemes in a timely manner;
- requiring employer sponsors to put compliant funding plans in place for their defined benefit pension schemes, and requiring the employer and those companies associated with it to support the scheme;
- enforcing standards of trustee governance, including the appointment and removal of trustees; and
- securing pension scheme assets which have been misused or misappropriated.

In addition, TPR has a number of other powers, including the ability to issue compliance and unpaid contribution notices, to impose fines on individuals and others, to wind up pension schemes, issue improvement notices, and apply to the court for injunctions and interdicts; where it is satisfied that the legislation has been contravened.

When considering enforcement action, TPR considers a number of factors, including its powers, the evidence and grounds for using these powers, and whether a proposed course of action, given the circumstances, is reasonable and proportionate. TPR will consider taking urgent direct enforcement action when necessary, for example, where scheme funds may have been, or could be about to be, misappropriated.

In undertaking its statutory functions and objectives as set out in the Pensions Acts, TPR requires the ability to obtain significant amounts of information from employers, trustees and others, and the Pensions Act 2004 provides statutory powers for TPR to obtain information which is set out in Sections 72 to 79 of that Act (Gathering Information) within which TPR's powers of entry are situated.

Section 72 of the 2004 Act provides TPR with the power to request information and documentation from trustees or managers of pension schemes, their professional advisers, sponsoring employers and others, as specified, providing it is relevant to its functions. In relation to automatic enrolment, TPR is also able to require explanations of documents or information provided in response to a Section 72 notice. This is TPR's main method of obtaining information and the overwhelming majority of trustees, pension providers and employers etc, comply with such requests.

For those cases where information is not provided as previously requested, or where TPR considers that, given the circumstances, an inspection is a more appropriate method of obtaining information, TPR has six powers to enter premises without a warrant, each for a different statutory purpose, as set out in Sections 73 and 74 of the 2004 Act. Sections 75 and 76 set out what the inspector may do when undertaking an inspection, as well as providing restrictions on these powers.

The restrictions provide that the powers of entry cannot be used in respect of premises which are private dwellings not used for business purposes, and they do not permit the regulator to gain entry by force. The occupier of the premises may, therefore, refuse entry, although if he does so without a reasonable excuse he may be guilty of an offence as provided for in Section 77 of the 2004 Act. TPR may gain entry by force, if this is considered appropriate, by obtaining a warrant under the power in Section 78 of that Act.

The inspectors powers include the power to examine and make enquiry, to require the production of documents, take copies or possession of documents etc, as well as interviewing any person on the premises TPR has reasonable cause to believe is able to provide relevant information.

These powers are limited by provisions providing a number of statutory safeguards, including a requirement that an inspection is to take place at a reasonable time; for the inspector to produce a certificate of appointment; and restrictions on the period within which any documents obtained may be retained. TPR also has a number of internal controls over the use of these powers, which comply with the safeguards to be set out in the Government's code of practice. These include internal written authorisation for an inspection by a suitably senior officer, the recording of the use of these powers, and an inventory of, and safeguards around the handling of, any items obtained.

The legislation does not, however, require TPR to provide advance notice of an inspection, as will be provided for in the forthcoming code of practice, although it is normal practice for TPR to consider doing so unless it would defeat the purpose of the inspection.

The statutory powers to gather information as set out in the Pensions Act 2004 are designed to enable TPR to take a flexible approach when considering the most effective and proportionate way to obtain the information it needs. The vast majority of time it successfully obtains information by requesting what it needs, either on a voluntary basis or by using its powers in Section 72 of the 2004 Act. Very occasionally, these requests are not complied with and an inspection is considered appropriate; or it is considered, given the circumstances of the case in question, that an inspection without a prior request for information should be undertaken. As a backstop, TPR has the power to obtain documents using its power to obtain a warrant, using reasonable force if necessary.

## The Pension Protection Fund

PPF was also established by the Pensions Act 2004 (Part 2). It protects 11.4 million members of eligible defined benefit occupational pension schemes (and the defined element of hybrid schemes) by paying compensation where an employer has a qualifying insolvency event and there are insufficient assets in the scheme to pay benefits at PPF compensation levels.

The PPF commenced in April 2005 and is funded by a combination of:

- an annual levy on eligible defined benefit schemes;
- the assets transferred from schemes for which the PPF assume responsibility;
- recoveries from schemes' insolvent employers; and
- investment returns on assets held.

In the year to 31 March 2014 the PPF: – considered whether it should take responsibility for 160 occupational pension schemes where the sponsoring employer became insolvent and the scheme was unable to meet its liabilities and; having completed its assessment took responsibility for 122 schemes comprising over 28,000 members.

As at August 2014, it is currently progressing 164 schemes through its assessment process which have, between them, an estimated 114,000 members. Currently the PPF is paying compensation to over 104,000 people and has £17.1 billion of assets, and has paid out over £1.4 billion in compensation.

The PPF is also responsible for:

- the Fraud Compensation Fund, that provides compensation to occupational pension schemes in certain circumstances when a scheme has suffered a loss due to dishonesty; and
- the Financial Assistance Scheme, that pays assistance to members of defined benefit pension schemes where the employer became insolvent before April 2005, prior to the start of the PPF.

In undertaking its statutory functions as set out in the Pensions Act 2004, the PPF, like TPR, needs to obtain significant amounts of information from trustees or managers of pension schemes, employers, and others, including insolvency practitioners, which is relevant to its functions. The statutory bases for its ability to obtain information are in Sections 190 to 194 of the 2004 Act.

These provisions are similar to the powers applicable to TPR, although there are regulations (The Pension Protection Fund (Provision of Information) Regulations 2005 [SI 2005 No. 674]) made under the power in Section 190 of the 2004 Act, which set out the information which the Board of the PPF, the members and beneficiaries of certain occupational pension schemes, the trustees and managers of such schemes and certain insolvency practitioners, are required to provide where compensation is, or may become, payable by the Board.

Section 191 of the 2004 Act provides the PPF with the power to request relevant information and documentation from trustees etc. Section 192 provides very similar powers of entry and restrictions as is provided for TPR. For example, the PPF cannot use this power in respect of premises which are private dwellings not used for business purposes; the power does not provide for forced entry; and an inspection must take place at a reasonable time.

When undertaking an inspection, Section 192 also sets out what the PPF may do, and these are also very similar to the provisions covering inspections made by TPR (make examination and inquiry, require the production of documents, take copies and take possession of documents etc).

The PPF also has the power, under Section 194 of the 2004 Act, to request a warrant to obtain documents (using reasonable force if necessary) where the documents have been previously requested and not produced, or if the PPF did request them they could be removed or destroyed etc.

## Reporting/analysis of the review of each power of entry

In reviewing each of the powers of entry applicable to TPR and the PPF we have worked with colleagues in both bodies to consider the extent to which these powers remain valid and/or could be repealed or rewritten, as provided for under Section 42 of the Protection of Freedoms Act 2012.

TPR has six powers under which it may enter premises used for business purposes without a warrant to ensure that specific legal provisions are being complied with, as set out in Sections 73 and 74 of the Pensions Act 2004.

### **Section 73(1) Pensions Act 2004**

The first of these powers is at Section 73(1), and permits an inspector to enter premises for the purpose of investigating whether, in the case of an occupational pension scheme, various legal provisions provided for in the Pensions Acts of 1995 and 2004, the Welfare Reform and Pensions Act 1999, and the Pension Schemes Act 1993 (as listed) are being complied with.

In considering the regulation of occupational pension schemes and the provisions covered by this power, the review was mindful of the significant sums of money that these schemes are responsible for and the consequences for members if something goes wrong.

The combined assets of the 46,000 plus schemes regulated by TPR is some £1.5 trillion, with many individual schemes having assets of billions of pounds and even smaller schemes having hundreds or tens of millions. Although rare, there have been cases of fraud being committed, the most notable in recent years being the G P Noble case, when £52 million was misappropriated.

The review also noted the limited number of times that TPR has decided to use the power in Section 73(1) – six times in the last five years, which confirmed that TPR used these powers in a responsible and proportionate way.

In considering this power the review looked at examples of when it was used. One case arose following concerns reported to TPR about how the assets of a small pension scheme were being invested. Following preliminary enquiries, TPR decided it needed to undertake an unannounced inspection using the power at Section 73(1) to talk to the trustees and obtain evidence; mitigating the risk of documents etc being destroyed. It was discovered that the trustees were using about £100 million of assets from a number of pension schemes to generate approximately £4 million in ‘secret commissions’ for themselves.

As a result, TPR appointed an independent trustee to take responsibility for these schemes, regularise the investments, and bring about a class action seeking to recover the ‘commission’ paid as a result of the earlier investments. As a result of this inspection TPR also referred tax issues to Her Majesty’s Revenue and Customs (HMRC), and details of the individual’s purporting to be Financial Advisers to the Financial Services Authority (FSA), who subsequently prohibited them.

Another example of the effectiveness of the power at Section 73(1) arose when TPR’s Intelligence team learned of the imminent movement of several million pounds of pension fund assets offshore. TPR immediately used its power to appoint an independent trustee to the scheme in question and the power at Section 73(1) to obtain the necessary information in time to enable the new trustee to successfully block the movement of these funds.

The review considered whether it would be appropriate for TPR to rely solely on its power to obtain a warrant in the future in order to gain access, in place of the power at Section 73(1), but concluded that such a change would have detrimental consequences as it would limit TPR’s ability to operate flexibly and proportionately, and could be far less effective than an ‘enabling’ and collaborative inspection under the s.73(1) power in achieving the desired outcomes.

The review therefore concluded that this power should be retained, although there was scope for amending it by consolidating into it the power of entry at Section 74(4) of the 2004 Act, as noted below.

### **Section 73(3), 73(4) and 74(1) Pensions Act 2004**

These three powers relate to provisions in the Welfare Reform and Pensions Act 1999 concerning stakeholder pension schemes. The first, (Section 73(3)) concerns investigations into whether the stakeholder scheme complies with the requirements set out in Section 1 of the 1999 Act (stakeholder pension schemes) and Section 2(4) (registration of these schemes).

The second (Section 73(4)) concerns investigations into whether trust-based personal stakeholder schemes have met the trust-based scheme provisions as set out in paragraph 1 of Schedule 1 to the 1999 Act. The third, (Section 74(1)), concerns investigations into whether an employer is complying with the requirements in Section 3 of the 1999 Act (duty of employers to facilitate access to stakeholder pension schemes).

Stakeholder pension schemes were introduced in 2001 with the intention of encouraging more long-term saving for retirement, particularly among those on low to moderate earnings. The 1999 Act and subsequent 2000 regulations set down a number of conditions that have to be met in respect of these schemes, including a cap on charges, low minimum contributions, and flexibility in relation to stopping and starting contributions.

In considering the three powers of entry that TPR has in respect of the legal provisions governing stakeholder pension schemes, the review concluded that, on the basis that TPR retained its power at Section 73(1) and the ability to obtain a warrant under Section 78 of the Pensions Act 2004, these three powers could be revoked. These provisions have not been, and are unlikely to become, a high priority area for TPR, and the remaining powers would be sufficient to enable TPR to meet its responsibilities in respect of these schemes should action need to be taken.

### **Section 74(4) Pensions Act 2004**

This fifth power, which TPR has used once, relates to investigations into personal pensions with direct payment arrangements (work-based personal pensions have over 2.7 million memberships) and whether payments are being correctly paid into them.

In considering this power, the review noted that it had been used when an employer had failed to pay over £130,000 of pension contributions and had not responded to TPR's requests for information or to take action to resolve the issue. As a result TPR decided that a visit using its Section 74(4) power was the most appropriate and proportionate action to take, and notified the employer of its intention to undertake an inspection. This resulted in the immediate payment of some of the outstanding contributions and, at the subsequent inspection, TPR discussed the employers cash flow profile and agreed a payment plan for the balance of the unpaid contributions.

This approach would not have been possible if TPR had entered the premises with a warrant, as this would have limited TPR's action to obtaining documents/information. It would not, therefore, have enabled a constructive investigation to take place, with the cooperation of the employer, which reached an acceptable conclusion.

Given the importance of ensuring that TPR is able to effectively investigate such cases of non-compliance, the review concluded that:

- this power should be retained; and
- it should be consolidated with the power in Section 73(1).

### **Section 74(A1) Pensions Act 2004**

The sixth and final power was inserted into Section 74 of the Pensions Act 2004 by Section 61(3) of the Pensions Act 2008, and covers investigations as to whether employers are complying with their duties to auto-enrol their employees into a pension scheme.

This is a major government initiative to increase the number of people saving for a pension and is being rolled out from 2012 to 2018, starting with the largest employers and progressively applying to smaller ones. It is estimated that these duties will apply to some 32,000 medium-sized employers in 2014/15 and over 769,000 small and micro-sized employers in the two years 2015/16 to 16/17.

This power has only recently started being used by TPR, when it notifies employers of its intention to undertake an inspection with a view to helping them meet their new auto-enrolment duties. In the first use of this power, which has now been used on six occasions, TPR inspected the employer's auto-enrolment processes and discussed the difficulties faced by the employer in complying with the legislation. The outcome was that TPR gained a much better understanding of the employer's difficulties and was able to work directly with the employer to enable it to comply with its new duties. This approach (as with other examples) is not possible using TPR's power to obtain a warrant, which would not have been proportionate given the need to engage with the employer in a constructive manner.

The review considered whether it would be possible for TPR to make greater use of its power to obtain a warrant when undertaking these inspections, but concluded that this was not the case. Whilst obtaining a warrant may well be appropriate for some inspections, for example, when TPR was undertaking enforcement action with an employer who was uncooperative, it would not be the right approach for all inspections, for example, where TPR was seeking to engage with and assist employers, to understand their concerns and help them comply with their new duties.

The review concluded that, for the next few years, TPR will need the ability to adopt a flexible approach to ensure employers comply with their new auto-enrolment duties, and this includes the ability to undertake inspections of premises used for business purposes without obtaining a warrant, especially as these duties become applicable to smaller employers.

However, the review recognised that it was still early days in the implementation of this policy and that, accordingly, TPR's need for this power should be reviewed in 2017, when TPR will have had practical experience of enforcing these duties, especially in respect of small/micro employers.

### **Amendments to the powers at Section 73(1) and 74(A1) Pensions Act 2004**

In considering TPR's powers of entry it was noted that there was no legal requirement for TPR to give notice of a visit (even though this is TPR's normal practice). In line with proposals for the Government's code of practice, the review recommends that the remaining powers in Sections 73(1) and 74(A1) are amended to require notice, unless such notice would defeat the purpose of the visit.

### **Power to obtain a warrant – Section 78 Pensions Act 2004**

The review concluded that TPR's ability to obtain a warrant, for the rare cases where this course of action was considered appropriate, should be retained.

### **Section 192 Pensions Act 2004**

The PPF has one power, at Section 192 of the Pensions Act 2004 Act, under which an appointed person may enter certain premises (as defined) used for business purposes, without a warrant, to obtain information to support the functions of the Board of the PPF.

Section 192 sets out a number of restrictions on how the power may be used and details what may be done. The power does not apply to any private dwellings not used for trade or business purposes; entry must be at reasonable time; a certificate of appointment must be produced if requested; and there are restrictions on the length of time any documents obtained may be retained.

When undertaking a visit, Section 192 provides that the inspector can examine and make enquiries as necessary, require the production of relevant documents, take copies and/or take possession of appropriate documents, and examine any person on the premises who can give relevant information.

As with TPR the PPF uses its power at Section 191 of the 2004 Act to request information from trustees/ employers etc, and has a power (at Section 194) to obtain a warrant to enter premises, using reasonable force if necessary, in addition to its power of entry at Section 192.

In considering the case for retaining the PPF's power of entry at Section 192, the review noted the large amounts of money that can be held in pension schemes and the number of members involved, and took account of the need for the PPF to be able to speedily obtain information to reach decisions on whether or not to take responsibility for a pension scheme and to make compensation payments to members.

The review also noted that the threat of a possible inspection by the PPF could encourage trustees etc to speedily comply with the PPF's written requests for information.

However, it concluded, on the basis that the PPF has never used the power at Section 192 and was unlikely to do so to any significant extent in the future, that this power should be revoked. In reaching this view, the review was mindful that should the PPF need to gain access to premises it would still be able to do so having obtained a warrant under its powers in Section 194 of the 2004 Act.

In considering the consequences of the loss of the power at Section 192, it was agreed that DWP and PPF officials would look at the wording of Sections 191 and 194 of the Pensions Act 2004 to see if either needed amending to ensure that the PPF retained the ability to obtain the information it needed to function effectively.

## Annex B

# Detailed report of the powers of entry relating to Child Maintenance Group

In line with the cross-government review, officials have recommended that while Section 15 should be retained, there should also be the addition of a further safeguard included to ensure that the power is exercised in a way that is fully compliant with the terms of the Protection of Freedoms Act 2012.

As a Category B power, The Child Maintenance Group's intention is that Section 15 will be amended to include, where an occupier in England and Wales refuses to allow access to premises to an officer utilising their powers of inspection, the Department for Work and Pensions (DWP) will then be required to obtain a judicial warrant from the Magistrates' Court to gain access to acquire the necessary information. Consultations will also be made with devolved administrations in relation to extending the intended changes to Scotland and Northern Ireland.

Section 15 operates as an incentive for a non-compliant individual to provide information and although the power is used in only a small number of cases, these are the most difficult cases. The Secretary of State is required by the Child Support Act 1991 to consider the best interests of children when taking decisions under the Act, and the retention of this power, with the additional safeguard of a judicial warrant where entry is refused is considered to be necessary to protect children's best interests.

There is a clear and specific justification for retaining the power and the addition of the proposed safeguard should give additional assurance it is being exercised appropriately and proportionately.

## In the future

It is our aim to publish an implementation plan by summer 2015, setting out a clear timetable detailing the milestones and target dates relating to the proposed changes to the Section 15 powers of entry.

Amendments to the Section 15 powers are intended to be made by spring 2016.

## Annex C

# Detailed report of the powers of entry relating to the Fraud and Error Service

The Fraud and Error Service (FES) has responsibility for one piece of legislation containing powers to enter an occupier's premises when investigating suspected benefit fraud; namely the power contained in Section 109C of the Social Security Administration Act 1992.

**Section 109C** provides authorised officers with powers of entry to certain premises only with the consent of the owner/occupier of the premises. An authorised officer may enter premises either on their own, or with other persons. These persons could be other Jobcentre Plus officers, local authority (LA) officers, officers from other government departments or other persons with a legitimate interest that is clearly linked to the reason for the visit, for example, matters related to benefit fraud that give rise to the visit. The presence of non-Department for Work and Pensions (DWP) accompanying officers at premises must be lawful and authorised by the officer's own legislation. On no account may a person make use of a visit to further their own independent enquiries.

### Premises liable to inspection

In accordance with **Section 109(C)(4)(a)** an authorised officer may seek entry to premises where he has reasonable grounds for suspecting that they are a person's place of employment. An authorised officer can seek entry to anywhere a business or trading activity is taking place in accordance with **Section 109C(4)(b)**, which describes business premises as:

‘premises from which a trade or business is being carried on or where documents relating to a trade or business are kept by the person carrying it on or by another person on his behalf’.

In addition, an authorised officer can seek entry to any premises where information relating to a trade or business is kept by the owner/employer or by someone who is acting on their behalf. The premises where information is kept need not be the same place as that where the trade or business is being carried out.

Documents may be held by solicitors. Information may not be requested where it is the subject of legal privilege, for example, confidential communications between a legal adviser and his client for the purposes of giving or receiving legal advice, or any information obtained or documentation prepared for the purposes of legal proceedings, as opposed to business records simply being held by a solicitor. Authorised officers will not seek entry to a solicitor's premises without first obtaining legal advice from the Crown Prosecution Service, or (in Scotland) via the Central Prosecution Team.

**Section 109C(4)(c) allows for an authorised officer to enter premises where he has reasonable grounds for suspecting they are** premises where a personal or occupational pension is being administered from or where details of a personal or occupational pension can be obtained. This could be a business, office premises or trading premises. For example, an insurance company or accountant's office, that is in a different location from the place where the business or trade is being carried out.

**Section 109C(4)(d) allows for an authorised officer to enter premises where he has reasonable grounds for suspecting they are** premises where a compensator<sup>3</sup> is to be found. This will normally be an employer's premises or those of their insurance company, an accountant's office, a government department, etc.

**Section 109C(4)(e) allows for an authorised officer to enter premises where he has reasonable grounds for suspecting they are** premises of someone that holds information on behalf of a compensator.

An authorised officer should only attempt to visit premises liable to inspection during the employer's hours of business. If an authorised officer is making a notified visit, then that visit should suit the owner/occupier or employer. Where it is decided to make an un-notified visit, this must be during the employer's normal working hours. Similar principles apply to any occasion when visiting a private dwelling house.

An authorised officer can seek entry to premises used wholly, or in part, as a private dwelling where there are reasonable grounds for suspecting that:

- a trade or business is being conducted;
- documents relating to a trade or business are kept by the persons carrying it on or by another person on their behalf.

Whenever an authorised officer seeks entry to a private dwelling or part of a private dwelling, the request must be fully justified, for example, there must be good and firm evidence that the trade or business is being carried out at the dwelling or that relevant documentation is kept there.

Where firm evidence for the use of Section 109C powers of entry do exist, the authorised officer should attempt to visit the owner/occupier in the normal way, by notified or un-notified visits, as appropriate in the circumstances of the individual case. A record of all attempted visits and letters sent to, or received from the owner/occupier must be kept.

<sup>3</sup> Compensator refers to a person who is the compensator in relation to an accident, injury or disease as is referred to in section 109A(2)(b) of the Social Security Administration Act 1992.

Authorised officers:

- **must never** attempt to force an entry;
- **must always** obtain consent to enter the premises from the owner/occupier;
- **must show** their Certificate of Authorisation;
- may once on the premises, remain there only if the owner/occupier continues to consent to their presence;
- **must leave** the premises if asked to do so;
- **must never** enter premises if the only occupant is, or appears to be, under the age of 17, for example, a minor or juvenile as legally defined in the Police and Criminal Evidence Act 1984 (England and Wales).

Whenever questioning an employer, or their representative, on a visit to premises under Section 109C, an authorised officer must advise them that they are not required to provide any information (whether documentary or otherwise) that tends to incriminate them or, in the case of married/civil partners, their spouse/civil partner. Evidence obtained from a person without giving this warning and used to obtain a conviction, is likely to be a breach of Article 6 of the European Convention on Human Rights; for example, the right to a fair hearing, and a breach of Section 109C.

## Outcome of the review

The conclusion of the review is that Section 109C of the Social Security Administration Act 1992 is a category A power, that is, it contains a legislative power of entry that is still relevant and considered necessary by those who exercise them. Section 109C provides for a necessary and critical power for the prevention and detection of social security benefit fraud, and there is a clear and specific justification for retaining the power in its existing form and no changes will be made to the Act under this review. DWP has considered the safeguards it currently has in place to ensure they are appropriate, effective and commensurate with its fraud investigation activities and has found them to be fit for purpose. The safeguards ensure the power is not used in excess of requirements or without a proportionate need and is exercised in a way that is fully compliant with the terms of the Protection of Freedoms Act 2012.

# Annex D

## Detailed report of the powers of entry relating to the Health and Safety Executive

The Health and Safety Executive (HSE) has responsibility for six pieces of legislation containing powers of entry (PoE) and for relevant associated powers that can be divided into two distinct categories and are listed below: Category A contains legislative PoE and associated powers that are still relevant and considered necessary by those who exercise them. There are two powers in this category. Category B contains four PoE and associated powers that are either no longer used or that are already being considered as part of other reviews.

### Category A (Relevant and necessary powers)

The relevant and necessary powers that have been reviewed are found within:

- the Health and Safety at Work etc Act 1974 (HSWA): HSWA contains a PoE and a range of associated powers; and
- the Gas Safety (Rights of Entry) Regulations 1996: these regulations have PoE attached to them for gas suppliers.

### Category B (Unnecessary and or under separate review)

The four pieces of legislation, which HSE has already identified as no longer necessary or that are already part of a wider ongoing review are:

- the Explosives Act 1875: This was revoked on 1 October 2014;
- the Biocidal Products Regulations 2001: these regulations have been revoked and consolidated with other regulations into a single set of regulations called the Biocidal Products and Chemicals (Appointment of Authorities and Enforcement Regulations) 2013;

- the Submarine Pipelines (Inspectors etc) Regulations 1977: the majority of these regulations have been revoked and the remainder are currently being considered as part of the Red Tape Challenge to establish whether they are still necessary; and
- the Petroleum (Consolidation) Act 1928: Powers of entry under this Act were revoked on 01 October 2014 by the introduction of the Petroleum (Consolidation) Regulations 2014

## Aims of HSWA

The specific aim of HSWA is to secure the health, safety and welfare of people at work, protect the health and safety of the public who may be affected by the activities of people at work, and control the keeping and use of explosive or highly flammable or otherwise dangerous substances. It provides the vires and powers for the properly appointed inspectors of HSE, Office for Nuclear Regulation (ONR), Office of Rail Regulation (ORR), Department for Transport (DfT), Vehicle and Operator Services Agency (VOSA), Home Office (HO) and LAs.

The figure for the number of workers fatally injured in 2012/13 in Great Britain is 148<sup>4</sup> and there were 78,000 reportable injuries to employees. In 2012/13, HSE followed up over 10,000 complaints, commenced over 3,200 investigations into incidents, and undertook 22,240 proactive inspections. The total estimated cost associated with workplace injury and ill health in Great Britain in 2010/11 was £13.8 billion. This total reflects the fact that injuries and illnesses have fallen in the four years prior to that. ORR statistics for the rail sector for 2011/2012 show that 66 people died on the mainline railway and 419 people suffered major injuries.

In the last eight months of 2012, VOSA conducted 555 checks on vehicles carrying dangerous goods, 42 per cent of which did not comply with the carriage of dangerous goods regulations.

## Powers of Inspectors – Power of Entry

Inspectors appointed by an enforcing authority under Section 19 of HSWA have powers of entry and associated powers so as to enable them to enforce the relevant statutory provisions of the HSWA and associated regulations. These enforcing authorities have a high public profile as regulators and this means that those with whom they interact rarely challenge the use of their powers. Where it is necessary to formally identify themselves and explain the extent and application of their powers to duty holders (which is something they can quite properly be required to do), entry is usually given by consent (failure to do so would be a criminal offence).

Inspectors do not formally exercise their powers every time they visit premises. Powers of entry and associated powers are usually only formally invoked where necessary and appropriate, for example during an investigation or when taking enforcement action. This can be particularly relevant when establishing the propriety of evidence being obtained by that inspector. The apparent low usage is therefore an indicator of successful regulation and compliance and not an indication of their importance.

<sup>4</sup> <http://www.hse.gov.uk/statistics/>

## Associated powers

The relevant associated powers under Section 20 of HSWA were provided for the efficient and effective inspection, progress of an investigation or other intervention, or enforcement. To enable a regulator to discharge its duties under Section 19 HSWA, and in line with Section 1 HSWA, inspectors need to be able to gather evidence which requires the use of the associated powers. If an inspector had the power of entry without the associated powers, for example, to take measurements or copies of documents, they would be potentially unable to legally obtain evidence of an appropriate standard, so as to bring a duty holder who has committed an offence to justice.

## Necessity

The powers of entry and associated powers were considered necessary to enable inspectors to do the following:

- Investigate accidents and incidents arising from systemic failures in health and safety management and, if appropriate, enforce the provisions of HSWA, for example, following a case of carbon monoxide poisoning in a domestic property (HSE).
- Inspect higher risk workplaces to assess the effectiveness of risk management measures, taking action to prevent the risk of serious personal injury/illness where appropriate (HSE and LAs).
- Safeguard the public by challenging the rail industry to improve its health and safety performance and prevent people being killed, injured or made ill as a result of its activities (ORR).
- Secure the protection of people and society from the hazards of the nuclear industry (ONR).
- Protect life by working to ensure that certain high risk substances cannot be stolen from sites by those who may wish to use them in a terrorist attack within the UK (DfT).
- Protect life by checking that vehicles comply with the Carriage of Dangerous Goods by Road Regulations (VOSA).
- Protect life by ensuring that explosives are kept securely (HO and LAs). Explosive Liaison Officers, who are police staff, cannot use the powers of police officers and are therefore wholly reliant on their Section 20 powers.

## Proportionality

HSE works with approximately 382 individual LAs who are responsible for regulating over 1.6 million workplaces. The Health and Safety (Enforcing Authority) Regulations 1998 (EA Regulations) allocate the enforcement of health and safety legislation at different premises between LAs and HSE. In general, LAs are the main enforcing authority in retail, wholesale distribution, warehousing, hotel and catering premises, offices, and the consumer/leisure industries. It should be noted that under the EA Regulations 1998<sup>5</sup>, LAs may only undertake enforcement activity in ‘non-domestic’ premises.

<sup>5</sup> <http://www.legislation.gov.uk/uksi/1998/494/body/made>

In his report, Professor Löfstedt<sup>6</sup> recommended that HSE be given a stronger role in directing LA enforcement activity. In response to this recommendation and as an outcome of the Red Tape Challenge on Health and Safety, a National LA Enforcement Code<sup>7</sup> has been developed. The Code is designed to ensure that LA health and safety regulators take a more consistent approach to enforcement. The Code includes a Section on the training and competence of LA health and safety inspectors, including procedures to legally authorise competent inspectors to use the powers granted to them under HSWA in a proportionate manner.

HSE and ONR use the powers in accordance with publicised procedures that are transparent and accountable, see <http://www.hse.gov.uk/enforce/enforcementguide/investigation/physical-obtaining.htm> for more information.

Powers are used by trained inspectors who are appointed by statute following appropriate training specifically on the use of PoE to ensure that such use is proportionate.

Inspectors operate within agreed intelligence-led procedures and target premises in accordance with published strategies and enforcement policies and procedures, see <http://www.hse.gov.uk/enforce/> for more information.

In addition, incident selection criteria are used to decide on which investigations should be pursued, see <http://www.hse.gov.uk/enforce/incidselcrits.pdf> for more information.

There are also further publicised operational procedures related to inspection, investigation and complaints, see <http://www.hse.gov.uk/foi/internalops/og/ogprocedures/index.htm> for more information. LA's have similar procedures.

## Current safeguards

HSE has also considered the safeguards it currently has in place in relation to its powers of entry and associated powers. The HO<sup>8</sup> guidance states that all necessary PoE and associated powers should have as many relevant safeguards attached to them as possible to protect individuals and businesses from intrusion.

## Safeguards in relation to private dwellings

HSWA gives a PoE and associated powers to HSE inspectors to enter 'any premises' (which includes domestic premises) to carry into effect any of the relevant statutory provisions within their enforcing authority's field of responsibility. In practice, therefore, the need for enforcing authorities to enter premises is limited to premises where a work activity is being carried out or where it is necessary to control the keeping and use of explosives or highly flammable or otherwise dangerous substances, or where there may be evidence (for example, documents or other material) that relates to such activities. There is an exception to this in Section 51 of HSWA, which disapplies the Act in respect of domestic service<sup>9</sup>.

<sup>6</sup> <https://www.gov.uk/government/publications/reclaiming-health-and-safety-for-all-lofstedt-report>

<sup>7</sup> <http://www.hse.gov.uk/lau/national-la-code.pdf>

<sup>8</sup> <https://www.gov.uk/powers-of-entry>

<sup>9</sup> A person employed as or employing another as a domestic servant in a private household is not subject to the substantive parts of the HSWA.

In the construction sector, HSE inspectors carry out inspections of construction sites, which may be in or around domestic premises, many of which are still occupied during the construction work. Usually, places of work are not domestic premises, but some examples where the PoE and associated powers are necessary and provide a compelling case to enter domestic premises are described below.

- During the investigation of a fatal accident on a fairground, inspectors may require access to areas where the paperwork related to the running of the fairground is in the home of the fairground worker. This might be fixed premises, such as their winter quarters, or in a mobile home at a temporary site. It may be necessary to access the office or mobile home to collect evidence, for example, manuals related to machinery, safe systems of work, training records etc, where people are working from home and storing dangerous substances for example, cylinders or pesticides.
- When a dangerous gas appliance is found, to investigate the installer's or landlord's duties, and make sure that the premises are safe for its occupiers to return to.
- Investigating a complaint or accident to a peripatetic care worker or a member of the public in their own home, for example, related to manual handling equipment or other care-related tasks which may have caused injury or have the potential to.
- Enforce health and safety legislation where peripatetic workers in domestic property or those adjacent to domestic premises may work in a manner that puts themselves and others at risk.
- PoE are necessary to gain access to a garden at a domestic premises, for example, an arborist has been or is working on a tree where there is a danger of serious personal injury, or where there has been overspray from a nearby agricultural activity.

Entry is required by inspectors appointed to deal with special hazards:

- Explosive Liaison Officers need to gain access to the premises of those who are registered or licensed to manufacture or store explosives in domestic premises, to check the security of storage and protect members of the public.
- DfT Transport Security Inspectors need to visit farms or small hauliers where the domestic premises can also be the business premises.
- ONR inspectors may need to enter a private dwelling to ensure the security of nuclear-related information or material held off-site.

Where there has been a fatal accident on a farm or a construction site, or a death from carbon monoxide poisoning, there is a paramount need to gather evidence, to fully and thoroughly investigate. There is a public expectation that enforcing authorities will take decisive action in these situations to deliver justice for the bereaved.

## Use of judicial warrants and access to private dwellings – unqualified entry

HSWA currently provides inspectors with the power to enter any premises to carry out their duties without a judicial warrant. HSE has looked closely at this issue and feels that exceptional circumstances do apply to the duties under Section 20 of HSWA and that it should not be necessary to apply for a warrant authorised by a Justice of the Peace if consent is not given. The reasons are set out below.

It is not practicable to require inspectors to apply for warrants if they need to get into a property because warrants are applied for on the basis of a suspicion that an offence has occurred. HSE prosecutes several hundred cases a year, but it inspects many thousands of premises. The primary aim of inspections is to check for compliance with HSWA. It is during inspections that breaches of health and safety legislation may be uncovered. It may not be possible to apply for a warrant as there may be no suspicion of an offence.

Alternatively, it might be clear that an offence has been committed, in which case the possible existence of a danger would make the situation time-critical and the application for a warrant would delay inspectors taking the necessary action.

The inherent difficulty with the judicial warrant procedure is that it is designed as part of the system for the prosecution of crimes. HSE does not only have a role as a prosecutor; it has a proactive role in improving safety with a view to preventing accidents and ill health. Even where it is acting in a reactive way, for example, when investigating accidents, these investigations are not undertaken purely with a view to obtaining a successful prosecution. They are also undertaken to understand why such accidents occur and with the aim of preventing their reoccurrence.

Finally, as currently drafted, there is no provision within HSWA for inspectors to apply for judicial warrants if they need to get into a property. To enable inspectors to obtain such a warrant, the Minister would need to make use of the Order-making powers in the Protection of Freedoms Act. This is a complicated process that could take up to a year.

For the reasons stated above, HSE believes it is not appropriate to use judicial warrants to access property. There have been several reviews of health and safety over the years<sup>10</sup> and none of these reviews have identified the lack of a judicial warrant as being something that is problematic in the context of HSE's regime.

## Internal written authorisation to exercise the powers

Section 19 of HSWA states that every appointment of a person as an inspector under this section shall be made by an instrument in writing, specifying which of the powers conferred on inspectors by the relevant statutory provisions are to be exercisable by the person appointed.

<sup>10</sup> In addition to the reviews of health and safety by Lord Young and Professor Löfstedt, the Regulatory Enforcement and Sanctions Act (RES) was part of the then Government's commitment to implementing the Hampton agenda. It sought to advance Hampton's vision of a regulatory system, that was risk-based, consistent, proportionate and effective. Part 4 of the Act, required regulators to review their functions, not to impose unnecessary burdens, and unless disproportionate or impracticable, to remove burdens that were found to be unnecessary.

An inspector shall, in light of his appointment under Section 19(2)(a), be entitled to exercise only such of those powers as are so specified and under Section 19(2)(b), be entitled to exercise the powers so specified only within the field of responsibility of the authority which appointed him/her. HSE inspectors hold internally-issued warrants that are proof of their appointment and authorisation for them to carry out their duties.

HSE inspectors must complete an extensive programme of training and must operate under appropriate supervision until considered competent to exercise their powers in an appropriate and proportionate way.

Under Section 19(4) of HSWA an inspector may be required to show proof of their appointment. Section 20 does not confer a power to search premises (or enter for that purpose).

## Provision of reasonable notice

Unless the inspector has cause to think that a situation may be dangerous, entry must, by statute (HSWA Section 20 (2) (a)), be 'at any reasonable time', which does not of itself necessitate having to give notice. Where the situation may be dangerous, the inspector can enter premises at any time. Where appropriate, however, it is standard practice to seek consent before entering premises, particularly domestic premises.

## Exclusion of force

None of the powers given to inspectors by virtue of HSWA can be enforced using any degree of physical force. If entry is refused, inspectors cannot enter by force. Section 33 (1) (h) of HSWA states that it is an offence 'intentionally to obstruct an inspector in the exercise or performance of his powers or duties'. Ultimately, an occupier can therefore refuse entrance as long as they do so in the full knowledge of the ramifications of that decision, i.e. that they are committing a criminal offence.

## Providing occupants with a copy of inspectors' written authorisation to enter the premises

Under HSWA, there is no authorisation needed for each entry, but inspectors may be required to display proof of appointment.

It is HSE's practice for inspectors to show their warrant/identity card to duty holders and to give them a business card on arrival as a means of proving their identity. For example, <http://www.hse.gov.uk/aboutus/howwework/standards.htm>

## Complaints procedures

HSE/ONR/ORR/VOSA and LAs all have longstanding procedures for dealing with complaints against their staff (this does not relate to complaints about decisions made by staff, for which there is a different procedure). In addition, an independent Regulatory Challenge Panel has been set up to look into complaints regarding advice given by HSE or LA inspectors about health and safety which may be incorrect or goes beyond what is required to control risk adequately.

## Recording the exercise of powers

The formal exercise of the power of entry is recorded by individual inspectors in their notebooks.

## Leaving premises secure and as close to the condition they were in when entered

Inspectors have the power to require that premises are left undisturbed in Section 20(2)(e) of HSWA, but there is no comparable requirement for the inspector to secure premises.

However, the power referred to in Section 20(2)(h) – to dismantle or test substances or articles found – is qualified by a requirement not to cause damage other than may be necessary and, under Section 20(4), to allow the persons responsible for that article/substance to be present during the procedure.

HSWA does not contain a provision requiring that premises be left in a state as near as possible to the condition in which they were found. However, as a matter of policy, inspectors would only be exercising their powers to the extent necessary to properly apply and enforce this Act.

## Limiting the maximum number of officials entering premises at any one time

Inspectors are empowered to take with them any other person duly authorised by the inspector's enforcing authority. This is, for example, to allow HSE staff to take specialist inspectors or scientists into premises with them. Inspectors can also take a constable with them if they believe they are likely to be obstructed or there could be a breach of the peace.

## Seizing items and providing inventories

The HSWA does not give its inspectors any powers to search or seize. Under Section 20(6), where an inspector exercises the power to take possession of a substance or article referred to in Section 20(2)(i), the inspector must leave a notice containing the particulars of the article or substances taken, and, where possible, allow the person responsible for that substance/article to take a sample of it.

## Review of Gas Safety (Rights of Entry) Regulations 1996

### General

These regulations are used by gas transporters (Southern Gas Network, Northern Gas Network, Wales and West Utilities, National Grid Gas and Northern Gas) to ensure the safety of gas systems. Although those exercising these powers are not part of any central or local government direction for regulatory enforcement, their powers fall within the remit of this review as set out by the HO. The powers are used as follows:

- Regulation 4 is used to carry out work necessary to prevent gas escapes and take other necessary steps to avert danger to life and property. A public gas transporter can enter if they have reasonable cause to suspect gas they have conveyed is escaping or may escape. They can carry out any work necessary to prevent the escape to avert danger to life/property.
- Regulation 5 is used to carry out work to inspect any gas fitting on the premises, any flue or means of ventilation used in connection with any such gas fitting, or any part of the gas system on the premises where it is for the purpose of averting danger to life or property. A public gas transporter can enter to inspect, test and/or disconnect network pipes and/or fittings.

The power is used on a regular basis. As an illustration, National Grid Gas used the PoE for 306 single emergency jobs during the year 2012/13.

### **Safeguards – Access to private dwellings**

The ability to be able to gain access to premises quickly, where there is either a smell of gas or reason to suspect gas is escaping, is imperative to avert danger to life or property. The regulations only allow entry into dwellings under certain prescribed circumstances. These are:

- if the gas transporters suspect that gas has escaped or will escape or to avert danger to life or property;
- if inspectors consider that there is a danger to life or property they can force entry without a warrant. In these circumstances (that is, an emergency) there would be no time to apply for a warrant.

There are additional requirements where it may be necessary to obtain a warrant, but these are for non-urgent purposes.

## **Conclusions**

### **General**

HSE acts in the public interest to reduce work-related death and serious injury across Great Britain's workplaces. As such, it enforces where people create serious risks, put others in danger or flagrantly flout the law. HSE provides support to businesses in helping them understand and manage their legal duties. HSE works with co-regulators in local authorities to inspect, investigate and, where necessary, take enforcement action. Ultimately, HSE is working to help sustain an innovative, technological and progressive economy, with prosperous companies and safe workplaces.

The powers HSE derives from the HSWA are essential to its everyday operational needs. The majority of staff are frontline and they include highly-trained inspectors, skilled scientists and other specialist staff. HSE regulates sectors including: construction; agriculture; general manufacturing; engineering; food and drink; quarries; and domestic gas safety.

HSWA regulators also deal with hazardous industries: chemicals; gas; offshore; pipelines; mining; diving; explosives; and biological agents. These are industries vital to the economy, but which, because of their nature, need independent regulatory oversight by experts. The Office for Nuclear Regulation (ONR) regulate and inspect all aspects of the civil, military and power generating nuclear industry to ensure compliance with safety standards.

If the PoE and associated powers under HSWA were lost, it would be impossible for inspectors to provide the protection which the HSWA requires. It would not be possible to enforce the law and deal with serious risk, whilst protecting members of the public. This would encourage the flagrant breach of basic legal protections for economic gain and advantage, and would ultimately harm the economy due to the associated societal costs of accidents and injury.

DfT consider that the loss of their powers would render them unable to determine breaches of security requirements within buildings and their surrounding enclosed site, and to require their rectification. This could ease criminal or terrorist access to high consequence dangerous goods, which would create a significant risk to public safety and property. VOSA would be unable to check vehicles for dangerous goods, which could affect public safety.

In relation to private dwellings, if the HSWA powers were to no longer apply, people working or living in domestic premises would have a lower level of protection than others, as would any members of the public in the vicinity. In addition, any kind of targeted intervention, inspection or investigation regime in private dwellings, for the few occasions when this is necessary, would be rendered impracticable. There would therefore be a risk of more dangerous work practices being undertaken, potentially leading to less protection of workers and members of the public from the risk of serious injury.

## Gas Safety

In relation to the Gas Safety (Rights of Entry) Regulations 1996, if there were no PoE, gas distribution networks could not fulfil the obligations placed upon them to ensure that the public is safeguarded against the risks posed by gas emergencies. This includes attending to and making safe all gas escapes, including those which are downstream (that is, internal), for example, gas escapes, emissions of carbon monoxide fumes or other hazardous situations could not be dealt with immediately. The gas transporters consider that these regulations are therefore necessary for the proper protection of life and property.

## Overall conclusion

HSE therefore proposes that no changes be made to HSWA or the Gas Safety (Rights of Entry) Regulations 1996.

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