

# **UNISON's Consultation Response to The future of the Local Better Regulation Office and extending the benefits of the Primary Authority Scheme (16/09/2011)**

## **About this Response**

This response is on behalf of UNISON nationally. In formulating this response, we have consulted with our members who work in local authority enforcement, particularly those working as environmental health officers (EHO's). We

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This response may be published in its entirety.

## **About UNISON**

UNISON is Britain's biggest trade union with almost 1.4 million members. Our members work in the public services, for private contractors providing public services, and in the essential utilities. They include frontline staff and managers working full or part-time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

## **The tone and approach within this Consultation Document**

Our EHO members are concerned that the Government seems to have made a political commitment to end "tick box regulation" without defining what that means. Presumably this decision was made on the strength of advice from business and the LBRO. Many regulators do not recognise that description of their performance. Within the limits of their remit, they are sensitive to the needs of business and as helpful as their roles allow.

### **Question3 - Do the arrangements for the representative steering group and the draft memorandum of understanding provide sufficient assurance that the BRDO will be sufficiently independent?**

No. To quote one EHO member: "Within the limits of their remit, they [regulators] are sensitive to the needs of business and as helpful as their roles allow... Sometimes it seems that this is neither understood nor recognised and I am not confident that regulators will be allowed the voice of a full partner." In addition reference is made to involving stakeholders with an interest in better regulation including businesses and regulators, but trade unions are notable by their absence. There is no mention of trade unions which clearly have an interest in better regulation, as applied by our members within enforcement (the regulators) and for our members who are protected by the regulations.

**Question 8 – Do you agree that eligibility for the Primary Authority scheme should be broadened by removing the requirement for a primary authority to: itself regulate the business in all areas covered by the partnership/only cover regulated activities that coincide within the primary authorities area?**

No. It is hard to see how a LA could give expert advice to a regulated business within a partnership, on a business area for which they have not experienced the practical operational problems that may occur. This is all the more important if the advice they give is "assured" and binding on other LAs.

The experience of one local authority is that they "support the the principle of primary authority. If our local businesses want us to provide it we do so. However, there is no appetite for it in our local businesses nor, apparently, in Wales."

EHO'S are also concerned extending the primary authority scheme and inspection plans may allow the regulated standards to slip. The consultation document states that participating businesses are able to work with their primary authority to develop an inspection plan and thereby agree priorities for inspections nationally. This allows other local authorities to focus their resources, eliminate unnecessary checks, and save time and resource for both business and the local authorities. However, if a company has help with their compliance, especially in the primary authority's area, there is a real risk in the experience of our EHO members that standards can slip in other authorities' areas, with little recourse, as these other authorities may be limited in the scope of action they can take.

There is also a worry that the primary authority scheme could skew local authority resources and thereby reduce the level of support they are able to give to SMEs. If the primary authority scheme is to be extended there will need to be a way of ensuring that local authorities do not become overwhelmed or under-used.

As identified within the consultation document, the scheme allows local authorities to recover the cost of providing assured advice and business support, which then allows that authority to use its scarce resources to support SME's. However, if some authorities were to become overwhelmed by their primary authority role, whilst others suffer a respective decline in work and subsequently resources, this could see the former authorities with too little time to support SME's within their area, and the latter authorities with a lack of financial resources to support SME's within their own area. Both to the detriment of SME's.

This point is further developed by the concerns of a UNISON EHO member: "I am also concerned that larger private sector companies may seek out local authorities which they perceive to be more favourable... in terms of their mindset or that... are considered to be... weak[er]." This has been seen to be the case with building regulations and related inspections whereby these may be conducted by the local planner or another accredited body or person. Developers have been found to build a relationship with inspectors that give them more favourable interpretations.

## **Question 9 - Extending the primary authority scheme to different business models**

Enterprise Inns with its leased pubs and its landlord tenants who are in the main small businesses operating just one pub is given as a case study. It is stated that it has a compliance service to support tenant compliance with health and safety requirements. Apparently 40% its tenants are currently signed up to this service and this proportion is growing. New tenants are required to take on the health and safety management system as a requirement of their tenancy. If the primary authority scheme eligibility was extended, Enterprise Inn's tenants would be covered by the scheme.

One EHO and UNISON member is currently dealing with two premises belonging to Enterprise Inns which have been taken over by new tenants. This EHO is concerned that they found that the tenants are not given any knowledge or training but are expected to sign multiple documents on the same day as taking on their tenancy to demonstrate that they are fully aware of their health and safety responsibilities, etc. These documents are being signed unread, due to the sheer number of documents which they are being expected to sign. This is hardly the model of good practice that it is being held up to be.

The government has said that it is committed to "end the culture of 'tick-box' regulation" as quoted within this consultation document, but here we have a clear demonstration that the primary authority could and self-regulation can be misused by employers/organisations. Rather than challenge a perceived "tick-box" culture, these proposals could result in a meaningful approach to regulatory compliance being replaced by such a tick-box exercise.

To quote one member EHO: "The weakness of [the] Primary Authority Scheme as it stands is that there is an assumption that there is no inconsistency within the private sector in the way different outlets of the same company operate in terms of conducting their business. The reality is that examples of inconsistency can [also] be found in the... private sector," and even within the same business organisation.

Another EHO member reported: Yesterday I visited a multiple retailer following a complaint about an ongoing major refit. No asbestos survey had been carried out even though walls, ceiling, and floors were being disturbed. The shop remained open with trailing cables, propped up shelving and major drilling, creating lots of dust over the products and general environment.

Self-regulation approaches are not a viable alternative to regulation and enforcement, and have "failed" where they have been tried. This is confirmed in the US, where an investigation just this year, by the Centre for Public Integrity concluded that since 2000 at least 80 workers had died in 'model' workplaces exempted from some official safety inspections under a 'Voluntary Protection Program (VPP)'.

Critics of the program suspect some companies in VPP of operating a system of 'cosmetic compliance', demonstrating only that they are good at preparing paperwork. Wade Smith, a former safety official for some of the USA's largest construction contractors said that contractors in VPP are no safer than those that aren't; they're just better at looking like they're safe. "They do their little song and dance in front of [the regulator]... It's just paperwork; that's all it is."

## **Question 10 - Earned Recognition and Extending Inspection Plans**

A familiar concern in their reply to UNISON can be summed up by the comments of one EHO: "Our experience is that during unannounced inspections of businesses for food safety law which already fall out with the current proactive scheme for health and safety intervention, we often find serious health and safety breaches, some with potentially life threatening consequences. Formal notices to rectify safety hazards including neglected electrical and gas services and appliances are not uncommon."

Earned recognition will encourage a significant amount of effort being focused on achieving the earned recognition, after which it is likely that there will be a tailing off of interest, leading to standards below the level which the earned recognition had required.

It is stated within the consultation document that inspection plans are a key feature, providing a mechanism to reduce unnecessary inspections and adopt a more targeted, risk based approach to inspection. However it is our EHO members experience that in being responsible for the implementation of a wide range of statutory functions including food safety, food standards, and occupational health and safety laws; it's been the case for at least well over a decade that businesses to which these laws apply, are inspected by enforcement authorities on a risk assessed basis.

Codes of practice already exist for food safety and for health and safety law enforcement. The proper application of these are independently audited and publicly reported upon by the Food Standards Agency (FSA) with regard to UK food law, and for health and safety, a peer review arrangement is in place. Higher risk premises are already visited more frequently and certain other businesses are subject to an alternative enforcement scheme.

The CD also states that "duplication of effort by local regulators is an inefficient use of limited public resources." Our members are not familiar with any duplication, instead this appears to be a throw away phrase without any proper explanation or evidence to substantiate it.

Nor are local authorities reliant upon the primary authority scheme to provide 'intelligence' or inspection plans. The standards by which companies are judged and by which enforcement bodies are expected to operate are well known and can be easily accessed by all interested parties. Also whilst local authorities have regard to inspection plans, they reserve the right to act when it becomes evident that the business in question itself fails to adhere to agreed standards.

Again the example above of Enterprise Inns shows the danger of strengthening inspection plans and of earned recognition with multisite organisations. Fewer inspections are envisaged as an outcome, but where the national/head office compliance service results in local sites being encouraged or allowed to "tick-box" their way through the health and safety management process, a lack of local inspections will mean that this is less likely to be picked up. Local authorities must therefore be able to inspect and enforce as required according to local intelligence.

So to specifically reply to question 10, we do not agree that local authorities should be obliged to follow (rather than having regard to) inspection plans drawn up by a primary authority. Nor do we agree that the current duty for local authorities to "give notice" to primary authorities when deviating from inspection plans should be amended so that local authorities are obliged to obtain consent in advance from the primary authority.

Whilst it is helpful to have an inspection plan which lists issues that the partnership want to have independently verified, it is not acceptable for local regulators to be confined to the issues identified in the plan. Inspection plans will inevitably be based on national systems and data which gives a national picture. However, there will inevitably be local variation in the implementation of company procedures. Local inspection is all about identifying those local anomalies so that they can be put right. If local inspectors cannot look for them they will never be brought to the attention of the primary authority partnership.

One recommendation within the just released report from the Federal investigation on the causes of the Deepwater Horizon drilling-rig explosion is the strengthening of regulations and more unannounced inspections. The Wall Street Journal reported last year that the enforcement agency had largely stopped conducting surprise inspections.

We do support the providing back of feedback on inspections to the primary authority so that inspection plans can be updated to accommodate current compliance activity and to ensure that local issues can be addressed. We also agree that if a local authority objects to any element of an inspection plan they should be able to request that the BRDO (which consents to all plans before they are implemented) review the appropriateness of the plan.

UNISON and our members are not clear about what is being asked by the question: "The current exemptions for inspectors which cover enforcement action should be extended to cover deviations from inspection plans?" If this means to extend the powers of enforcing authorities to take action outside of the inspection plan then we agree.