

UNISON's Discussion Document (Consultation) Response to Transforming Regulatory Enforcement: Freeing up Business Growth (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 have also only replied to the questions of most concern to our members, and added further comments as appropriate.

For further information contact Vincent Borg on 020 7121 5709, or at v.borg@unison.co.uk.

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 Discussion (Consultation) Document

UNISON and our members are concerned by the approach within this discussion document. To the uninformed reader, the document portrays a bleak picture of an unhelpful, inflexible, dogmatic, and bureaucratic public service which bears no reality to the one that our members in local authority enforcement work in. This point has been repeatedly made within their replies. To quote one: "As an EHO with decades of professional experience, I can categorically state that many of the aspirations within the documents are already a reality for my profession."

Risk Assessment Basis to Enforcement

EHOs are 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 other businesses are as appropriate, sometime subject to alternative enforcement schemes. Advice and guidance on legal compliance and best practice is given free to all local businesses, and this includes: the provision of web based information on a wide variety of topics, visiting premises upon request, and providing information and assistance by other means. Contact details are usually very well

publicised.

Consistency is maintained by adhering to official codes of practice and other technical guidance issued by the FSA, the HSE, and industry groups, etc. In addition, local authorities are represented on national liaison groups for enforcement personnel, helping to promote consistent enforcement activities.

Formal action and the final sanction, referral to the courts, are set out in a hierarchical order within the enforcement policies of local authorities. These are subject to scrutiny by independent auditors and are approved by the council's elected members.

Following an intervention at their business premises, employers are encouraged to make representations to the service if they disagree with any request by an enforcement officer. For example, a number of our member EHO's in Scotland report that this is boldly stated on every report, a copy of which is always left with the business operator at the time of inspection, and should representation be made; a mechanism is established for a manager to impartially review any grievance.

Another example is member EHOs in Wales, who report being happy to discuss areas of contention. Businesses are welcome to have the discussion with the inspector, the team managers, and the Heads of Service. Any enforcement action is vetted at each of these levels and "The Council has a formal Complaints Procedure which is available to anyone."

Employers Do Not Find the Regulations on the whole Burdensome

Over all, it is reported that complaints from the businesses regulated are rare. The isolated comments received tend to be from larger companies who have good corporate procedures and therefore believe that they should be exonerated from any responsibility for local failures to implement them. However, it is not just about having systems in place on a global scale, there must also be proactive and effective steps to ensure that they are implemented.

Indeed it has been repeatedly stated by our members working within enforcement that their authorities over-arching objective is economic regeneration. It would therefore be perverse to impose unnecessary enforcement burdens on their local businesses. "In fact, we work hard to help them comply and we offer sensitive support where we can."

But paragraph 25 of the discussion document goes beyond this, stating that: "*Reviews will start from the business perspective and.....will include asking whether specific regulators should still exist and perform the functions they do*". Our members are concerned that rather than being evidence based, this statement and the document's proposals are ideologically and politically driven and will give undue consideration to urban myths and anecdotes. In his review, *Common Sense, Common Safety*, Lord Young recognised that the problem with health and safety is one of perception rather than reality. It is this false perception that needs to be challenged because it denigrates the importance of health and safety in tackling the very real risks and devalues and undermines the work of EHOS and other professional health and safety advisers.

This year the British Chamber of Commerce press release headlined that: "Half of businesses tied up in health and safety "yellow tape". The report, *Health and Safety: a risky business?*, in fact found health and safety legislation not a major concern to the majority of businesses. In the

survey over half of the 5,928 employers questioned did not find workplace safety regulations significantly burdensome and one in five didn't find them burdensome at all.

EHO members are also concerned that this discussion envisages a move to largely “self-regulation” by the private sector. This model was applied to the banking industry with disastrous results which the general public, not the bankers, are all paying for now.

Self-Regulation (in one form or another) doesn't work

There are many forms of self-regulation including earned recognition, corporate compliance systems, and self and co-Regulation.

Within the BIS consultation on primary authorities, there is a case study on Enterprise Inns. It has leased pubs with landlord tenants who are in the main small businesses operating just one pub. It is stated that it has a compliance service to support tenant compliance with health and safety requirements. Apparently 40% of it's tenants are currently signed up to this service and the proportion is growing. New tenants are required to take on the health and safety management system as a requirement of their tenancy.

This is the sort of scenario in which “earned recognition” (possibly by extending the primary authority scheme) would be covered. Indeed it is offered as a prime example within the consultation document. It is however flawed. One EHO and UNISON member is currently dealing with two premises that belong to Enterprise Inns where new tenants have just been taken on. This EHO has found that the new tenants are not given any knowledge or training but are expected to sign multiple documents on the same day as taking on their tenancy, supposedly 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.

The government has said that it is committed to “end the culture of ‘tick-box’ regulation” as quoted within the consultation document. However, here we have a clear demonstration that systems of self-regulation, whether corporate compliance, earned recognition, or something else, can be misused by employers/organisations, and thereby become a tick-box exercise, rather than a meaningful approach to regulatory compliance. This discussion document states that “we want to give businesses the means to make a reality of ‘earned recognition’”. There is a very real danger as shown by this case study, that when investigated on the ground or at a local level, the realities of earned recognition means no more than a tick-box exercise. Indeed it is a concern that a case study that BIS is offering as a positive example, is anything but.

The example of Enterprise Inns also 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.

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."

An investigation by the US Government Accountability Office (GAO) confirmed that the Bush administration's reliance on voluntary policing by employers of their safety and health actions did not improve worker safety and let some dangerous employers escape scrutiny. The GAO report, released in June 2009, concluded that the VPP scheme of OSHA, the US regulator, lacked proper oversight, did not improve worker safety, and diverted scarce resources from other enforcement duties. VPP companies were able to avoid routine inspections as long as they demonstrated that they had an exemplary safety and health programme, had no ongoing enforcement actions, and had an injury and illness rate below the average rates for the industry. However, GAO found that OSHA did not properly ensure that only worksites that had exemplary safety programmes were eligible for relief from routine inspections.

Back in the UK, a succession of voluntary approaches have flopped. A HSE/government review published in June 2010 found most company directors are not taking health and safety seriously at boardroom level, despite voluntary guidance being produced. While most directors (65%) felt additional guidance would increase "the amount of effort and attention they personally gave to ensuring health and safety," about half also pointed to greater penalties for directors (51%) and new legislation (48%) as likely to focus their minds. The majority of directors believed that each of the measures would increase the amount of effort and attention that they devoted to health and safety. Over a third of directors of large organisations thought new legislation "would make a significant difference," as did one in five small organisations.

In October 2010, another initiative failed entirely. The British Occupational Hygiene Society [BOHS] said "with deep regret" it was closing the Asbestos Building Inspectors Certification Scheme (ABICS), a body supported by the Health and Safety Executive (HSE) and intended to ensure asbestos surveyors were certified to have reached the necessary competence standard. It added without a legal duty for asbestos surveyors to be certified, the scheme did not work - after eight years of significant and unsustainable investment.

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 (like VPP mentioned above) 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 dropping below which the earned recognition required.

In addition, there is a potential conflict of interest with proposals around co-regulation or deregulating functions to businesses or third-party providers. The public need to have confidence that businesses are independently regulated. Many businesses also express their support for independent action to provide a level playing field for fair competition. Recent experience of self regulation in the banking industry should not be forgotten.

We cannot see how using third party providers to enforce the same regulations will remove burdens from business. If they are paid by their commissioners there is at least a risk that the public will perceive regulatory inspection and enforcement as not entirely impartial. More over there is a very real risk that necessary interventions may not be made in the public interest. Indeed 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.

Consultation – Next Steps.

UNISON understands that this discussion document will be followed up by a consultation, and looks forward to being invited to put forward it's members views.