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Submission to the House of Commons Regulatory Reform Committee Inquiry into the Government Deregulation Agenda

By

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Introduction: the need for change

Our comments reflect three decades of analysis and empirical research by the authors on the effectiveness of the Government's deregulation agenda. This evidence is concerned with both the effectiveness of regulation in general as well as its operation in relation to health and safety at work.[1] More specifically, following this short contextualizing introduction, attention is paid in turn to: (a) the damaging consequences of this agenda for the regulation of workplace health and safety and policy proposals aimed at enhancing, rather than undermining the way in which it is regulated; and (b) five broader features of deregulatory policy that need to be reversed because of their implications for all forms of social regulation.

The claim that regulation or 'red tape' prevents business success, and therefore must be eradicated, has been at the heart of UK government policy since at least the mid-1980s.[1] This claim has endured despite the evidence that clearly shows how the absence of regulatory controls in the financial sector encouraged new forms of investment and unsustainable financial products that ultimately created the conditions leading to the 2008 crash.[2] The tragic fire at Grenfell Tower in June 2017 it is argued represents wake-up call for the misguidedness of this 'bonfire of red tape' approach and a clarion call for an alternative one focused on prioritizing the well-being of citizens, not businesses and their shareholders.

Government initiatives to reduce the 'burden' of regulation have given disproportionate weight to the policy aim of reducing regulatory costs to businesses at the expense of worker and public safety. The result is that the UK currently faces an unprecedented deficit in social protection resulting from a combination of: government deregulation initiatives; loss of national and local enforcement capacity; and outsourcing of regulatory responsibility to the private sector.

Levels of social protection for workers and the public are now extremely low. According to the OECD, UK employment protections are amongst the weakest in the developed world; only the USA and Canada rank lower than the UK.[3] OECD evidence also shows the UK to have the second lowest product market regulation in the world.[4]

There is little public support for this policy of deregulation. When the public are consulted they are, in fact, supportive of strong protections.[5] Yet successive governments have tailored policies not to public interest, but to a narrow set of perceived business interests. We say 'perceived' because we do not accept that the emasculation of socially protective regulation - a so-called race to the bottom – can be in the interests of either business or the public. In fact, it is likely that deregulation initiatives have had negligible benefits for business. The National Audit Office (NAO), for example, calculates that deregulation initiatives brought forward by the 2010-15 government saved the average UK business just £400.[6]

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[1] Work for the Institute of Employment Rights includes: James, P and Walters, D (2017) *Health & Safety at Work: Time for Change*; , Institute of Employment Rights.Tombs, S. and Whyte, D. (2010) *Regulatory Surrender: death, injury and the non-enforcement of law*, Institute of Employment Rights.

Most of the rules and regulations that business organisations and government complain about and describe as "red tape" are there to ensure that workers, consumers and communities are protected from the potentially harmful effects of business.
The effect of undermining 'red tape' is that business is not encouraged to reach the highest standards for its stakeholders, allowing companies to compete not by investing in their workforce and in research and development, but by cutting labour and costs. The poor productivity performance of the UK economy is in large part a testament to this lack of investment.

1 The regulation of workplace health and safety

The number of offences prosecuted for health and safety violations that endanger and kill workers and members of the public has halved in the past 15 years. What the government describes as the removal of red tape sends out a powerful message to business: that government will not control anti-social business activities, no matter how damaging they are.

Successive governments have cut the resources that HSE and local authorities have to monitor and enforce compliance with statutory health and safety requirements. The effects of these cuts are clear. On 1 April 2004, there were 1483 'Front-line inspectors' in HSE; by the same date in 2015 this figure had fallen by 34%, to 972. At the same dates, there were, respectively 1140 and 736 full-time equivalent local authority Environmental Health Officers (EHOs) holding appointments under S19 of HSW Act – a fall of 35%.[7] Against this backcloth, over the period 2003/4 to 2015/16, proactive inspections undertaken by the HSE's Field Operations Division (FOD) fell by 69%, while in the case of EHOs total inspections fell by 69% and preventative ones by a staggering 96%.

Declines in the enforcement of food safety and environmental health regulation by local authorities have similarly fallen in the face of public sector cuts. Trading Standards departments have experienced an average 40% cut in England and Wales since 2009.[8] The number of local authority inspectors in the UK has been cut by 50% in the same period.[9]

The decline in workplace health and safety enforcement has been exacerbated and indeed institutionalised through the DWP's decision, in 2011, to identify whole sectors of economic activity as 'low risk' and thereby prohibit proactive inspections at local authority and then at HSE level. No rationale for what constituted 'low-risk' was provided, and an analysis by Hazards magazine found that of the 258 reported worker fatalities in the 19 months which followed the change, 53% were in 'low-risk' sectors.

In this context, too many workers and their families continue to suffer from the failure of their employing organisations to provide safe and healthy working conditions. Injuries, acute and chronic ill-health and death occur all too frequently, along with the emotional and financial costs they cause. Yet employing organisations are rarely held

accountable for these outcomes. In fact, according to the Health and Safety Executive (HSE), the vast majority of the associated costs are borne by those harmed and their families, and the taxpayer through the costs of paying benefits and providing health care.

It is also clear that the risks faced by workers vary not only in relation to the type of work they do but on what basis they do it. Temporary workers and those deemed to be self-employed are, for example, significantly more likely to suffer injuries. Indeed, while the self-employed constitute around 15 per cent of employment, HSE figures indicate that they account for 30 per cent of workplace fatalities. Those working in micro and small enterprises (MSEs) have similarly been found to experience proportionally greater serious injuries and fatalities than those working in larger enterprises. Furthermore, evidence suggests that this partly stems from how large, powerful purchasing organisations can undermine health and safety standards in their (often smaller) suppliers through the price and delivery demands they impose.

Current government policy, by exempting from inspection workplaces in which millions of workers earn their living through arbitrarily deeming them to be 'low risk' compounds such inequality. So, at one level, it means that some workers are more equal than others when it comes to the likelihood of their employer being held accountable for a failure to comply with their legal duties. Meanwhile, at another level, employing organisations are not only operating under less and less external oversight, as the numbers of HSE and local authority inspectors have fallen and all forms of enforcement action have declined, but are differentially affected by this reduction.

This situation is neither acceptable nor inevitable. Changes to the current framework for regulating workplace health and safety could address the serious social protection deficit we now face. All that is needed is a political will to take the necessary action.

2 Creating a rigorous regime of enforcement

Evidence indicates that the capacity and willingness of employers to effectively manage health and safety in line with laid down legal requirements is frequently problematic. Even large and well-resourced employers have been found to struggle to establish effective internal systems of management[10], while many smaller ones have little understanding of their legal obligations or a capacity to manage health and safety in a legally compliant and effective way, even within high-risk sectors like construction.[11] Many SMEs want and need contact with inspectors to act upon their willingness to comply with law.[12]

If the number of inspections (18,000) carried out by HSE in 2015/16 is considered in relation to the number of premises for which its inspectors have enforcement responsibility (some 900,000), then the statistically average workplace can now expect an inspection once every 50 years. Current levels of enforcement activity cannot therefore be credibly argued to be compliant with the commitment under Article 6 of ILO Convention 81 that: 'Workplaces shall be inspected as often and as

thoroughly as is necessary to ensure the effective application of the relevant legal provisions.'

Similarly, Article 17(1) of ILO Convention 81 that '[p]ersons who violate or neglect to observe legal provisions enforceable by labour inspectors shall be liable to prompt legal proceedings without previous warning…' given how the threat of non-compliance with health and safety laws being sanctioned, through prosecution and other enforcement action, has been dramatically eroded over the past two decades. For example, in the case of HSE's FOD division, the period from 2003/04[13] to 2015/16 saw convictions following prosecutions fall by 24%; improvement notices by 14%; prohibition notices by 35%; and the combined total of all notices by 23%. Meanwhile, if attention is focussed on EHOs, convictions declined by 60%, improvement notices by 65%; prohibition notices by 28%; and all notices combined by 57%.

These declines mean that already low levels of enforcement action have been significantly reduced. For example, in 2015/16, there were only 696 prosecution cases instituted by HSE, notwithstanding the already noted evidence that employer compliance with health and safety laws is often problematic.[14] Moreover, even when prosecutions are successfully brought, the penalties imposed are low; the average penalty for all health and safety offences prosecuted under the 1974 Act in 2015/16 standing at just under £58,000[15], while that for those relating to fatal injury was £62,148.[16]

It is argued that action to address this situation should, at a minimum, include:

- Establishment of inspection and enforcement regimes that are ILO compliant.
- Repeal of policies prohibiting unannounced inspections to "low risk" workplaces.
- Significantly increasing the numbers of HSE and local authority inspections (including those undertaken at random, rather than on (an alleged) "risk-based" basis. Consideration also needs to be given to placing the HSE on a new constitutional footing that would make it harder for subsequent governments to reverse such increases.
- Provision of government funding to recruit enough inspectors to properly enforce the law.
- Development of an enforcement policy that places more emphasis on inspectors using their powers to issue enforcement notices and initiate prosecutions, including on indictment.

3 Refocusing health and safety duties to reflect the changes in the economy

The core duties imposed on employers under the Health and Safety at Work Act have been undermined by two important features of labour market change – the growth in various forms of contingent employment and the extent to which vulnerable workers tend to be concentrated in industries where lead firms determine the product market conditions within which their suppliers set wages and conditions.

There is a consequent need for regulatory strategies to be updated in ways that address the market dynamics underlying the detrimental effects of such change. It is argued that this could be done by introducing reforms along the lines of those recently introduced in Australia.

In 2010 the Australian federal government, adopted a model Workplace Health and Safety Act, following reaching an agreement with the governments of six states, and two territories, to harmonize their different occupational health and safety statutes. Influenced directly by a desire to adapt the then legal frameworks to better accommodate changes in the Australian labour market and the organisation of work, the model statute transformed the way in which the duties of employing organisations were framed. [17] In particular, it imposes the primary duty of care on `persons in control of a business or undertaking' (PCBU), rather than on an 'employer'. The Act further defines a workplace to be 'a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.' Accordingly, the Act expressly expands the duties of PCBUs to premises that they do not control. Furthermore, it places the obligation to consult workers over health and safety on PCBU's, rather than employers,[18] and makes clear that it extends to all types of workers.[19]

4 Enhancing the role of workers in the regulation of health and safety at work

A growing body of international evidence points to the capacity of systems of worker representation and consultation to improve both health and safety management and outcomes. However, this evidence also indicates that the effectiveness of these capacities is dependent on the presence of a number of 'pre-conditions'. These include, the presence of a surrounding regulatory framework; employer commitment to a participative approach to health and safety management; supportive trade union organisation inside and outside the workplace; and well trained and informed representatives. [20] Such evidence also indicates that representatives are more effective when they have additional rights to require the cessation of work which in their assessment poses serious and imminent risks to workers safety or health, such as in sectors like mining in some countries, and more generally in forward thinking EU member states like Sweden, and rights to issue notices to employers requiring remedial actions to be taken, as is the case with the system of provisional improvement notices used in Australia.[21]

Collectively, this evidence casts considerable doubt on the value of non-union forms of workforce representation and consultation, as well as on the utility of direct, non-representative ones. Meanwhile, it is clear that as workplace union recognition has fallen so has the coverage of health and safety representation, with the result that a key component of effective self-regulation is missing from most British workplaces. There is consequently a clear need to strengthen the representative rights of workers over health and safety matters.

Actions that could be usefully taken to achieve this strengthening of representation rights include:

- Loosening the current linkage in the Safety Representatives and Safety Committees Regulations between union recognition and rights under them in order to enable unions to represent members in workplaces where they are not recognised;
- Removing the current option to directly consult workers over health and safety matters in non-unionised(see section 3 above) workplaces and placing the duty to consult on PCBUs as opposed to employers;
- Extending this duty to encompass all categories of workers (and hence not just employees);
- Empowering representatives to issue to issue 'provisional improvement notices' and to 'stop the job' in situations of serious and imminent risk.[22]

5 Reversal of Broader Deregulation Policies.

There are various additional schemes and initiatives currently in operation which necessarily further the deregulation or non-enforcement of existing regulation or both. They often appear to be both technical and a-political but are in fact highly detrimental to systems of social protection - while not being subject to political challenge since they are embedded as administrative or institutional mechanisms. We address five of these here.

a) The Business Impact Target (BIT)

The introduction of the BIT in 2015 outlined the Government's formal commitment to reduce regulatory costs for business by £10bn between 2015 and 2020, and obliged government departments to appraise regulations with regard to their cost to business. In 2016, the regulations noted to have the greatest cost implication for businesses were the standardisation of tobacco packaging and the prohibition of psychoactive substances. As this illustrates, the BIT creates an institutional bias in favour of businesses, potentially at the public's expense.

The NAO has stated: *"Cost assessments tend to be an overestimate because innovation potential is rarely assessed and are routinely based on exaggerated figures from industry - in the past trade organisations have systematically inflated cost estimates to combat new regulations."*[23] The narrowly defined scope of the BIT cost appraisal process lends disproportionate weight to lobbying from business interests.

The BIT does not account for, or attempt to mitigate, the presence of economic externalities such as public health impacts, which will be picked up down the line by the taxpayer. This represents a transfer of responsibility for the safekeeping deficit from government to citizens.

The Business Impact Target should be abandoned because it operates as an unnecessary bulwark against effective regulation.

b) Regulatory Impact Assessments (IAs)

As part of the BIT, regulators are obliged to publish an IA alongside proposed policies or policy amendments, which sets out estimated cost implications for businesses. Social and environmental impacts are often mentioned, but not monetised, and therefore given no weight in the appraisal process - and the Regulatory Policy Committee (RPC) cannot 'red rate' a policy on these grounds. This framework means that public policies predicted to save businesses money - but which also forecast public harms - may legitimately be waved through.

For example, the IA for the repeal of 23 local building acts across England in 2012 points to a potential *"increase of approximately 3% (per thousand fires) in fires getting 'big'…"*[24], but was validated on the basis of estimated cumulative cost-savings of nearly £1m from removing the requirement to install smoke extractors or sprinklers in buildings.[25] The Regulatory Impact Assessment appraisal process is therefore unacceptably biased towards business, at the expense of citizen safety and wellbeing.

This narrow approach to assessing regulatory value has been similarly criticised by the NAO which has concluded that: *"too often RIAs are used to justify decisions already made rather than an ex ante appraisal of policy impacts".*[26]

IAs should be abandoned because they fail to enable adequate appraisal of policy and because they fail to adequately take into account wider societal benefits of regulation and associated long-term cost savings.

c) The 'Growth Duty'

Section 108 of the Deregulation Act 2015 sets out a 'Growth Duty' for regulators:

(1)A person exercising a regulatory function to which this section applies must, in the exercise of the function, have regard to the desirability of promoting economic growth.
(2)In performing the duty under subsection (1), the person must, in particular, consider the importance for the promotion of economic growth of exercising the regulatory function in a way which ensures that—

(a)regulatory action is taken only when it is needed, and
(b)any action taken is proportionate.

The purpose of this duty is to introduce a more economically-focussed calculative rationale into regulatory decisions. Its logical effect is that front-line inspectors must provide a rationale other than that of legal compliance, and to dilute the proper focus of regulatory decisions on public safety concerns. Moreover, it is inevitable that, as in the case of IAs discussed above, this narrow prescription of "economic growth" fails to take account of wider economic benefits of regulation.

Because it operates as an unnecessary bulwark against effective regulation and fails to take full account of the economic benefits of regulation, the 'Growth Duty' should be ended, through repeal of Section 108 of the Deregulation Act 2015.

d) The Primary Authority Scheme (PA)

PA allows a company – and, since April 2014, franchises and businesses in trade associations – operating across more than one Local Authority area to enter an agreement with one specific Local Authority to regulate all of its sites, nationally. Under the PA scheme, the company, franchise or business association can reach an agreement with one Local Authority to regulate its systems across all of its stores in every Local Authority for complying with a relevant body of law – occupational health and safety or food hygiene, for example. The company makes a payment to the Local Authority nominated as 'PA' and agreed through contract. The benefit for the company, of course, is the absence of effective oversight in the vast majority of its outlets. These can be visited in other areas, but any enforcement action needs to be undertaken through the Local Authority which is the PA. In short, PA places regulation in a market context: Local Authorities compete with each other to sign up large companies to the scheme, seeking to conclude contracts based upon monetary exchange. And in practice it operates as a bulwark against enforcement.

The PA has mushroomed in recent years. In April 2014, 1,500 businesses had established PA relationships across 120 Local Authorities; at 27 March, 2017, there were 17,358 such relationships across 182 authorities. Moreover, PA now applies across a vast swathe of areas of regulation, including occupational health and safety but extending to food safety, and a wide range of regulators, from environmental health and trading standards departments to fire and rescue services and port authorities.

Because it operates as an unnecessary bulwark against enforcement and fails to take full account of the economic benefits of regulation, the PA scheme should be ended, through repeal of Sections 67 and 68 of The Enterprise and Regulatory Reform Act 2013.

e) The One-in-One Out (OINO) Approach to Regulation

The OINO approach decrees that the value of the UK's regulatory stock must be considered in the light of the associated net impacts on business, rather than the net impacts on society. The procedure serves as a brake on operational policy-making on this basis.[27] As such, the OINO approach contains an inherent structural bias, which prioritises business interests above, and sometimes at the *expense of*, societal interests. In 2014 Brandon Lewis MP (then Housing Minister) cited the One-in-One-Out rule as justification for his decision not to mandate the fitting of sprinklers in domestic and commercial properties.[28] Experts now attest that the presence of sprinklers in Grenfell Tower would undoubtedly have saved lives. At best, OINO legitimises the safekeeping deficit. At worst, it can lead to catastrophic social harms.

Oxford University's Smith School 2017 comparative analysis of the OINO approach in 8 countries found that: *"none of the countries we review has demonstrated that this policy innovation has actually led to improvements in economic efficiency"*. [29]

OINO is arbitrary, illogical and potentially harmful and it should be abandoned.

Conclusion

The starting point for this submission has been that the claim that regulation or 'red tape' prevents business success, and therefore must be eradicated, has been at the heart of UK government policy since at least the mid- 1980s. Government initiatives to reduce the 'burden' of regulation have given disproportionate weight to the policy aim of reducing regulatory costs to businesses at the expense of worker and public safety. The result is that the UK currently faces an unprecedented deficit in social protection resulting from a combination of: government deregulation initiatives; loss of national and local enforcement capacity; and outsourcing of regulatory responsibility to the private sector.

In short, we have indicated how the broad deregulation agendas pursued by successive Governments have had damaging consequences for social protection in general and the regulation of workplace health and safety in particular. We have further highlighted five specific area of deregulatory policy that need to be reversed because of their implications for all forms of social regulation.

Changes to the current framework for regulation in general and for regulating workplace health and safety in particular are urgently needed to address the serious deficits in social protection which we now face. What is needed is political will to take the necessary action.

References

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[8] This figure is derived from research by Professor Chris Elliot, Queens University Belfast, and cited in Channel 4 Dispatches (Food: What's really in your trolley?, broadcast 8pm Monday March 17th).

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[10] See e.g. Hutter, B. 2001. *Regulation and risk: Occupational health and safety on the railways*. Oxford: Oxford University Press.

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[12] See, eg., Borley L. and Page, A., 2016. 'A reflection on the current local authority-led regulation model: views from small- and medium-sized businesses', *Policy and Practice in Health and Safety*, 14(2): 144-162.

[13] 2003/04 marked the beginning of New Labour's commitment to 'light-touch' regulation. (Tombs, 2016)

[14] http://www.hse.gov.uk/statistics/tables/index.htm, accessed 1st March 2017

[15] Source: http://www.hse.gov.uk/statistics/prosecutions.htm

[16] Source: HSE Freedom of Information Request Reference No: 201612015, 23 December 2016.

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[19] See section 7(a) Work Health and Safety Act 2011 (QLD).

[20] See e.g. Robinson, A.M. and Smallman, C. 2013. 'Workplace injury and voice: a comparison of management and union perceptions', *Work, Employment and Society*, 27(4):674–693; Walters, D., Wadsworth, E.J.K., Marsh, K., Davies, R., and Lloyd-Williams, H. 2012. *Worker representation and consultation on health and safety. An analysis of the findings of the European Survey of Enterprises on New and Emerging Risks (ESENER).* Luxembourg: European Agency for Safety and Health at Work, available at: http://osha.europa.eu/en/publications/reports/esener_workers-

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