

‘Better Regulation’: Better for whom?

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Foreword

This *Briefing* by Professor Steve Tombs places the spotlight on the lack of effective regulation of pollution, food safety and workplace health and safety standards in the UK. An estimated 29,000 deaths each year in the UK are attributable to the effects of airborne pollution. Some one million cases of foodborne illness in the UK each year result in 20,000 hospital admissions and 500 deaths. Around 50,000 people die each year as a result of injuries or health problems originating in the workplace.

These staggering figures are probably underestimates. The litany of lives shortened and health impaired to which these figures bear witness are also largely avoidable. Yet as Professor Tombs points out, the rate of inspection and enforcement actions for environmental health, food safety and hygiene, and health and safety have all been falling. In the case of health and safety inspections by local authorities, for instance, the average business can now expect to be visited only once in every 20 years.

This is not just a problem of infrequent inspections and lax enforcement. In the name of cutting red tape, governments of all political persuasions have, for over a decade, undermined independent and effective business regulation. Budget cuts under the austerity programme have compounded the problem. So too have moves to outsource and privatise regulatory and enforcement activity. Private companies are increasingly involved in ‘regulating’ themselves. Taken together, Professor Tombs argues, these changes may ‘mark the beginning of the end of the state’s commitment to, and ability to deliver, social protection’.

We are taught that the greatest harms faced by citizens are crimes dealt with by the police, courts and other criminal justice agencies. Professor Tombs’ *Briefing* makes clear that this is far from the case. The harms he writes about are the result of political and economic decisions. They are not random happenings. The story the *Briefing* tells is one of ‘avoidable business-generated, state facilitated violence: social murder. And, quite remarkably, it proceeds, daily – met only by academic, political and popular silence’.

This *Briefing* is a contribution to breaking this silence. It reflects the Centre for Crime and Justice Studies’ commitment to informing public understanding of the role and limitations of criminal justice processes, and to fostering a greater knowledge of the harms faced by citizens, and of how they might best be regulated and reduced.

Richard Garside, Director, Centre for Crime and Justice Studies

Regulation is widely derided, a dirty word now equated with red tape, rules, burdens and bureaucracy. Yet we would do well to recall that regulation of business emerged ostensibly to provide some levels of ‘social protection’ for workers, consumers and communities from the worst excesses of the industrial revolution. Thus, from the 1830s onwards, a rapidly industrialising Britain became the site of the earliest forms of social protection, won through inter- and intra-class conflict and compromise. The regulatory

agencies formed in Victorian Britain created the basis of regulatory regimes through to the present day (see Box 1). The nature and level of business regulation has since been a site of contest; the Victorian regime was chronically under-staffed, while social protection through regulation probably reached its high point in the 1970s/80s. Then, the emergence of neo-liberalism provided the context for a concerted attack on regulation in the name of freeing business from the burdens of red tape.

Box 1: The emergence of the ‘Social Protection State’ in Britain

In 1802, the *Health and Morals of Apprentices Act* was designed specifically to regulate the working conditions of ‘Poor Law’ apprentices in the textile industry.

From 1831 onwards, a series of *Factories Acts* were passed – regulating the hours and conditions of young workers and women, extending across industries and workplaces of different sizes, until the consolidation of existing legislation in the *Factory Act of 1878*.

In 1842, Chadwick’s government-commissioned report into sanitation - *The Sanitary Conditions of the Labouring Population* - was published. It directly linked living and working conditions with illness and disease. Chadwick’s report was implemented via the *Public Health Act of 1848*,

and was to prove ‘a powerful catalyst for the development of local government’ (Fee and Brown, 2005).

1863 saw the first thoroughgoing attempts to install and enforce environmental protection regulation, through the *1863 Alkali Act* (and, subsequently, of 1874, 1881, and 1892).

In 1875, the passage of the *Sale of Food and Drugs Act*, to be enforced through the Local Government Board, was the culmination of the struggles of social movements for pure food, drugs and drink.

In sum, this was a key period in the emergence of central pillars of social protection, at least in the context of public health.

As we shall see in this *Briefing*, in the past 15 years, virtually without political, public nor academic comment, this ‘social protection state’ has been radically transformed. Specifically:

- Regulation now proceeds virtually without enforcement, a result of a political initiative, ‘Better Regulation’, rolled out by Labour, Coalition and Conservative Governments
- The politics of anti-regulation have been overlain by the economics of austerity
- Austerity has particularly impacted upon regulation and enforcement at the level of local authorities
- Private businesses are increasingly involved in the business of regulation
- The agencies of social protection – such as the national Health and Safety Executive or Local Authority Environmental Health Offices - have been radically transformed to the extent that they are either unable to perform their statutory duties, or now perform protection for rather than from business, or both.

Overall, these developments have left workers, consumers and local communities more vulnerable to business-generated harms (see Box 2), while exacerbating economic and social inequalities.

The politics of better regulation

Despite the 18 years in which Conservative Governments had regulation in their sights, it was the second New Labour Government which most zealously set about the task of transforming regulation and enforcement. In 2004, Chancellor of the Exchequer Gordon Brown, established the *Hampton Review*, with a remit to propose ways to reduce regulatory ‘burdens on business’ across all (63) major, national regulators, as well as 468 local authorities (Hampton, 2005). The review came in a period in which anti-regulatory rhetoric had been considerably ratcheted up amongst senior echelons of government and the civil service, and across a range of print and broadcast media outlets (Almond, 2009).

Box 2: Business harms as ‘social murder’

Business harms are routine, systematic and, crucially, *avoidable*: they are a form of violence. In fact, the harms indicated below are so widespread that they are a form of what others have called ‘social murder’ (Chernomas and Hudson, 2007) – communities, consumers and workers put in a position that ‘they inevitably meet a too early and an unnatural death’, day-by-day, year-in, year-out (ibid).

It is this inevitability which has been mitigated by regulation and enforcement.

The scale of contemporary harm is significant:

The UK Committee on the Medical Effects of Air Pollution (COMEAP), looking at the effects of poor air quality effects at a population level, has estimated that 29,000 deaths every year are ‘brought forward’ by pollution, albeit this is thought to be a significant under-estimate (Bosely, 2015).

According to the most recent report from the Chief Scientist, ‘Our best estimate suggests that there are around a million cases of foodborne illness in the UK each year, resulting in 20,000 hospital admissions and 500 deaths’ (Food Standards Agency, 2012). Even these estimates of food related illness are likely to understate the scale of the problem (Food Standards Agency, undated).

There is now strong evidence that around 50,000 or so deaths per annum are related to working in Britain. Most of those deaths are caused by diseases that may cause many years of illness before their victims die (Tombs, 2014).

In each of these areas, the majority of these deaths originate in profit-making businesses.

Hampton’s subsequent 2005 report – *Reducing Administrative Burdens: Effective Inspection and Enforcement* – proved to be a turning point in the trajectory of business regulation and enforcement across Britain. It marked the consolidation of the establishment of what had already been termed ‘Better Regulation’, a formal policy shift from enforcement to advice and education, a concentration of formal enforcement resources away from the majority of businesses onto so-called high-risk areas, and consistent efforts to do more with less. Notwithstanding the question begged by this initiative – who on earth would want *worse* regulation? – in 2005, Brown summed up this new approach to regulation and enforcement pithily; these were to be characterised by ‘Not just a light touch but a limited touch’ (cited in Furness, 2012).

Five years later, at the General Election of 2010, changes to law coupled with downward pressures on inspection and formal enforcement meant that, both nationally and locally, much in the regulatory landscape across Britain had been transformed. Of course, in the intervening years, the financial crisis had erupted across much of the world, not least in Britain, resulting in massive state bailouts and a tide of criticism of the level of regulation of ‘the banks’. Yet, quite remarkably, the political consensus, at least in Britain, remained that business was *over*-regulated – and all three mainstream political parties campaigned on manifestos to further reduce regulation. The five years of coalition government which followed went on to act on

that commitment with a feverish intensity. The current Conservative Government shows no sign of slowing down the attack on regulation – quite the opposite, in fact.

The effects of Better Regulation can partly be seen via some headline data on enforcement trends in three key protective fields in the sphere of social regulation in Britain – food safety, occupational health and safety, and pollution control (see Box 3). Regulation here is something of a patchwork of national and local responsibilities, albeit most businesses across these areas are regulated at the local authority level. Food safety enforcement in the UK operates almost entirely at the local level, overseen by the national body, The Food Standards Agency (FSA). Local functions are divided between Environmental Health Officers (EHOs) and Trading Standards Officers. Food EHOs oversee food safety and food hygiene, enforcing law across all forms of retail food business organisations (restaurant, shops, and so on), as well as food processing and food manufacturing outlets. Occupational health and safety regulation is divided between a national regulator, the Health and Safety Executive (HSE), and Health and Safety EHOs at a local level; the division is based on the main activity of any premises. Pollution control is also divided between a national regulator, the Environment Agency, while at local level, pollution control EHOs enforce regulation of businesses operating ‘Part B’ premises, as well as significant areas of non-business activity such as littering and fly-tipping.

Box 3: Regulation without enforcement?

Below is summary data of trends in inspection and enforcement, 2003/04-2012/13. This period is deliberately chosen. The start date marks the rolling out of the Better Regulation agenda. But this period is also marked by the 2007 financial crisis which was used, by the coalition government from 2010 onwards, to justify austerity – so it is likely that within this data there is evidence of both politics and economics at play.

Inspection and Enforcement Trends between 2003/04 – 2012/13:

Local Environmental Health Officers enforcing food safety and hygiene law undertook:

- 12% fewer food hygiene inspections
- 34% fewer food standards inspections
- 28% fewer prosecutions

Health and Safety Executive inspectors, the national health and safety regulator, undertook:

- 53% fewer inspections (on the part of Field Operations Directorate, the body within HSE which undertakes by far the vast majority of inspections)
- 40% fewer prosecutions of offences, resulting in 32% fewer convictions

Local Environmental Health Officers enforcing health and safety law undertook:

- 90% fewer preventative inspections
- 56% fewer total inspections
- 40% fewer prosecutions, resulting in 38% fewer successful convictions

Environment Agency Officers engaged in national pollution control undertook:

- 52% fewer inspections (1999/00-2008/09; the Environment Agency claimed it could not separate data for inspections to businesses from 2009/10 onwards)
- and 54% fewer successful prosecutions, while issuing 42% fewer cautions

Local Environmental Health Officers enforcing local pollution control law undertook

- 48% fewer 'Part B' Inspection Visits
- and 30% fewer 'Part B' Notices (Notices rather than prosecutions are used, since the latter are so few – there were five in 2013/14 and three the previous year – as to render data almost meaningless)

(Tombs, 2016)

Now, taken in isolation, perhaps no one individual data set on any specific of enforcement activity data relating to any one regulator over a ten year period is particularly surprising. What is remarkable, certainly for a set of social scientific data, is that *each set of data reveals precisely the same trend*: that is, notwithstanding variations across regulators, the form of law being enforced, and indeed within regulators and specific forms of enforcement activity by year, *each set of data unequivocally indicates a long-term downwards trend in every form of enforcement activity*.

There are two further observations which might be made on the data underlying these trends.

First, while the trends in relative declines are striking, indeed uniformly so, this should not be allowed to obscure the fact that for the most part the data also indicates some *absolutely* low levels of enforcement activity.

So if we take the example of health and safety visits by local authority EHOs, we see that there

were 81,000 of these in 2014/15 in the context of some 1.7m registered business – meaning that only about five per cent of businesses that might be visited in any one year actually received a visit. Put differently, the average business can expect to be visited by a local health and safety inspector once every 20 years.

Second, then, this data indicates that for all of these regulators, prosecutions are indeed the formal enforcement action of last resort:

- For food EHOs, 340,000 visits generated 361 prosecutions – a rate of approximately one prosecution for every thousand inspections and audits
- In health and safety, 81,000 visits prompted 164 prosecutions, at roughly one prosecution per 500 inspections
- Pollution control EHOs generated 64 Enforcement and Prohibition Notices in the course of over 11,000 inspections – or one notice for every 176 visits

Such prosecution levels surely tell us more about an approach to enforcing law *vis-a-vis* business than about the level of compliance on the part of those businesses, not least in the context of what we know about the levels of social harm they generate.

What this data indicates, in short, is an institutionalisation of *regulation without enforcement* as a sustained political initiative.

From the politics of better regulation to the economics of austerity

During the latter half of the period under examination in the above section, it is clear that the politics of Better Regulation became substantially over-determined by the ‘economics’ of austerity. The macro-level trends to which the previous section has pointed are barely insignificant. Yet beyond stating that these create greater freedom from oversight for private business, and thus facilitate greater business harm, their effects are often hard to gauge. The remainder of this *Briefing* drills down to local authority level as a means of examining what these new politics of regulation mean in the context of unfolding austerity.

By way of context, funding for local authority services had been progressive under at least the first two New Labour Governments (Lupton et al., 2013). However, from 2009/2010, local government funding from Westminster came under pressure. Indeed, of all the cuts to government departments between 2010-2016, the Department for Communities and Local Government (DCLG) is impacted most of all.

Analyses of the distribution and impacts of these cuts indicate overwhelmingly that they impact most heavily upon poorer local authorities:

Councils covering the 10 most deprived areas of England – measured according to the index of multiple deprivation – are losing £782 on average per household, while authorities covering the richest areas are losing just £48 on average. Hart district council in Hampshire, the least deprived local authority, is losing £28 per household, while in Liverpool District B, the most deprived area, the figure is £807. (Sparrow, 2014)

One of the most deprived regions in the UK is Merseyside – and the remaining sections of this *Briefing* draw upon a case study of regulation and enforcement in the local authorities which make up this region. Merseyside is a populous conurbation: the combined population of the five local authorities under examination here – Knowsley, Liverpool, St Helens, Sefton and Wirral – is 1.4 million. There are some 40,000 businesses registered across these authorities. Merseyside is also one of the poorest regions in England, if not the poorest. The Index of Multiple Deprivation is a ranking of all English local authorities, where 1 is the most and 326 the least deprived local authority, based upon government’s measurement of 38 indicators across seven domains of deprivation. On the 2015 Index, Knowsley is the second poorest local authority area in England, Liverpool the fourth poorest. All five local authorities are ranked among the ten per cent most *health deprived* districts in England (Liverpool City Council, 2015). Moreover, all have higher than the national average of unemployed, and benefit claimants, have higher than the national ratio of part-time to full-time jobs, a higher percentage of public sector jobs and a lower than national average of jobs in the private sector. In general, these observations all indicate a local population which is particularly reliant upon the local state for a range of welfare, social and public services, as well as employment opportunities, so that changes in any of these impact disproportionately upon local people, as residents, consumers, and workers (Centre for Local Economic Strategies, 2014).

No two local authorities nor regions are identical, so there is no claim here regarding representativeness. And it is certainly the case that a poor region such as Merseyside will be particularly affected by austerity from a baseline of already very low per household spending by local authority. But at the same time, there is no reason a focus on Merseyside cannot enhance our understanding of how the politics and more latterly the economics of Better Regulation might impact upon local authority enforcement efforts.

Local better regulation: insights from the front-line

In a series of interviews with 35 Environmental Health Officers (EHOs) across Merseyside, during 2014-15, it is perhaps unsurprising that

the strongest, most consistent theme to emerge focused around ‘the cuts’. The effects of these are starkly illustrated in **Table 1**, which sets out EHO staffing levels across the five authorities

over the years of coalition – but *prior* to the election of a Conservative Government set on even more swingeing funding reductions for local government.

Table 1: Merseyside local authorities' Environmental Health Officers (full-time equivalents), by principal responsibility, 2010-2015¹

	1 April, 2010	1 April, 2013	1 April, 2015
Knowsley			
Food safety and hygiene	1.85	1.6	1
Health and safety	1.65	1.4	2.6
Pollution control	2.7	1.2	0
Total	6.2	4.2	3.6
Liverpool			
Food safety and hygiene	14	12] 7.6
Health and safety	4	2	
Pollution control	21	13	9
Total	39	27	16.6
St Helens			
Food safety and hygiene	5	5	4
Health and safety	3	3	2
Pollution control	2	2	1
Total	10	10	7
Sefton			
Food safety and hygiene	5.5	5] 7.58
Health and safety	3	3	
Pollution control	6	4	3
Total	14.5	12	10.58
Wirral			
Food safety and hygiene	8.95	9.15	6.5
Health and safety	5.0	2.0	1.5
Pollution control	7.0	6.30	2
Total	20.95	17.45	10

¹ Sources: F2016.01.1883 - Freedom of Information Request, Freedom of Information Request F2014-12-864; Freedom of Information Request 357573 Response; FOI - Sefton Environmental Health Officer Numbers; FOI 856837 - Steve Tombs - Environmental Health Staffing; Liverpool City Council, Freedom of Information Act Request 424218, 9 December 2015; Sefton, Freedom of Information Request, 9 December 2015; St.Helens Council Freedom of Information Request ref: 20151125-00153-1; Wirral FOI 980631, 27 November 2015.

This staffing data demonstrates clearly that staffing levels across each of the functions across all of the local authorities have, virtually across the board, been radically reduced. It is worth noting the absolutely low numbers of staff resource at issue here, in any authority in any year, but notably by the final year for which data is provided, that is, 2015. At its most extreme, Knowsley had no dedicated pollution control EHOs by April 2015, and neither Liverpool nor Sefton had any dedicated health and

safety EHOs – rather, food EHOs would ‘keep an eye out’ for health and safety issues. This decline of health and safety resource was no doubt partly an effect of a change, in May 2013, to HSE’s National Enforcement Code which had effectively banned preventative health and safety inspections at a local level (Department for Work and Pensions, 2013).

This data certainly coheres with what were remarkably similar phrases used to describe the

state of regulatory and inspectorial resources in the course of interviews (Box 4), 35 of which were conducted with Environmental Health Officers (EHOs) across Merseyside. Phrases

such as those presented in Box 4 provide a stark illustration of what funding cuts mean in practice for regulation and enforcement (see also UNISON, 2012).

Box 4: What do the 'cuts' mean in practice?

'At present, we can't meet our statutory duties'

'To be honest we're now doing statutory stuff only'

'There's nothing left to cut now'

'There is no padding left, we're below the statutory minimum ... there are no areas of discretion left'

'There's nothing else to be cut'

'Where we are now, we're at the point where worker safety is being jeopardised'

'It's going to come to the point where it going to affect the residents, the local population, in many ways we are at that point now, public health and protection is being eroded'

'We're at the point where there is no flesh left, this is starting to get dangerous, a danger to public health'

There are various dimensions to these staffing reductions – as well as other pressures on local authority enforcement – which are worth greater exploration.

Increased obstacles to enforcement

With fewer staff, it is hardly surprising that many interviewees raised the issues of a long-term decline in inspection, a long term decline in the use of formal enforcement tools, and a decreasing use of prosecution. On the latter, another clear message from the data was of increasing obstacles to the ability to prosecute. The latter included: a lack of staff time; fear of losing cases; lack of support from legal services departments to prosecute; and an increased political risk ('flak') in prosecuting. Moreover, these types of responses are indicative of a political context for regulatory enforcement where the idea of regulation is under attack, and are a useful illustration of how discourses and policies at national level can translate into barriers to enforcement at local levels.

The loss of expertise

It should also be noted that, if all of the local authorities had seen reductions in staff, this did not just mean a loss of *overall* resource, but the loss of a *particular* kind of resource, that is,

expertise and experience. Most notably, redundancies did not only mean that staff were not replaced but a loss of specialist expertise, alongside pressures for regulators to become generalists. As one respondent put it, 'the last two years have been a nightmare', the authority had lost staff and expertise – 'it's the experienced staff who have gone, so we have lost numbers and expertise'. In fact, the shift from regulators being specialists to generalists was one consistent theme across the interviews, referred to by numerous respondents and in every authority: 'People have had to become generalists'; 'most of them are just thankful they've still got a job'.

A lack of training

Moreover, the loss of staff combined with a shift from a specialist to generalist inspection focus had made re-training necessary. However, another clear theme to emerge from the interviews was of declining opportunities for training – at the time when most needed. As one Regulatory Services manager put it to me, 'We have a training budget, but it is now business hardened' – by which he meant that there was 'little access' to training, 'except to free online courses'. An EHO translated this into the effects on an individual: 'I used to go on six to ten courses a year, now perhaps one or two, I'm supposed to do ten hours of CPD a year but am struggling to manage that'.

The reach of the private sector into public service

Alongside the resource constraints within which local authorities are struggling to meet their statutory duties as regulators, is a related development – the creeping influence of the private sector in those regulatory efforts. Here we find clear instances of politics meeting economics – and, in their combination, changing the role of local regulation and enforcement, perhaps irrevocably. This not only undermines the idea that regulation is something which is aimed at controlling business, but it creates an increasing democratic deficit, as *public* services designed for *social* protection come under ever increasing *private* influence.

Educating EHOs

We can see the creeping influence of the private sector in changes to the education of EHOs. EHOs attain professional status through a university degree course accredited by the Chartered Institute of Environmental Health (CIEH). In 2011, the curriculum was over-hauled, partly, in the words of one interviewee, a programme leader of one such course at a North West University, to reflect ‘the shift in the profession from not being seen as inspection focused’. In the words of another respondent, a student EHO, ‘CIEH is increasingly making the

content of degrees more private-sector friendly’. This process had already begun as a result of local authorities’ inability to offer paid placements for students, while students require placements in order to complete the main assessment on their degree course. Several respondents told me that local authority funded students simply no longer exist – the one student EHO I interviewed was working in the authority part-time, unpaid. More commonly, since students still have to undertake a placement, they now take these where they can be paid, or at least receive expenses, that is, in the private sector; Asda, Sainsbury’s and Tesco’s were all mentioned as significant sites for such placements in the food sector. Obviously, and as was said to me, this also means that the values and perspectives of the private sector, the regulated, are prioritised for the student EHO over those of the regulator. In such subtle ways are the mind-sets and thus practices of a profession shifted.

The Primary Authority scheme

The transformation of social protection is not simply about non-enforcement – it also involves a concerted effort to change the relationship between the state, the private sector and regulation. Indeed, this changing relationship is increasingly one in which the private business, ostensibly the object of regulation, becomes a

FOOD

Chart 1: Food inspections and audits, UK

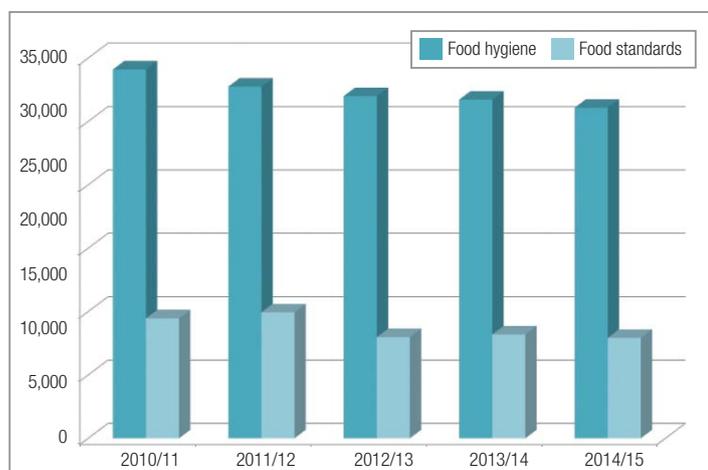
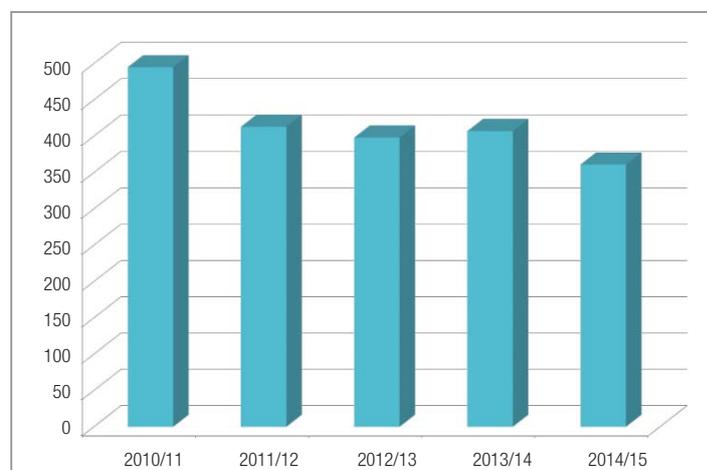


Chart 2: Local authority prosecutions, number of establishments, UK



Sources: Food Standards Agency Freedom of Information Request FOI 1573/1033/2014, 11 June 2014. Food Standards Agency Freedom of Information Request FOI 1131, 20 February 2012. Food Standards Agency (2015), *Annual Report on UK Local Authority Food Law Enforcement 1 April 2014 to 31 March 2015*, London: Food Standards Agency. Food Standards Agency (undated), *Monitoring Data by Year*, www.food.gov.uk/enforcement/monitoring/laems/mondatabyyear. Purcell, N. (2016), *UK Local Authority Food Law Enforcement Annual Report 2014/15*. Food Standards Agency FSA 16/01/05 Board Meeting – 28 January 2016, www.food.gov.uk/sites/default/files/fsa160105.pdf

HEALTH AND SAFETY

Chart 3: Total health and safety visits by local authorities, GB

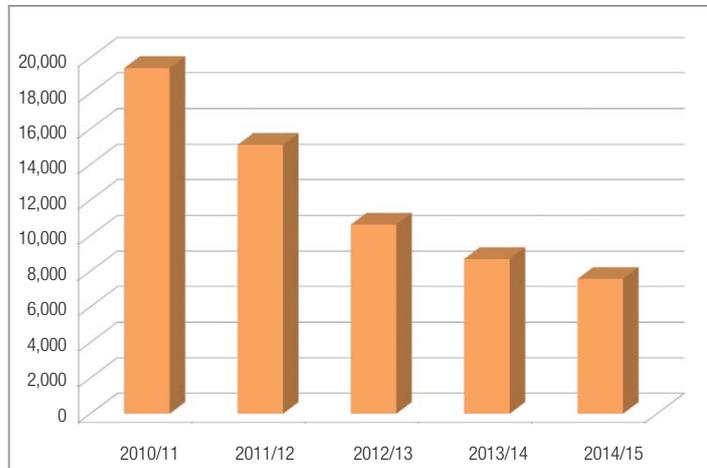


Chart 4: Preventative health and safety visits by local authorities, GB

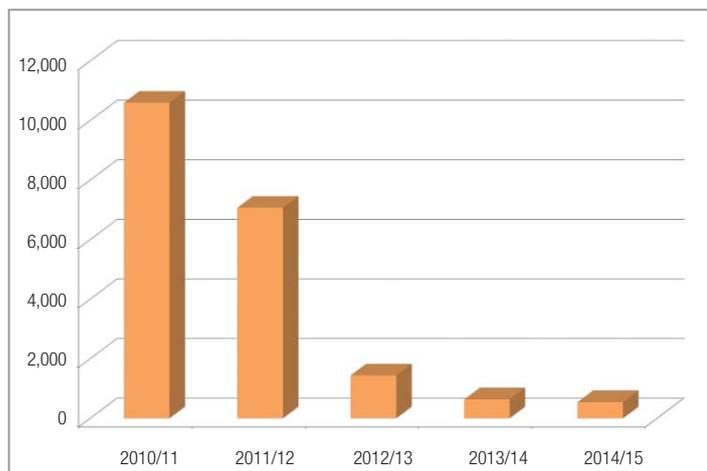
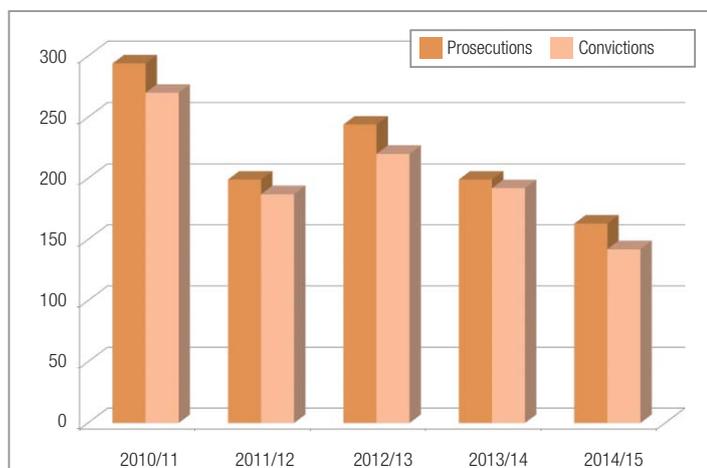


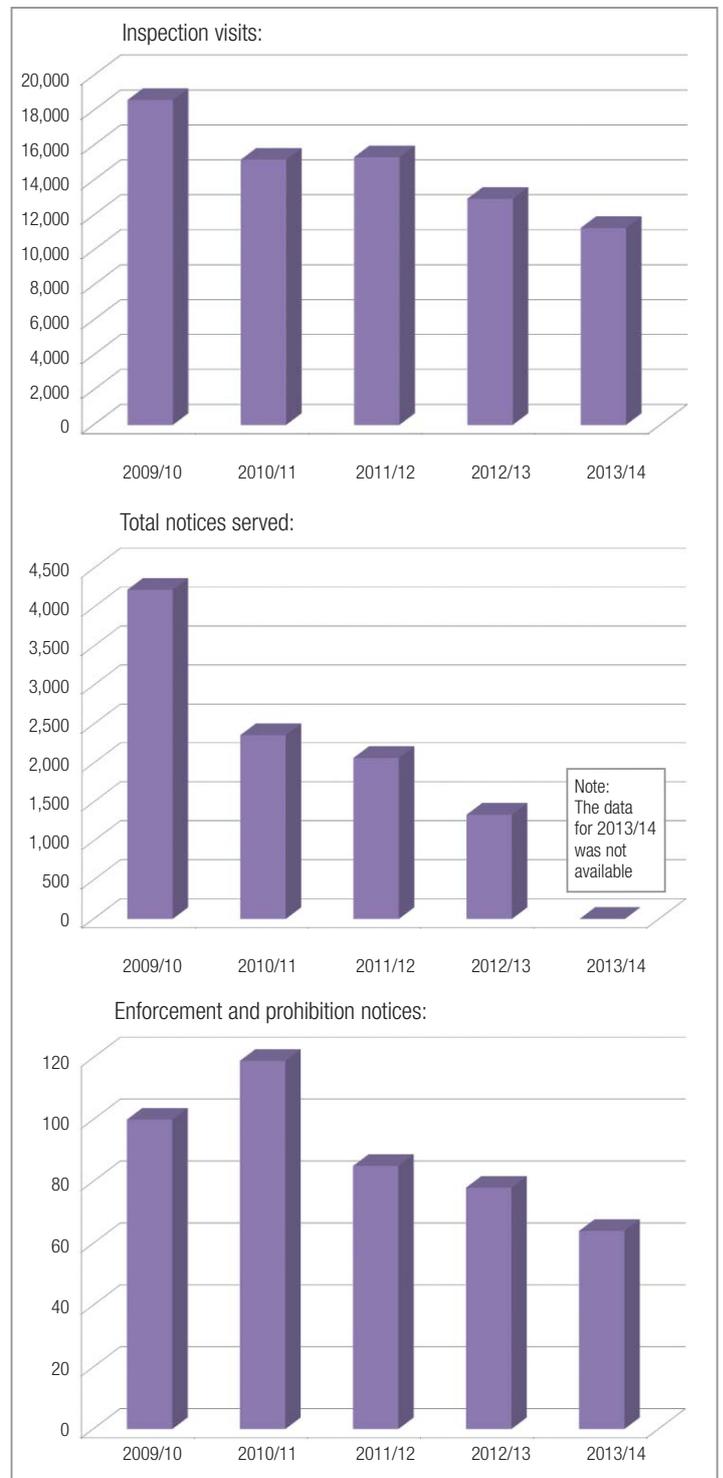
Chart 5: Health and safety prosecutions and convictions by local authorities, GB



Sources: Freedom of Information Request, HSE Response, 2016/01002, 19 January 2016. Freedom of Information Request, HSE Response, 2014060117, 2 July 2014. Health and Safety Executive (2015), *Prosecutions in Great Britain (2014/15p)*. *Enforcement action taken by HSE, local authorities and, in Scotland, the Crown Office and Procurator Fiscal Service (2014/15p)*, www.hse.gov.uk/Statistics/prosecutions.pdf

POLLUTION CONTROL

Chart 6: Local authority pollution control enforcement activities, Part B Installations, England and Wales



Sources: Defra (2014), *Defra Official Statistics Release: Local pollution control statistics in England and Wales, 2003 to 2013*, London: Department for Environment, Food and Rural Affairs. Defra (2014), *Statistical release, 25 June 2014*, London: Department for Environment, Food and Rural Affairs. Hartley McMaster Ltd (2012), *Local Pollution Control Statistical Survey: management summary*, London: Department for Environment, Food and Rural Affairs. Hartley McMaster Ltd (2015), *Local Pollution Control Statistical Survey: management summary*, London: Department for Environment, Food and Rural Affairs.

key vehicle in that regulation. A paradigmatic instance of this is being achieved through the Primary Authority (PA) scheme, itself illustrative of how the economics and politics of Better Regulation have combined to produce a fundamental shift in the practice and principles of regulation and enforcement. The PA scheme

was introduced by the Labour Government in 2009, but given considerable impetus by the coalition government from 2010, notably following the establishment of the Better Regulation Delivery Office (BRDO) in 2012, for which oversight of the scheme was a key priority (see Box 5).

Box 5: The stated rationale for the Primary Authority scheme

According to the BRDO, the scheme allows businesses to be involved in their own regulation. It enables them to form a statutory partnership with one local authority, which then provides robust and reliable advice for other councils to take into account when carrying out inspections or addressing non-compliance. The general aim is to ensure that local regulation is consistent at a national level, but sufficiently flexible to address local circumstances. The business can decide what level of support it requires, and the resourcing

of partnerships is a matter for the parties concerned. A primary authority can recover its costs (Better Regulation Delivery Office, 2014).

When this statement was issued, in April 2014, 1500 businesses had established PA relationships across 120 local authorities (ibid). By April 2016, there were 10,105 such partnerships across 175 authorities.

(<https://primaryauthorityregister.info/par/index.php/home>).

PA applies across a vast swathe of areas of regulation, including food safety, occupational health and safety and pollution control, and a wide range of regulators, from EHOs and trading standards to fire and rescue services and port authorities. It is a classic Better Regulation initiative – and, at local level, its key formal initiative. It allows a company – and, since April 2014, franchises and businesses in trade associations, to be further extended through the *Enterprise Bill* currently going through parliament - operating across more than one local authority area to enter an agreement with one specific local authority to regulate all of its sites, nationally. Thus, for example, a supermarket like Tesco's may have stores in every one of the local authorities in England and Wales. Under the PA scheme, it 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. To regulate its systems, the company makes a payment to the local authority, agreed through contract. The benefit for the company, of course, is the absence of 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. Should a local authority wish to prosecute a company in a PA agreement, for

example, it can only do so with the permission of the local authority which is party to that agreement. Then, under the scheme, any consideration of a potential prosecution must entail prior notice being given to the company; the company can then request that the matter be referred to the BRDO for determination (Williams, 2013).

In interviews with two civil servants at the BRDO, it was claimed that the PA scheme is 'a big success', referring to the numbers of businesses which had entered agreements with local authorities, and 'what businesses say about it, the savings it has generated', as well as the fact that 'every major business has been snapped up'.

It's clear, however, that the scheme is proving highly problematic for local regulators, even as they sought to enter into PA agreements in order to generate income – 'this is why we are really pushing the PA scheme'. Another referred to ongoing negotiations with a company, stating that although she'd 'always been opposed to the scheme', it 'would generate about £18,000 in the first year when systems and so on are being set up, this is peanuts for a multinational but half a job for us'. So although one regulatory services manager noted that the scheme 'did not really work', he and his local authority were constantly pursuing PA partnerships (see Box 6).

Box 6: Local EHO views of the Primary Authority scheme

'In theory it could work well, in practice it protects large companies from local authority enforcement'

'Under PA they [companies] only have to demonstrate the existence of systems'

Local authorities have a 'disincentive to take enforcement action because PA schemes are a source of income'

PA schemes 'protect companies from inspection and enforcement'

They operate 'in my experience at the level of a tick-box rather than real co-operation or taking responsibility'

PA schemes 'work on paper only, there are hundreds of businesses in the scheme and I can't see how these can all be genuine'.

In general, then, as one enforcement officer noted, 'Primary Authority has had a real impact on what we can and cannot do'; the claim was made at length that businesses 'pick and choose' which local authorities to enter into PA agreements with, with the insistence that 'they wouldn't pick an authority like Liverpool', they will pick the 'no-one knows anything authority', that is, local authorities with no experience of the industry/business.

Moreover, in the processes of negotiation to draw up the contract which represents the PA agreement, local authorities are at a distinct disadvantage – there is an 'asymmetry of expertise' (Social Enterprise UK, 2012) between local authority negotiators and private companies in such contractual negotiations, as well, of course, as a structural power accruing to private companies operating across numerous authorities to drive down the terms of contract with any one local authority.

Outsourcing and privatisation

The PA scheme represents a fundamental shift in the nature of local regulation and enforcement. It is a classic vehicle of Better Regulation, since it reduces inspection, exacerbates the power imbalance between regulators and regulated, builds in checks against regulation and enforcement, and operates on a marketised, contract-based system. Discussion of the PA scheme was, then, inevitably used as a way of discussing the future trajectories of local regulatory services. And, when respondents were asked where they thought their service might be in five to ten years, responses were a variation on a theme, encapsulated pithily by the response, 'I don't know if I'll be here in one year let alone five

years'. Those who expanded upon this rather dispirited response indicated that the function would become marketised or privatised or likely some hybrid of the two – reflecting more general prognoses of how local authorities would respond to the pressures of funding cuts (Hastings et al., 2013).

Such indications are hardly pure speculation (**See Box 8**).

These wholesale shifts from public to private provision are the mere visible tip of a significant iceberg. Councils in Bromley, Chester West, Cheshire, and Wandsworth have all publicly considered wholesale privatisation of regulatory services (Wall, 2015a). Moreover, recent research by the New Economics Foundation for the Trades

Box 7: PA as Better Regulation

Primary Authority schemes are a classic Better Regulation initiative. As indicated, they:

- Are a form of marketisation of the relationships between regulator and the regulated
- Entail contractual relationships based upon an imbalance of expertise and resources
- Provide a source of income for increasingly cash strapped local authority services
- Entail shifts in the balance of power from the regulator to the regulated
- Further remove the practice of inspection from regulation.

Box 8: The wholesale outsourcing of regulatory functions

October 2012: North Tyneside Council announced the transfer of 800 employees to Balfour Beatty and Capita Symonds (BBC News Online, 2012).

August 2013: The London Borough of Barnet saw off a legal challenge to a contract to hand over its services to two wings of Capita, under what has become known as the 'One Barnet' model. Business services – estates, finance, payroll, human resources, IT, procurement, revenues and

benefits administration, and customer and support services – have been out sourced to Capita in a ten-year contract worth £350m. A range of other services – including regulatory services – were contracted to its subsidiary Capita Symonds, in a £130m contract, also for ten years (Smulian, 2013).

January 2016: Burnley Council's environmental health services were outsourced to Liberata (Wall, 2015b).

Union Congress (TUC) calculated that, 'Environmental and regulatory services is the sector with the second biggest proportion of expenditure paid to external contractors, at 44 per cent' (TUC and New Economics Foundation, 2015). The arrangements under which this outsourcing proceeds are complex and opaque, confounding accountability and often even transparency (under clauses of 'commercial confidentiality'), and include diverse arrangements such as the use of Strategic Service Partnerships (SSPs), Joint Venture Companies (JVCs), shared services, and collaborative outsourcing (ibid).

It was no surprise, then, when one of my interviewees noted that, in contexts where all possible savings had been made, notably in terms of in-house staff, that there would likely be more merging of functions and more outsourcing – claiming that 'the Capitas of this world' would take over functions and make savings by 'driving down pay and conditions', so that there would be left 'a rump of people working for a council who commission services'. Several respondents noted that the most likely scenario was to become a commissioning authority. Indeed, this was also a view held by the one elected member whom I interviewed, a Labour Councillor. In his words, given resource constraints and the fact that 'it's the Council's duty to set a legal budget', 'nothing is off the table', so that what he called 'the Barnet privatisation ... might be something we'd consider in the future'. Another interviewee raised these two developments critically, arguing that 'enforcement should be kept in house', and explicitly raising 'the problems' of 'a private company enforcing against private companies' – this was, in her words, 'a conflict of interest'.

How much 'better' can better regulation get?

Once regulation is successfully cast as a problem, to be reduced, a drain on state resources, private entrepreneurship and economic growth, and once that view is furthered through regulatory, legal and institutional reform, then the momentum against regulation becomes virtually unstoppable – if less state regulation and enforcement is *always* to be preferred, then *how little is little enough?*

This issue emerged in interviews with two staff at the BRDO. For each of these, they were clear that Better Regulation was established to 'restore trust' on the part of business with regulators, a relationship which one described as having been 'broken'. Of interest was the view, even after over a decade of Better Regulation initiatives, that regulators failed to understand that 'regulation and economic development and prosperity go hand in hand', rather viewing the former 'as a matter of enforcement' – and claiming that this was especially problematic at the level of local regulation. Thus, for each, the Better Regulation message had not been effectively received at local level: 'Most [EHOs] didn't know and many still won't where their local Economic Development programme sits within the authority'. Thus the task was still to get regulators 'to see themselves in a different light in relation to business, to reposition themselves in terms of businesses'. This 'requires a commercial mindedness that most local authority regulators simply do not have' – albeit there was optimism that newer recruits were more likely to be imbued with this attitude, and thus to embrace Better Regulation. Such views found echoes amongst some of my interviewees (see Box 9).

Box 9: Local regulators' views on Better Regulation

'We need to be more business friendly and get our customer focus right'

'Increasingly we're told that our main job is to facilitate business, industry and so on'

'I am in the business of collaborative regulation ... there must be growth, and that is the context in which we must support business to comply with the law.'

Better Regulation has continued, and will continue, apace. It is a long-term political initiative, effectively designed to break the link between regulation on the one hand and inspection or external oversight on the other. To paraphrase Fooks's prescient analysis of financial regulation of the City of London in the 1990s (Fooks, 1999), what we are witnessing is a shift from the regulation *of* business to regulation *for* business.

As one analysis of the effects of spending cuts on Local Authorities has concluded, these will lead to a 'repositioning' of authorities in relation to 'individual well-being and quality of life as well as economic leadership' (Hastings et al., 2013) with:

A renewed emphasis on developing and managing economic growth as a means both to generate income and to develop the economic competitiveness of the local authority and its region in the longer term. (ibid)

There is good reason to suggest that regulatory functions will likely be increasingly re-cast as part of *growth* initiatives – that is, as part of permissive and facilitative regulatory regimes (Bernat and Whyte, 2014).

In 2007, the *Regulators' Compliance Code* – which governs the work of regulators both nationally and locally – had already been amended under the Labour Government in a way that made clear the new realities of Better Regulation as they were then unfolding, so that '[r]egulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection' (BERR, 2007). A new, 2014 version made the so-called growth duty its first principle: that is, '*Point 1*' of the new Code emphasised that, 'Regulators should carry out their activities in a way that supports those they regulate to comply and grow' (BRDO, 2014).

Better regulation: from social protection to social harm

What we are witnessing is the transformation of a system of social protection which, for all of its limitations, has existed in the UK since the 1830s. Under conditions of advanced neo-liberalism, recent UK Governments of all political stripes have sought to roll out a politics of Better Regulation – via ceaseless initiatives on a range of mutually reinforcing political, institutional, legal, and discursive fronts – which effectively entails creating regulatory regimes in key areas of social protection from which enforcement is increasingly absent. Moreover, at national level, all major regulators face a statutory review every three years of their existence and mandate, and all are likely to face further reductions in government funding. This may be hands-off government as far as business goes, but it's hardly hands-off as far as regulatory agencies are concerned. They are under constant, critical scrutiny.

Indeed, according to the political logic of Better Regulation, perhaps no better captured by its 'less is more' leitmotif, *there is no logical end point* to this drive towards regulation without enforcement. Once regulation and enforcement are defined as 'too much', and once the argument that regulation can proceed without enforcement is won, it is impossible to perceive when there will be 'little enough' of either or both. Better Regulation might thus mark the beginning of the end of the state's commitment to, and ability to deliver, social protection.

More latterly, these political initiatives have been turbo-charged by the political economy of austerity. And, as we have seen, the effects of central government funding reductions and changes can be witnessed most clearly at the level of local authorities, via the DCLG bearing the

brunt of central government cuts – funding for local government fell in real terms over 50 per cent between 2010-11 to 2015-16 (Tinker, 2015). Moreover, this aggregate figure masks the fact that within this, some local service provision is protected – so that unprotected areas, such as regulatory services, suffer disproportionately.

As has also been indicated in this *Briefing*, the rationale for regulation has shifted during this period – from one ostensibly claimed to deliver some level of social protection to regulation as

vehicle for private growth and profitability. At local levels, as we have seen, this shift has been stark, with local authorities increasingly servicing private business rather than providing public service, and even with public provision being replaced wholesale by private regulation of private capital.

In other words, what is at issue here is not just reducing, but changing the shape and nature of, local government (**Box 10**) – even if any focus on local responsibilities for social protection is often absent from even critical analyses of this process.

Box 10: Changing the state

From the mid-1980s to 2010, the mass sell-off of council housing, the denuding of powers of local education authorities, the commissioning out of services under the rubric of ‘compulsory competitive tendering’ and then so-called ‘best value’ under ‘new public management’, the effective privatisation of public assets under the Private Finance Initiatives and the creation of cabinet government and mayors have all been part of a steady progression to a new form of

local governance the final shape of which is now beginning to appear in view.

(McMahon, 2015)

We are sticking to the task. But that doesn’t just mean making difficult decisions on public spending. It also means something more profound. It means building a leaner, more efficient state.

We need to do more with less. Not just now, but permanently.

(Cameron, 2013)

At both national and local levels, the process of Better Regulation continues apace. The process is one which will generate further harms whilst creating an increasing democratic deficit, through which Local Authorities evade local accountability for their failures to provide some of those services on the basis of which elected governments claim legitimacy.

In November 2015, Chancellor of the Exchequer George Osborne’s spending review committed the government to abolishing the central government grant to local authorities by 2019-2020 – under the sham of localism and devolution, councils will be forced to fund all services through business rates. Funding local government entirely through private companies shifts even further the local balance of power between business on the one hand and elected representatives on the other, again creating a greater democratic deficit,

generating further political inequality at local levels. But the effects will be also to exacerbate economic and social inequalities.

The repercussions for local and regional inequalities could be enormous, potentially entrenching divides between north and south and more and less prosperous areas. Already struggling areas with low business activity could be left with dwindling funding.

(Hood, 2015)

This is not a story about rules, regulations, red tape. It is a story about social harm and social inequality – lives lost and shortened, the health of communities, workers, consumers made poorer. This is avoidable business-generated, state facilitated violence: social murder. And, quite remarkably, it proceeds, daily – met only by academic, political and popular silence.

Biography

Steve Tombs is Professor of Criminology at The Open University. His most recent publication is *Social Protection After the Crisis: Regulation without Enforcement* (Bristol: Policy Press, 2016), based on research funded by The Leverhulme Trust via a Research Fellowship, RF-2011-173.

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