

An IER submission  
to  
The Löfstedt Review of  
health and safety legislation

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## About the Submission

The Institute of Employment Rights is an independent think tank involving academics and lawyers specialising in all issues of labour law. It is supported by trade unions representing over six million workers. This Submission, kindly drafted by the academics named, reflects the collective considerations of a group of health and safety experts from within the Institute's specialist network at a round-table discussion meeting.

## Executive Summary

The idea of regulation as a 'burden' – the central rationale for the Review – is value-laden and simply unsustainable. The terms of reference of the review must be informed by an evidence base which is credible and reliable.

Various characteristics of the new economy create fundamental problems for placing responsibility on 'those who create the risks': many of the risks to which workers are exposed are less visible, but by no means less serious, than those faced by most workers some 40 years ago; there are also hidden dangers in newly emergent structures of work organisation that impact upon the way we can recognise those responsible for risks to workers.

Although the world of work has certainly changed, and the profile of the types of risks faced by workers has also changed, there is no reason to believe that the level of risk and the gross numbers of injuries, illnesses and fatalities have significantly diminished since the introduction of the Health and Safety at Work Act, if they have diminished at all.

The weight of research evidence on what actually generates improved performance in occupational health and safety points to legislation backed by credible enforcement.

Our own evidence points to a significant degradation in the past decade in HSE's ability to provide the threat of credible enforcement. Between 1999/2000-2008/09, there was:

- a 69% fall in the numbers of inspections made of business premises;
- a 63% decline in investigations of safety incidents at work;
- a 48% reduction in prosecutions.

This collapse in inspection, investigation and enforcement has dramatically reduced the chances of businesses being detected and prosecuted for committing safety offences.

In the light of this evidence, we **recommend** that:

- the numbers of front-line inspectors should be doubled;
- the 'union effect' should be maximised by extending safety representatives' powers.

## Introduction

The following submission presents to the Review evidence based upon empirical data that is of central importance to the rationale behind, and the terms of reference of, this review, as well as speaking directly to the questions posed by the Review.

Announcing the establishment of the Review, Employment Minister Chris Grayling stated "Professor Löfstedt's review will play a vital part in putting common sense back at the heart of Britain's health and safety system and I look forward to receiving his findings. By rooting out needless bureaucracy we can encourage businesses to prosper and boost our economy." (Department of Work and Pensions, 2011).

Following this statement, the Review document itself states its purpose as being to: "consider the opportunities for reducing the burden of health and safety legislation on UK businesses whilst maintaining the progress made in improving health and safety outcomes".

Our evidence to the Review suggests that the idea of regulation as a 'burden' – the central rationale for the Review – is value-laden and simply unsustainable. Indeed, as our submission to the Review will suggest, the terms of reference of the review must be informed by an evidence base which is credible and reliable.

We wish to state at the outset that the debate on health and safety is currently, and rather disappointingly in our view, dominated by a view that lacks evidential support and is promoted by a relatively small number of participants in the debate. There are a number of organisations that are currently promoting the view that the UK is over-regulated in terms of health and safety protections and that this hampers enterprise and good business. We rarely see any evidence to support this view, beyond some anecdotal or rhetorical flourishes.<sup>1</sup> A recent report by the Chartered Institute of Personnel and Development concluded that business lobbying against employment regulation uses statistics selectively and "flies in the face of economic evidence" (Chartered Institute of Personnel and Development, 2011a, 2011b).

We would contend that a similarly distorted view has reinforced a number of myths surrounding health and safety regulation and its enforcement. This submission presents evidence which challenges many of those myths.

Before we set out our evidence below in more detail, we wish to make some comment on the way that the Review has been framed, and, in particular, the claim that health and safety law represents a burden for business. Our comments below address three aspects of this claim:

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<sup>1</sup> The recent pamphlet produced by the British Chamber of Commerce (BCC, 2011) is a paradigmatic example: this pamphlet is based upon no credible evidence to support its claim that "health and safety legislation has gone too far", beyond a survey of its members which lacks the methodological detail necessary to judge this evidence on its merits.

**1. *that regulatory burdens are reflected in unnecessary costs borne by specific businesses and by the ‘business world’ in general***

This approach to understanding the costs of regulation generally excludes the external costs not borne by business, and disproportionately borne by the victims of injuries and illnesses and the taxpayer. Those include costs associated with the loss of earnings, the social costs associated with the loss of work, medical costs and insurance costs, some of which are absorbed by individual businesses and by the business community through various form of taxation, but in the main are costs that fall on the victims and the general public – thus, “the bulk of these costs” fall “‘externally’ on individuals and society” (Pathak, 2008: 7), as a series of HSE research reports has consistently demonstrated (Davies and Teasdale, 1994, HSE, 1999, Economic Advisors Unit, 2004).

**2. *that regulatory burdens and costs somehow translate into shackles upon entrepreneurship, innovation and profitability; and relatedly, that minimising regulation and its enforcement is a key to the economic success of specific firms, sectors, and the UK economy as a whole.***

We find those, almost ubiquitous assumptions, to be highly misplaced. The collective historical experience of advanced industrial nations indicates exactly the opposite: that raising regulatory standards stimulates rather than hinders innovation and economic development. This is precisely the argument that is currently being made by leading international law experts who are exploring ways of integrating business into the architecture of international human rights law: that those developments at the level of international law are likely to be given momentum by the drive to enhance competitive advantage (Nowak 2007; Nowak and Kozma 2009; and Scheinin, 2009).

**3. *that UK businesses are somehow over-regulated in the context of their international competitors***

Evidence for this claim is at best highly contradictory and at worst wholly lacking. When we look at the evidence we have from related areas, in fact the opposite is more likely to be the case. The UK is regarded by the OECD as the third least regulated labour market amongst its member 40 states (OECD, 2006).

As we indicate, none of these assumptions stands the tests of empirical nor indeed conceptual scrutiny.

In fact, what seems to be behind the currency that these assumptions have is not empirical evidence nor conceptual clarity, but a general ideological position which has become a mantra across the business world and is increasingly accepted in government with a lack of any credible evidence.

We contend that this lazy acceptance of a set of highly questionable assumptions has permeated the terms of reference of this Review. This is clearly reflected in many of the questions upon which this Review is based.

For these reasons, our submission is largely directed at **Question 10**, though we would like our submission to be regarded by the Review as evidence which reflects more generally on the process of the Review and the way that the questions have been framed. In other words, we would invite the Review to consider how our evidence speaks generally to the terms of reference and the questions framed by the Review team.

Following the terms framed by Question 10, the rest of the submission addresses the extent to which law places responsibility on those who create risk by identifying two broad dilemmas for the regulation of health and safety in the UK. First we highlight how the characteristics of the new economy are creating fundamental problems for placing responsibility on those creating risk. Second, we outline some detailed evidence of a rapid decline in health and safety enforcement patterns.

### **Placing responsibility on those who create Risk 1: dilemmas of the new economy.**

We live in an era where, on the face of things, it appears that the risks of injury and illness at work has been completely transformed for the better. If we use official statistics, then we could observe that in 1975 there were 620 fatal injuries across HSC/HSE enforced workplaces, and 328,500 non-fatal injuries (Dawson et al., 1988: 225). HSE currently note that the fatal injury per 100,000 workers in 1974 was 2.9 (based on 651 fatalities). By 2008/09, there were 179 such fatalities, at a rate of 0.6 per 100,000 workers<sup>2</sup>. That same year, there were 135,192 non-fatal injuries to workers (that is, major injuries and over-3 day injuries to workers, combined<sup>3</sup>). On the basis of such data, British workplaces may appear to be far safer places, and this fact may also vindicate the legislative and regulatory architecture established, following Robens, by the 1974 Act.

However, there are two fundamental methodological caveats to note regarding the comparability of data across time periods. First, there **are issues relating to recording injuries and deaths**. HSE fatality figures generally only include deaths caused relatively quickly by sudden injury. Deaths that result from occupational disease and deaths where there is a significant period of time between the injury and the death are only rarely recorded by HSE in fatality statistics (and we discuss the full toll of occupational disease caused fatalities below). This peculiarity alone ensures that the HSE headline figure of deaths only takes account of a small minority of occupational fatalities (and we discuss this in more detail below). Even the sub-categories of fatalities that are recorded and reported in annual statistics by HSE are gross under-estimates. We have demonstrated elsewhere that the real total of fatalities resulting from sudden injury recorded is *at least* 3-4 times that recorded by HSE (Tombs, 1999; Tombs and Whyte, 2008). What this means is that we have no way of knowing the full toll of deaths caused by work. Indeed, there is reason to project a sharp increase in at least one of the sub-categories of fatalities generally not counted by HSE, deaths caused by driving.

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<sup>2</sup> <http://www.hse.gov.uk/statistics/history/histfatals.xls>

<sup>3</sup> see <http://www.hse.gov.uk/statistics/history/histinj.xls>

Second, there are **issues related to reporting injuries**. Indeed, because of widespread under-reporting, the 'headline' level of occupational fatalities presented by HSE is a significant under-statement of the actual level of work-related non-fatal injuries. HSE itself documents the level of under-estimate: for example, while there were 131,895 non-fatal injuries to employees reported under RIDDOR in 2008/09 (502.2 per 100,000 employees), the 2009 Labour Force Survey found 246,000 reportable injuries occurred in the same year (at 870 per 100,000 workers). Indeed, it is well documented that each category of non-fatal injury data maintained under RIDDOR is subject to significant under-reporting.

Turning to deaths due to occupational illness, the HSE does not report a total figure for such deaths but routinely observes that, every year, thousands of people die from work-related diseases – in excess of 10,000 per annum. This is based upon reportable deaths, and an estimate that 4% of total cancer deaths can be attributed to work-related causes. However, both Hazards magazine and various trade unions have utilised research by some of the world's leading epidemiology experts to suggest that a much higher proportion of cancers are work-related, resulting in the HSE commissioning epidemiologist Dr Lesley Rushton to carry out a review of the burden of occupational cancer. Although not yet complete, her work has already revealed '4 per cent' as a significant underestimate.

In fact, evidence suggests that the annual death rate could be more than twice that of even the larger of the HSE's figures. Dr Richard Clapp, the author of a 2005 review of the causes of occupational and environmental cancer, estimates that the probable range of occupational cancer deaths is 8-16 per cent. Applying the mid-range of 12 per cent to all cancer deaths in Great Britain therefore gives an estimate of 18,000 work-related cancer deaths a year.

Meanwhile, Hazards magazine estimates that up to 20 per cent of all heart-disease deaths have a work-related cause – for example, stress, long hours, shift work – which is about 20,000 a year. For all those diseases to which work can be a contributory cause, such as Parkinson's, Alzheimer's, Motor-Neurone Disease, rheumatoid arthritis, chemical neurotoxicity, auto-immune conditions, and restrictive lung diseases, a further conservative estimate of about 6,000 deaths a year can be made. All of this adds up to a convincing – and lower end - estimate of deaths from work-related illness in the UK of up to 50,000 a year, or more than four times the official HSE figure.

The reason that we enter into a prolonged discussion of occupational diseases and the lack of our ability to know anything about those diseases is because this is also closely related to the changing profile of work since 1973. For if the decimation of the manufacturing industries appears to be a key factor in driving down industrial sudden *injuries*, the concentration of workers in clerical and service sectors also has consequences for their health. The conditions that cause the bulk of occupational illnesses referred to above are either equally – or more - likely to arise in clerical and service industry workplaces as well as manufacturing. Let us briefly sketch out some examples. First, asbestosis and mesothelioma are problems that are increasingly linked to people who work in the buildings that are full of asbestos: office workers, teachers and pupils in schools and so on. If the first wave of asbestos-related fatalities fell disproportionately upon building workers, the victims of the current wave have a very different profile. Second, stress-related diseases impact

upon workers in office-based or service industry jobs no more or less than their counterparts in manufacturing occupations. Third, the many of the manufacturing sectors that have thrived in the UK in recent years have been characterised by high risks of dangerous occupational exposures. Witness the emergent high rates of cancer and occupational health problems in the electronics industries, and the various waste disposal and recycling industries. It is also, of course, of relevance that the levels of trade union organisation tend to be particularly low amongst many of these new risk groups.

Of course, these points refer to selective, if highly significant, categories of occupational risk. Notwithstanding the convenient selection of those examples, taken together they indicate that although the world of work has certainly changed, and the profile of the types of risks faced by workers has also changed, there is no reason to believe that the level of risk and the gross numbers of injuries, illnesses and fatalities have significantly diminished since the introduction of the Health and Safety at Work Act, if they have diminished at all.

If those features of the new economy render the risks that workers are exposed to less visible, but by no means less serious than 40 years ago, there are also hidden dangers in newly emergent structures of work organisation that impact upon the way we can recognise those responsible for risks to workers. Most notable here is the proliferation of sub-contracting and self-employment so that complex supply chains of labour – while formally under the ‘management’ of a main contractor – make it impossible to identify adequately in law the employer actually responsible under law for the creation of risks.

## **Placing responsibility on those who create risk 2: recognising and responding to declining formal enforcement**

The evidence outlined in this section illustrates trends that we have discussed in more detail previously (Tombs and Whyte, 2007 and 2010). And as a preface to it, let us be clear about the weight of research evidence on what actually generates improved performance in occupational health and safety. As Courtney Davis concluded in her meta-review of such studies,

*“Whilst the weight of international research supports the proposition that legislation, backed by credible enforcement, is the primary driver of corporate commitment to OHS, a number of studies dealing specifically with UK businesses provide confirmatory evidence. These studies have found first, that compliance with the law is the most commonly cited reason for organisations initiating changes to improve OHS management, and that this is true for all sizes of organisations, and second, that the introduction of regulations are generally associated with reported changes in employer practice”. (Davis, 2004: 21).*

In sum, however, our own evidence points to a transformation of HSE’s role in the regulatory system designed to prevent death and injury at work which amounts to a significant decline in the ability to formally enforce law. This situation is reflected in the following trends in the previous decade (1999/2000-2008/09):

- a 69% fall in the numbers of inspections made of business premises;

- a 63% decline in investigations of safety incidents at work; and
- a 48% reduction in prosecutions

This collapse in inspection, investigation and enforcement has dramatically reduced the chances of businesses being detected and prosecuted for committing safety offences. This is hardly the deluge of red tape or the burden of regulation that permeates public debates about health and safety at work.

To summarise our interpretation of the above and following data briefly: HSE was, by the end of the last decade, virtually incapable of adequately enforcing safety law. The scale of this collapse in particular forms of regulatory activity is clear if we look at data relating to the various formal enforcement activities of HSE over the past decade. We should emphasise that the data captured here covers a period before the planned budget cuts to HSE in general, and the stated intention to cut proactive inspections by a further 11,000.

Of course the precise data for each indicator varies – but what is remarkable is that if we take inspections, investigations, enforcement notices and prosecutions, we find that each of these have declined, most dramatically, over the past ten years – the symmetry of the trends in the decline of each of these activities is so striking as to leave it unquestioned that there have been marked changes in HSE’s enforcement practices, away from the use of formal measures towards the less tangible forms of advice, education and encouragement.

### ***FOD Inspections***

FOD is the arm of HSE which undertakes the vast majority of workplace inspections. Between 1999/00 and 2008/09 there was a drop of 69% in FOD Inspection Records.

Now, HSE note that the method of undertaking and recording inspections changed from 2004/05 – after this point, inspections became “longer and deeper” - so that data before and after this change are not strictly compatible. As HSE put it, the streamlining of the recording system has produced a reduction in the number of inspection records created since 2005/06. However, if we break the period at 2005/06 when the method of recording changed, we still find that:

- between 1999/00 and 04/05, inspection records fell by 39%
- between 05/06 and 2008/09 inspection records fell by 26%

In other words, whatever method of recording, whatever the nature of the inspection, the downward trend has continued apace throughout the decade.

### ***HSE Investigations***

If we now turn to look at those RIDDOR reported incidents that are investigated by HSE, we find a decline of a similar order to that in the numbers of inspections, so that:

- between 1999/00 to 2008/09, there was a 63% decline in HSE investigations
- between 1999/00 to 2008/09, the *proportion* of incidents reported to HSE that were investigated fell by 54%

If we look more closely at the decade under examination, we find that:

- investigations peaked in 2000/01 and since then have fallen by 69%

This decline in investigation has occurred across *every category* of RIDDOR reportable incidents which HSE might be expected to respond to – that is, dangerous occurrences, injuries to members of the public, over 3-day injuries, and major injuries.

So, between 1999/2000-2008/09, **investigations** of:

- major injuries fell by 49%
- over 3-day injuries fell by 85%
- dangerous occurrences fell by 35%
- injuries to members of the public fell by 75%

By 2008/09, less than one per cent of over 3-day injuries that were reported to HSE were actually investigated. Less than one in ten - 8% - of reported major injuries were actually investigated.

Currently HSE do *not* investigate the following:

- 66% of amputations
- 84% of major fractures
- 96% of major dislocations
- 84% of major concussions & internal injuries
- 90% of major lacerations and open wounds
- 83% of major contusions
- 75% of major burns
- 66% of major poisonings and gassings

Moreover, as Table 1 shows, the proportion of some very serious injuries – already low in 1999/2000 - has declined significantly during this period.

Table 1: HSE Investigations of Major Injury by Type

Injury Type	1990/00	2008/09p	% Fall
Amputations	42.9	33.6	22
Major Fractures	10.5	6.2	41
Major Dislocations	4.9	4.4	10
Major Concussions & Internal Injuries	15	16.1	(+7)
Major Lacerations and Open Wounds	21.9	9.9	55
Major Contusions	23.3	17.4	25
Major Burns	34.6	25.4	27
Major Poisonings and Gassings	47.4	33.7	29

### **HSE Enforcement Notices**

Beyond inspection and investigation, if we move to formal enforcement action in terms of notices imposed in response to breaches, we again find a decline during the decade under examination. So, the data indicates that between 1999/00 and 2008/09, we find:

- a 29% fall in the number of all types of enforcement notice issued
- a 30% fall in improvement notices
- a 26% fall in prohibition notices

### **HSE Prosecutions**

If there are fewer inspections, investigations and notices during the period we are examining, we might also expect there to have been fewer prosecutions. And that is indeed the case. Thus we find that:

- between 1999/2000 and 2008/09, HSE prosecutions fell by 48%

This decline also applies to those incidents which we might expect are most likely to result in prosecution – fatal injuries to workers. Again, if we examine the data, we find that:

- between 1999/00 and 2006/07 the number of worker deaths that resulted in prosecution by HSE fell by 39% (from 129 to 79).

In short, the data above points clearly to one unequivocal conclusion: that by the end of the last decade, HSE's formal enforcement capacity/threat was barely credible.

If we reflect upon **Question 10** posed by the Review, this situation is highly problematic in terms of developing responsibility for those that create risk for a number of reasons.

First, law which cannot be enforced undermines respect in law *per se* – and this in turn may be enough to further non-compliance amongst the regulated population.

Second, such low levels of enforcement are likely to exacerbate unequal conditions of competition.

Third, the declining levels of presence within workplaces will further undermine HSE's abilities to target its resources effectively, since the intelligence upon which such targeting is based is less and less gathered as inspections and investigations decline both absolutely and relatively. Indeed, this issue has been raised. As a recent BRE/NAO Report found, "Due to the relatively small number of inspections undertaken by the HSE, it may frequently be the case that the HSE has little or no information on past performance of an individual firm" (Better Regulation Executive / National Audit Office, 2008L 23).

In other words, it is *under-* not over-regulation which is currently diminishing the efficacy (and perceptions of the value and legitimacy) of the work of the HSE.

Of course, formal enforcement data is only one, and in some ways an imperfect, index of the efficacy of HSE. Thus, a response to such data which merely withdraws effective

regulation from whole categories of businesses (so-called 'low-risk' sectors, for example) or withdraws types of regulatory activity (notably proactive inspection) and then reduces the discretion of inspectors who do reach workplaces, requiring them to 'get the enforcement numbers up', is no solution at all. Indeed, it will further undermine the credibility of HSE, reduce morale of staff, and exacerbate its demise.

## Recommendations

This submission informs two concluding observations which in turn point to practical recommendations to the Review.

**First, on the resourcing for the HSE, or, rather, its front-line inspectors.** The 2004 Work and Pensions Committee on *the Work of the HSE and Executive* recommended that the number of inspectors in HSE's Field Operations Directorate – those who do the bulk of the inspecting - should be doubled, and that substantial additional resources were needed to fund this and to reverse the "low level of incidents investigated and at the low level of proactive inspections" (House of Commons Work and Pensions Committee (2004: 83, 107). A subsequent 2008 Select Committee report reiterated this, concluding that HSE increase its levels of inspection, "which we believe will have a significant impact on compliance with health and safety legislation. This will require an increase in the numbers of front-line inspectors deployed by HSE" House of Commons Work and Pensions Committee (2008: 95). We support these recommendations.

**Second, on the role of trade-union appointed safety representatives.** Either in the absence of, or preferably alongside, adequately increased inspector numbers, inspections and investigations – all providing the intelligence as to 'who is responsible' - safety representatives' powers need to be supported and strengthened, maximising the well-known 'union effect' in relation to health and safety at work (see James and Walters, 2002, Morantz, 2011, Nichols et al., 2007, Reilly et al., 1995, Walters et al, 2005). Thus, we recommend that new rights should be introduced to: support roving safety representatives, which HSE research documented as so successful when piloted in agriculture; serve Provisional Improvement Notices (PINS), in a system akin to that already in use in Australia; allow refusal to engage in dangerous work by 'stopping the job'; and facilitating full participation in all aspects of health and safety in the workplace, for example in the preparation of risk assessments.

*Institute of Employment Rights, July 2011*

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