THE INSTITUTE OF EMPLOYMENT RIGHTS

Health & Safety at Work: Time for change

by Phil James & David Walters

Phil James is Professor of Employment Relations at Middlesex University and a member of IER's executive committee. He has researched and published widely within the fields of both industrial relations and occupational health and safety and twice served as a specialist adviser to the Work and Pensions Select Committee on inquiries into the work of the Health and Safety Executive. Phil is co-author (with David Walters) of the IER book *Regulating Health and Safety at Work: An Agenda for Change?*

David Walters is Professor of Work Environment and Director of the Cardiff Work Environment Research Centre (CWERC), at Cardiff University research centre in the School of Social Sciences. His research and writing is on various aspects of the work environment and he has particular interests in employee representation and consultation on health and safety, the politics of health and safety at work, and regulating health and safety management, and health and safety in micro small firms.

ISBN
978-1-906703-34-9
December 2016

published by the Institute of Employment Rights
4th Floor, Jack Jones House, 1 Islington, Liverpool, L3 8EG

e-mail
office@ier.org.uk
www.ier.org.uk

Design and layout by Upstream (TU)
www.upstream.coop

Printed by The Russell Press (www.russellpress.com)

£10 for trade unions and students
£40 others

THE INSTITUTE OF EMPLOYMENT RIGHTS

contents

CHAPTER ONE

executive summary

This booklet critically examines the continued appropriateness of the framework of law established by the Health and Safety at Work (HSW) Act 1974. It does so through an exploration of four key issues: the Act's application to today's employment patterns and structures; the oversight and enforcement of employers' compliance with their duties; worker access to representation; and the regulatory framework's overall governance and resourcing.

The analysis points to the existence of major problems in each of these areas. In particular, it highlights:

- the current failure of the 1974 statute to place obligations on lead organisations in supply chains sufficiently, notwithstanding their potential capacity to undermine health and safety standards in supplier organisations through the cost and delivery pressures they impose;
- the inadequate resources available to Health and Safety Executive (HSE) and local authorities to monitor and enforce employer compliance and a continued commitment on the part of regulators to using enforcement action as a 'last resort';
- the misleading promulgation of 'risk-based' targeting of inspections as a solution to this resourcing problem;
- a lack of worker representation in the majority of workplaces and hence an absence of a key and effective component of 'self-regulation';
- a failure of the HSE to act as an independent and autonomous decision-making body, rather than a reactive instrument of government policy.

In the light of these conclusions, a variety of recommendations are put forward to address the identified weaknesses that serve to reinforce the health and safety related proposals contained in the IER's recently published manifesto for labour law.[1] These encompass:

- placing the primary duty of care on 'a person in control of a

business or undertaking' (PCBU), rather than an employer, and defining the workers to whom this duty applies in a way which includes non-employees who carry out work connected with a PCBU's business or undertaking at worksites controlled by another organisation;

- substantially increasing the resourcing of HSE and local authorities in order to significantly expand inspection numbers and hence the likelihood of non-compliance being identified and penalised;
- supporting the above increase in inspection numbers via the adoption of a more aggressive approach to enforcement on the part of HSE and local authorities, and an increased ability to bring private prosecutions;
- 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;
- restricting the current option to directly consult workers over health and safety matters in non-unionised workplaces and placing the duty to consult on PCBUs, as opposed to employers;
- empowering representatives to issue 'provisional improvement notices' and to 'stop the job' in situations of serious and imminent risk; and
- re-constituting the governance of the HSE in line with United Nations principles relating to the desirable status and functions of National Human Rights Institutes.

More widely, it is concluded that the time has come to repeal the HSW Act and replace it with a more appropriate and effective framework of law.

CHAPTER TWO

introduction

Employment laws both reflect and influence the world surrounding them. The objectives they are intended to achieve, the way in which they go about pursuing them and the extent to which they are achieved are consequently intimately connected with the social and economic context from which they stem. It follows that laws may be viewed as appropriate in some settings and time periods and as inappropriate in others. It also follows that their effectiveness is likely to decline when the contextual assumptions and conditions that informed their creation no longer hold.

The issue of workplace health and safety has been the subject of statutory regulation since the early nineteenth century, following the passing of the Health and Morals of Apprentices Act 1802. Since then, the statutory framework of law has both grown substantially and undergone periods of radical revision, most recently as a result of the Health and Safety at Work (HSW) Act 1974. From a historical perspective, there is no doubt that these developments have occurred alongside dramatic improvements in standards of workplace health and safety. At the same time, work continues to generate large and unacceptable levels of harm to those undertaking it, notwithstanding the massive reductions of employment in more high risk areas of employment like manufacturing, docks, steel and mining.[2]

Provisional statistics collected under the Reporting of Injuries, Diseases and Dangerous Occurrences (RIDDOR) Regulations indicate that 105 employees and 39 self-employed workers died as a result of work-related incidents during 2015/16.[3] These statistics, however, exclude deaths from work-related traffic accidents, work-related deaths in coastal waters and those which have been reported to the Civil Aviation Authority, as well as work-related suicides. When account is taken of these, it has been estimated that they bring the annual total of work-related fatalities to around 1,500.[4] Estimates derived from the Labour Force Survey meanwhile suggest that 621,000 non-fatal work injuries occurred during the year, of which 152,000 led to over-7-day absences.

The HSE also reports on the basis of survey data that in 2015/16 there were 1.3 million people who had worked during the last 12 months and believed that they had an illness which had been caused or made worse by their current or past work: a statistic that roughly translates into a one in 30 probability of a British worker suffering from such a condition.[5] Half a million of these illnesses were new conditions which had started during the year, around 80 per cent of which comprised musculoskeletal disorders or cases of stress, depression and anxiety. In addition, while considerable uncertainty surrounds the number of deaths occurring each year as a result of occupational illnesses, there is no doubt that they exceed by a considerable margin those arising from work-related accidents. Indeed, one estimate suggests that there could be up to 50,000 deaths a year stemming from such illnesses.[6] While many of these deaths will arise from conditions with long latency periods and therefore reflect the impact of past working conditions, too much comfort from this should not be taken since it has been estimated that in the early 1990s about five million workers in Britain were exposed to carcinogens.[7]

In short, work-related harm remains substantial. Indeed, it has been argued that the likelihood of suffering a work-related death is twice that for homicides and, more widely, that 'work is much more likely to be a source of violence in Britain than those 'real crimes' recorded by the Home Office.[8]

These statistics raise inevitable questions about the capacity of the current legal framework to protect the well-being of workers. The fact that the centre piece of that framework, the HSW Act, is now over 50 years old – and essentially in the same form – adds weight to these questions given the dramatic changes that have taken place in the world of work in the intervening period. For example, shifts in the occupational breakdown of jobs and the sectors in which they are based and a growth in the proportion of employment based in small- and medium-sized enterprises, as well as a somewhat related trend towards the outsourcing of work to supplier organisations and the rise of what the U.S academic David Weil has labelled fissured organisations.[9] They have further encompassed expansions in part-time and agency working, a significant rise in both real and bogus self-employment, the expansion of zero-hours contracts, and, as a corollary of such developments, a reduction in the proportion of workers engaged under contracts of employment and hence having the status of an 'employee'.[10] On top of all this, far from expanding,

as they were in the early 1970s, trade union membership, recognition and workplace organisation have all undergone substantial declines.[11]

Against this backcloth, official endorsements of the continued appropriateness of the HSW Act cannot be taken at face value. Rather, they merit critical examination.

The purpose of this booklet is to provide such an examination. It does so, not through the provision of a comprehensive evaluation of the current regulatory framework for workplace health and safety – a task that is to be the subject of a later and more substantial piece of work by the IER – but through a consideration of four issues central to the framework's effective operation. These are: the Act's application to today's employment patterns and structures; the oversight and enforcement of employer compliance with their duties; worker access to representation; and the framework's overall governance and resourcing.

As shall be seen, in drawing together these four lines of analysis, it is concluded that the time has come to repeal the 1974 statute and fundamentally reform the current framework of law governing workplace health and safety. In doing so, attention is drawn to how recent legislative change in other countries such as Australia provides a potential model on which to base key aspects of this process of reform.

CHAPTER THREE

improving the Act's application to current employment patterns and structures

As many readers will recall, the HSW Act largely implemented the recommendations put forward in the 1972 report of the Robens committee.[12] A striking feature of the recommendations was the proposal that the self-employed be brought within the scope of the legislation 'as far as their own health and safety is concerned' and 'where their acts or omissions could endanger other workers (employed or self-employed) or the general public'.[13] This proposal was in turn duly implemented in the 1974 statute. So while section 2 of the Act requires employers to ensure, so far as reasonably practicable, the health, safety and welfare of their employees, section 3(1) requires them to conduct their undertaking 'in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment are not thereby exposed to risks to their health or safety' and section 3(2) imposes a similar duty on the self-employed with regard to both themselves and 'other persons'.

The provisions of section 3 were remarkably prescient in that they effectively anticipated the growth in self-employment and other forms of employment in which the status of employment, and/or the identity of the employer is unclear. An expansion that is graphically illustrated by the rise in self-employed workers from 3.8 million to 4.6 million over the period 2008-2015, and more widely by how self-employment accounts for much of the employment growth that has occurred since the 2008 economic crises.[14]

Unfortunately this did not stop the Coalition government from accepting the recommendation of the Löfstedt review of health and safety legislation it sponsored, that 'those self-employed whose work activities pose no potential risk of harm to others' be exempted from health and safety law,[15] a recommendation that was implemented in October 2015.[16] This created a situation whereby it is often left

to untrained and inexperienced self-employed workers to assess whether their activities involve risks to others, in contexts where they may be under financial and time pressures encouraging them to decide that they don't. For example, such pressures are a common feature of sub-contracting arrangements under which self-employed frequently work.

Clearly this change should be reversed, particularly given that while the self-employed constitute around 15 per cent of employment,[17] HSE figures indicate that 30 per cent of work-related fatalities involve them.

Section 3, as originally worded, does, however, also have limitations. Relatively expansive interpretations of what constitutes an 'undertaking' for the purposes of section 3(1) have been adopted by the courts. In *R v. Associated Octel Co.*, the employer was operating a chemical plant and the House of Lords held that 'anything which constituted running the plant was part of the conduct of the 'undertaking'.[18] It was therefore concluded that the hiring of a subcontractor to clean a tank during the plant's annual shutdown constituted part of the employer's undertaking. Their Lordships further observed, however, that 'the cleaning of the office curtains at the dry cleaners; the repair of the sales manager's car in the garage; maintenance work on machinery returned to the manufacturer's factory… cannot be fairly described as the conduct by the employer of his undertaking.' They also noted that while independent contractors undertaking cleaning and repairs on an employer's premises, as an activity integrated with the general conduct of the business, could be regarded as 'an ancillary part of his undertaking', this would not be the case with regard to activities carried out by 'another person entirely separately on their own.'

These limitations on the reach of section 3 clearly sit uncomfortably with the extent to which organisations have moved to externalise activities and to operate on a more distant networked basis. For they mean that its provisions are unlikely to sufficiently place obligations on the lead organisations in supply chains who possess a capacity to both directly and indirectly undermine health and safety standards in supplier organisations through the cost and delivery pressures they impose.[19] In the case of supermarkets, for example, it has been found that supply chain relationships between supermarkets and their suppliers can lead to increased casualisation and agency working, unstable patterns of work and working time, and work intensification,

with one study concluding that:

> *…supermarkets add to the difficulties of managing health and safety as cost pressures and delivery requirements push companies towards using agency workers, increasing the pace of work and utilizing long working hours*.[20]

Another study undertaken by the British Equality and Human Rights Commission (2010) on recruitment and employment in the meat and poultry processing sector reinforces this conclusion.[21] Thus, in finding evidence of the widespread poor treatment of agency workers, including in respect of health and safety, it showed that the main reason for the use of them was to meet the demands of supermarkets. It was also observed how a number of agencies felt that current profit margins did not allow for compliance with labour laws because of supermarkets 'driving their prices' and that 'the downward price pressures exerted by supermarkets and the way they went about ordering products from suppliers brought about conditions that supported unethical traders'.

A considerable body of evidence further highlights that the types of work changes commonly resulting from supply chain pressures are linked to a variety of adverse health and health-related outcomes, including cardiovascular disease, burnout and depression.[22] These changes include greater job insecurity, poorer pay, lowered access to training among precarious workers, and less control over working time.[23]

It is therefore unsurprising that academic writers such as David Weil (who was also the Director of the Labor and Hours Division of the U.S. Department of Labor under President Obama) have noted how vulnerable workers tend to be concentrated in industries where lead firms determine the product market conditions within which suppliers set wages and conditions. Or that, Weil and others have advocated the development of regulatory strategies that address the market dynamics underlying the detrimental effects of 'fissured' employment arrangements.[24]

When viewed through this lens the current provisions of the HSW Act must be seen to be problematic given their failure to impose a clear duty of care on those at the head of supply chains to ensure that their delivery and pricing demands do not have detrimental health and safety consequences in supplier organisations. This is particularly

so given that elsewhere similar issues have not only been recognised but grasped via the making of appropriate changes to the law.

For example, in 2010 the Australian federal government adopted a model Workplace Health and Safety Act following the reaching of an agreement with the governments of six states, and two territories to harmonize their different occupational health and safety statutes. Following its adoption, the years 2011 and 2012 saw all Australian jurisdictions, with the exceptions of Victoria and Western Australia, enact mirror statutes into law.[25] 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.[26] In particular, it imposes the primary duty of care on `a person in control of a business or undertaking' (PCBU), rather than an employer, and defines a worker to whom this duty is owed widely to include a person who:[27]

> 'Carries out work *in any capacity* for a person conducting a business or undertaking, including work as—
>
> (a) An employee; or
>
> (b) A contractor or subcontractor; or
>
> (c) An employee of a contractor or subcontractor; or
>
> (d) An employee of a labor hire company who has been assigned to work in the person's business or undertaking; or
>
> (e) An outworker;
>
> (f) An apprentice or trainee; or
>
> (g) A student gaining work experience; or
>
> (h) A volunteer; or
>
> (i) a person of a prescribed class.'[28]

Furthermore the Act 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.'[29] The Act's primary duty of care consequently applies to non-employees on worksites not controlled by a PCBU but who are carrying out work connected to its business or undertaking. Accordingly, the Act expressly expands the duties of PCBUs to premises that they do not control.

These provisions show how the limitations on the application of Section 3 of the HSW Act could be overcome to create a system of supply chain regulation that is much better suited to address the challenges to worker health and safety arising from the growth and importance today of fissured employment arrangements.[30] Moreover the provisions have been established in a national jurisdiction with a similar legal system to Britain and in which health and safety legislation has also been fundamentally shaped by the recommendations of the Robens Committee. There are as a result no fundamental legal challenges to the creation of a similar framework of law in this country.

CHAPTER FOUR

employer compliance with statutory obligations

Employers possess an extensive set of obligations under the current framework of occupational health and safety law. In addition to the general duties of the 1974 Act they include requirements found in supporting sets of regulations, such as the Management of Health and Safety at Work Regulations. Compliance with these statutory obligations is monitored and enforced by local authority and HSE inspectors armed with powers to issue improvement and prohibition notices and to initiate prosecutions leading to fines and (for some types of offences) imprisonment.

Historically, the direct enforcement of health and safety laws has been regarded as a 'matter of last resort' by inspectors.[31] Indeed a central objective of the Robens committee's recommendations was to create a more effectively self-regulating health and safety system – an objective informed by the twin beliefs that there 'are severe practical limitations on the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies', and that the 'primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them'.[32] This self-regulatory approach remains the philosophical touchtone underlying the present legal framework.

The capacity and willingness of employers to self-regulate the management of health and safety, remains, however, highly problematic. Undoubtedly, some do carry it out effectively. Available evidence, however, indicates that even large employers struggle to establish effective self-regulatory systems.[33] It is further clear that many smaller employers have little understanding of their legal obligations or the capacity to self-regulate.[34] This has been found to be so even within high-risk sectors like construction. For example, between June and September 2014 inspectors visited 2,300 construction refurbishment sites as part of an intensive inspection

initiative during which it was deemed necessary to issue around 350 improvement and over 300 prohibition notices.[35]

There seems no doubt that the types of supply chain pressures discussed above in relation to the growth of fissured work arrangements, as well as the growing concentration of employment in small- and medium-sized enterprises, has served to render the aspiration of self-regulation even more problematic. Not least because an important criticism of outsourcing is that it enables large, well-resourced employing organisations to export their risks to less well-resourced smaller ones.[36]

There remains then a major challenge in securing employer compliance with their statutory health and safety obligations. HSE, and its generally highly committed staff, has sought to rise to this challenge in three main ways. First, through marketing and communication activities aimed at increasing awareness of legal obligations and what needs to be done to comply with them. Secondly, through the promulgation of business case arguments intended to encourage a view that compliance is financially beneficial. Thirdly, by continuing to use 'traditional' methods of inspection and enforcement. However the use of the latter has declined substantially (see further below) and instead HSE has placed increasing reliance on softer approaches to achieving compliance though the marketing and communication of its regulatory messages, and by appealing to the 'business instincts' of employers. Yet evidence for the effectiveness of these methods remains weak and unconvincing. In contrast, there is ample and long-standing evidence that inspections act to improve legal compliance and worker protection both directly and indirectly.[37] Directly by engaging with employers at the workplace level and indirectly by creating an awareness among them that non-compliance is likely to be detected and punished. In fact, evidence indicates clearly that corporate compliance with social laws more widely is supported by a perception that there is a real possibility of non-compliance being detected and penalised.[38]

To resolve, at least rhetorically, this evidence mismatch successive governments – Conservative, Labour and Coalition – have supported the targeting of inspections at higher risk workplaces as a means of countering accusations that a reduction in the number of inspections will lead to a lowering of health and safety standards. The argument here being that an approach focussing attention on workplaces where workers are at most risk of harm offers a means of reducing costs,

inspector numbers and unnecessary inspections, while simultaneously maintaining existing levels of protection.[39] However, while perhaps superficially appealing, this argument is deeply flawed since it effectively assumes that existing standards of worker protection are adequate and takes no account of the absence of comprehensive and reliable data on the relative levels of risk present in different workplaces. For the HSE, in common with local authorities, have to place reliance on the far from comprehensive reports made by employers under RIDDOR and, irony of ironies, information derived from the risk-targeted inspections themselves: a truly circular logic. Consequently, while the HSE has long claimed to target proactive inspections on the basis of risk, it has been observed by the National Audit Office that:

> '*in terms of deciding who to inspect, the assessment tended to go little further than the analysis of risk sectors and the types of accidents that occur in such sectors. In other words, for many inspection visits, consideration of the individual firm's past performance on health and safety or the 'type' of business beyond sector (e.g. whether the firm is a small or large business) appeared to play little part in the consideration of whether or not to inspect'*.[40]

The report of the Robens Committee in 1972 argued that inspectorates should move away from carrying out 'periodic routine visits' and instead focus inspections 'on priorities and problems that have been identified through the systematic assessment of all the available data'.[41] In this sense the HSE has always been informed by a risk-based approach towards inspection. But the application of the approach has been intensified. First, as a result of the adoption of the conclusions of the Labour government sponsored Hampton report that periodic routine inspections were wasteful and inefficient and that it would be better concentrate inspections on workplaces where risks were highest and/or where management of them was poor.[42] Second, and more dramatically, as a consequence of the aim stated in the Coalition government's *Good Health and Safety, Good for Everyone* document to reduce HSE inspections by a third and its recommendation that this be pursued by identifying three groupings of 'non-hazard industries' for inspection purposes,[43] namely:

a) comparatively high risk areas where proactive intervention would be retained, such as construction, waste and recycling and areas of manufacturing;

b) areas of concern but where proactive inspection is unlikely to be effective, for example health and social care, agriculture and quarries;

c) lower risk areas where such inspections would no longer take place, including parts of manufacturing like textiles, clothing, footwear and light engineering, the transport sector, local authority administered education provision and postal and courier services.

This approach is echoed in a new National Enforcement Code for local authorities under which they are expected to concentrate proactive inspections on particular types of hazard in particular sectors where they create 'high risks'. As a result, they are effectively prohibited from undertaking such inspections in most of the workplaces in respect of which they have enforcement responsibilities.[44]

Unsurprisingly, the effect of these policies has been to substantially reduce the number of proactive inspections taking place. HSE has reported that the number of such inspections fell from 33,000 in the 'baseline year' 2010/2011 to 23,472 in 2013/14.[45] Since then they have fallen further, to 20,200 in 2014/15 (see below) and around 18,000 in 2015/16.[46] Meanwhile, in the local authority enforced sector, numbers fell over the period 2009/10 to 2014/15 by a staggering 95%, from 118,000 to just 5,400 (HSE, 2014).[47] These reductions, moreover, have occurred on top of the significant reductions in HSE inspections and investigations that occurred during the last decade of new Labour rule: reductions that during the period 1999/2000 to 2009/10 encompassed falls of 69% in planned inspections and 49% in investigations of major injuries.[48]

Enforcement actions against non-compliant duty holders have also fallen markedly. Here, however, trends have been less consistent and notably varied between HSE and the local authority sector. In the case of HSE, Tombs and Whyte have revealed how the period of Labour government saw a 29% decline in the number of enforcement (improvement and prohibition) notices issued by the HSE and a cut of nearly a half in prosecution numbers. Since then, as Table 1 shows, prosecution case numbers have tended to increase, although not sufficiently to compensate for the previous reduction, while numbers of improvement and prohibition notices have declined further overall: from 11,020 to 8771.[49] The picture for the local authority sector is rather different. The figure for annual prosecution cases

has been lower for each year between 2010/11 and 2014/15, with the figure for the latter year being around 46% lower than that for the former. Similarly, the number of enforcement notices issued has fallen consistently over the period 2010/11 to 2015/16, and by nearly two-thirds overall.[50]

Table 1: HSE and Local Authority enforcement action 2010/11 to 2015/16

Type of Action	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
HSE and Procurator Fiscal prosecution cases	520	577	605	604	659	696
Local Authority prosecution cases	129	95	105	88	70	?
HSE Improvement and Prohibition Notices	11,020	9,909	8,806	10,121	9,446	8,771
Local Authority Improvement and Prohibition Notices	7,270	6,045	4,693	3,671	2,984	2,632

Sources: Health and Safety Statistics for Great Britain, 2011/12, 2012/13, 2013/4, 2014/15 and Enforcement in Great Britain 2016[51]

These falls in inspection numbers and enforcement action clearly cannot be defended on the basis of existing levels of work-related harm. This is particularly so when it is borne in mind that the current policy of risk-based inspection is highly misleading and something of a misnomer. Indeed, the more it is used to support reductions in inspections, the more its credibility declines. After all, could it credibly be claimed that a policy of inspecting the single most high-risk workplace would provide a basis for protecting standards in all others?

More inspections, and the resources required to undertake them, are therefore needed. In addition a shift in compliance strategy is required that recognises the weakness of business case arguments, accords greater recognition to the contribution that inspections make to improved standards of worker protection and legal compliance, and rolls back the current emphasis on the risk-based planning of proactive inspections. We need to create a situation where *all* employers feel there is a reasonable probability that they will be inspected and that failures to comply with legal requirements will be

identified and sanctioned. After all, even the Hampton report drew attention to the deterrent effect of the threat of inspection, arguing the need to retain a 'small element of random inspection' to 'ensure that businesses that are tempted to break the law always know that they could be inspected'.[52 / 53]

This expansion of inspectorate resources must also take due cognisance of three further inter-related considerations. First, the current scale of work-related psychosocial harm. Secondly, the need for inspectors to focus more attention on addressing the organisational issues giving rise to such harm. Thirdly, research both in Australia and Sweden has shown that to do so adequately, requires inspectors to undertake more thorough and in-depth inspections than is the current practice.

Experience shows, however, that such changes in staffing and inspection policy and practice will be difficult to secure, may well not go far enough and will always be vulnerable to the vagaries of public sector funding decisions. Furthermore, the 'last resort' philosophy regarding the use of formal enforcement action is deeply embedded in current policy and practice and hence is unlikely to be easily jettisoned institutionally. For all these reasons consideration must be given to supplementing the work of HSE and local authority inspectors in two ways. First through removing the current requirement under the HSW Act to secure permission to initiate private prosecutions. Secondly, as will be discussed further below, by increasing the ability of workers and unions to inspect working conditions and to challenge those found to be unsatisfactory.

CHAPTER FIVE

health and safety representation

The Robens Committee attached great weight to the importance of workforce involvement in health and safety matters and saw it as central to the development of a greater degree of self-regulation within industry. To this end it recommended that all employers be placed under a statutory duty to consult with employees or their representatives at the workplace on 'measures for promoting safety and health at work, and to provide arrangements for the participation of employees in the development of such measures'.[54] In the event, the then Labour government went further by including in the 1974 Act provisions in sections 2(4) to 2(7) allowing for the making of regulations under which (a) recognised trade unions could appoint safety representatives, (b) the workforce could elect such representatives and (c) these representatives could request the establishment of health and safety committees.[55]

These provisions were used to make the Safety Representatives and Safety Committees (SRSC) 1977 that enable recognised unions to appoint workplace safety representatives from amongst employees, and provide those so appointed with various rights and functions, including ones relating to the carrying out of workplace inspections and the establishment of joint health and safety committees. Subsequently, as a result of the need to comply with the provisions of a European directive, the Health and Safety (Consultation with Employees) (HSCE) Regulations 1996 were made which impose consultative obligations on employers in respect of workers not covered by union appointed safety representatives.[56] These regulations, however, provide employers with discretion as to whether they consult with employees directly or via elected representatives, known as Representatives of Employee Safety. Furthermore, the functions of these representatives do not include the carrying out of inspections, or the investigation of notifiable accidents, diseases and dangerous occurrences. Nor do they provide a right to request the establishment of a health and safety committee and their construction is widely acknowledged to render them almost entirely unenforceable.[57]

These two sets of regulations have operated against the background of a growing body of international evidence pointing to the capacity of systems of worker representation and consultation to improve both health and safety management and outcomes. This evidence though also indicates that their effectiveness is dependent on the presence of a number of 'pre-conditions': 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.[58]

Such evidence casts considerable doubt on the value of non-union forms of workforce representation and consultation, as well as the utility of direct, non-representative ones. Meanwhile, it is clear that as workplace union recognition has fallen so has the coverage of representative systems of health and safety representation, as Table 2 below shows.

Table 2: UK Health and Safety Arrangements 1998- 2011

Percentages	1998	2004	2011
Single or multi-issue joint committees	26	20	11
Free standing worker representatives	25	22	21
Direct methods	47	57	66
No arrangements	2	1	2

Workplaces with 10 or more employees

Sources: Kersley et al, 2006: 204, Table 7.12 and van Wanrooy et al, 2013, page 38[59]

The findings of the 2011 Workplace Employment Relations survey from which the last column of the above table is drawn, further highlight how the growth in direct methods of consultation has reflected declining union recognition. Thus, they show that workplaces with union recognition were statistically less likely to rely on such methods and more likely to have a health and safety committee.[60]

In short, while there is evidence that effective systems of worker representation and consultation can make an important contribution to the protection and enhancement of workplace health and safety standards, it is apparent that such systems are currently present in only a small proportion of workplaces. It is therefore difficult to see how self-regulation as a regulatory strategy can be viewed as viable in

a context where one of its key component elements is missing.

Radical action is needed to address this situation. This action should encompass three overlapping strands. First, taking steps to expand union-based representation over workplace health and safety matters. Secondly, reforms aimed at focussing consultative obligations on PCBUs, in line with the previous proposal to shift the primary duty on to them, and away from employers. Thirdly, action to enhance compliance with statutory obligations.

In the first of these areas, there is a need to loosen the current linkage in the SRSC regulation between union recognition and union rights of inspection and representation in order to enhance the ability of unions to provide the latter. This could be done by building on statutory frameworks that have been used in such countries as Sweden, Norway and Italy to enable workers in small workplaces to have access to health and safety representation, and by taking heed to those in Australia that allow trade union officials similar rights of access to workplaces where they have members. Research evidence on the operation of these measures in Sweden show them to make a highly effective contribution to occupational health and safety in small firms.[61] It further shows that, contrary to politically inspired concerns about their acceptability, the interventions of these representatives are generally welcomed by employers and employees alike. A second objection to such measures, frequently raised, is the question of their potential operational costs. However, here again, the evidence suggests they are a highly cost-effective resource, for example providing greater support for preventive health and safety in small firms in Sweden than that provided by the combined work of the far more expensive occupational health services and Work Environment Authority personnel. In Sweden the system is supported in part through a small work environment levy on employers, a system that could be usefully explored in the UK. Alternatively, a range of other ways of supporting a new generic right of access to workplaces for trade unions could be examined.

As regard the scope of employer consultation duties, the option that employers currently have under the 1996 HSCE regulations to consult with employees directly should be removed, or at least restricted to workplaces below a minimum size threshold. More radically, and again echoing the provisions of Australia's model Workplace Health and Safety Act, the obligation to consult should be placed on PCBU's, rather than employers, and relate to workers as defined in this

statute.[62] In this way the new provisions would place consultation obligations on large employers in relation to those working in smaller supplier organisations. In addition, workers in such organisations could have the right to request a PCBU for whom they undertake work to facilitate the appointment of health and safety representatives to represent them in relation to the work they carry out, and to consult with them in a context in which the PCBU and the immediate employer must cooperate and co-ordinate their activities where they have a duty in relation to the same matter.

Careful consideration would need to be given to the precise nature of such a legal framework for consultation and representation. For example, thought would need to be given to how best to accord a central role to unions. Reforms of this nature do though potentially offer a means to significantly improve the coverage and effectiveness of health and safety consultation and representation in smaller organisations, as well as potentially enabling it to address the adverse health and safety consequences arising from the nature of trading relationships between purchaser and supplier organisations. Clearly, however, the effectiveness of such a framework of law would be influenced by how far it is supported by meaningful systems for monitoring and enforcing compliance with it.

Since the introduction of the SRSC regulations the HSE (along with local authorities) has preferred to avoid involvement in disputes over the operation of the regulations relating to worker consultation and representation. There is as a result little evidence of inspectors formally intervening to support the application of the regulatory requirements and virtually no examples of enforcement actions being taken in cases of employer non-compliance. A more rigorous approach towards the enforcement of representative rights is therefore required. In addition, inspectors should seek to encourage and support health and safety representatives in focusing on health as well as safety issues and in doing so help them to address the psycho-social risks faced by their constituents.

This encouragement is much needed given that, as highlighted earlier, stress, depression and anxiety and musculoskeletal disorders represent by far the most common forms of work-related illness experienced by workers. Its relevance is reinforced by employee responses to the 2011 Workplace Employment Relations Survey which indicated that just under half of respondents felt that work during the past few weeks had made them feel depressed,[63] findings that are in line with

the international evidence on the effects of the current organisation of work and employment on the health of workers. The importance of addressing psycho-social risk factors is yet further emphasised by the correlation of these responses with those regarding experiences of work intensification and long working hours.[64]

Relying on inspectors alone to ensure compliance with statutory provisions on worker representation and consultation is, however, unlikely to be sufficient. Consequently, in addition to the earlier proposal aimed at facilitating private prosecutions, it is argued that representatives should have the power to issue 'provisional improvement notices' where they believe there to be a serious infringement of health and safety standards and a right to 'stop the job' where there is felt to be a serious and imminent risk to workers. Such measures exist in other national jurisdictions, including Sweden and Australia, where they have been found to be both highly effective and to be used responsibly by trade union representatives.[65]

CHAPTER SIX

governance and resourcing of the statutory system

Administratively, the HSW Act established a tripartite national (policy) authority in the form of the Health and Safety Committee (HSC) and an operational executive, the Health and Safety Executive (HSE). These bodies were later merged, in 2008, under the name of the latter.[66] The new merged body is required to consist of a chair and at least seven and no more than eleven other members, and retains a tripartite structure in that three members be appointed respectively following consultation with organisations representing employers and employees.[67]

This tripartite system of representation has come under attack. In 2013 the government rejected the appointment of a high-profile trade unionist and instead chose someone who was retired and had no current links with unions.[68] More recently, in September 2016, the government replaced one of the employee representatives on the HSE management board with a former chief executive of the Durham and Darlington Fire and Rescue Service, who had previously played the same role for the Northern Business Forum and been a director of the food company Greggs.[69] Following union protest, however, the government subsequently confirmed that a further position on the board would be advertised to represent the interests of employees and that the TUC would be consulted over the recruitment process.

A longer and more marked trend has been for the operational capacity of the HSE to be continually attacked through cuts to its funding. Indeed, with the exception of a period following the election of the first Blair government in 1997, the period since 1979 has seen an almost continuous process of funding reductions. Most recently, quickly after its election the 2010 Coalition government announced that the HSE's government funding would be cut by a further 35 per cent, or by over £80 million, over the period to 2014.[70] Almost unbelievably, under the latest funding settlement with the Department of Work and Pensions it is planned that funding will fall further, from £142.6 million in 2015-

16 to 128.4 million in 2019.20, an absolute reduction of another 10%.[71] As a consequence, HSE's funding will staggeringly have fallen by more than 60% over the period from 2004/05.[72]

Against this background, it is no surprise that HSE staffing has fallen by more than a third over the period 2004-16, from 4019 to 2576, with the result that in March 2016 it employed a grand total of 920 inspectors engaged on frontline work.[73] It is similarly unsurprising that in the face of austerity driven funding cuts to local authorities the number of (full-time equivalent) local authority inspectors declined from 1050 to 736, or by 30%, during the period 2009/10 to 2014/15.[74] It is also the case that in many local authorities these inspectors now carry out no enforcement on workplace health and safety whatsoever, conserving their much reduced resources for securing compliance with food safety and environmental protection measures, on which they have more onerous obligations.[75]

These attacks on HSE budgets and staffing obviously link to the trends in inspections and enforcement actions reported earlier. At the same time, the development of these strategies cannot be viewed as straightforwardly flowing from a hostile funding environment. This is because during the same period the HSC/E itself has consistently exhibited a policy commitment to a 'business friendly' approach to regulation that downplays the roles of inspection and enforcement. Many of the prescriptions advanced in the Hampton report, for example, were already embedded in previously published HSC/E strategies. One good example of this commitment was provided during an evidence session held in May 2004 as part of Parliamentary Select Committee inquiry into the work of the HSC/E. During this, the then HSC chair, Bill Callaghan, was given several opportunities to indicate how he would use a substantial increase in HSE's resources and in responding to them chose not to mention securing an increase in inspector numbers.[76] A second example is how the HSE chose not to adopt new sanctions provided under the Regulatory Enforcement and Sanctions Act 2008, such as fixed monetary penalty notices and enforcement notices under which offenders agree to carry out specific activities to improve health and safety, much to the apparent frustration of the Local Authorities Coordinators of Regulatory Services.[77]

The HSE, in common with the preceding HSC, is of course statutorily obliged to act in accordance with directions given by the relevant Secretary of State and hence to conform to the policy dictates

of the government of the day. Over successive decades since its establishment in 1975 this has meant that the HSE has experienced not only swingeing budget cuts, but also the reorientation of its strategic direction in line with the neo-liberal policies that governments have been pursuing since the end of the 1970s. It is a moot point how far it could have chosen to have voiced disquiet about this reorientation and its implications. The fact is, however, that an agency which incorporates the oldest and probably most respected regulatory inspectorate in the world has been transformed from an institution admired internationally for the impartiality of its inspection and enforcement practice into a toothless handmaiden of government. Notwithstanding the tripartite consultative bodies it embraces and indeed its tripartite system of governance. In fact, this so-called tripartitism has arguably acted to mute voices of protest about current government policy.

While resourcing to the HSE clearly needs to be substantially increased, this history of responses to governmental cuts and more general hostility raises broader issues regarding its governance. For it highlights how the HSE falls short of constituting an independent and autonomous decision-making body, rather than one that effectively operates as a reactive instrument of government policy. In doing so, it therefore raises the question of whether it is possible to put the HSE on an alternative constitutional footing that would better enable it to act in an independent and autonomous way.

The simple answer to this question is 'yes'.

Back in 1993 the World Conference on Human Rights, held in Vienna under the auspices of the United Nations, adopted a set of standards, known as the Paris Principles which set out the desirable status and functions of National Human Rights Institutes (NHRIs).[78] These principles state that such bodies should be established in a way which ensures 'the pluralist representation of the social forces (of civilian society)', and enables 'effective cooperation with, or through the presence of, representatives of relevant non-governmental organisations, trade unions and concerned professional organisations', as well as Parliament, and government departments. At the same time, they also make clear that where government departments are represented, this should be in an advisory capacity and that, more widely, NHRIs should have the 'adequate funding' that will enable them to be 'independent of government and not be subject to financial control which might affect its independence'.

Such UN based principles might perhaps appear rather prosaic in the present context. However, developments closer to home reinforce their potential relevance.

In a 2003 report in which it discussed the proposed establishment of the Equality and Human Rights Commission the House of Lords Joint Committee on Human Rights recommended that Parliament ratify the appointment of its commissioners and chief executive, that the commission formally report to one or more Parliamentary select committees and that its budget be set by Parliament.[79] None of these recommendations were subsequently adopted in relation to the constitution of the UK's designated NHRI, namely the Equality and Human Rights Commission. They have, however, largely been operationalised in relation to the composition of the Scottish Commission for Human Rights.[80] So, the chair of this commission is appointed following a nomination from the Scottish Parliament, and its other members appointed by the Parliamentary Corporation – a body comprising the presiding officer and four other members of the parliament. In addition, it is made clear that in exercising its functions, the Commission is not to be the subject to direction or control of any members of the Parliament, the Scottish Executive, or the Parliamentary Corporation.

While in a technical sense the HSE is not a human rights body, it clearly can be argued to be concerned with a fundamental human right, namely the protection of the life and health of workers. It would seem entirely appropriate therefore for it to be constituted along the above lines.

Such a reform would require important budgetary decisions, notably those involving major cuts in HSE resources, to be openly and transparently debated and approved. It would also ensure that decision-making better reflects the expertise and views of key stakeholders and help avoid major short-term shifts in policy occurring simply as a result of the ideological preferences of governments. More generally, a reform along these lines would also act to enhance democratic control and oversight over occupational health and safety policy-making.

The importance of this last virtue cannot be over-stated. As authors who have served as specialist advisers on select committee inquiries into the work of the HSC and HSE, we have witnessed at first hand how governments have chosen to respond to the reports of such

inquiries by rejecting, or 'side-stepping', recommendations which do not fit with their political ideology or require changes in resourcing. Responses that can be contrasted with the alacrity with which the 2010 Coalition government accepted the recommendations of its own review (the Löfstedt Review) or, for that matter, the similar way in which a previous Labour government accepted those of the Hampton report it commissioned.

CHAPTER SEVEN

conclusion

As was made clear at the outset, this booklet has not sought to provide a comprehensive blueprint for the reform of British health and safety law: a task that is to be taken up in a future successor volume to the earlier IER publications *Regulating health and safety at work: The way forward* and *Regulating health and safety at work: An agenda for change?* [81] It has not, for example, addressed the reform of arrangements for the compensation of work-related injuries and illness, or the nature of the health and safety management infrastructures that employers should be legally required to put in place.[82] Nor has it addressed issues connected with the return to work and employment security of those so harmed, or the provision of support for preventive services for occupational health, such as those commonly required in EU member states. Instead it has focussed attention more narrowly on four topics central to the structure and operation of the present statutory framework for occupational health and safety, as embodied in the HSW Act: its application to today's employment patterns and structures; the oversight and enforcement of employer compliance with their duties; worker access to representation; and the framework's overall governance and resourcing. In each of these areas the offered analysis has pointed to the need for radical reform.

With regard to the HSW Act's application to the world of work today, an impressive feature of the Act is noted to be the way in which section 3 serves to extend the duties of employers to the protection of 'others' who may be affected by the operation of their undertakings. However, we have also drawn attention to judicial interpretations which suggest that these duties are unlikely to place obligations on employers in respect of workers engaged on 'externalised work' that takes place away from their undertakings. Consequently, Section 3 does not in practice provide a clear platform from which to address situations where the pricing and delivery demands of those outsourcing work can have adverse implications for the health and safety of workers in supplier organisations. To remedy this situation, and borrowing from legislative developments in Australia, it has been

argued that the law be reformed to move the primary duty of care away from 'employers' and on to 'a person in control of a business or undertaking' (PCBU) and to make clear that the duties of PCBU's apply to all workers engaged on work relating to the conduct of their undertakings, regardless of where they are located.

As regards the oversight and enforcement of compliance, our analysis notes how the capacity and willingness of employers to 'self-regulate' the management of workplace health and safety is highly variable, particularly among smaller organisations. It also questions the notion that employer compliance with their legal obligations can be improved via the promulgation of 'business case' arguments. Rather, evidence is seen to lend strong weight to the view that improvement is most likely to be achieved where there is a real possibility of legal non-compliance being detected and penalised. In this context, government driven reductions in inspections and enforcement actions over the last four decades are observed to conflict with international evidence concerning what works in improving OSH arrangements and outcomes. This mismatch between evidence and policy needs to be addressed. First, through the resourcing of much larger programmes of proactive inspections on the part of HSE and local authorities, and secondly through enhancing the ability of unions and workers to challenge unsatisfactory working conditions via the bringing of private prosecutions.

On the issue of worker representation, attention is drawn to how it necessarily forms a central component of effective self-regulation by workers and their employers and the wide range of international evidence which bears witness to the role it can play in improving health and safety standards and outcomes. At the same time, the coverage of such representation is observed to have fallen in line with declining union recognition and hence a falling capacity to appoint safety representatives under the SRSC regulations. This decline is seen to point to the need to loosen the linkage between union recognition and statutory rights of health and safety representation to enable unions to visit and inspect any workplaces in which they possess members. In addition, it is further proposed that PCBU's be placed under obligations with regard to the representation of workers undertaking work for them at remote locations under the control of another employers: a change which would serve, along with that just mentioned, to potentially increase worker access to representation in small and medium sized enterprises. Finally, and following on from the suggestion put forward at the end of the last paragraph,

it is advocated that inspectors adopt a more rigorous approach to the enforcement of representative rights and that unions and safety representatives themselves be given the power to issue provisional improvement notices and 'stop the job' where they believe there is a serious and imminent risk to workers.

Turning to the resourcing and governance of the health and safety system, the way in which government cutbacks have decimated the ability of both the HSE and local authorities to meaningfully oversee and enforce compliance with statutory health and safety requirements is highlighted. The HSE's responses to government cuts and hostility are further seen to indicate that it cannot reasonably be seen to constitute an independent and autonomous decision-making body. As well as calling for much more funding for HSE and local authorities, it has therefore been argued that the HSE be re-constituted in line with UN principles relating to the status and functions of National Human Rights Institutes.

Taken together, the various recommendations advanced are seen to support the case for a radical reform of the current statutory framework for health and safety law encompassing the repeal and replacement of the 1974 HSW Act. In due course the authors in the promised subsequent volume will go on to detail more fully the nature of such new legislation.

endnotes

1 Ewing, KD., Hendy, J. and Jones, C. (ed). 2016. *A manifesto for labour law: Towards a comprehensive revision of workers' rights*. Liverpool: Institute of Employment Rights.

2 These shifts in employment should arguably have led to larger reductions in work-related harm than those which have occurred.

3 Health and Safety Executive. 2016. Health and safety at work: Summary statistics for Great Britain 2016, available at http://www.hse.gov.uk/statistics/index.htm

4 Tombs, S and Whyte, D. 2008. *A crises of enforcement: The decriminalisation of death and injury at work*, Briefing 6. London: Centre for Crime and Justice Studies.

5 This relatively high probability appears even more disturbing when it is borne in mind that a significant proportion of the employed workforce work on a less than full-time basis and hence have a lower exposure to workplace risks as a result.

6 Palmer, H. 2008. 'The whole story'. *SHP Online*, accessed May 15 2015, www.shponline.co.uk/features-content/full/the-whole-story.

7 Kauppinen, T. 2000. 'Occupational exposure to carcinogens in the European Union', *Occupational and Environmental Medicine* 57: 10-18.

8 Tombs and Whyte, op cit, 4.

9 Weil, D. 2014. *The fissured workplace: Why work became so bad for so many and what can be done to improve it*. Boston: Harvard University Press.

10 See e.g. Thornquist, A. 2015. 'False self-employment and other precarious forms of employment in the 'grey area' of the labour market', International Journal of Comparative Labour Law and Industrial Relations, 31: 114 - ; Office for National Statistics, *Contracts that do not guarantee a minimum number of hours*, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/march2016.

11 See Department for Business Innovation and Skills. 2016. *Trade union membership 2015*, available at https://www.gov.uk/government/statistics/trade-union-statistics-2015. ADD WERS REF

12 Robens, Lord.1972. *Safety and health at work: Report of the committee 1970-72*, Cmnd 5034. London: HMSO.

13 Ibid, pp.54-55.

14 See Office for National Statistics, 'Trends in self-employment in the UK: 2001 to 2015', available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2001to2015.

15 See Löfstedt, R. 2011. *Reclaiming health and safety for all: An independent review of health and safety legislation*. Cmnd 8219. London: HMSO. For a critique see James, P., Tombs, S. and Whyte, D. 2013. 'An independent review of British health and safety legislation? From common sense to nonsense', *Policy Studies*, 34(1), 36-52.

16 The Health and Safety at Work etc Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015.

17 See Office for National Statistics, *op cit*.

18 *R v Associated Octel Co Ltd* [1997] IRLR 123. Also see *R v Mara* (1987) 1 WLR 87.

19 See James, P., Johnstone, R., Quinlan, M and Walters, D. 2007. 'Regulating supply chains to improve health and safety', *Industrial Law Journal*, 36(2): 163-187; and Walters, D., Wadsworth, E., Sampson, H and James, P. 2012. *The limits of influence: The role of supply chains in influencing health and safety management in two sectors*. Leicester: Institution of Occupational Safety and Health.

20 James S. and Lloyd C. 2008. 'Too much pressure? Retailer power and occupational health and safety in the food processing industry', *Work, Employment and Society,* 22(4): 1–18.

21 Equality and Human Rights Commission. 2010. *Inquiry into recruitment and employment in the meat and poultry processing sector*. Manchester: Equality and Human Rights Commission.

22 See e.g. Ferrie, J.E., Shipley, M.J., Stansfeld, S. A. and Marmot, M. G. 2002. 'Health effects of chronic job insecurity and change in job security on self-reported health, minor psychiatric morbidity, physiological measures and health related behaviours in British civil servants: The Whitehall II Study', *Journal of Epidemiology and Community Health*, 56(6): 450-54; and Benach, J., Amable, M., Muntaner, C. and Benavides, F.G. 2002. 'The consequences of flexible work for health: are we looking in the right place?', *Journal of Epidemiology and Community Health*, 56:405-406.

23 See e.g. Aronsson, G., Gustafsson, K. and Dallner, M. (2002) 'Work environment and health in different types of temporary jobs', *European Journal of Work and Organisational Psychology* 11:151-175; Quinlan, M. and Bohle, P. 2008. 'Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work', *International Journal of Health Services*, 38(3):489-525.

24 Weil, D. (2014) *The fissured workplace: Why work became so bad for so many and what can be done to improve it*. Cambridge, MASS: Harvard University Press.

25 Harpur, P. and James, P. 2014. The shift in regulatory focus from employment to work relationships: Critiquing reforms to Australian and UK occupational safety and health laws. *Comparative Labor Law and Policy* 36 (1): 111-130.

26 Johnstone, R. 2008. 'Harmonising occupational health and safety regulation in Australia: The first report of the National OHS review', *Journal of Applied Law and Policy*, 1: 35-58.

27 See Harpur and James (2014), *op cit;* and Johnstone, R. 2011. 'Dismantling worker categories: The primary duty of care and worker consultation, participation and representation in the model Work Health and Safety Bill 2009', *Policy and Practice in Health and Safety*, 9(2): 91-108.

28 See section 7(a) Work Health and Safety Act 2011 (QLD).

29 *Ibid*.

30 More specific initiatives to regulate working conditions in supply chains within particular industries have also been developed in Australia. See e.g. Nossar, I., Johnstone, R., Macklin, and Rawling, M. 2015. 'Protective legal regulation for home-based workers in Australian textile, clothing and footwear supply chains', *Journal of Industrial Relations*, *57*(4): 583-603; and Johnstone, R., Nossar, I. and Rawlings, M. 2015. 'Regulating supply chains to protect road transport workers: An early assessment of the Road Safety Remuneration Tribunal', *Federal Law Review*, 43(3): 397-421.

31 Hawkins, K. 2002. *Law as last Resort: Prosecution decision making in a regulatory authority*. Oxford: Oxford University Press.

32 Robens (1972), *op cit*: pages 7 and 12.

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

34 See e.g. Hanson, M., Tesh, K., Groat, S. Donnan, P., Ritchie, P. and Lancaster, R. 1998. *Evaluation of the six-pack regulations 1992*. Contract Research Report 177/1998. Sudbury: HSE Books.

35 Health and Safety Executive, *Annual Report and Accounts 2014/15*, p.16. Available from http:www.hse.gov.uk/aboutus/reports/ara-2014-15.htm.

36 See e.g. James et al (2007), op *cit*.

37 See Cutler, T. and James, P. 1996. 'Does safety pay? A critical account of the HSE Document "Costs of Accidents"', Work, Employment and Society, 10 (4): 755-765; Davis, C. 2004. *Making companies safe: What works?* London: Centre for Corporate Accountability; Wright, M., Marsden, S. and Antonelli, A. 2004. *Building an evidence base for the Health and Safety Commission strategy to 2010 and beyond: A literature review of interventions to improve health and safety compliance*. HSE Research Report 196. Sudbury: HSE Books; and Baldock, R., James, P., Smallbone, D. and Vickers, I. 2006. 'Influences on small-firm compliance-related behaviour: The case of workplace health and safety', *Environment and Planning C: Government and Policy*, 24(6): 827-846.

38 See e.g Short, J.L and Toffel, M.W. 2010. 'Making self-regulation more than merely symbolic: The critical role of the legal environment', *Administrative Science Quarterly*, 55: 361-396.

39 Strikingly, the thrust of such policy announcements is invariably on the *maintenance* rather than *improvement* of existing standards.

40 Better Regulation Executive/National Audit Office. 2008. *Effective inspection and enforcement: Implementing the Hampton vision in the Health and Safety Executive*. London: Better Regulation Executive, p.23.

41 Robens (1972), *op cit*, pp. 66-67

42 Hampton, P. 2005. *Reducing administrative burdens: Effective inspection and enforcemen*t. London: HM Treasury.

43 Department for Work and Pensions. 2011. *Good Health and Safety, Good for Everyone*. London: DWP.
The reference to 'non-hazard industries' here is used to make clear that the classification does not apply to major hazard sites as defined under the European Seveso directive.

44 See List of activities/sectors suitable for targeting proactive inspections at http://www.hse.gov.uk/lau/enforcement.htm.

45 Health and Safety Executive. 2015. *Health and safety statistics: Annual report for Great Britain 2013/14*, available at http://www.hse.gov.uk/statistics/overall/hssh1314.pdf.

46 *Health and Safety Executive Annual Report and Accounts 2015/16*, available at http://www.hse.gov.uk/aboutus/reports/

47 To put these quoted figures in something of a historical context, in 1973 'HSE and HSC agencies' undertook over 503,000 workplace visits, while in 1977 local authorities conducted over 534,000. See Dawson, S., Willman, P., Bamford, M. and Clinton, A. 1988. *Safety at Work: The Limits of Self-Regulation*. Cambridge: Cambridge University Press, p. 25.

48 See Tombs, S. and Whyte, D. 2010. 'A deadly consensus: Worker safety and regulatory degradation under New Labour', *British Journal of Criminology*, 50(1): 46-65; and Tombs, S. and Whyte, D. 2013. 'The myth and realities of deterrence in workplace safety regulation', *British Journal of Criminology*, 53(5): 746-763.

49 The recent increase in the (still low) number of HSE prosecutions means that the propensity of inspections to give rise to them is increasing. However, it is unclear how far this rise reflects a tougher approach towards non-compliance on the part of the HSE, the increased focussing of inspections on higher risk areas of activity and/or an increase in rates of non-compliance. The first of these possible explanations fits uneasily, however, with the fall occurring in the number of enforcement notices issued.

50 On a more positive note, following the coming into force of new sentencing guidelines in February 2016 it would

seem likely that fines imposed on convicted companies are likely to rise significantly,. See 'Higher fines should spur safety improvements', Risks, 739, 20 February 2016, available at https://www.tuc.org.uk/workplace-issues/health-and-safety/risks-newsletter/risks-2016/tuc-risks-739-20-february-2016. In fact, albeit as a result of a small number of cases, total fines imposed as a result of HSE prosecutions increased between 2014/15 and 2015/16 from nearly £18.1 million to £38.3 million.

51 The annual statistics reports are available at http://www.hse.gov.uk/search/search-results.htm?q=statistics%202014-15#gsc.tab=0&gsc.q=statistics%202014-15&gsc.page=1. The 2016 enforcement report is available at http://wwwhttp://www.rssb.co.uk/library/risk-analysis-and-safety-reporting/2011-01-report-riddor-review-of-network-rail.pdf.hse.gov.uk/statistics/enforcement.htm.

52 See for example, Johnstone, R.; Quinlan, M. and McNamara. M. 2011. 'OHS inspectors and psychosocial risk factors; Evidence from Australia', *Safety Science* 48:547-557; Bruhn, A. 2006. 'Inspectors' dilemma under regulated self-regulation', *Policy and Practice in in Health and Safety* 4 (2): 3-33

53 Hampton (2005), *op cit*, p.7

54 Robens (1972), *op cit*, pp. 21-23.

55 Section (5) enabling the election of safety representatives was subsequently repealed under pressure from the trade union movement.

56 James, P. and Walters, D. 1997. 'Non-union rights of involvement: The case of health and safety at work', *Industrial Law Journal*, 26(1): 35-50.

57 James, P. and Walters, D. 2002. 'Worker representation in health and safety: options for regulatory reform'. *Industrial Relations Journal*, 33 (2):.141-156; Nichols, T. and Walters, D. 2009. 'Worker representation on health and safety in the UK — problems with the preferred model and beyond', in Walters, D. and Nichols, T. (eds.) *International perspectives on representing workers' interests in health and safety*. Basingstoke: Palgrave Macmillan.

58 Nichols and Walters (2009), *op cit*; 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-involvement; and Walters, D. and Nichols, T. 2007. *Worker representation and workplace health and safety*. Basingstoke: Palgrave Macmillan.

59 Kersley, B., Alpin, C., Forth, J., Bryson, A., Bewley, H., Dix, G. and Oxenbridge, S. 2006. *Inside the workplace: Findings from the 2004 Workplace Employment Relations Survey*. Abingdon: Routledge; van Wanrooy, B., Bewley, H., Bryson, A., Forth, J., Freeth, S., Stokes, L. and Wood, S. 2013. *The 2011 Workplace Employment Relations study: First findings*. London: Department for Business, Innovation and Skills.

60 van Wanrooy et al (2013), p.38.

61 See Frick, K. and Walters, D. 1998. 'Worker representation on health and safety in small enterprises: Lessons from a Swedish approach'. *International Labour Review*, 137 (3): 367-389; and Frick, K. 2013. 'Resilience within a weaker work environment system – The position and influence of Swedish safety representatives', in Walters, D. and Nichols, T. (eds.) *Safety or profit? International studies in governance, change and the work environment*. Amityville, NY: Baywood. On Australia see: Walters, D., Johnstone, R., Quinlan, M. and Wadsworth, E.J.K. 2016. 'Safeguarding workers: A study of health and safety representatives in

the Queensland coal mining industry, 1990-2013', *Revue Relations Industrielles/ Industrial Relations,* 71(3):418-441.

62 Johnstone (2011), *op cit*; and Johnstone, R and Tooma, M. 2012. *Work health and safety regulation in Australia: the Model Act*. The Federation Press, Australia

63 van Wanrooy, B., Bewley, H., Bryson, A., Forth, J., Freeth, S., Stokes, L. and Wood, S. 2013. *Employment relations in the shadow of the recession*. Basingstoke: Palgrave Macmillan, p.129.

64 van Wanrooy et al (2013), Ibid, p.132.

65 On the use of such notices in Australia see: Walters, D., Johnstone, R., Quinlan, M. and Wadsworth, E.J.K. 2016. 'Safeguarding workers: A study of health and safety representatives in the Queensland coal mining industry, 1990-2013', *Revue Relations Industrielles/ Industrial Relations,* 71(3):418-441. These proposals also link to wider discussions about the use of systems of 'co-production' to enforce labour standards involving trade unions and other public interest groups working alongside government inspectorates. See e.g. Fine, J. and Gordon, J. 2010. 'Strengthening labor standards enforcement through partnerships with workers' organisations', *Politics & Society*, 38(4): 552 – 585.

66 Legislative Reform (Health and Safety Executive) Order 2008 (S.I. 2008/960),

67 See Schedule 2, Health and Safety at Work etc Act 1974, as amended.

68 Trades Union Congress. 2014. *Toxic, corrosive and hazardous: The government's record on health and safety*. London: Trades Union Congress, p.9.

69 See 'TUC condemns appointment of employer to workers' representative seat on Health and Safety Executive', available at https://www.tuc.org.uk/workplace-issues/health-and-safety/tuc-condemns-appointment-employer-worker%E2%80%99s-representative-seat.

70 Trades Union Congress (2014), *op cit*.

71 *Health and Safety Executive Annual Reports and Accounts 2015/16*, *op cit*, p.64.

72 Also see Tombs, S. 2016. *Social protection after the crises: Regulation without enforcement*. Bristol: Policy Press.

73 See Tombs (2006), op cit; and *Health and Safety Executive Annual Reports and Accounts 2015/16*, *op cit*

74 See HELA meeting paper, *op cit*.

75 Tombs (2016), *op cit*.

76 House of Commons Work and Pensions Committee. 2004. *The work of the Health and Safety Commission and Executive: Volume 2 – Oral Evidence*. London: Stationary Office, Ev137.

77 'Deadly business', *Hazards* 104, October – December 2008. Available at http://www.hazards.org/deadlybusiness/justice.htm.

78 *Principles relating to the status of national institutions*. United Nations General Assembly Resolution 48/134, December 1993. For a discussion of these principles in the case of domestic equality law see Hepple, B. 2011. 'Enforcing equality law: Two steps forward and two steps backwards for reflexive regulation', *Industrial Law Journal*, 40(4): 315-335.

79 Joint Committee on Human Rights. Sixth Report, session 2002-03, paras 223, 225 and 230.

80 See Schedule 1, Scottish Commission for Human Rights Act 2006.

81 James, P. and Walters, D. (eds). 1999. *Regulating health and safety at work: The way forward*. London: Institute of Employment Rights. James, P. and Walters, D. 2005. *Regulating health and safety at work: An agenda for change?* London: Institute of Employment Rights

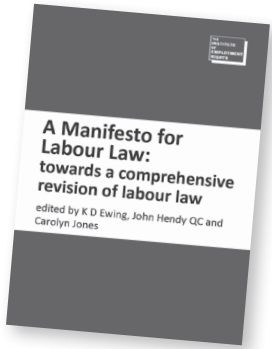
82 For example, the need to restore civil liability for breach of health and safety regulations, reversing the recent amendment to section 47 of the HSW Act.

New from IER

Just published:

A Manifesto for Labour Law:

towards a comprehensive revision of workers' rights



The world of work has changed and with it the nature and role of the workforce. For the UK's 31 million workers, many of the changes have had a devastating impact on their working lives and their living standards. Britain's workers are amongst the most insecure, unhappy and stressed workers in Europe.

The law needs to change. This Manifesto offers 25 major policy recommendations for consideration. It proposes changing the way in which working conditions are regulated by embedding the voice of workers at national, sectoral and enterprise levels. It moves responsibility for workplace regulation from legislation to collective bargaining. It calls for a Ministry of Labour and a National Economic Forum; sectoral collective bargaining; the repeal of the Trade Union Act 2016 and the introduction of fundamental and enforceable rights for workers.

This is a timely, authoritative and extremely important contribution to the debate on the future of the world of work.

Price £10 trade unions, £40 others available to order on 0151 207 5265 or online at www.ier.org.uk

About the Institute

The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

We provide the research, ideas and detailed legal arguments to support working people and their unions by calling upon the wealth of experience and knowledge of our unique network of academics, lawyers and trade unionists.

The Institute is not a campaigning organisation, nor do we simply respond to the policies of the government. Our aim is to provide and promote ideas. We seek not to produce a 'consensus' view but to develop new thoughts, new ideas and a new approach to meet the demands of our times.

IER officers

For more information and a full list of IER members visit **www.ier.org.uk**

The Institute of Employment Rights
4th Floor Jack Jones House
1 Islington
Liverpool, L3 8EG
Tel: 0151 207 5265
Email: **office@ier.org.uk**
Twitter: @ieruk

THE INSTITUTE OF EMPLOYMENT RIGHTS

The world of work is changing. Fast. But the framework of law tasked with protecting the health, safety and well being of workers is now 50 years old and – according to the authors of this report – no longer fit for purpose. As a result, work continues to generate large and unacceptable levels of harm, despite the massive reductions of employment in high risk areas of work like manufacturing, docks, steel and mining. The authors conclude that the time has come to repeal the 1974 Health and Safety at Work Act and to fundamentally reform the current framework of law governing workplace health and safety. To support this conclusion, the authors measure the appropriateness of the Act against four central issues: the Act's application to today's employment patterns and structures; the oversight and enforcement of employer compliance with their legal duties; worker access to representation on health and safety issues; and the overall governance and resourcing of our regulatory bodies. Looking to the future, the authors offer a number of informed policy recommendations based on good international practices.

£10 for trade unions and students
£40 others