

Regulatory surrender: death, injury and the non- enforcement of law

by Steve Tombs and David Whyte

THE
INSTITUTE
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RIGHTS



Steve Tombs is Professor of Sociology at Liverpool John Moores University. He has a long-standing interest in the incidence, nature and regulation of corporate crime, in particular the regulation and management of health and safety at work and has written extensively on these issues. He was Chair of the Centre for Corporate Accountability, 1999-2009.



David Whyte is Reader in Sociology at the University of Liverpool where he teaches and researches state and corporate power. He has written extensively on safety crimes, death and injury at work and enforcement issues. He was co-author of ICL/ Stockline Disaster: an Independent Report on Working Conditions Prior to the Explosion (2007) and is a former member of the Scottish Government Expert Group on Corporate Homicide. He has recently completed a study of the role of corporations in the reconstruction and corruption of the Iraqi economy for which he won the 2007 Radinowicz Prize for Criminology.

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Executive summary

Regulation goes to market

This report presents a detailed analysis of the work of the Health and Safety Executive (and, formerly, the Health and Safety Commission) under the last government. It begins with an analysis of business regulation policy developed by New Labour during 13 years in power. Chastened by, but thoroughly modernised during, seventeen years in political opposition, New Labour swept to office in May 1997 determined to break cleanly from its past. Committed to freeing business of its burdens, by the time of its second election victory, in 2001, New Labour set about furthering this end with considerable élan. Established in 2004, the Hampton Review, supported by the Macrory Review of Regulatory Penalties, was to prove a key vehicle for New Labour in rolling out its 'better regulation' agenda, with its central aim of reducing 'burdens on business'.

Regulating safety: strategy, policy, scrutiny

HSE has continually sought to accommodate New Labour's agenda, while never really satisfying Governmental demands, but at the same time finding itself less and less able to maintain its formal role in terms of enforcement of safety law. Indeed, there are real senses in which HSE anticipated and helped to develop the Hampton agenda. Despite the mounting evidence of the failures of its new enforcement approach HSE/C at a senior level saw no contradiction between the government's 'burdens on business' strategy and their role as regulator. Perhaps most bizarrely of all, senior figures at HSE failed to admit to what almost all others saw – namely, the detrimental effects on the organisation and its capacities of the constraints created by the level of resource available to it.

Regulating safety: an analysis of recent enforcement data

Using a combination of published data and data obtained through a series of Freedom of Information requests, this report charts how regulatory enforcement has been repositioned to accommodate neo-liberal, business-friendly values. In combination, the available data indicates that something rather dramatic took place with regards to HSE enforcement practices in the past decade. Specifically, it indicates:

- a rapid decline in HSE enforcement action generally is apparent from 2002/03, and in particular, the most recent sharp decline in prosecutions begins in 2003/04
- a collapse in RIDDOR prosecutions which appears to begin in 2002/03
- some indications that the collapse in prosecutions is replaced to some extent by a rise in enforcement from around 2004/05, although enforcement notices remain at a significantly lower level than in the early years of Labour's first period in office.

This decline in prosecution and enforcement activity needs to be put in the context of the evident trend away from inspections and investigations. That is: the shift in inspection strategy which effectively mean that inspectors conduct a third of the inspections of premises when compared to 10 years ago, alongside a concomitant decline in RIDDOR investigations are clearly the driving factors in this decline of enforcement.

In general, the acute decline in enforcement, and in particular a collapse in prosecution, coupled with an acute decline in other forms of regulatory activity, appears to have begun at the start of Labour's second term in office. This decline continued steady until 2005/06, when enforcement and inspection plateaued at a relatively low level, and in some cases exhibited a slight rise. This can be interpreted thus: HSE's apparent surrender to policies of neo-liberalism, as well as to key tenets of its neo-liberal discourse has so ideologically and materially undermined its enforcement capacity that it is now unable to fulfil what it is tasked to do. That is, it is now unable to maintain a credible threat of enforcement. One interpretation of the enthusiastic embracing of a targeted enforcement policy is that it reflects a necessary pragmatism, as the only legitimate post-Hampton discourse which can allow the HSE to represent itself as fit for purpose.

A strategy of regulatory failure

There is considerable evidence of failure at the most senior level of HSE management to on the one hand credibly perform its duty as a regulator, and on the other even to meet the demands of Hampton's targeted intervention approach. Recent questions in high places about the efficacy of HSE's enforcement strategy have gone further than simply to note its inadequate resources and the collapse in enforcement. The current predicament is indicative of at best a dereliction of duty, and at worst a negligent disregard for the enforcement role of the regulator. HSE senior management have been all too willing contributors to their organisation's decline.

Where next for the regulation of safety?

As for the future, regulation in general is likely to come under further attack – and this will include safety regulation. In a political climate in which the idea of the 'over-regulated' workplace, and a populist view of safety regulation as a sphere of excessive interference holds some weight, HSE may be justified in assessing the harsh public sector financial climate as ominous. Its consistent capitulation to the Better Regulation agenda has certainly weakened its ability to resist a government that exhibits even more contempt for trade union demands for regulatory protection than its immediate predecessors.

In short, a new politics of regulation – under the guise of better regulation – has been developed by the New Labour governments. *If* the dramatic trends alluded to in this report make it inevitable that safety standards will decline, it is because the changing regulatory role of the order illustrated here will have the effect of weakening the ability of workers to represent their concerns to management. In the absence of routine inspections, and without a credible threat of prosecution, managements are far less likely to respond to workers' demands to comply with the law. Indeed, in an ever more competitive economic environment, and lacking the moral fortitude predicted by naive proponents of corporate social responsibility, it is surely rather crucial to ask – why would they?

Questions are raised as to how much energy trade unions should still be investing in a body which is unable effectively to do that with which it is charged, and which has proceeded along a route to that position with tripartite agreement. It may be time for the trade union movement now to reconsider its formal role within a body so integral to 'better regulation' and thus, in fact, to a politics of neo-liberalism.

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The Institute of Employment Rights was launched on 28th February 1989 and was granted charitable status in 1994. As a labour law “think-tank”, supported by the trade union movement, our purpose is to provide research, ideas and detailed argument on all aspects of employment law. As a charity, however, we are not a campaigning organisation.

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Based upon close analysis of government, parliamentary and civil service documents, and using previously unpublished information, the authors chart – and seek to explain – what they describe as a “collapse” in the numbers of HSE inspections and enforcement. This is perhaps most dramatically illustrated by the rate of prosecutions of deaths falling from 46% to 28% in six years. In the context of the regulatory failures in the Gulf of Mexico and coinciding with Lord Young's health and safety review, this timely book documents how the politics of regulatory surrender has developed. With Britain in the midst of a fiscal crisis, the book asks where the unfolding crisis in enforcement leaves worker safety.



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