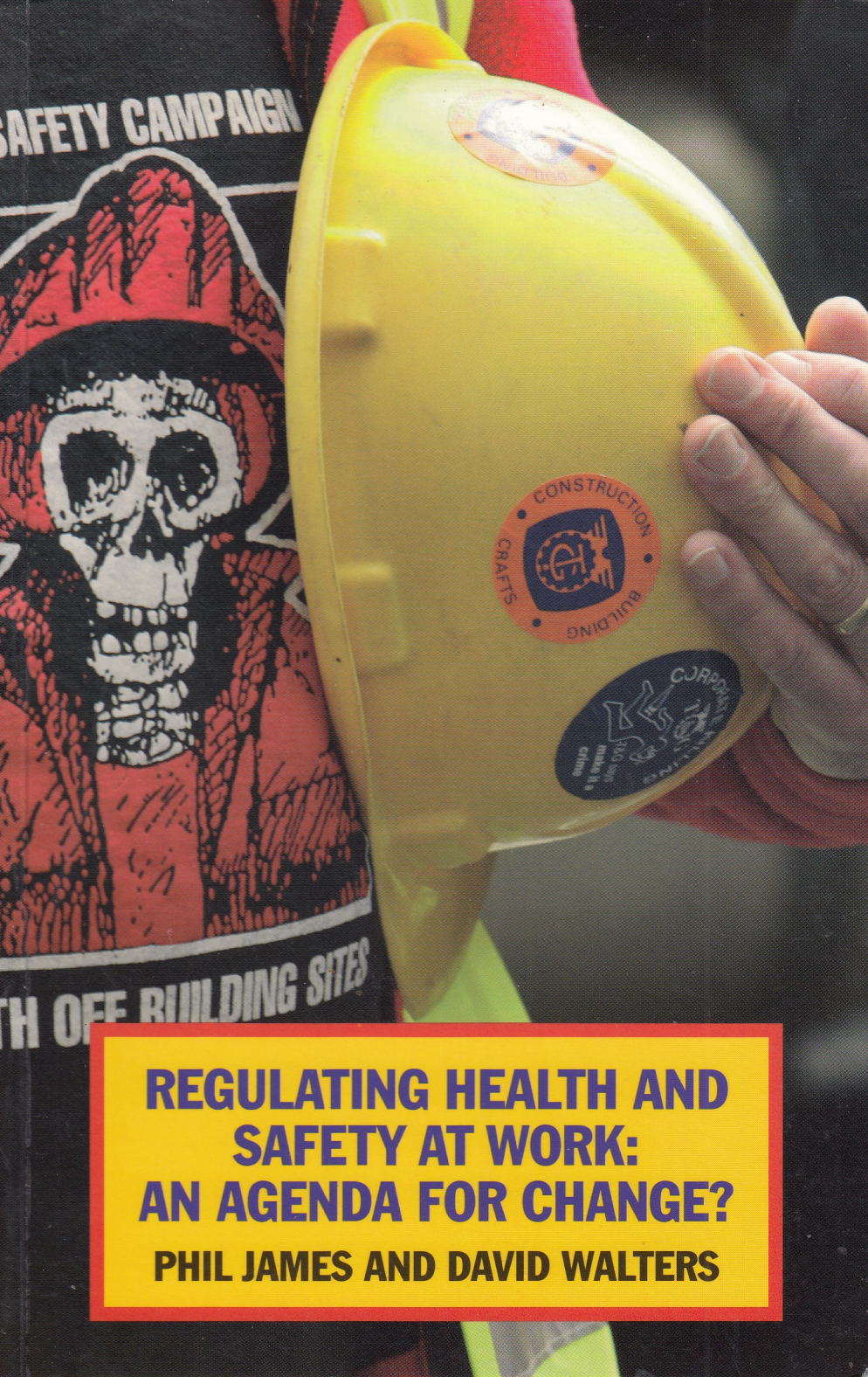

REGULATING HEALTH AND SAFETY AT WORK: AN AGENDA FOR CHANGE?

PHIL JAMES AND DAVID WALTERS

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THE present book updates and revisits the recommendations of an earlier volume, *Regulating Health and Safety at Work: the way forward*, which was published by the Institute of Employment Rights in 1999. In building on this previous volume, the authors wish to acknowledge the efforts of the more than thirty trade unionists, academics and lawyers who gave up their time to participate in the activities of the working groups which contributed to its preparation and, in particular, the chairs of those groups – David Bergman, Simon Pickvance and Charles Woolfson. They would also like to express their gratitude to Petra for suffering without complaint the disruption to her holiday that the writing of this book caused, to Megan Dobney for her wonderfully efficient work on the book's production and to Carolyn Jones, the Institute's Director, for continually encouraging us, if that's the right word, to actually finish the manuscript.

Phil James David Walters

Foreword

THE importance of maintaining and improving the health and safety of people at work must be something that attracts the highest of priorities from government, employers and workers themselves. Unfortunately, the reality is somewhat different when you consider that over a million workers each year experience an accident at work, more than two million people suffer from an illness which they believe has been caused or made worse by their work, and in excess of 25,000 workers permanently leave the labour force each year as a result of work-related injuries and illnesses.

The Health and Safety at Work Act 1974 established a new approach to health and safety in the workplace. However, the shift away from traditional manufacturing and mining, coupled with the reduction in trade union membership and density, and a growth of employment in SMEs means there is a very different climate to that which existed at the time of the Robens Committee, whose recommendations laid the foundations for the structure and administration of the 1974 Act.

It would have been impossible for these changes to be predicted or for the Committee to have foreseen that an approach which recognises that protecting workers encompasses not only preventing exposure to dangerous machinery and hazardous substances but the creation of working environments that take adequate account of their physical and mental capabilities. The fact is though, that much work-related harm to workers now takes the form of musculoskeletal disorders and stress-related illnesses; although more traditional injuries and ill-health are unfortunately still affecting large numbers of workers.

The initial improvements in health and safety that resulted from the 1974 legislation seem to have reached a plateau. The government seems happy to ignore reports from HSE that show that there is no clear evidence of change from 1999/2000. It has taken a similar view on the report from the House of Commons Select Committee on Work and Pensions which examined the work of HSE and HSC and

said that limited progress seemed to have been made on the revitalising targets. Instead the government seems more intent on reducing 'red tape' for business than ensuring that there are sufficient resources to carry out inspection and enforcement activities. The flaw in this approach is that it relies on those individuals and organisations that create the risk of harm to people at work being able to be trusted to minimise the risk on a voluntary basis.

The current enthusiasm for a voluntary approach to health and safety means that the alternative view put forward in this publication from the Institute of Employment Rights could not have come at a better time. The government's Draft Bill on Corporate Manslaughter has attracted a lot of comments from both sides of the argument and is currently going through the scrutiny process. The book makes a coherent argument, based on the evidence, that the way forward on health and safety at work is to develop robust regulation. It further highlights that this needs to be done through approaches to regulating the activities of individuals and organisations as well as through the provision of enhanced individual and collective rights for workers.

There are serious challenges facing people at work. The workplace of 2005 has changed from the one that the Robens Committee examined and their principle of 'self regulation' is much less effective now. In workplaces where there are trade union safety representatives and they are able to work together with employers the evidence indicates that standards of health and safety are likely to be higher. Unfortunately, this type of situation is all too uncommon. New regulations that allow workers to have access to effective representation are therefore urgently needed and this book provides a valuable source of information and argument to help advance this cause.

Alan Ritchie
General Secretary UCATT

Introduction

EACH year, around 1.6 million people are injured at work. At the same time it has been estimated that some two million people have an illness that, in their view, has been caused or made worse by their employment, that around 25,000 people leave employment each year due to work-related illness and that during a further 300 million days workers experience limitations on their daily activities which stem from such illness. These words are taken from the book *Regulating Health and Safety at Work: the way forward*, which was published by the Institute of Employment Rights (IER) in 1999[1]. In the intervening years there has been little change in these figures and they remain as broadly, and disturbingly, true for 2006 as they were in the late 1990s.

There is a spectrum of current opinion on how society should understand and respond to the challenge of health and safety at work. At one end is a view that suggests that the harmful consequences of production can to some extent be controlled through regulating the activities of the individuals and organisations that cause the harm and through the provision of rights for workers to be treated in a decent and civilised manner. Such thinking suggests that it is legitimate for (and indeed a responsibility of) the state to exercise such control and for organisations representing the collective interests of workers to have a say in the creation, implementation and operation of this control. This being all the more necessary because experience suggests that those individuals and organisations that create the risk of harm to people at work cannot be entirely trusted to minimise such risk voluntarily. Essentially, this is the view that has informed the writing of the present book.

At the other end of this spectrum of ways of seeing health and safety at work, are those who would argue that the use of data such as the above to support state-based regulation is problematic and a consequence of our risk averse culture. According to this way of thinking, regulation by the state and through providing citizens with individual and collective rights to safe and healthy work threatens to

curtail human freedoms and stand in the way of economic progress in a world that is anyway already over-regulated. We totally reject this view and in the process note that there is nothing especially new in it.

Although enjoying a political and media revival in recent times, this viewpoint is basically a recycling of traditional arguments against regulating the exploitation of labour by capital that have been made by employers, and their political and media allies since attempts were first made to introduce such regulation in the early part of the 19th century. These arguments also contain no more substance now than they did when they were aired nearly two hundred years ago.

What is disturbing, though, is that a political climate exists domestically which makes it possible for such views to be taken seriously today. What is, perhaps, even more worrying, is that this is not purely an indigenous British phenomenon, but a widespread governmental response to the challenges of globalisation that can be heard in most affluent market economies, as governments seek new roles for themselves in the face of economic forces and strategies that are international in both origin and impact.

Nevertheless it remains particularly depressing that a Labour government (albeit a *New* Labour government) endorses notions that any further regulation of health and safety is somehow both wrong and an ineffective means of achieving desired improvements, and accepts them as constituting a serious discourse on the way forward for improving health and safety outcomes. Equally worrying are the consequent ideas promulgated by government ministers that it is legitimate for the state to progressively disengage from its role in regulating economic activity. For, in so doing, it further becomes legitimate to progressively reduce the resourcing of state regulatory activity on health and safety and replace it with exhortation and appeals to the economic self-interest of business to regulate itself, alongside a naïve reliance on untested notions about how the business environment provides its own levers and pressures to encourage effective self-regulation.

This book is an attempt to present an alternative to the nonsense that constitutes current neo-liberal political and economic rhetoric concerning the way forward on health and safety at work. Its aim is to use an evidence based approach to demonstrate the need for robust regulation on health and safety – both through approaches to regulating the activities of individuals and organisations as well as through enhanced individual and collective rights for workers.

Our thesis is not new. The present volume updates and revisits the

recommendations put forward in the book *Regulating Health and Safety at Work: the way forward*, which was published by the Institute of Employment Rights (IER) in 1999.[2] It does so for two reasons. The first is that the period since this book's publication has witnessed the major changes of direction in relevant national policies and policy debates referred to above; changes which, as will be explained in more detail in subsequent chapters, have encompassed a number of important developments, including reductions in Health and Safety Executive (HSE) funding, the launching by the government of a *revitalising health and safety* strategy, and the acceptance by the government of a new Health and Safety Commission (HSC) approach to encouraging compliance with the law that places less emphasis on the role played by routine workplace inspections.

The second reason, however, is that these developments have, fortunately, not met with universal acceptance. Indeed, they have met with well informed criticism from a number of sources, including trade unions, the research and specialist communities, public interest pressure groups and notably, Parliamentary Select Committees such as the Work and Pensions Select Committee. As a result, now is, therefore, a timely point at which to review both how far the recommendations of the earlier book have been acted upon and to what extent they remain valid.

In what follows, the origins and nature of the 1999 book are, initially, reviewed in order that the reader has a firm understanding of where the present volume comes from. The approach adopted towards the preparation of the present volume is then outlined.

Regulating health and safety at work: the way forward

THE 1999 book was the outcome of a project organised by the IER in order to examine the regulation of health and safety in Britain under the Health and Safety at Work (HSW) Act with a view to:

- identifying areas of weakness in the present system of regulation; and
- making recommendations aimed at:
  - — strengthening the protection of people from work-related risks;
  - — improving the position of workers harmed as a result of such risks; and
  - — enhancing the economic incentives and benefits associated with promoting and maintaining a safe and healthier work environment.

This project was undertaken at a time when the twenty-fifth anniversary of the HSW Act was on the horizon and prompted by a number of considerations.[3] These included, doubts as to whether the Act had been the unqualified success often claimed, a recognition that societal expectations and perceptions of the relationship between work and worker and public well-being had undergone a marked change and encompassed a growing intolerance of risk, and the potential opportunities for reform offered by the election of a Labour government in 1997, following nearly 20 years of Conservative rule. In particular, its development was informed by two main concerns. First, the continuing enormous scale of harm experienced by both workers and members of the public as a result of work activity and, secondly, doubts as to whether the regulatory framework put in place by the Act, as well as the self-regulatory philosophy underlying it, remained appropriate to an economy in which a large proportion of employment was no longer undertaken by male, full-time, employees working for large unionised companies in the manufacturing and extractive industries.

The project was carried out, under the direction of Professor Phil James, by four working groups, each of which consisted of a combination of academics, lawyers, and trade unionists[4], who were charged with conducting an examination of one of the following four themes:

- the governance of accountability for personal injury, ill health or death, as well as other related loss or damage;
- the processes by which the risks to workers and others who may be affected by work activities are assessed and managed by employers and other duty holders;
- the role played by workers' representatives in the development and operation of these processes; and
- the means for treating, compensating and rehabilitating workers harmed by their work.

In each case, these groups identified a number of areas of weaknesses in existing arrangements and went on to put forward a range of proposals for reform intended to overcome them – proposals which flowed from the experience and expertise of their members and evidence gathered orally through the holding of special committees of enquiry.[5] Taken together, these proposals constituted a radical agenda for change which it was believed could provide a basis for improving substantially both the way in which health and safety at the workplace was regulated and the levels of protection afforded to workers and others.

The subsequent book was structured in a manner which largely

reflected the way in which the Institute's project had been developed and undertaken. Thus, the reports from the working groups formed the basis of separate chapters on employers and their statutory duties, the administration of the statutory framework, worker representation and the amelioration of work-related harm. These chapters were, then, 'topped and tailed' by the present authors via a scene-setting chapter which outlined the existing statutory framework and discussed the key factors which had influenced its development since 1974 and a concluding one which drew together the main conclusions and recommendations which emerged from the project.

The present volume

IN approaching the preparation of the present volume, the authors had the choice of either completely re-writing and re-structuring its predecessor, or working within its existing structure and amending the text as appropriate. Both of these alternatives were seen to have advantages and disadvantages. However, on balance, it was decided that a compromise would be sought whereby the logic of the existing structure, which seemed sound, was retained.

This decision was, in part, taken so that a substantial degree of continuity could be maintained between the two publications, thereby enabling previous readers to more easily identify any changes made. It was, however, also informed by two further considerations. First, the fact that, despite the plethora of policy pronouncements on health and safety that have been heard in recent years, there has been little change in the outcomes that they are intended to address. Second, the further fact that these pronouncements have been, in the main, characterised by an orientation in direct contrast to the one we adopted in 1999 in that they have been full of rhetoric on the need to improve health and safety outcomes voluntarily, consciously modeled in a business friendly language, in which the business benefits of doing so have been repeatedly extolled. The retention of the original structure of the book and its constituent chapters, we believe, helps us to draw attention to the increasing gulf between governmental pronouncements on actions to improve health and safety and the reality of their effects, while also highlighting the continuing need for more robust regulation; no matter how unfashionable it might appear in the context of the neo-liberal economic thinking that dominates present-day government policy.

The revisions made to the individual chapters have, in some cases, entailed far more than the updating of their texts to take account of new research findings and recent legal and other policy developments. Nevertheless, the original options for reform we iden-

tified in the 1999 publication in our view remain the most pertinent and have therefore been reiterated here, with just one addition, namely the recommendation that, in some areas of the economy, regulatory frameworks be established under which organisations at the head of supply chains would be required to ensure that those lower down them have adequate health and safety management arrangements and to report any instances of legal non-compliance to the relevant enforcing authority.

That the number of such additional proposals made is so small draws attention to a fundamental conclusion that the authors reached in undertaking the book's revision. This is that, while few of the proposals previously made have been implemented, recent research and policy developments have, in fact, served to only further highlight their validity and continuing relevance. Indeed, as will be discussed in more detail in the concluding chapter, the striking lack of progress that has been made with regard to achieving the targets for improvement laid down in the government's current *revitalising health and safety* strategy is seen by the authors to provide added support for the central notion underlying the proposals, namely that significant improvements in standards of workplace health and safety simply cannot be achieved without the creation of a more effective legal framework and by taking action to improve the way in which this framework is enforced.

In short, in contrast to the present government and the HSC, the present volume, in common with its predecessor, does not conclude that the regulatory framework put in place by the HSW Act has 'stood the test of time'.[6] Instead, it concludes that, even if the framework established by the Act in the mid-1970s was appropriate at the time, this is no longer the case. Thus, far from standing the test of time, it has been overtaken by a range of subsequent events that raise fundamental doubts as to its continued appropriateness and effectiveness. These events are seen to have included the increasing economic importance of small and medium sized businesses, the growth in various forms of 'non-standard' employment, the decline in trade union based systems of representation and a growing recognition that more needs to be done to support the rehabilitation and financial security of those injured and made ill by their work.

In its 1972 report, a report whose recommendations essentially provided the basis for the self-regulatory regime laid down by the HSW Act, the Robens Committee observed that:

> 'There are no good reasons for merely assuming that our traditional approach to the control of these problems necessarily corresponds to what is really needed today or what may be needed in the future'.[7]

A central message of this book, therefore, is that the government and the HSC should recognise the wisdom of these words and get on with the task of establishing a system for health and safety at work that is better suited to a world of work that is very different to that which existed at the time of the Robens Committee's deliberations. We think that the proposals for reform put forward in the pages that follow provide them with a good starting point from which to work when considering how to establish such a system.

Notes

1 P James and D Walters (eds), *Regulating Health and Safety at Work: the way forward,* 1999, Institute of Employment Rights.
2 P James and D Walters (eds), *Regulating Health and Safety at Work: the way forward,* 1999, Institute of Employment Rights.
3 For a fuller discussion of these considerations see D Walters and P James, *Robens Revisited: the case for a review of occupational health and safety legislation,* 1998, Institute of Employment Rights.
4 See Appendix 1, P James and D Walters (eds), *Regulating Health and Safety at Work: the way forward,* 1999, Institute of Employment Rights.
5 see Appendix 2, P James and D Walters (eds), *Regulating Health and Safety at Work: the way forward,* 1999, Institute of Employment Rights.
6 Department for the Environment, Transport and the Regions/Health and Safety Commission, *Revitalising Health and Safety: Strategy Document,* 2000, Department for the Environment, Transport and the Regions.
7 Lord Robens, *Safety and Health at Work: Report of the Committee 1970-72,* Cmnd 5034, HMSO.

Chapter 1

Health and safety regulation: the development of the present system

IN 1972 the Committee of Inquiry on Safety and Health at Work – the Robens Committee – produced a report which heralded a significant change of approach in British health and safety regulation.[1] It recommended the introduction of measures which would:

- provide a more self-regulating system for health and safety;
- ensure wider coverage of those affected by the risks associated with work;
- clarify duties for health and safety in a single comprehensive framework;
- enable a greater degree of involvement of employers, workers and their organisations in health and safety;
- create a national authority for health and safety; and
- provide new enforcement powers to health and safety inspectors.

Prior to these recommendations, the system for health and safety regulation which had been in force in Britain was essentially one of piecemeal prescriptive measures which were complex and sometimes incomprehensible to the people affected by them, often marked by incomplete and overlapping coverage, produced with little involvement from either those they were intended to protect or those whose activities they were meant to regulate, and with limited procedures for their enforcement. It was for these reasons that the Robens recommendations were much vaunted as a radical departure from traditional approaches to health and safety regulation.

Such a view was not shared by all. A significant minority of critical opinion argued that the Robens approach really did very little to challenge the established pattern of regulating the creation of hazards and risks. In particular, doubt was expressed about its central argument that apathy, rather than the nature and context of work, was the primary cause of work-related injury and ill-health. Indeed, by setting so much store on the concept of self-regulation, some critics argued that its recommendations effectively eschewed the opportunity to advocate a more rigorous approach to enforcement.[2] Despite this criticism, the Robens recommendations were generally accepted by policy makers as providing a basis for the creation of a more effective system of regulation that would result in improved levels of worker protection. They were therefore largely enacted in the HSW Act 1974, which was supported by all political parties and widely held to represent a radical departure from the previous legislative strategy on health and safety when it came into force in April 1975.

Despite the considerable changes that have subsequently occurred in the nature of work and the wider society, the Act has remained the main primary legislation on health and safety in the UK to this day. Indeed, although there have been a number of changes to the framework for health and safety regulation since 1975 – occasioned by a variety of influences, such as the impact of the European Union (EU), the consequences of neo-liberalism, and changes in the structure and organisation of work and the labour market – the basic system of law has remained recognisably that introduced by the HSW Act.

The fundamental concern of the chapters that follow is to provide a detailed review of the appropriateness of this system of health and safety regulation to the protection and promotion of the health and safety of people engaged in, or affected by, work activity. To set the scene for what follows, this chapter consequently provides an introduction to the system's origins and structure, and the factors which have influenced its evolution and operation over the past three decades. The chapter begins with an outline of the framework for the regulation of health and safety that was provided by the HSW Act. It then pursues several themes that describe the impact of change on the system for health and safety regulation in this country through from the beginning of the 1980s until the present time. Thus, it considers some of the operational and organisational influences of government strategies during this period, examines the influence of public opinion and the changing nature of societal perceptions of risk and its regulation and considers developments aimed at both

enhancing the role that the compensation system plays in encouraging employers to protect their workers from harm and establishing more effective mechanisms for providing rehabilitative support to those so harmed. Finally, the chapter considers the development of the EU's role in the area of health and safety and its impact on the British system.

The HSW Act 1974 – a brief outline

THE HSW Act was intended to provide a framework through which the Robens Committee's idea of preventing injuries and ill-health through 'self-regulation' could flourish. Its aim was to facilitate a shift of emphasis in British legislative provisions away from prescriptive standards towards a goal-setting approach and to create greater participation of representatives of employers and employees in the making and maintaining of preventive health and safety standards.

Under the Act a tripartite national authority was created – the HSC. Subsequently, a large number of industry and subject-based Joint Advisory Committees were established and a philosophy of policy making was advanced – most succinctly described in a paper by a former Director General of HSE[3] – under which, to paraphrase the Robens Report, the people who created risks and those who worked with them would be involved in decision-making about what level of risk was acceptable.

The Act also established the HSE as the executive arm of the HSC with the responsibility for achieving compliance with its provisions. The HSE included a number of previously separate Inspectorates. The powers accorded to inspectors also represented a development of the previous system in that they provided them with greater flexibility in terms of enforcement action through the introduction of the right to issue Improvement and Prohibition notices – as well as the retention of the ability to prosecute. Penalties for offences under the Act and its Regulations were also increased from previous levels for summary offences; unlimited fines and the possibility of imprisonment were introduced for more serious offences.

The Act enables the Secretary of State to approve Regulations in which more specific legislative standards can be spelt out. At the time of its introduction it did not replace the existing provisions made under previous statutes or indeed the statutes themselves. Rather, it was envisaged that these earlier provisions would be replaced gradually by regulations made under the Act.

An innovation of the HSW Act was its provision for the use of Approved Codes of Practice (ACOPs), which are instruments that

do not impose legal duties, but which set out the means by which a legal duty may be accomplished. ACOPs generally accompany major new sets of regulations and their provisions relate to those in the regulations. In the event of a breach of one of the Regulations made under the Act that is accompanied by an ACOP, the normal direction of the burden of proof is in effect reversed and the defendant required by the court to show that the means used to discharge the relevant duty were equivalent to those laid down in the ACOP.

The base requirements of the HSW Act are a set of general duties found in Sections 2 to 9. These duties cover a number of classes of persons, including employers, employees, the self-employed, controllers of premises, and manufacturers and suppliers of articles and substances used at the workplace. They were intended to give everyone concerned with health and safety at work clear, concise and accessible notions of their basic legal obligations in order to remedy the criticism of the previous legislative system – that it was too complex, unwieldy and alienating to those people whose activities it was intended to regulate. They were also intended to facilitate greater attention to the management of health and safety.

The obligations on employers are detailed in Section 2. They require them to ensure the health, safety and welfare at work of their employees. They also make clear that this duty of care extends to encompass a number of specified matters, including the provision of plant, systems of work, information, training and supervision, means of access and egress, the working environment and the use of articles and substances. These general duties of employers, which draw on previously established common law principles, are qualified by the concept of reasonable practicability. This phrase, which appears in relation to most of the duties in the Act, draws its legal definition from case law in which it is established that the duty holder must take into account the danger or hazard or injury which may occur and balance it against the cost, inconvenience, time and trouble needed to counter it. In a much quoted case in which this legal definition was developed the judge said:

> 'it seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed in one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other. If it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them'
>
> *L J Asquith in* Edwards v National Coal Board, *1949*

That there are many problems with this qualification on the duties

under the Act has become abundantly plain. It contradicts the intention of the Act to make everyones duties clear in relation to the prevention of occupational injury and ill health, since ultimately the extent of their duty can only determined after the event, when it has been tested in court. It is also subject to differences of perception – differences that are affected by the passage of time, the extent and development of knowledge and experience and changes in societal expectation in relation to risk. Furthermore, the HSW Act's reliance on the qualification would seem to be out of step with the requirements of EU Directives and in particular with those of the EU Framework Directive 89/391 which states that 'improvements to health and safety must not be subordinated to purely economic considerations'.

Employers are required further under Section 2(3) to have a written policy in which the organisation and arrangements with which they intend to carry out their duties are identified. However, the Employers' Health and Safety Policy Statements (Exceptions) Regulations 1975 exempt employers with less than five employees from this requirement.

As well as providing the framework for a national structure of consultation over health and safety, the Act provides the basis for a statutory framework for worker representation and consultation at the level of the workplace. Thus, under Sections 2(4) and 2(7) the Secretary of State is given powers to make regulations which allow recognised trade unions to appoint safety representatives and provide such representatives with the right to require employers to set up joint health and safety committees – powers that were subsequently used to introduce the Safety Representatives and Safety Committees Regulations 1977. These measures were the only ones that precipitated any real political division during the passage of the Health and Safety at Work Bill through Parliament. It is also important to note that they were not part of the recommendations of the Robens Committee, but rather the result of a trade union campaign which had resulted in an undertaking on the part of the Labour government to introduce them.

Section 3 of the Act extended the health and safety duties of employers and the self-employed in the conduct of their undertaking to persons not in their employment. In doing so the Act provided protection to the general public and to workers, such as sub-contractors, who are not in the direct employment of the employer in question but might be affected by the employer's activities; protection that was further extended by virtue of the provisions of Sections 4 and 5 of the Act. Thus, the first of these sections imposes obligations

on persons who have control of non-domestic premises used as a place of work, while the second lays down obligations on those in control of prescribed premises in respect of the emission into the atmosphere of noxious or offensive substances.[4]

The duties on the designers, manufacturers, importers and suppliers of articles and substances for use at work contained in Section 6 of the Act were intended to introduce protective measures at source. Since the Act came into force this principle has been strengthened by amendments introduced by the Consumer Protection Act 1987. The requirements of Section 6 are now also supplemented by European 'new approach' Directives (see further below).

Employees too have duties under the HSW Act. They are essentially twofold:

- a duty to take reasonable care for the health and safety of themselves and of others; and
- a duty to co-operate with employers to enable them to carry out their statutory duties on health and safety

In addition, section 8 of the Act states that nobody should intentionally or recklessly interfere with or misuse anything provided in the interests of health, safety and welfare in pursuance of relevant statutory requirements. Finally, section 9 of the Act precludes employers from charging employees in respect of anything done or provided in order to comply with these requirements.

The development of the statutory framework

THE HSW Act has now been in place for over 30 years. During this period significant, although not fundamental, changes have taken place regarding both the structure and operation of the regulatory framework established by the Act.

These changes have, in large part, occurred in response to a range of political and societal pressures that have been faced by the HSC and HSE over the period since their establishment. The most important of these pressures, and the types of changes that they engendered, are highlighted below. As will be seen, they have encompassed the influence of governmental policies, shifts in public and societal perceptions of risks and how they should be regulated, the impact of European level policies and actions regarding the regulation of workplace health and safety, and the implications of debates regarding the inter-relationships that should exist between legislative provisions relating to the protection of worker health and safety, on the one hand, and arrangements relating to the compensation and rehabilitation of those harmed as a result of work activities, on the other.

Deregulation and the post-1979 Conservative governments

Following the election of the first 'Thatcher government' in 1979, government policy shifted dramatically away from the pursuit of the type of corporatist political agenda which had informed the approaches of the preceding post-1974 Labour governments and provided the foundations for the statutory framework established under the HSW Act. Central elements of this shift included the adoption of a hostile approach towards trade unions, notably via the passing of a range of anti-union legislation and a more general, commitment to deregulatory economic strategies under which monetarism, market forces and privatisation were actively pursued.

The regulatory structures relating to workplace health and safety were not completely immune from this deregulatory strategy. However, in practice, its impact on them, as opposed to the way in which they operated, was relatively limited.

In 1985 and 1986 government White Papers were published which called for reductions in the regulatory 'burdens on business'. Despite their targeting of health and safety regulation amongst their proposals, the legislation and the regulatory system survived subsequent scrutiny more or less intact. One reason for this was the lack of evidence that the presumed beneficiaries of deregulation, such as small firms, actually found health and safety law a burden. According to Dalton,

> '...When the government researchers went on to ask 200 small firms whether they felt health and safety law was a burden they found the requirement was not mentioned by 178 firms even when prompted'.[5]

Despite the absence of widespread support for the deregulation of health and safety, later Conservative governments continued to pursue the policy. In 1993 eight high profile Deregulation Task Forces were set up under the auspices of the Department of Trade and Industry and once again health and safety regulation was a target. In addition, the Minister for Employment instructed the HSC to conduct its own review of health and safety legislation. Its brief was similar to that of the DTI Task Forces in so far as it was to review workplace health and safety legislation and advise the government on whether it was still relevant, whether it all remained necessary and whether it was possible to reduce the administrative burdens that it created for business, especially small businesses.[6] The subsequent report produced by the HSE recommended the removal of 40 per cent of the volume of health and safety legislation to reduce the 'voluminous, complicated and fragmented' body of law. In particu-

lar, seven pieces of primary legislation were repealed and almost 100 sets of Regulations revoked, including most of the remaining parts of the two main Acts that regulated health and safety at work before the introduction of the 1974 Act: the Factories Act 1961 and the Offices, Shops and Railway Premises Act 1963. However, its recommendations were little more than a final acceleration of the process begun as a result of the recommendations of the Robens Committee more than 20 years before, and did not represent a challenge to the framework of law established by the HSW Act. Indeed, the HSC Review concluded that there was widespread support for maintaining the 'overall architecture' of regulation. It also refrained from recommending the repeal or revocation of legislation introduced to implement EC Directives, despite the criticisms and recommendations to this effect contained in the DTI Task Force proposals. Nor did it recommend any revocation of any of the significant Regulations that had been introduced under the 1974 Act that had been targeted by the DTI Task Forces. Furthermore, the Review found almost no support for exempting small employers or the self-employed from health and safety law. The Review, did however, recommend improving the accessibility of advice and the facilitation of public debate about the ways in which changes in the structure of employment were affecting health and safety.

The government's support for the findings of the Review indicated a move away from its previous more bullish position on the scope for reform and suggests that, by demonstrating that there was little public support for the more extreme deregulatory measures advocated elsewhere, such as the exemption of small businesses from health and safety measures, the HSC had successfully staved off major legislative reform and potential conflict with EC provisions. Particularly significant in this respect was the recommendation to leave Section 1(2) of the 1974 Act unchanged – a section which requires that new legislative provisions should provide a level of protection that is at least as rigorous as that applied previously or that which still applied to other sectors of employment.[7]

However, the case against deregulation of health and safety was not won entirely. In 1994 the Deregulation and Contracting Out Act became law. This Act contains delegated powers to allow the repeal of legislation. Thus, section 37 gives the Secretary of State the 'appropriate authority to repeal or revoke' any:

- provision which is an existing statutory provision for the purposes of Part 1 of the HSW Act (ie. pre-HSW Act legislation); and
- any regulatory provision made under section 15 of the HSW Act 'which has effect in place of a provision which was an existing

statutory provision for the purposes of that Part' (ie. regulations made after the HSW Act that replaced pre-HSW Act legislation).

Meanwhile, in November 1995, a Deregulation Task Force, established by Michael Heseltine in the previous year to follow through the implementation of the recommendations of the eight deregulatory task forces appointed in 1993, identified health and safety legislation as 'one of the single largest regulatory burdens on business'. The Task Force Report, while welcoming the HSC Review of Regulation, expressed disappointment 'that some of the key Sainsbury recommendations [ie. those of the deregulatory task forces] – an urgent review of the 'six pack' of EC Directives, consolidation of legislation on flammable substances and the implementation of telephone reporting of injuries – had not yet been implemented'. It also made a number of other recommendations with implications for the regulation of health and safety. For example, it recommended that a risk assessment should be required for all regulatory proposals affecting business and that the Cabinet Office be charged with providing guidance on a methodology that could be used for this purpose. It also recommended that no regulatory proposal affecting business should be entertained without a proper compliance cost assessment. For its part, the government accepted that it 'should continue to discourage new EC health and safety legislation', and indicated that it was not yet finished with deregulation and that it was simply varying its approaches to the subject.[8]

Overall, then, notwithstanding their commitment to deregulation, the successive post-1979 Conservative governments did not prompt any fundamental changes to the regulatory system for health and safety established under the HSW Act. At the same time, the surrounding deregulatory environment did act to influence significantly its operation in number of ways. First, by creating a considerable hesitancy on the part of the HSC to bring forward new legislative proposals, other than those required as a result of European legislation (see below), in part, because of the need for it to justify them in terms of costs and benefits. Secondly, through providing support for the making of successive cuts to HSC/E funding; cuts which resulted in a decline in inspector numbers and an associated reduction in the numbers of enforcement actions and inspections undertaken.[9] Thirdly, by also providing support for the introduction of requirements on market testing within the civil service which led to the outsourcing of a number of areas of HSE activity. Finally, through the imposition of new obligations on inspectors which required them to inform employers at least two weeks in advance of their intention to serve improvement notices in order to allow them time to complain

to an inspector's line manager if they felt the impending notice was unjustified.

Furthermore, this environment of financial constraint and political hostility was, in turn, compounded by the HSE gradually acquiring a number of new, and onerous, areas of enforcement responsibility (see the table below) that served to further limit the Executive's ability to effectively carry out its tasks (and statutory duties) within its available resources.

Major new areas of responsibility for HSE: 1983-95[10]

Year	*New area of responsibility*	*Cause*
1983	Asbestos licensing	New legislation
1983	Genetic modification	New legislation
1985	Gas safety	Transfer from Dept of Energy
1985	Transport of dangerous goods by road	Transfer from police
1986	Pesticides	New legislation. Food and Environmental Protection Act
1990	Railway safety	Transfer from Department of Transport[11]
1990	Nuclear safety research	Transfer from the Dept Energy
1991	Offshore safety	Transfer from the Dept Energy
1995	Outdoor activity centres	New licensing system

Source: 20 Years into the New Era: Some Reflections, *J McQuaid and D Snowball, HSE, 1995, p10*

Health and safety regulation and New Labour

The advent of the first of a series of Conservative governments in 1979 consequently meant that, barely after they had been established, the HSC and HSE found themselves operating in a hostile political environment and one which meant that the substantial increase in inspector numbers that was expected to occur following the passing of the HSW Act never materialised. In fact, such was the nature of this environment, that the tripartite Commission faced a real threat to its continued existence. Unsurprisingly, against this background, the 1980s therefore saw little progress occur with regard to the replacement of pre-1974 legislative requirements by new regulations made under the HSW Act and, more generally, few new sets of regulations introduced. Indeed, in the period up until the late 1990s it is not going too far to say that, insofar as new statutory requirements were introduced under the Act, these almost entirely stemmed from the need to bring domestic law into line with the requirements of European directives; an issue that is explored in more detail below.

Initially, the election of a Labour government in 1997 appeared to hold out the promise of a more positive regulatory agenda emerging. Thus, shortly after it came to power, the Labour government announced an increase in HSE funding, removed the need for inspectors to give employers advance warning of their intention to serve an improvement notice and, in establishing a Better Regulation Unit, more generally indicated that deregulation was no longer to form a fundamental philosophical touchstone of government policy. In addition, after the carrying out of an extensive consultation exercise, the government, in conjunction with the HSC, launched, in June 2000, a revitalising health and safety strategy and thereby gave a clear public indication that the achievement of improved standards of workplace health and safety constituted an important policy objective.[12]

The core of this strategy document set out a number of targets for measurable improvements in health and safety performance that were to be achieved over the subsequent 10 years and, then, went on to detail 44 action points that were intended to facilitate their achievement. The targets in question were to:

- reduce the number of working days lost per 100,000 workers from work-related injury and ill health by 30 per cent by 2010;
- reduce the incidence rate of fatal and major injury accidents by 10 per cent by 2010;
- reduce the incidence rate of cases of work-related ill health by 20 per cent by 2010; and
- achieve half of the improvement under each of the above targets by 2004.

As regards the supporting action points, these covered a range of both legislative and non-legislative actions (see Appendix). In particular, they held open the prospect, albeit often in a somewhat tentative fashion, that legislative action would be taken to address a number of perceived weaknesses in the current regulatory framework for health and safety that had been identified in the 1999 predecessor to this volume, notably by:

- providing the courts with greater sentencing powers by extending the £20,000 maximum fine that can be imposed by magistrates courts to a much wide range of offences and providing them with the power to imprison for most health and safety offences;
- introducing more 'innovative penalties' for health and safety offences, such as fines linked to the turnover or profits of a company, the prohibition of Director bonuses for a fixed period of time, suspended sentences pending remedial action, community service orders, and fixed penalty notices for specific offences;

- amending the HSW Act to enable private prosecutions in England and Wales without the consent of the Director of Public Prosecutions;
- placing statutory health and safety duties on directors
- removing crown immunity from statutory health and safety enforcement;
- amending the 1974 Act to take account of the 'changing world of work', with a view, in particular, to ensuring that the same protection is provided to all workers regardless of their employment status, and to extend the 'principles of good management practice' promoted by the Construction (Design and Management) Regulations to other sectors;
- undertaking of a fundamental review of the health and safety reporting regulations; and
- strengthening the duty on employers under health and safety law to ensure the continuing health of employees at work, including action to rehabilitate where appropriate.

Admittedly, the targets for improvement detailed in the *revitalising health and safety* strategy were far from ambitious in nature, the potential legal reforms identified in it fell far short of those advanced in the IER's 1999 publication, and its underlying approach to reform was premised on the view that the HSW Act had 'stood the test of time'.[13] Nevertheless, compared with what had occurred during the previous 18 years of Conservative rule, the strategy did provide some grounds for believing that the Labour government would act to, at least partially, address the inadequacies that existed within the current regulatory framework for health and safety at work.

In the event, even this optimism proved to be largely misplaced. Thus, at the time of writing, not only have none of the identified possible legal reforms been introduced, but several of them, including those relating to the imposition of new legal duties on directors and the strengthening of the legal obligations to ensure 'continuing health', had been dropped. Furthermore, this lack of action had been compounded by the imposition of new, and significant, cuts to HSC/E funding (see chapter 3), which mean that their resourcing does not, in real terms, differ much from that which existed prior to the 1997 election, and the government has accepted a set of recommendations put forward by a Treasury initiated review of the work of regulatory enforcement bodies, known as the Hampton Review, which, together, point to the adoption of an even more 'business friendly' approach to enforcement.[14] Indeed, in announcing the government's acceptance of these recommendations, the Chancellor of

the Exchequer, Gordon Brown, astonishingly appeared to suggest that henceforth such bodies should refrain from utilising programmes of routine inspection encompassing anything other than a small minority of relevant duty holders, as the following quote illustrates:

> *'there is no inspection without justification, no form-filling without justification and no information requirements without justification. Not just a light touch, but a limited touch. Instead of routine regulation attempting to cover all, we will adopt a risk-based approach that targets only the necessary few'*[15]

While developments following the election of a Labour government in 1997 initially promised a reinvigorated approach towards the regulation of workplace health and safety, in large part, this initial promise has, then, failed to come to fruition. As a result, the (inadequate) framework of health and safety law that was inherited at the time Labour came to power has remained largely unchanged and the HSC/E have continued to not only be severely under-resourced, as a recent report from the parliamentary Work and Pensions Select Committee has highlighted, but to operate at a level of resource not significantly different to that which existed under the last Conservative government.[16] Indeed, in a throw-back to the deregulatory ethos of previous Conservative governments, there seems a real likelihood that both HSE and local authority inspectors will in future operate in the context of an enforcement philosophy that is even more business friendly than that which currently exists.[17]

The influence of public opinion

In the period since the introduction of the HSW Act there has been a massive shift in attitudes and awareness towards the risks associated with living in contemporary Western society. In particular, environmental risks and the role of societal expectations in shaping the direction of regulatory policy in the broadest sense have become increasingly high profile issues. While this is not to say that it has necessarily resulted in any fundamental change in the nature of the governance of risk or in the relatively limited power of those affected by risks to influence their objective outcomes, it does represent a change in public consciousness and tolerance of environmental risk. This is seen, for example, in the increasing amount of both scientific and popular literature dealing with risk and risk communication.[18]

Such attention has been fuelled by both subjects, as well as the number of disasters that have occurred during the period, such as the British examples in the table below and those in other countries, notably Chernobyl, Bhopal, and Three Mile Island. However, cur-

rent sociological analysis suggests that societal concern with risk runs much deeper than mere sensationalism occasioned by the reporting of a catastrophic environmental or industrial accident and is a reflection of more general trends in risk consciousness in post-industrial western societies.

Certainly, it is clear during the 1980s and onwards there has been:

- a growing intolerance of risk on the part of the public;
- a shift from concern about worker health and safety *per se* to a wider concern about the impact of business activity on the public;
- an increased readiness to press for retribution;[19]
- increased public expectation of access to information, and demands for transparency and accountability; and
- greater demand for public involvement in decision-making processes affecting public safety.

Major incidents

Year	*Location*	*Incident*	*Dead*
1974	Flixborough	Explosion	28
1975	Appleby Frodingham	Explosion	11
1976	HMS Glasgow	Fire	8
1978	Bentley Colliery	Locomotive accident	7
1979	Golborne Colliery	Explosion	10
1984	Abbeystead	Explosion	16
1985	Putney	Domestic gas explosion	8
1985	Rutherglen	Domestic gas explosion	5
1987	Kings Cross	Fire	31
1987	Zeebrugge	Ferry capsized	187
1988	Piper Alpha	Fire and exposion	167
1988	Clapham	Train crash	35
1989	Marchioness	Boat collission	51
1992	Castleford	Fire	5
1994	Lyme Bay	Canoeing accident	4
1997	Southall	Train crash	7
1999	Ladbroke Grove	Train crash	31
2000	Hatfield	Train crash	4
2002	Potters Bar	Train crash	7

Adapted from: 20 Years into the New Era: Some Reflections, *J McQuaid and D Snowball, HSE, 1995, p9*

This growth of concern with public safety led the former Director General of the HSE to estimate that by 1995 it was spending nearly half of its annual resources on this area, as opposed to that of worker protection.[20] It also, subsequently, prompted the HSC, in 2004, to

announce its intention, against the background of the severe resource pressures that the Executive was facing, *'to determinedly move away from intervening in those areas of public safety that are better regulated by others or by other means'*.[21]

In the event, this proposal to dramatically reduce the HSE's role in protecting public safety was replaced by a more qualified one following the obtaining, by the Centre for Corporate Accountability, of legal opinion that the policy would be in breach of its duty to make adequate arrangements for the enforcement of the relevant duty under Section 3 of the HSW Act and consequently *ultra vires*.[22] It, nevertheless, remains clear that the HSE will continue, without a substantial increase in its resources, to face severe difficulties in striking an appropriate balance between investment in the protection of workers, on the one hand, and the public, on the other, and to be unable, as the HSC's policy proposal effectively acknowledged, to effectively carry out either of these protective roles adequately.

The EU role in regulating health and safety

It is possible to discern three phases in the development of European legislation and policy on health and safety. All have influenced the British scene to some extent.

The first phase was already underway by the time the United Kingdom acceded to membership of the Community in 1972. Occupational health and safety formed part of the original objectives of European economic co-operation by virtue of the 1957 Treaty of Rome. Both Articles 100 and 118 of this Treaty were taken to allow for the introduction of provisions on health and safety, if they were agreed unanimously by the Council of Ministers. In fact, several directives, such as the directive on the classification, labelling and packaging of dangerous substances, had been adopted through this process prior to the HSW Act.

In 1974 the Council initiated a social action programme that included specific reference to health and safety and which stimulated new directives on safety signs, and vinyl chloride monomer. It also led to the establishment of the Advisory Committee on Safety Hygiene and Health Protection at Work, which became the main forum in which employers, trade unions and representatives of national authorities debated the development of detailed policy on health and safety in Europe. In 1978 the first Action Programme on health and safety was announced. The most significant legislation made under this programme was a Framework Directive on the control of chemical, physical and biological agents at work, known as

the 'Harmful Agents Directive' (80/610/EEC, later amended by 88/642/ EEC), which led to the introduction of the Control of Substances Hazardous to Health Regulations 1998. However, it also led to further directives on asbestos, lead and noise, all of which led to the introduction of new British regulations in the late 1980s. A second Action Programme followed in 1984 extending the areas covered by the first.

Despite the significance of the 'Harmful Agents Directive', legislative progress within the Council of Ministers was slow, the requirement for unanimity effectively giving individual member states the opportunity to veto new requirements – an activity in which the representatives of the United Kingdom government played no small part. This changed in 1986 as a result of the Single European Act, which heralded a new phase of European level action. This Act inserted a new Article 118A into the Treaty of Rome which stated that:

> '1 The Member states shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area while maintaining the improvements.
>
> 2 In order to help achieve the objective laid down in the first paragraph, the Council acting by a qualified majority on a proposal from the Commission and after consulting with the European Parliament and the Economic and Social Committee, shall adopt, by means of Directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States...'

The provision for qualified majority voting on health and safety meant that under the third Action Programme adopted in 1987 it was possible to introduce an ambitious legislative agenda at the European level in time for the completion of the single market by the end of 1992. Spearheading the resulting directives was the Framework Directive (89/391/EEC) on the introduction of measures to encourage improvements in the safety and health of workers at work. It was followed by a series of daughter directives including those on workplaces (89/655/EEC), the use of work equipment (89/655/EEC), the use of personal protective equipment (898/656/ EEC), manual handling of loads (90/269/EEC), and display screen equipment (90/270/EEC) – which, along with the Framework Directive, were implemented in Britain via the 'six pack regulations'. Amongst further directives adopted under the same programme were ones on temporary or mobile construction sites (92/57 EEC),

implemented by the Construction (Design and Management) Regulations 1994; on pregnant workers (92/85/EEC), which led to amendments to the Management of Health and Safety at Work Regulations; on the packaging and labelling of dangerous substances, (for example, 92/32/EEC, 93/69/EEC and 93/90/EEC), which required new Chemical (Hazard Information and Packaging) Regulations (CHIP 1 and CHIP 2); on carcinogens (90/394/EEC), which required amendments to COSHH; and on genetically modified organisms (90/219/EEC), implemented by the GMO (Contained Use) Regulations 1992 and 1993.

Another change to the Treaty of Rome introduced by the Single European Act was Article 100A. This allowed the Council to adopt measures for the approximation of member states' provisions and laws concerning the establishment and functioning of the internal market. It resulted in the so called 'new approach' product directives which deal with essential safety requirements and which are supported by detailed standards issued by the European standards organisations CEN and CENELEC. Such directives have included the Machinery Directive (89/392/EEC) and the Personal Protective Equipment Directive (89/686 EEC).

At the same time as these developments were taking place discourse at European level on social policy led to the adoption of the Community Charter of Fundamental Social Rights of Workers, the Social Charter, which contained principles on workplace health protection, safety and improved working conditions. These principles were subsequently incorporated into a further Social Action Programme, which contained the original proposals for directives on working time, pregnant workers and young workers. The powers of the EU to take action in the area of social policy were subsequently further increased via the Protocol on Social Policy annexed to the 1991 Maastricht Treaty. This protocol provided an alternative route for the making of European legislation on social and employment issues, including health and safety, for the member states who were signatories. That is all of the then member states other than the UK. However, following the 1997 Labour government's decision to reverse the UK's 'opt out' from the protocol, it, as well as an amended Article 118A, were subsequently incorporated, in a modified form, into the consolidated European Communities Treaty by means of the Amsterdam Treaty.

The period of intense legislative activity and proactive policy on the part of the EU and its institutions, however, came to an end before the middle of the 1990s. The fourth Action Programme from the Commission, adopted in 1996 and covering the period to 2000,

for example, centred, for the most part, around a range of non-legislative measures, although it did lead to the establishment of the European Health and Safety Agency based in Bilbao. The same is also true of the Commission's current programme on health and safety at work, covering the period 2002-2006.[23]

Nevertheless, notwithstanding this more recent stepping back from legislative action at the European level, it is difficult to overstate the role that European directives have played in shaping domestic health and safety law. The phase of action encompassing the adoption of the 1989 Framework Directive and a range of other directives during the period to the mid-1990s, for example, exerted an enormous influence not only on the quantity of British health and safety legislation during the first half of the 1990s, as the discussion above has highlighted, but also its quality. In particular, these directives, and most notably the Framework one, acted to establish a general statutory model of health and safety management under which employers are required to undertake risk assessments in order to identify actions that need to be taken to improve worker protection, keep the validity of these assessments under review, provide relevant information and training to workers (and their representatives) and ensure that appropriate health and safety expertise and advice is available (see chapter 2).

As a result, while British interpretation and implementation of European directives may sometimes have been idiosyncratic and arguably often incomplete, perhaps, most notably with regard to the way in which the requirements of the Framework Directive on 'preventive services' have been transposed into domestic law via very vague provisions on the appointment of 'competent persons', rather than through the specification of the composition of such services, as well as the qualifications of their personnel (see chapter 2), they have become undoubtedly the single most significant source of new health and safety legislation in the country.[24] Moreover, as a number of recent sets of regulations, such as the Control of Vibration at Work Regulations 2005, the Work at Height Regulations 2005 and the forthcoming revised regulations on the control of noise at work illustrate, this continues to be the case.

Indeed, in the context of the analysis offered later in this book, the contribution that European directives have already made, and may continue to make, to a broadening of the agenda of 'health and safety at work' to incorporate concerns about how the design and organisation of work, and the relationship between work and wider social life, can adversely affect worker well-being additionally needs to be acknowledged. The three directives adopted so far on working

time, for example, have each made a contribution in this respect. The same is true of the 1989 Framework Directive's laying down as a 'principle of prevention' that employers adapt *'work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health'*.[25] Meanwhile, the fact that the current European Commission programme on health and safety at work is centrally focussed on well-being at work and, in doing so, makes reference to the taking of various, for the most part, non-legislative, actions in respect of psychological harassment and violence at work, and musculoskeletal complaints suggests that similar such contributions cannot be entirely ruled out in the future.[26]

Compensation, rehabilitation and the prevention of harm

A striking feature of the British system of health and safety regulation is that it largely exists in parallel to the arrangements in place for compensating and rehabilitating the victims of work-related harm and, in doing so, therefore contrasts sharply with the situations subsisting in some other countries (see chapter 5). In fact, in formal, legal terms, it only overlaps with these arrangements in two ways. First, through the enforcement powers of HSE and local authority inspectors extending to cover employer compliance with their obligations under the Employers Liability (Compulsory) Insurance Act 1969. Secondly, by virtue of the fact that all sets of regulations made under the HSW Act make provision for breaches of them to form the basis of common law actions for breach of statutory duty.

In its report, the Robens Committee did provide some discussion of the extent to which the Industrial Injuries Scheme (IIS) and common law actions for damages provided employers with an incentive to prevent work-related harm. However, the Committee did not feel that its terms of reference allowed it to examine the operation of the compensation system in detail or to put forward recommendations for change. Nevertheless, it did make two recommendations. First, that a detailed study should be undertaken as to the possibility of amending the IIS to introduce differential rates of employers' contributions based on claims experience. Secondly, that a review should be conducted of the system of actions for damages at common law, with particular reference to the effects of the system upon accident-prevention provisions and arrangements.

Subsequently, a review of civil law compensation was commenced

in the late 1970s by the Pearson Commission.[27] In its report, this Commission did recommend changes to both the IIS and the operation of the tort system. It did not, however, support the reform of the IIS along the lines raised by the Robens Committee. Nor did it favour utilising the system of employers' liability insurance to provide employers with an incentive to encourage them to do more to stop worker injuries and ill health.

Recently, however, there have been signs of governmental interest in establishing more holistic and mutually reinforcing linkages between the systems in place for preventing work-related harm, and compensating and rehabilitating the victims of such harm. The revitalising health and safety strategy document, for example, observed that a *'major reform of the compensation, benefits and insurance system presents the prospect of a powerful new lever to raise health and safety standards'* and also went on to note the role that insurance could play in motivating employers to rehabilitate workers. In addition, one of its Action Points, as alluded to above, called on the HSC to consult on *'whether the duty on employers under health and safety law to ensure the continuing health of employees at work, including action to rehabilitate, where appropriate, can be usefully clarified or strengthened'*. Even more recently, the Department for Work and Pensions (DWP), in a review of Employers' Liability insurance, argued that more effort should be made to link premiums to health and safety performance and, following on from this review, published a national *Framework for Vocational Rehabilitation* in which a commitment was given to review the IIS to see how it could be modified to encourage activity in the area.[28]

More concretely, this interest in establishing a closer synergy between prevention, compensation and rehabilitation would seem to have been an important factor in influencing the decision to transfer responsibility for the HSC/E to the DWP, following the demise of their earlier host department, the DETR. It has also led the HSE to commission a number of research studies in the areas of vocational rehabilitation and absence management and, in the case of the latter issue, to publish guidance on it.[29]

Conclusion

IN this chapter we have tried to do two things. First, we have described the broad infrastructure of the system for health and safety regulation in Britain, its policy underpinnings and its development during the past 30 years. Secondly, we have considered some of the influences on both its operation and development during this period.

The discussion has highlighted how the HSW Act, the core of the current regulatory system, was in large part based on the recommendations put forward in the 1972 report of the Robens Committee. It has also drawn attention to the fact that the Act essentially sought, notably by the laying down of broad, goal-orientated, general duties on employers and others, and the establishment of a framework for worker representation, to create a legal system which encouraged greater self-regulation on the part of employers and workers: albeit one that also provided more extensive enforcement powers to inspectors.

It has further been noted that, since its inception, the HSW Act has not been effectively supported by a compensation system which supports its preventive objectives and, in fact, has essentially operated in parallel to the arrangements in place relating to the compensation and rehabilitation of workers who have been harmed by work activities. In addition, it has been observed that for much of its life the framework of law established by the HSW Act has, at the domestic national level, operated in a generally unsupportive, and at times overtly hostile, political environment.

Successive Conservative governments during the period 1979-97 cut the funding of the HSE, increasingly required regulatory proposals and enforcement action to be justified in cost-benefit terms and exerted on-going pressures for deregulation. However, while these pressures led to the repeal and revocation of a substantial body of existing law, they did not act to fundamentally reduce the statutory obligations of employers. Rather they can better be seen as having stimulated the overhaul of pre-HSW Act legislation along the lines advocated by the Robens Committee. In fact, as a result of a growth in European level activity in respect of health and safety, a host of new regulations were made in order to transpose into domestic law the requirements of new directives. This expansion of European-inspired legislation inevitably caused concerns for Conservative governments committed to a deregulatory agenda. These concerns were, in part, addressed by the adoption of an often minimalist approach to the transposition of directives – an approach, perhaps, most clearly seen in the inadequate way in which the HSC sought to implement the requirements of the framework directive relating to preventive health and safety services.

The advent of a Labour government in 1997, initially, held out the promise of a significant change of policy direction, as funding to the HSC/E was increased, it was clearly indicated that deregulation would no longer form a philosophical touchstone of governmental policy and a new *revitalising health and safety* strategy was launched

which set a number of targets for improvement and specified a range of actions that were intended to facilitate their achievement; a number of which held out the prospect of desirable – although limited – legal reforms. In practice, however, many of the hopes raised by these developments have subsequently been dashed. Thus, as is shown in chapter 3, funding to the HSC/E has, more recently, been cut, none of the potential legal reforms referred to in the revitalising health and safety strategy have been introduced and it now seems that an even more business friendly approach to the enforcement of health and safety laws is to be adopted.

Meanwhile, not withstanding these domestic and European developments, the nature of the regulatory regime for workplace health and safety put in place by the HSW Act has remained fundamentally unaltered and the self-regulatory philosophy which underlay its development continues to receive official support. That this has been the case could be seen to be a reflection of the strengths of this regime and the soundness of the Robens analysis on which it was largely based. On the other hand, it could also be seen to reflect a misguided faith in the system's adequacy on the part of the health and safety establishment, as well as governmental inertia, or worse, a governmental agenda which places the health and safety of workers below that of supporting the business interests of employers. In the pages that follow we will shed light on the validity of these alternative explanations.

Notes

1 Lord Robens, *Safety and Health at Work: Report of the Committee 1970-72,* 1972, Cmnd 5034, HMSO.

2 For example see, T Nichols and P Armstrong, *Safety or Profit?* 1973, Falling Wall Press; and A Woolf, "The Robens Report – the Wrong Approach", *Industrial Law Journal,* 1973, 2, 88-95. For a more recent discussion see S Dawson, P Willman, M Bamford, and A Clinton, *Safety at work: The limits of self regulation,* 1988, Cambridge University Press, and in the context of the relevance of self-regulation to hazards in the chemical industry see D Smith and S Tombs, "Beyond Self-Regulation: Towards a Critique of Self-Regulation as a Control Strategy for Hazardous Activities", *Journal of Management Studies,* 32, 1995, 619-636.

3 J Locke, *The Politics of Health and Safety, Sir Alexander Redgrave Memorial Lecture,* IOSH; also summarised in *Protection,* July 1981.

4 No premises have so far been prescribed for the purposes of this section.

5 A J P Dalton "Lessons from the United Kingdom: Fightback on workplace hazards", *International Journal of Health Services,* 22, 1992, 489-495.

6 HSC, *Review of Health and Safety Regulation,* 1994, HSE Books.

7 J Hendy, *International Trade and International Trade Union and Workers' Rights,* 1st Jack Hendy Memorial Lecture, 1994, Thames Valley University.

8 H Fidderman, "Mood music with Jenny Bacon", *Health and Safety Bulletin,* 1998, 10-15; and H Fidderman, "More HSE mood music", *Health and Safety Bulletin,* 1999, 7-12.

9 P James, "The enforcement record of the HSE's Field Operations Division", *Health and Safety Bulletin,* 261, 1997, 9-12.

10 It has, more recently, been proposed that the HSE acquire a number of new areas of responsibility. See P Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement,* 2005, HM Treasury.

11 Responsibility for rail safety has recently been passed to the Office of the Rail Regulator.

12 See Department for the Environment, Transport and the Regions/Health and Safety Commission, *Revitalising Health and Safety, Consultation Document,* 1999, DETR; and Department for the Environment, Transport and the Regions/Health and Safety Commission, *Revitalising Health and Safety: Strategy Document,* 2000, DETR.

13 See P James and D Walters, *Health and Safety: Revitalised or Reversed?,* 2004, Institute of Employment Rights.

14 See Department for the Environment, Transport and the Regions/Health and Safety Commission, *Revitalising Health and Safety: Strategy Document,* 2000, DETR.

15 Industrial Relations Services, "Brown takes Scalpel to Red-tape Herring", *Health and Safety Bulletin,* 341, 2005, 2.

16 House of Commons Work and Pensions Committee, *The Work of the Health and Safety Commission and Executive,* Volume 1, 2004, Stationary Office.

17 The present government, however, does, apparently, remain committed to increasing the penalties for health and safety offences and removing Crown Immunity from health and safety enforcement. In addition, although not a central focus of interest here, it should be acknowledged that the government has also, albeit after much delay, produced draft legislation which would reform the current law on corporate manslaughter. See chapter 3.

18 U Beck, *Risk Society: Towards a New Modernity,* 1992, Sage.

19 Interestingly, however, and contrary to the widely publicised view, in part stimulated by employer liability insurers, that a compensation culture has been developing in Britain, there is no evidence of an increased propensity for workers to seek compensation for work-related injuries and ill health. See Trades Union Congress, *The Compensation Myth,* 2005, TUC.

20 J Rimington, *Valedictory summary of industrial health and safety since the 1974 Act,* paper presented at the Electricity Association 26/4/1995 (summarised in *Health and Safety Bulletin,* 236, 1995, 11).

21 Health and Safety Commission, *A Strategy for Workplace Health and Safety in Great Britain to 2010 and Beyond,* 2004, HSE Books.

22 See http://corporateaccountability/hse/pubsafety/main.htm.

23 Commission of the European Communities, *Adapting to Change in Work and Society: A New Community Strategy on Health and Safety at Work 2002-2006,* Com(2002) 118 Final.

24 M Everley, "Leaked letter causes rumpus over HSE risk-taking", *The Safety and Health Practitioner,* January, 1993.

25 This principle has been transposed into domestic law though Regulation 4 of the Management of Health and Safety at Work Regulations 1999 (SI 1999/1877).

26 P James, "Well-being: has its legislative time come?", *Policy and Practice in Health and Safety, 1(2),* 2003, 1-15.

27 Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, 1978, Cmnd. 7054.

28 See Department for Work and Pensions, *Review of Employers' Liability Compulsory Insurance: Second Stage Report,* 2004, Stationary Office; and Department for Work and Pensions, *UK Framework for Vocational Rehabilitation,* 2004, DWP.

29 See Health and Safety Executive, *Managing Sickness Absence and Return to Work,* HSG249, 2004, HSE Books; P Ritchie, H Cowie, M Graham, P Hutchison, R Mulholland, A Melrose and A Pilkington, *Managing Health at Work – Recording and Monitoring Information on Sickness Absence Including Work Relatedness,* Research Report 310, 2005, HSE Books; and P James, I Cunningham and P Dibben, *Job Retention and Vocational Rehabilitation: The Development and Evaluation of a Conceptual Framework,* Research Report 106, 2003, HSE Books.

Chapter 2

Employers and their statutory duties

OCCUPATIONAL health and safety legislation has always focused primarily on the role that employers and the occupiers of work premises play in ensuring adequate standards of worker protection. The self-regulatory philosophy advocated by the Robens Committee, and given statutory effect by the HSW Act, continues to emphasise this role and with good reason.[1] For it is the employer who ultimately controls work activities and the organisational and physical environment within which they take place. Indeed it was precisely this feature of working life that led Robens to stress the importance of using the law to encourage greater self-regulation on the part of both employers and workers.

In this chapter attention is consequently paid to the adequacy of current employer approaches towards the management of health and safety at work and how far they appear to be embracing the central tenets of self-regulation. Initially, the meaning of self-regulation and the managerial practices considered central to its effective operation are considered. The operation of self-regulation in practice is then explored in relation to the legal duties placed on employers through a consideration of three issues: the willingness of employers to develop and implement the organisational arrangements necessary to ensure the health and safety of workers; the extent to which they have the capability to both establish and effectively operate such arrangements; and the degree to which current management systems and practices do currently act to protect workers from work-related harm.

The meaning of self-regulation

IN its report the Robens Committee did not provide a comprehensive model of what constituted effective self-regulation on the part of employers. Rather, the Committee identified and discussed three 'prerequisites' which it considered were needed if 'progress towards a more effectively self-regulating system' was to be achieved. First, an awareness of the importance of the issue, particularly at the senior management level. Secondly, the clear definition of organisational responsibilities. Thirdly, the carrying out of methodical assessments of the nature of health and safety problems and the translation of these assessments into practical objectives and courses of action.

Subsequently the HSW Act sought to establish a legislative framework that would encourage the more widespread adoption of these 'prerequisites' through the imposition of three sets of duties on employers. First, the duty laid down under section 2(1) to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all employees: a duty which section 2(2) makes clear encompasses responsibilities with regard to a number of specific matters, such as the provision and maintenance of systems of work, arrangements relating to the use, handling, storage and transport of articles, and the provision of information, instruction, training and supervision. Secondly, the requirements under section 2(3) to prepare a written statement of health and safety policy and the organisation and arrangements in place to implement this policy, to bring this statement to the attention of employees, and to periodically review, and where necessary, revise it. Thirdly, the laying down of a duty under section 3 to ensure, again so far as is reasonably practicable, the health and safety of non-employees who might be affected by an undertaking's activities.

Later regulations and associated ACOPs, as well as a wide-range of official guidance material, have added further detail to what employers need to do to protect workers and in doing so served to specify more clearly the types of management and preventive arrangements that they need to put in place. In recent years many of these regulations have been introduced to implement the requirements of EC directives – although the extent to which they have in fact done so has been variable.[2] For example, as a result of such directives new regulatory requirements have been introduced in respect of the carrying out of risk assessments and the implementation of their results, the appointment of competent persons, and the provision of both information and training, and workforce consultation. Indeed the Management of Health and Safety at Work (MHSW) Regulations 1999, a set of regulations, initially, introduced

to implement two EC directives – the safety framework directive and that on temporary workers – cover all of these matters and as a result effectively provide a far clearer statutory outline of what self-regulation is than do the duties imposed under sections 2 and 3.[3]

More generally, the HSE, through a series of publications produced during the 1980s and the 1990s, such as *Managing Safety* in 1981, *Monitoring Safety* in 1985, *Human Factors in Industrial Safety* in 1989 and *Organising for Safety* in 1993, has spelt out in some detail the main issues that need to be considered by employers when approaching the management of health and safety. Much of this guidance was brought together by the HSE in the booklet *Successful Health and Safety Management* (HS(G)65), a publication first issued in 1991, and subsequently revised in 1997.[4] HS(G)65 therefore provides the most comprehensive official outline of what constitutes effective self-regulation on the part of employers.

At its core, HS(G)65 embodies an approach to health and safety management which echoes that found in health and safety management systems more generally. This is a systems approach within which the effective control of workplace risks is seen to require the systematic assessment of such risks, the consequent identification of areas where risks need to be better controlled and adoption of appropriate methods to secure this control, the subsequent putting into place of strategies to effectively implement the controls in question, and the adoption of mechanisms to monitor and review their adequacy and identify whether action is needed to improve them.

There seems little doubt that, in theory, an approach of this type, if utilised in a thorough and participative way, that is a way in which workers and their representatives can take an active part in its various elements, can result in the achievement of high standards of health and safety management. At the same time, however, research evidence indicates that all too often organisations do not approach the management of risk in such a systematic manner and, even where they do so, a considerable gap often exists between how health and safety is supposed to be managed and the way in which it is actually managed.[5] Indeed, a graphic illustration of this latter point was provided, as this chapter was being finalised, by the decision of the US Chemical Safety and Hazard Investigation Board, in August 2005, to issue an urgent Recommendation to BP's Global Executive Board of Directors following the interim findings of its investigation into an explosion and fire at the company's Texas City refinery which killed 15 workers and caused another 170 injuries.[6] Thus, in making this recommendation, the Board noted that its findings raised 'serious concerns about (a) the effectiveness of the safety management system at the Texas City refinery; (b) the effec-

tiveness of BP North America's corporate safety oversight of its refining facilities; (c) corporate safety culture that may have tolerated serious and longstanding deviations from good safety practice'. It further went on to note that, in investigating and reporting on three incidents at the BP Grangemouth refinery in Scotland in 2000, the HSE had, somewhat similarly, concluded that while 'BP Group Policies set high expectations', these were 'not consistently achieved because of organisational and cultural reasons'.

The fact that situations of this type occur is, moreover, not surprising if attention is paid to the research evidence that sheds light on the willingness and capacity of employers to manage health and safety effectively.[7]

Employer willingness

A CENTRAL proposition advanced in HS(G)65 is that the effective adoption of a systematic approach to health and safety management is not only required by the law, but makes economic or business sense. Indeed, it states that the costs associated with a failure to manage health and safety successfully can be so high that they constitute 'the difference between profit and loss'.

This belief in the business case for health and safety does, however, sit uneasily with the qualification of the employer's duty in section 2(1) of the HSW Act in terms of reasonable practicality. For this qualification effectively acknowledges that there is a point where it becomes 'uneconomic' to remove existing risks.[8] It can also be more concretely questioned on the basis of the problematic evidence that the HSE advances to support the existence of such a case, the findings of official inquiries into the causes of major disasters and the results obtained from a range of research studies.

In its report *The Costs of Accidents* the HSE, through the medium of five case studies, sought to demonstrate the large-scale costs incurred by employers through accidents deemed 'economic to prevent'.[9] In doing so it went on to again argue that there is a strong economic case for employers to do more to prevent such events. The exclusion of accidents that were considered not economic to prevent, however, demonstrates once again that there are clear limits to the business case. Moreover, even if this issue is ignored, the fact remains that the costs of accident study does not, even on its own terms, clearly demonstrate that the case study organisations had an economic incentive to invest further on health and safety.[10] Thus, no account is taken of the potential opportunity costs associated with this expenditure and no recognition given to the fact that while organisations might recognise the long-term benefits of a given expenditure, their ability to make it might be hindered by short-term

budgetary and financial constraints. In addition, the internal politics of management decision-making processes are ignored, with the result that it is questionably assumed that organisations invariably behave in an economically rational way.

Furthermore, the findings of official inquiries conducted into the causes of major disasters, such as Piper Alpha, the sinking of the Herald of Free Enterprise, and the train crashes at Clapham Junction, Southall, and Ladbroke Grove, add weight to the above doubts about the extent to which employers view the maintenance of high standards of health and safety as integral to their financial performance. For example, the Zeebrugge inquiry found that the immediate cause of the sinking was the failure of an Assistant Bosun to close the bow doors prior to sailing.[11] It further discovered, however, that the possibility of such an occurrence had been raised previously to senior management with a request that indicator lights be used to confirm that the doors were closed. This request was, though, rejected, with one manager responding 'don't we already pay someone?'. In a similar vein Lord Cullen, the chair of the Piper Alpha inquiry, expressed puzzlement as to why, with so much construction and maintenance work taking place, it had been decided to allow production to continue,[12] while the Clapham Junction inquiry found that an internal memo written by a senior BR manager had earlier drawn attention to how a new system for appraising investment decisions provided an 'organisational disincentive for health and safety', and concluded that a contributory factor to the accident was the decision to carry out a re-signalling project to a deadline which could only be met by staff working exceptionally long hours.[13]

Disasters of the scale of those above are, of course, exceptional in terms of the scale of the harm involved. A host of other studies, however, also demonstrate how operational pressures stemming from production and broader financial objectives can act to endanger the health and safety of workers. For example, piecework payment systems, intended to encourage workers to produce more, have been found to be associated with higher accident levels;[14] a number of studies have obtained evidence of an association between accident rates and work intensity;[15] strong associations have been identified between levels of stress and such factors as working long hours, high exposure to noise, having to work fast and high workloads,[16] and it has been shown how the desire to reduce energy and running costs can lead to the design of office environments with lighting, heating and ventilation arrangements that result in workers suffering adverse health effects.[17] HSE commissioned research into the links between total quality and health and safety management, two processes which are considered in HS(G)65 to be mutually supporting, merely

serves to cast further doubt on how far employers perceive the protection of worker health and safety as being critical to business success.[18] For the researchers not only found that these links were often limited but further concluded that this lack of linkage partly stemmed from a leadership vacuum at executive level in respect of health and safety and a view that investment in health and safety does not generate income or profits.

There are, furthermore, indications that current pressures on employers to cut costs and increase efficiency are often leading them to adopt systems of work organisation that are detrimental to worker health and safety. Some call centre operations, for example, have been found to be associated with a number of adverse occupational health outcomes.[19] Meanwhile, the introduction of 'lean systems of production' has been shown to be associated with adverse health effects for workers.[20]

On top of this, there is ample evidence that directors and senior managers frequently accord the issue of health and safety a relatively low priority, despite survey evidence which would seem to suggest that they often see it as being of considerable financial importance. For example, a recent survey found that in more than a quarter of the large organisations surveyed responsibility for health and safety was delegated to below board/director level and that, where it was not, director and board level involvement in the issue was often very superficial – an impression which can be graphically illustrated by the finding that only around 10 per cent of boards in this situation were found to be involved 'a lot' in ensuring that sufficient resources were allocated to health and safety.[21]

This picture of low senior management commitment to health and safety is, in turn, reinforced by the findings of two other studies. Thus, in one of these, which involved surveying senior staff in 50 major UK companies, 60 per cent of respondents mentioned lack of leadership at board level as one of the four top impediments to good risk management and in the other, almost a third of the health and safety managers surveyed believed that health and safety was rarely, or never, a priority of senior management and that just under a quarter were unhappy with the support they received from senior executives.[22]

In the face of such findings as those reviewed above it would consequently seem that many British employers do not, in reality, possess a willingness to adopt and implement the types of arrangements advocated in HS(G)65 or, more generally, to effectively self-regulate themselves. It would further seem that an important reason for this is that health and safety is frequently not perceived to make an important contribution to organisational success and that a tension

therefore all too often exists between expenditure on worker protection and wider financial and business objectives, notwithstanding the HSE's questionable argument that there is 'a business case' for managing health and safety successfully Indeed, it is difficult to see how it can be validly argued that employers, in general, accept this argument in the face of evidence suggesting that many of them simply do not attempt to measure the costs of injuries and ill health or consider the issue of economic effectiveness when considering preventive measures.[23]

Existing and relatively recent, case law, moreover, only serves to reinforce the above views in relation to some of the country's largest employers. In a case involving the prosecution of J Sainsbury's plc following the death of a warehouse worker, for example, the judge, in imposing fines on the company totalling £425,000, referred to a 'picture of working practices that date back to the dark ages of work safety' and also accused the supermarket chain of having priorities that meant that 'making money was at the top of the list and safety was at the bottom'.[24] In a similar vein, in a case involving the prosecution of British Sugar following an explosion at one of its plants, the judge noted that this was the fifth time that the company had appeared in court in five years for health and safety offences and, in doing so, observed that it 'really ought to feel a significant sense of embarrassment'.[25] Meanwhile, in imposing a £10 million fine on Balfour Beatty in respect of its contribution to the occurence of the Hatfield train crash, Mr Justice Mackay described its culpability as 'one of the worst examples of sustained industrial negligence'.

The HSE has, against this background, nevertheless, continued to promulgate the business case argument. In particular, it has established a separate website on the issue which, among other things, contains a 'Ready Reckoner' that can be used by employers to calculate the costs of accidents and occupational ill health and provides a small number of case studies which, it is argued, demonstrate the financial benefits of effectively managing health and safety. A striking feature of these case studies, however, is that one of them does not provide any quantification of these benefits, while several others focus attention on the impact of narrowly focused, issue specific, initiatives, rather than aggregate cost-benefit analyses of health and safety related expenditure. In addition, none of them seem to have been based on independent and rigorous research. Consequently, taken together, the studies do not convincingly challenge the arguments advanced above or the conclusions of a number of other pieces of research which have similarly cast doubt on the existence of a general business case for adequately protecting worker health and safety.[26]

Employer capacity

FOR effective self-regulation to occur it is clear that employers (a) need to possess the knowledge and expertise required to identify risks and appropriate remedial strategies and (b) have in place management systems that ensure that these processes are carried out and that any necessary remedial actions are taken. Consequently, in this section attention is paid to two, related, issues. First, the extent to which the present legal framework ensures that organisations do possess the health and safety knowledge and expertise they need. Secondly, how far employers do currently adequately identify and control risks.

Knowledge/expertise

Under the MHSW Regulations employers are required to appoint one or more competent persons to assist them in undertaking preventive activities. A competent person for these purposes, however, is defined in very general terms as someone who has 'sufficient training and experience or knowledge and other qualities to enable him to properly assist...' As a result the Regulations do not require employers to have access to professionally qualified safety or occupational health specialists – a situation that contrasts sharply with that in most other member states of the European Union and almost certainly means that British law fails to comply with the provisions of the EC Framework Directive on protective and preventive services.[27]

The most reliable, comprehensive and up-to-date information on the use made of occupational health and safety specialists by British employers is provided by a study of employer occupational health support conducted, on behalf of the Health and Safety Executive, via a survey of 4,950 organisations in the private and public sectors.[28] The results of this indicated that of the 3,329 of these organisations which were identified as providing some occupational health support, only 786 (24 per cent) had the use of a full-time or part-time occupational health physician, 811 (24 per cent) an occupational health nurse, 915 (28 per cent) a General Practitioner, 205 (six per cent) a staff nurse with no occupational health qualifications, 196 (six per cent) an occupational hygienist, 207 (six per cent) an ergonomist, 1,383 (42 per cent) a health and safety practitioner and 1,548 (46 per cent) a health and safety officer. Furthermore, for methodological reasons, these, obviously low figures, themselves considerably overstate the coverage of such specialists across the economy as a whole.

Moreover, where organisations do make use of occupational health professionals, their preventative role is often limited and, in

particular, appears rarely to extend to the identification of health problems at their pre-symptomatic stage. Thus, an earlier HSE commissioned study found that only 43 per cent of those used by private sector establishments provided advice on health and safety measures, just 40 per cent played a role in 'identifying other areas which might cause health problems' and a slightly smaller proportion (39 per cent) conducted regular health checks on some staff.[29] In a similar vein, the survey of occupational health support referred to above found that only 726 (22 per cent) of the organisations providing some form of such support provided 'well-person health checks (ie. full medical health screening)'.

There is little doubt, then, that, at present, health and safety in most British enterprises is carried out in the absence of specialist expertise. It is consequently, therefore, unsurprising that a range of studies have found that many of them are simply unaware of their legal duties and what they need to do to comply with them. A case in point is an HSE study, conducted to evaluate the impact of the 1992 'six-pack Regulations', which found that only 43 per cent had heard of the MHSW Regulations and that awareness of the other five sets of regulations, although higher, was still far from impressive – the relevant percentages ranging from 50 per cent to 71 per cent.[30]

However, this general picture of a lack of health and safety knowledge and expertise masks significant differences between sectors and sizes of undertaking. In particular, it conceals marked differences between small and larger organisations, with the former having been found to be particularly ignorant of their legal obligations and what constitutes compliance with them. Thus, a recent survey of small and medium enterprises found that just 37 per cent of them could name any piece of health and safety legislation, including the HSW Act itself,[31] while another, which involved an examination of legal compliance among 39 small hairdressers, found that while legal compliance within them was often poor, reaching a high of 61 per cent in the case of electrical safety and a low of 19.5 per cent in the case of risk assessment, all of those interviewed considered their organisations to be legally compliant.[32]

This lack of health and safety knowledge and expertise within SMEs is one that is highly troubling for three reasons. First, there has been a substantial growth of employment within such enterprises to the point where around a half of the working population is employed in businesses possessing fewer than 250 staff. Secondly, there is clear evidence that workers employed in SMEs face greater risks. For example, one HSE study found the rates of fatal injury and injuries involving amputations in manufacturing workplaces with less than 50 employees to be twice as high as was the case in

establishments that had 200 or more.[33] Thirdly, the HSC's 1994 Review of Regulation revealed that managers in SME's frequently experienced difficulties in interpreting and applying modern goal-setting statutory requirements and in doing so indicated that a more prescriptive approach to the drafting of statutory requirements would be preferred – an issue to which we return below.[34]

Management systems and control

There seems little doubt that the HSE is correct to argue that health and safety can only be managed effectively if it is approached in both a systematic and integrated way. That such a situation is desirable does not, however, mean that it exists very often in practice. Indeed the arguments already advanced concerning the willingness of employers to both prioritise and invest in health and safety suggest that the opposite is the case. In fact there is ample evidence to indicate that employers all too often do not adequately identify risks, or establish appropriate preventive measures to control the risks that have been identified, or ensure that these measures are fully implemented.

The following sample 'case study' examples, contained in an HSE publication entitled *Improving Compliance with Safety Procedures*, serve to clearly demonstrate these last points, particularly as they relate to large organisations operating in highly hazardous environments – in other words organisations that would be expected to have a 'more sophisticated' approach to the management of health and safety:[35]

Extract from the King's Cross Disaster Inquiry

'Many of the shortcomings in the physical and human state of affairs at King's Cross on 18 November 1987 had in fact been identified before by internal inquiries into escalator fires... The many recommendations had not been adequately considered by senior managers... London Underground's failure to carry through the proposals resulting from earlier fires... was a failure which I believe contributed to the disaster at King's Cross.'

International Chemical Firm Fined £250,000

'A vessel used in the distillation of nitrotoluene had been in use for 25 years and had never been cleaned out. Despite professing to be experts in the field, no one at the company knew what the residues were or what had formed over that time.

A 'rocket-like jet of flames' devastated a control room and an office block at the plant after a chemical cleaning job went wrong. Although the operators were under verbal instructions not to heat the sediment above 90°, they did not locate the thermometer cor-

rectly and monitored the vapour temperature above the liquid. Furthermore 'everything that should have been done to ensure safe practice was dealt with in what can only be described as a haphazard and knowingly wrong way'.

Because senior management failed to realise the complexity of the cleaning process and to issue instructions on technical expertise 'there existed a lacuna which needed to be filled by their own initiative and that's exactly what they did'.'

Impractical Rules Encourage Violations

'A Code of Practice stated that no person should enter a bunker or silo unless all material adhering to the bunker sides had been removed above the point where the work had to be performed. This was a requirement to prevent vibration etc causing adhering material to fall on the people working below – a known cause of fatal accidents. Despite the obvious importance of this requirement men were still being killed in this way. When this was investigated it became apparent that there was no practical way of fulfilling the Code of Practice requirement. Workers chose to take the risk to get the job done.'

Oil Rig Explosion Raises New North Sea Platform Questions

'Following an incident inquiry on an oil platform, a report identified the presence of over 1,500 electrical system faults on the platform. The company confirmed that the report was accurate but said that the apparently high total was misleading as many were minor and related to faulty labelling or missing screws.

A specialist said that in his view such a degree of electrical faults would require a thorough investigation of the planned maintenance systems. He questioned the maintenance procedures and structure of supervisory arrangements both offshore and onshore that would have led to a build-up of so many faults.'

These illustrative case study examples, moreover, seem unlikely to constitute isolated or extreme ones given other findings from the study of occupational health support referred to above. Thus, these show that just 2,157 (43 per cent) of the surveyed organisations provided 'broad' occupational health support, in the sense that they were found to be engaging in (a) hazard identification, (b) risk management and (c) the provision of information, and further suggest that only 15 per cent of all organisations in the United Kingdom were undertaking these three activities.

This weakness in the current way in which employers manage risks takes on added significance when account is taken of the growth that

has occurred over the last two decades in the subcontracting of activities that were previously carried out in-house and the use of various forms of 'non-standard' employment, such as homeworking, self-employment, and temporary working. For the available evidence indicates that the co-ordination of risk management can become problematic in situations of sub-contracting and labour outsourcing due the fact that overall management control and responsibilities are more diffused. In the case of sub-contracting, for example, Rebitzer, in a study of contract and directly employed workers in the US petrochemical industry, found that the former category of worker received markedly lower levels of supervision and training than the directly employed staff with whom they often worked in close proximity and Kochan *et al*, in another study in the same industry, found that poor communication between company management and contract workers created tensions that could have potentially serious implications for occupational health and safety.[36] In a similar vein, studies have drawn attention to the difficulties that can arise with regard to the adequate management and control of workers employed by sub-contractors in the railway and construction industries and a number of official inquiries into the causes of disasters in the offshore oil and rail sectors have drawn attention to these same problems.[37]

These concerns are added to if attention is paid to the health and safety implications of organisations externalising labour supply and 'production' to third party organisations. In a study of health and safety in small firms, for example, a number of the owner/managers interviewed reported how their ability to invest in health and safety was limited by the narrow profit margins that they were operating under as a result of the contract prices demanded by larger clients.[38] Meanwhile, a study funded by the HSE and undertaken in 2000 revealed that around half of the recruitment agencies surveyed did not have measures in place to ensure that they were fulfilling their legal obligations, that there was a widespread lack of awareness among agencies and host employers that responsibility for health and safety is, under current law, a shared one, that agencies are frequently unaware whether risk assessments have been carried out by host employers, and that the exchange of health and safety information between agencies and host employers is often poor.[39] In a similar vein, a Parliamentary inquiry in the Australian State of Victoria has recently concluded that the use of 'labour hire arrangements' can complicate the co-ordination of work processes, including occupational health and safety standards and that weak lines of communication between labour hire workers and agencies, and host employers and employees can lead to the obfuscation of occupational health and safety responsibilities.[40]

Relatively little research has admittedly been conducted to discover how far these changes have had adverse consequences for aggregate health and safety standards in Britain. It is clear, however, that those engaged on non-standard forms of employment are unsurprisingly exposed to relatively high levels of risk. For example, over 20 per cent of homeworkers interviewed in a government-funded study reported that they had suffered accidents, injuries or ill health caused by their work; official accident statistics indicate that self-employed workers are twice as likely as employees to be killed at work;[41] and Australian researchers have found self-employment to be associated with higher levels of injury among construction workers and lorry drivers.[42] In addition, and more generally, in a major review of relevant international research evidence, over 80 per cent of the studies examined were found to have obtained findings pointing in this same direction.[43]

The performance of self-regulation

OFFICIAL accident statistics provide, at least in theory, a potential means of assessing trends in accidents since the coming into force of the HSW Act and hence a way of assessing its impact. In practice, however, a number of factors act to make such an exercise difficult, if not impossible. The most obvious is the fact that no fewer than four accident reporting (or collection) regimes have been used over the period with the result that (with the exception of figures relating to fatalities) no consistent set of data can be compiled.[44] However, the longitudinal evaluation of accident trends is further made difficult by the fact that worker exposure to risk has changed for reasons which are unconnected to trends in standards of health and safety management, most notably as a result of the expansion of non-manual relative to manual employment, the use of more technologically advanced and safer equipment, and the shift of employment away from manufacturing and the extractive industries to the service sector. The official statistics on work-related fatalities can be used to illustrate this point.

Over the period since 1975 the number and rate of fatal accidents to employees have fallen significantly. This fall, which it should be noted has not been continuous, would at first glance seem to support a suggestion that safety has improved since the coming into force of the 1974 Act. When account is taken, however, of sectoral shifts in employment away from 'high risk' sectors and occupations to 'lower risk' ones the picture becomes less clear. Thus, in its 1994/95 annual report the HSC estimated that about half of the fall in the fatal injury rate could be attributed to shifting patterns of employment and more recently has suggested that around a third of

the improvement that occurred in the 1990s is likely to have stemmed from 'changes in the structure of the economy'.[45] Yet these estimates may well still underestimate the extent to which the decline in fatal accident statistics has occurred for reasons unconnected with improved levels of safety performance on the part of employers. For they take no account of the way in which employee exposure to risk may have fallen due to changes in working hours flowing from the growth of part-time work, the 'exportation of risk' to self-employed contractors, and shifts in the occupational composition of workers within, as opposed to between, sectors.

Research undertaken by Nichols indicates clearly that such factors can exert an important influence over official accident rates. Thus, in an analysis of trends in the combined fatal and major injury rate for manufacturing industry over the period 1986/87 to 1994/95 he found that the decline in this rate reported in the official statistics disappeared when the denominator on which it was based was changed from 'all employees' to the total number of weekly hours worked by operatives.[46] On the basis of his findings, Nichols therefore concludes that the decline in the official rate over the period in question largely stemmed from a decrease in the number of operatives employed and an increase in the number of administrative, technical and clerical staff utilised.

As a result of these statistical difficulties it is possible for widely differing conclusions to be reached as to the effectiveness of the HSW Act and the self-regulatory philosophy that underlies it. At the same time the available evidence, in our view, raises major doubts regarding the widely espoused view that the current legislative framework has led to significantly higher standards of safety and hence 'stood the test of time'.[47]

These doubts are, moreover, given added weight when attention is paid to the current extent of work-related harm suffered by workers. Official accident statistics, for example, show that 168 employees, 67 self-employed workers and 371 members of the public died as a result of work-related incidents during 2003/04 – a grand total of 606 deaths.[48] They further show that between them these groups suffered 175,763 non-fatal accidents.

These figures are obviously large. However, they provide a far from full picture of the present situation. The fatal accident statistics, for example, do not include fatalities among employees in the maritime industry, and those arising from the supply or use of flammable gas, and work-related road transport accidents – which almost certainly more than double the above fatality figure, primarily due to the scale of the latter.[49] In addition, non-fatal accident statistics exclude accidents resulting in absences of three days or less, and are

known anyway to grossly underestimate the 'official' situation because of the failure of employers to report accidents that are legally notifiable by them under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations. For example, Labour Force Survey (LFS) data suggests that just under around 60 per cent of reportable non-fatal injuries to employees are not actually notified to the relevant enforcement authorities.

LFS data further suggests that over a million employed people suffer non-fatal work-related injuries annually. This statistic is worrying enough. It nevertheless provides only a very partial indication of the scale of the harm arising from work activities since, by definition, no account is taken of the work-related illnesses suffered by workers.

No reliable and comprehensive figures exist on the number of deaths occurring each year as a result of work-related illnesses. However, the number of such deaths is known to be extremely large. The HSE has, for example, estimated that at least 3,000 deaths occur annually as a result of asbestos-related disease alone, and it has been estimated, more generally, that around 20,000 people die each year from work-related medical conditions.[50] Many of these deaths of course stem from exposure to harmful substances that happened many years ago. At the same time care must be taken not to underestimate either the number of deaths that are likely to occur as a result of current exposure to workplace risks or the extent to which workers, more generally, suffer work-related illnesses. Thus, findings from a self-reported household survey carried out in 2003/04 suggest that over two million people in Britain suffered from an illness which they believed had been caused, or made worse, by their current or past work. The most commonly reported of these illnesses being musculoskeletal disorders (1.1 million), stress, depression and anxiety (557,000), breathing or lung conditions (183,000) and hearing problems (81,000).

These figures clearly illustrate, yet again, how often workers have to put their health and safety at risk to earn a living. Those relating to musculoskeletal disorders and stress further suggest that there is an urgent need to encourage employers to not only pay much greater attention to the protection of workers from 'traditional' health risks, such as occupational deafness, but to adopt a more holistic approach to the management of occupational health which encompasses a consideration of how workers' health is affected by management decisions relating to the length and distribution of working time, the design of work tasks and worker-customer interactions. Moreover, the need for such an approach is further supported by findings from an HSE supported household survey that sought information on the working conditions experienced by workers. For

example, these show that around 20 per cent of workers considered that they always/nearly always had too much work to do, 32 per cent always/nearly always had to repeat the same sequence of movements many times in their job, and 13 per cent always/nearly always worked in awkward or tiring positions.[51]

The way forward

SELF-REGULATION as advocated by the Robens Committee and prescribed in HS(G)65 appears, at least in theory, to provide a firm basis for advancing health and safety standards. In practice, however, it appears that many, if not most, organisations neither have the willingness or capacity to develop management systems that embody the alleged virtues of self-regulation. That they do not is borne out by existing research evidence and the results of public enquiries. It is also demonstrated by the massive scale of harm suffered by workers, both in the form of workplace injuries and work-related ill health.

In advancing a self-regulatory approach the Robens Committee, essentially, took the view that employers could be persuaded to effectively manage health and safety. This same theme has continued to be pursued by the HSE through a variety of publications and guidance. The evidence reviewed in this chapter, and summarised in the preceding paragraph, suggests that such a viewpoint is to say the least optimistic – not withstanding the strenuous efforts made by some employers to reduce workforce accidents and ill health. Consequently, there seems no doubt that the Robens Committee underestimated the degree to which the behaviour of employers needed to be legally regulated.

In subsequent chapters attention is paid to the related issues of legal enforcement, worker representation and the amelioration of work-related harm. In each of these a variety of proposals are put forward to improve the present situation in the area concerned. Many of these proposals are primarily aimed at putting mechanisms in place to encourage employers to accord health and safety a greater priority and to manage it more effectively. However, as was argued in the first edition of this book, there seems little doubt that in themselves they are unlikely to be sufficient unless action is also taken to both clarify and strengthen the legal duties imposed on employers; an argument that receives strong support from the fact that evidence from both this country and elsewhere in the world indicates that legal requirements are one of the most important drivers of employer (and directors) actions in respect of health and safety, and perhaps the most important one.[52]

As before, in our view this action needs to embody the following, and inevitably, inter-related elements:

- the major reform of the general duties laid down under sections 2 and 3 of the HSW Act and the supporting of this by the introduction of a number of new sets of regulations;
- the creation of a statutory framework on occupational health and safety services; and
- the adoption of an approach to the drafting of regulations and supporting ACOPs which places greater emphasis on prescriptive requirements and guidance.

Reform of the general duties

At present the general duties imposed under sections 2 and 3 are vague to the point of opacity with the result that they fail to provide a clear statutory outline of what employers need to do to manage health and safety effectively. In addition, the qualification of them in terms of reasonable practicability is not only legally questionable, given the provisions of the EC Framework Directive, but also overly generous, particularly if the business case for investing in health and safety advanced by both the HSE and government is valid.[53]

The generality of sections 2 and 3 is admittedly mitigated to some extent by provisions laid down in supporting regulations, notably the MHSW Regulations. However, these regulations do not go so far as to lay down a 'model' which details all of the elements which HS(G)65 argues are central to the effective management of health and safety. Moreover, insofar as they do, it is surely strange that such statutory guidance is not embodied in the HSW Act itself.

Consequently, there seems a strong case for the general duties in the Act to not only lay down goal-orientated objectives, but also specify in broad terms the 'organisation and arrangements', to paraphrase the health and safety policy requirements of section 2(3), that employers need to put in place and the principles that should inform their development. Obviously there is scope for much debate as to how these provisions should be drafted. However, the end result should be that employers are left in no doubt that they need to assess risks to both employees and non-employees; clearly outline health and safety responsibilities; provide adequate information, instruction and training, prioritise the removal of risk as a means of protection, adapt work schedules and patterns to the abilities and capabilities, both physical and mental, of workers; investigate accidents and cases of occupational ill health; and regularly monitor and evaluate health and safety performance.

This broad specification of employer health and safety organisation and arrangements could be supplemented by more detailed regulations or guidance where necessary. For example, further guidance

on them could be provided in an ACOP that contained details of the steps that should be taken in respect of such matters as the auditing and measurement of health and safety performance, the planning and organisation of induction training, the allocation of management responsibilities, and the obtaining and utilisation of information from suppliers of articles and substances.

In light of the earlier analysis, there would also seem a case for supplementing this guidance with new regulations covering such matters as the management of road transport risks, the ergonomic design of work tasks and schedules, and the managing of temporary work and sub-contracting not covered by the Construction (Design and Management) Regulations, at least in relation to relatively high risk work activities. Indeed, the need for reforms of this type has received some support from the recent report on the work of the HSC/E produced by the Work and Pensions Select Committee. Thus in this the Committee recommended that the HSC/E should 'carry out a review of the case for an ACOP on work-related road safety' and produce an all-embracing strategy to address the changing world of work which included, in particular, measures to reduce the health and safety risks faced by agency workers.[54]

Given the extent to which organisations have engaged in the outsourcing of production and service delivery and the extent to which this has often led to the exportation of risks to companies that possess less sophisticated and adequate systems of risk management, there would also seem good grounds for, in some areas, establishing regulatory frameworks under which those at the head of 'supply chains' are required to ensure that adequate standards of health and safety management exist in those organisations lower down them and to report any failings with regard to legal compliance to the relevant enforcing authority. This is particular so given that a new regulation amending the Occupational Health and Safety Act 2000 in the Australian state of New South Wales serves to demonstrate that such supply chain regulation can be feasible in respect of certain types of outsourced activities. Thus, under this, freight consignors and consignees are effectively required to monitor 'head carriers' compliance with the legal obligations that the regulation impose with regard to the management of long distance lorry driver fatigue by prohibiting them from entering into contracts with them unless they have satisfied themselves on reasonable grounds that:[55]

(a) any delivery timetable is reasonable as regards the fatigue of any driver transporting freight long distance under the contract, taking into account industry knowledge of a reasonable time for the making of such a trip (including loading, unloading and queuing times), and

(b) that each driver who will transport freight long distance

under the contract is covered by a driver fatigue management plan.[56]

As regards the use of the phrase reasonably practicable, we propose that this should be removed and replaced by one that requires employer actions to protect workers to be evaluated in terms of their adequacy rather than their costs and benefits. It is, however, a moot point whether this would be sufficient to bring British law into line with European requirements.

Occupational health and safety services

The evidence reviewed earlier indicates that in most workplaces there is no access to either safety specialists or occupational health specialists. It further indicates that where the latter do exist, they frequently play a relatively limited role with regard to the identification and prevention of occupational ill health.

A major contributor to this situation is undoubtedly the fact that for the most part current law does no more than require employers to appoint one or more 'competent persons' to assist them in undertaking measures to comply with their statutory duties – an approach which, as previously noted, is likely to breach the requirements of the EC Framework Directive. As a result employers are accorded considerable discretion in terms of the use made of preventive health and safety services. This situation therefore differs considerably to that which exists in most EU member states, where legislative requirements are laid down in respect of the use and composition of such services, including the qualifications and skills to be possessed by those employed within them. It is also one that prompted the Work and Pensions committee in its report on the work of the HSC/E to recommend that a higher priority be given to developing national coverage of occupational health services and that an ACOP be developed for the purpose of defining the 'standards of competence employers are required to use to ensure they comply with health and safety requirements'.[57]

There consequently seems a strong case for adopting a statutory framework under which all employers would be required to have access, either internally or through accreditated external providers, to occupational health and safety services of a specified quality. This framework should specify the skills that must be available within such services, the tasks that these services should undertake and the level of service that they must provide, perhaps in terms of hours per employee. It is, however, recognised that there may be a need to vary the requirements imposed to reflect the differing needs of particular industry sectors.

Once again there would clearly need to be a lengthy process of

debate about the precise wording of the above framework, as well as the action needed to ensure an adequate supply of appropriately qualified staff. Nevertheless, in our view, the framework developed should embody two fundamental features. First, a recognition that the staff skills needed extend beyond safety specialists, and occupational doctors and nurses to encompass other types of professionals, such as ergonomists, physiotherapists and occupational psychologists. In other words a recognition of the fact that the multi-factorial nature of many current health and safety problems necessitates the adoption of a multi-disciplinary (and holistic) approach to their management which not only addresses 'hardware' and 'software' issues, but also the inter-relationships that occur between them. Secondly, an acceptance that the services to be provided must be jointly controlled in order to ensure that they operate in an independent way and are not dominated by employer views and interests.

More prescriptive regulation

In calling for greater prescription we are not arguing, as the above discussion of the general duties laid down under sections 2 and 3 of the HSW Act makes clear, for a complete move back to the pre-Robens approach to the drafting of statutory requirements. Rather what we are arguing is that the shift towards goal-orientated duties has at times gone too far and at times been used to provide employers with unnecessary and, at least in the case of SMEs, confusing discretion. A simple illustration of this is the way in which the Workplace (Health, Safety and Welfare) Regulations merely require employers to provide a reasonable workplace temperature, while their supporting ACOP refrains from providing any guidance on the level at which working temperatures become unacceptably high.[58]

Numerous other examples can be given of similar situations where overly general regulatory duties are supported by almost equally general supporting ACOP guidance. A good case in point concerns the requirements laid down on the appointment of competent persons under the MHSW Regulations. Thus, not only do these Regulations, as noted earlier, define such persons, in almost tautological terms, as one who 'has sufficient training and experience or knowledge and other qualities to enable him properly to assist...' but their supporting code merely observes that: 'Competence in the sense it is used in these Regulations does not necessarily depend on the possession of particular skills or qualifications. Simple situations may require only (a) an understanding of relevant current best practice; (b) an understanding of the limitations of one's own experience and knowledge and (c) the willingness and ability to supplement existing experience and knowledge...'.

Indeed, and more generally, all too often ACOPs fall far short of providing the 'practical guidance' that the Robens Committee argued they should. One reason for this would appear to be that, except where they support industry-specific regulations, they are drafted to apply to all types of work situation. Insofar as this is the case, there would consequently seem a case, as the Robens Committee recommended, for placing greater reliance on the development of sectoral-based codes which provide clearer and more comprehensible guidance to their readers. The issue of how a move in this direction could be supported is one to which we return in chapter 5.

Conclusion

THE self-regulatory framework laid down under the HSW Act, by according greater importance to management organisation and processes, represented an advance on the previously existing statutory system for occupational health and safety. However, the evidence reviewed in this chapter raises major concerns about its effectiveness. For it reveals that the scale of work-related harm suffered by workers remains enormous. It also indicates that many employers neither have the willingness or capacity to manage health and safety effectively, particularly against a background of recent trends towards the use of more devolved management structures and the greater utilisation of more distant and transitory employment relationships, and that these failures are compounded by the trend for large organisations to 'export' work to smaller ones under highly competitive conditions. As a result, the analysis presented accords with that of a study of health and safety management within the former British Rail (BR), the findings of which led its author to observe that the 'experiences of BR must cause us to ask serious questions about the ability of companies to self-regulate'.[59]

A number of proposals have been put forward to address these related problems and hence improve the current statutory framework. These focus attention on three main issues. First, the reform of the general duties imposed under sections 2 and 3 of the HSW Act, most notably through a more detailed specification of the health and safety organisation and arrangements that employers need to put in place. Secondly, the introduction of a statutory framework under which all employers would be required to have access to multi-disciplinary occupational health and safety services. Thirdly, the greater use of prescriptive regulatory requirements and guidance along with the placing of more emphasis on sectoral-based regulations and/or ACOPs.

Summary of key points

Employers and their legal duties

- amendment of the general duties laid down under sections 2 and 3 of the HSW Act so that they specify in broad terms the management 'organisation and arrangements' that employers need to put in place in respect of the management of health and safety at work, as well as the preventive principles that should inform their development;
- removal of the qualification of the above duties in terms of reasonable practicability and its replacement by one that requires employer actions to be evaluated in terms of their adequacy;
- the introduction of an Approved Code of Practice (ACOP) to provide detailed guidance on these revised duties;
- making of new regulations on the management of road transport risks, temporary working and sub-contracting, and the ergonomic design of work tasks and schedules;
- establishment, in some areas, of regulatory frameworks under which those at the top of supply chains are required to ensure that adequate standards of health and safety management exist in those organisations lower down them and to report any failings with regard to legal compliance to the relevant enforcing authority;
- creation of a statutory framework under which all employers would be required to have access, either internally or through accredited external providers, to occupational health and safety services of a specified quality;
- the placing of these services under the joint control of employer and worker representatives;
- reduction in the reliance placed on goal-orientated regulatory duties; and
- the increased use of sectoral-specific regulations and ACOPs.

Notes

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4 Successful Health and Safety Management, HS(G)65(revised), 1997, HSE Books.
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54 House of Commons Work and Pensions Committee, *The Work of the Health and Safety Commission and Executive,* Volume 1, 2004, Stationary Office, 38.
55 See Occupational Health and Safety Amendment (Long Distance Truck Fatigue) Regulation 2005.
56 These obligations it should be noted therefore apply not only in relation to those drivers employed by 'head carriers' that are to undertake the relevant contractual work, but also to any self-employed ones that are to be utilised
57 House of Commons Work and Pensions Committee, *The Work of the Health and Safety Commission and Executive,* Volume 1, 2004, Stationary Office, 70-71.
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Chapter 3

The administration of the statutory framework

CENTRAL to the argument presented throughout this book is the necessity for protective health and safety legislation, if workers are not to suffer unacceptable levels of injury and ill health as a result of their work. Its mere presence is not, however, sufficient for two reasons. First, the requirements laid down may be inadequate – as the discussion of self-regulation by employers in chapter 2 demonstrates. Secondly, those on whom duties are imposed may not choose to comply with them. In combination these two factors highlight the need for an evaluation of the statutory system of health and safety law to pay attention to the way in which its provisions are developed and enforced. In short, how the system is administered.

In Britain since 1974 this process of administration has been carried out by three main sets of actors – the Health and Safety Commission (HSC), the Health and Safety Executive (HSE) and Environmental Health Officers (EHOs) employed by local authorities. This chapter examines their roles, resources and activities, beginning with an outline of their statutory responsibilities and the way in which they are organised to deliver them. This is followed by a critical examination of the resources at their disposal and the way in which they have been used. Finally, conclusions drawn from this discussion concerning the effectiveness of the present system are presented along with some proposals aimed at its further improvement.

At the core of the present chapter, however, is an assessment of the influence of government policy on the administrative system in recent years. As in other areas of occupational health and safety, the

election of a Labour government in 1997 raised expectations of possible reforms to the way health and safety is administered in the UK. Indeed, the IER contributed significantly to this discourse with a call for reforms including:[1]

- considerable expansion of HSE resources to support a substantial increase in inspectors, a more rigorous enforcement policy and an expansion of research;
- imposition of an explicit health and safety duty on company directors;
- use of a range of innovative penalties to supplement traditional ones;
- strengthening arrangements for the investigation of workplace deaths along with the introduction of the offence of 'corporate killing';
- enhanced right for workers and their trade unions to initiate private prosecutions in respect of breaches of health and safety laws;
- investigation into the desirability, scale and consistency of local authority involvement in the enforcement of health and safety law; and
- supplementation of HSE and local authority inspections by the introduction of statutory requirements on the carrying out of 'third party' audits of employer health and safety arrangements and performance.

However, none of these actions have occurred to date. Shortly after this contribution was published the government department in which the HSE was then located produced its new policy for the future of the administration of health and safety in Britain.[2] Several years later, the HSC produced a further policy statement, outlining its strategy for the coming decade and beyond.[3]

Far from being an enactment of the sort of reforms we canvassed in *Regulating Health and Safety at Work: the way forward,* these strategy statements outlined a future with fewer resources available to regulatory inspectorates to undertake regulatory intervention and a greater emphasis on advice, education and other soft means of securing co-operation from duty holders. The opportunity to place explicit responsibilities on named company directors was eschewed, as was the opportunity to require third party audits of the health and safety performance of duty-holders and the chance to give workers and their trade unions rights to private prosecution. No serious investigation of the role of local authorities was proposed and although actions were promised on more innovative penalties and on corporate killing, precious little actually occurred in the five years following the *Revitalising* strategy.

Against this background, as we pointed out in a review of progress in 2004, there was little sign of the health and safety system being revitalised and if anything the evidence suggested it had reversed.[4] Nowhere was this more apparent than in the policy approach adopted towards the reform of the administrative system. Recently the determination of the government to limit the role of state inspection and control has become even more explicit, with the announcement of its response to the recommmendation of the Hampton Report, which called for a reduction of such 'administrative burdens'.

In the following pages, therefore, we present our understanding of the structure and functioning of the present system for the administration of health and safety at work in the UK together with an evaluation of the effectiveness of recent policy in improving and making the system more effective.

The structure of the administrative system

THE HSC was established under the HSW Act. It was originally conceived as a tripartite body representing the interests of the state (including the local authorities), employers and workers. It is required to consist of a Chair and between six and nine other members appointed by the Secretary of State for Work and Pensions (the Department for Work and Pensions has been the parent department for both the HSC and HSE since their transfer from the Department of the Environment, Transport and the Regions in 2002). To fill six of these positions, the government must consult with organisations representing 'employers' for three of them and those representing 'employees' in respect of the other three. In order to fill the remaining seats – which are not mandatory – the government must consult 'such organisations, including professional bodies, the activities of whose members are concerned with matters' relating to the purposes of the Act. At present, these three seats comprise two members representing a 'local authority' background and one representing a 'consumer' background.

The statutory functions of the Commission encompass assisting and encouraging persons to further the general purposes of the Act; making arrangements for the carrying out of research and the publication of its results; providing an information and advisory service to those concerned with matters relevant to the objectives of the Act; and submitting proposals for regulations. Various powers are given to the Commission, including rights relating to the ordering of investigations and inquiries and the approval, with the consent of the Secretary of State, of ACOPs. More generally, the Commission is

required to give effect to any directions given to it by the Secretary of State, including directions modifying its functions.

In carrying out its work the HSC draws on advice from around 25 advisory committees, boards and councils. Some of these deal with particular hazard areas and others with particular industries. For example, advisory committees exist in respect of genetic modification, toxic substances, nuclear installations and the construction, foundries and textile industries. Each of the bodies consist of people nominated by employer and employee organisations. In addition, they further include 'public interest representatives' and technological and professional experts. Although the functioning of the advisory committee structure has never been thoroughly evaluated, there has been an attempt to rationalise its composition in recent years that has been especially aimed at committees that were perceived by HSC/HSE and government ministers to be 'failing' or unrepresentative of the range of stakeholder interests. This has led to, for example, the dissolution of the Occupational Health Advisory Committee and the reconstitution of the Agriculture Industry Advisory – a Committee with fewer trade union members.

The HSE acts as the operational arm of the Commission. It is required 'to make adequate arrangements for the enforcement of the relevant statutory provisions' and more generally, to comply with any directions given to it by the latter in pursuance of its functions. However, the Commission is specifically forbidden from instructing the Executive as to how it enforces the statutory provisions in any particular case.

On its establishment the HSE brought together the existing factory, agricultural, quarry, mining and other inspectorates, together with their research and technology functions. Subsequently, it also became the home for the offshore and railway inspectorates (see chapter 1), although the decision has recently been taken to remove HSE's responsibility for the regulation of the railway industry.

The fieldwork undertaken by HSE inspectors is 'paralleled' by local authority EHOs whose areas of enforcement responsibility generally cover 'lower' risk areas of activity, such as retailing, leisure, and hotels and catering.[5] Although outside the HSC structure, EHOs are required to 'perform their duty... in accordance with such guidance as the [Health and Safety] Commission may give them'. An HSE/local authority liaison committee (HELA) exists to provide liaison between HSE and local authorities, and in particular, to ensure that a consistent approach is adopted towards enforcement.

The HSE's work covers three main areas: the carrying out of inspections and other regulatory activity to secure legal compliance;

policy formulation, including the development of new legislation and ACOPs; and 'science and technology' – a term that encompasses both the carrying out and commissioning of research and the provision of scientific and technological advice. However, its activities also encompass the provision of information and advice about the hazards and risks of work activities to employers, workers and members of the public, and the assessing, approval and certification of particular products and substances under various statutory schemes.

Around half of HSE staff time and costs is spent on 'inspection and other regulatory activity'. The other most significant use of HSE resources is on developing policy and proposing legislation. However, it should be noted that 'inspection and other regulatory activities' not only encompass preventive inspections and the investigation of accidents and complaints, but also a number of other types of activity. For example, advisory visits, visits in connection with the issuing of enforcement notices or court attendances, National Interest Group work and workplace contact officer[6] 'involvement' with low hazard/low risk workplaces. It should further be borne in mind that these last two types of activity do not for the most part involve any workplace visits.

The table shows the number of staff in post according to HSE's own figures between 1999-2004. However, by no means all of the 'inspectors' counted here are actively engaged in inspection activities. According to the trade union Prospect, which organises the inspectors, in mid-2004 only 500 or so of the Field Operations Division (FOD) inspectorate were engaged in front-line inspection, accident and complaint investigation and prosecution in the more than 600,000 premises for which the HSE is responsible. The others were managerial staff or in policy or support roles.

HSE staff in post 1999-2004

	April 1999	*April 2000*	*April 2001*	*April 2002*	*April 2003*	*January 2004*
Total staff HSE/HSL	3,880	3,937	4,081	4,282	4,162	3,995
Agency staff	N/A	N/A	187	232	94	85
FOD Inspectors	853	898	954	955	962	901
Other inspectors	644	609	580	670	689	404
Total inspectors	1,497	1,507	1,534	1,625	1,651	1,619

Source: Figures provided to the Work and Pensions Committee by HSE[7]
Other Inspectors include for example the Nuclear Installations Directorate and the Hazardous Installations Directorate

According to HSC's most recent figures, local authorities employed the equivalent of 1,060 full-time EHOs for the period 2001-02.[8]

These included personnel with a management role who carried out *some* inspections. This represents a fall of 26 per cent from the 1,440 local authority full-time equivalent inspectors with health and safety enforcement powers in 1997/98; a fall that has been associated with a drop in the rate of local authority inspections. It would, therefore, seem that resources for health and safety enforcement activities in local authorities have been squeezed by other competing priorities, especially those for food safety, which is regarded as having a higher profile, both politically and in terms of public awareness. The local authorities are estimated to be responsible for health and safety enforcement activities in around 1,210,000 establishments.

Without doubt the most debated issues in relation to the work of the HSE in recent years have concerned the resourcing it receives from government and its policy on how these are to be used. We will take this up more fully in the next section but first it is important to note that the HSE is currently experiencing reduced resourcing compared with previous allocations which is having inevitable consequences for the scale and composition of its activities.

Following increases in its budget in the years after the election of New Labour in 1997, by 2002 the HSE Budget had reached £258 million per annum. However, the 2002 spending review effectively introduced a cut in real funding by freezing the budget at £262 million per year for the next two years and reducing it to £260 million for 2005/6.[9] Not least of the consequences of this is anticipated to be a fall in the number of field inspectors through natural wastage and non-replacement, as the freeze on recruitment brought about by the budget constraints takes effect, with the inspectors' trade union Prospect anticipating that there will be less than 500 inspectors left to engage in inspection activities by mid-decade.

Critics see it as no coincidence that at the same time as these public-spending restrictions have been introduced by government, the regulatory policy of the HSC/HSE has increasingly emphasised the role of more multidimensional approaches to raising duty-holders' awareness of the positive reasons for undertaking their health and safety responsibilities and explored other alliances and levers in the economy that could be used to bring pressure on them to comply with their occupational health and safety (OHS) responsibilities. At the same time it is evident that the language in which these new approaches are couched is that of New Labour governance, with much rhetoric concerning business benefits, partnership, responsible employers, removal of excessive regulatory burdens and so on. We explore some of the important consequences of these approaches in the following section.

Operation of the administrative system

TO examine the operation of the present system for administering the statutory framework for occupational health and safety we consider seven issues. They are the:

- setting of regulatory standards;
- use of inspections and investigations by inspectors;
- enforcement action taken by them;
- penalties imposed following successful prosecutions;
- enforcement arrangements that exist in respect of occupational health; and
- role of the protocol on workplace deaths and the offence of corporate killing.

However, our analysis of these matters also needs to be seen in the broader context of the major developments in regulatory policy during recent years. Several features here stand out. They include the overwhelmingly 'business friendly' approach of government thinking, the *leitmotif* of which are neo-liberal economic arguments for less regulation rather than more, and for the use of more 'voluntary approaches' to improving health and safety performance, appealing to the 'hearts and minds' of the business community, while at the same time curbing public expenditure and generally withdrawing from regulation of the economy. The Prime Minister, Chancellor and a host of government ministers have repeatedly pronounced on these matters and there have been reports from high profile committees, such as the Hampton Review, that have added further to the retreat from regulation.[10]

It is therefore quite clear that the trajectory of governmental thinking is in a very different direction from that of our own and many other critics of the present system. This makes it especially important to consider, wherever possible, the evidence base for the effectiveness of these different approaches. We do so in the following sections and in so doing find considerably more support for our analysis than for the neo-liberal pronouncements of leading politicians and current government policy makers.

Setting regulatory standards

The HSC, in developing proposals for new (and revised) regulations and ACOPs, draws on the expertise of its advisory bodies and informal consultations with relevant organisations. In some cases, discussion documents may also be issued to gather views on the desirability of regulations and the form that they should take. Once formulated, draft regulations and ACOPs are published for public consultation. The results of this consultation are then analysed and, where it is deemed necessary, amendments made to the draft pro-

posals. They are then submitted for approval, first, by the Commission itself, then by the Secretary of State and finally by Parliament.

In recent years many of the regulations made through the above process have been developed in order to bring domestic law into line with the requirements of European directives (see chapter 1). A noteworthy feature of this transposition process, and indeed HSC regulation drafting more generally, has been an attempt on the part of the Commission to continue to place reliance as far as possible on the laying down of goal-orientated duties. This approach, because of the more prescriptive nature of many European requirements, continues to lead to them being transposed in an inadequate and questionable way at times.[11] It has also, as discussed in chapter 2, created problems for smaller employers in terms of understanding what they need to do to comply with their legal duties. Moreover, as also highlighted in chapter 2, these problems have frequently not been adequately resolved through the guidance provided in supporting ACOPs.

In effect therefore it would seem that in drafting regulatory proposals (and associated ACOPs) the HSC adopts an approach that better meets the needs of larger, often unionised, employers. This, in turn, suggests that it is the wishes of such employers that tend to exert most influence over the HSC decision-making process – which is not surprising given its composition.

A further issue that comes to the fore in a discussion of the regulatory role of the HSC concerns the negative effects of the approach it adopts towards achieving consensus. A particular case in point here was the fate of the draft HSE proposals on a new regulatory framework for worker representation (discussed in more detail in chapter 4). Although a strong case had been made for a new consolidated regulatory framework on employee representation, failure to reach a consensus on the detail of the proposals to achieve this that were put before the Commission in late 2003 led to the legislative approach being abandoned and the previous regulatory framework remaining in place, despite wide acknowledgement of its inadequacies. This aspect of the HSC's consensual operation led the Parliamentary Work and Pensions Committee to express concern 'that the decision to seek consensus may act as an effective veto to legislation to improve health and safety standards in disputed areas'.[12]

HSE inspections and investigations

Both HSE and local authority inspectors undertake 'preventative

inspections' and 'investigations' into reported incidents and complaints (including deaths, injuries, dangerous occurrences and ill health incidents). Both require an inspector to visit a workplace. This means the use of (limited) resources and it is why most of the debate that takes place in relation to inspection has centred around this issue.

In recent years there have been major policy developments promulgated by both the HSC and the senior management of the HSE that attempt to refocus the framework of regulatory activity. HSE policy makers and senior management claim that this refocusing of regulatory strategies is about using the range of tools at their disposal to improve preventive health and safety. However, this approach is, to say the least, somewhat disingenuous, and, to take a view shared by its critics, downright misleading – because, as they have demonstrated, it is promulgated at the same time as *resources are being reduced*, when government is anxious to reassure business that it is committed to avoiding 'unnecessary regulatory burdens' and when it involves senior management of the organisation arguing for a shift in the use of resources away from inspection and towards advisory and educational initiatives.[13] As a consequence it is hardly surprising that the report of the Work and Pensions Committee cautioned against shifting resources away from inspection to support increased education, information and advice while also expressing concern about the current low levels of incidents investigated and proactive inspection undertaken and recommending resources for both be increased.[14]

More specifically, as the table on page 55 shows, HSE resources and staffing grew in the years following the election of New Labour and continued to do so until the effects of the 2002 Spending Review were felt. Clearly, change in inspector numbers will have a direct impact on the level of inspections and investigations that the HSE can undertake. Therefore rises and falls in resources affect the amount of regulatory activity undertaken. Moreover, if resources for workplace visits remain static, a change in the number of either inspections or investigations will affect the other in the sense that if greater resources are devoted to one, it means less for the other. Recent developments illustrate this clearly.

For example, as a result of a deliberate strategy on the part of HSE, in response to recommendations from the Parliamentary Environment, Transport and Regional Affairs Committee in 2000, which had urged it to spend more effort on investigation and prosecution, the HSE undertook more investigations and as a result, shifted the ratio of its proactive (planned inspections) and reactive

(investigative) work from 70:30 to 50:50. As a result, as a study in 2002 showed, the proportion of major injuries investigated rose from 10 per cent in 1996/97 to 19 per cent in 2000-01 and there was a parallel decrease in proactive inspection activity of 41 per cent.[15]

Concerned that this conflicted with the organisation's intention to maintain a largely preventive focus, in 2003 the HSE took steps to streamline and reduce the investigative processes, with the aim of rebalancing the two activities in a ratio of 60:40. However, as Prospect has recently pointed out, this has meant that new criteria on what should be investigated exclude an even larger proportion of serious injuries from investigation than was previously the case. At the same time inspectors are obliged to concentrate their investigative time on activities that have a direct impact on the *Revitalising* targets. In the trade union's view this seriously limits the discretion of inspectors to identify important breaches of the law in which enforcement action would be warranted.[16]

The real issue however, is not the balance between investigations and inspections but the fact that there are clearly not enough resources to do either sufficiently. As the CCA pointed out to the Parliamentary Work and Pensions Committee Inquiry in 2004, despite the shift towards investigations in 2001, even then, 80 per cent of major injuries were not investigated. Even more significantly, the overall picture has remained one in which few workplaces are subject to inspection of any kind. Indeed, as the CCA/Unison study shows, on average only one in 20 workplaces currently can expect to receive an inspection visit annually and while this ratio improves to one in ten in a high risk sector like construction, it falls to one in 36 in the services sector. Even the CBI, in its evidence to the Work and Pensions Committee, acknowledged that 'statistically enforcement and inspection across the piece of British industry is a rare event'. This further explains why the Committee, echoing the views of many of its witnesses, expressed its concern at both the low level of incidents investigated and at the low level of proactive inspection and recommended that resources for both be increased.

Enforcement action

Notices: As explained in chapter 1, inspectors can issue improvement and prohibition notices: the former being servable where it is believed that a person is contravening one or more relevant statutory provisions, and the latter where it is believed that activities are being (or are about to be) carried out which involve a risk of serious per-

sonal injury. Improvement notices give the person on whom they are served a period within which to remedy the contravention, this period being no less than 21 days. Prohibition notices can take effect on an immediate or deferred basis. Generally improvement notices are issued more frequently than prohibition notices.

In addition, inspectors can initiate prosecutions. Section 33 of the HSW Act details 15 different types of offences that can give rise to prosecution. These fall into two categories: those triable summarily before a magistrates court and those triable either summarily or on indictment before a Crown Court. The latter category covers such offences as a failure to comply with an improvement or prohibition notice, and a failure to discharge any duties imposed under sections 2-9 of the HSW Act. The vast majority of cases are, however, heard in magistrates courts.

Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or have been attributable to any neglect, on the part of any director, manager, secretary or other similar officer, that person can also, by virtue of section 37(1) of the HSW Act, be prosecuted. However, the overwhelming majority of prosecutions concern corporate entities rather than individuals.

The maximum penalty applicable to a person found guilty on summary conviction varies by type of offence. Thus, breaches of sections 2-6 of the HSW Act, as well as failures to comply with enforcement notices, can give rise to a £20,000 fine; other breaches to a £5,000 fine. The failure to comply with an enforcement notice can also result in a prison sentence of up to six months. In the case of convictions on indictment, no limit is placed on the fine and those guilty of certain offences can be imprisoned for up to two years. In addition, both magistrate and Crown Courts have the power, under section 42 of the HSW Act, to make an order requiring a convicted person to 'remedy the cause of the offence'.

Table 3.2 shows the number of enforcement notices and prosecutions taken by the HSE and local authorities during the period up to 2003 when HSE inspectorate numbers were increasing. As can be seen, it shows that during this time there was an increase in these enforcement actions. However, it also details that, against the background of the budget cuts made in the 2002 Spending Review, the number of notices issued dropped in 2004 by 15 per cent from the previous year; a trend that it can be anticipated will continue.

Table 3.2: Trends in enforcement activity (enforcement notices and prosecutions)

Measure	*1999/00*	*2000/01*	*2001/02*	*2002/03*	*2003/04*
Number of Enforcement notices issued by HSE	11,340	11,056	11,082	13,324	11,295
Local authorities	6,100	5,810	5,960	5,780	n/a
Number of HSE prosecutions	2,115	1,973	1,986	1,659	1,756
Local authority (informations laid)	412	401	350	330	n/a

Data from HSE (2005) National Statistics Health and Safety Statistics Highlights

Prosecutions: There has been an overall decline in the number of prosecutions since the end of the 1990s. However, there have been fluctuations between years. For example, HSE prosecuted a total of 1,756 offences, in 2003/04, which was a six per cent increase on the previous year. The conviction rate in 2003/04 was 74 per cent, slightly lower than the previous year, when it had been 77 per cent. The conviction rate for the most recent year available (2002/03) for local authorities was 86 per cent, some two per cent lower than that of the year previously.

Concern over low levels of prosecution was one of the reasons behind the recommendation of the Parliamentary Environment, Transport and Regional Affairs Select Committee, in 2000, that HSE provide better access to legal expertise to assist in the preparation of cases for magistrates courts. In line with this recommendation, as well as with those set out by the Royal Commission on Criminal Justice in 1981 (the Phillips report) and in the more recent Gower-Hammond report (2001), a new prosecution model was subsequently piloted in HSE's London and South East regions which involved independent legal oversight of the decision to prosecute, thereby separating out the functions of prosecution from those of investigation. Although generally seen as beneficial, HSE decided that it was not possible 'within current resources' to extend the model to other regions and the procedures set up in the London pilot were later themselves disbanded.[17]

Several important points about prosecution activity should be highlighted. The first is that, as pointed out previously, many prosecutions are the result of investigations of fatalities and serious injuries rather than inspections. The decision referred to previously

to reduce the number of such incidents that are investigated even further is therefore likely to lead to a parallel decline in the number of prosecutions – a view that received reinforcement as this book went to press from an HSE report on *Health and Safety Offences and Penalties 2004/2005* which revealed that during this year the number of investigations conducted and prosecutions taken both fell, as did the number of inspections carried out. Also, prosecutions are an expensive use of scarce HSE resources and therefore, as Hawkins demonstrated in his study, resources are a key influence on decisions to take prosecutions.[18] One disturbing feature of this is that such resource constraints may have a negative impact on decisions to prosecute larger companies. Such cases are likely to be more complex because of the greater complexity of large organisations and because such organisations may themselves have greater resources with which to defend their case, both resulting in the need for HSE to expend more on their investigation.

The more general point also needs to be made that, despite some increases in the number of notices served, it remains relatively uncommon for a formal enforcement notice to be issued following an inspection and even rarer for a prosecution to be undertaken.

Penalties: The average fine for each conviction secured during 1997/98 by the HSE was £4,785, a figure which was almost seven times higher than the corresponding figure for 10 years earlier. By 2001/02, this average fine had increased further to £11,141 before falling during the following two years to £8,828 in 2002/03 and £9,858 in 2003/04. However, if fines of over £100,000 are excluded, the overall average is considerably lower. In 1997/98, it was £3,886 and, in 2003/04, £6,534. Fines following a successful local authority prosecution are generally lower. In 1997/98 they were £2,224, rising to £3,903 in 2001/02 and £4,100 in 2002/03.

On 6 November 1998, the Court of Appeal gave some guidance to courts in sentencing companies convicted of health and safety offences.[19] In particular, the Court stated that in assessing the gravity of a breach attention should be paid to:

- '...how far short of the appropriate standard the defendant fell in failing to meet the reasonably practicable test'; and
- the 'degree of risk and extent of the danger created by the offence', and
- the defendant's resources and the effect of the fine on its business.

In addition, the Court identified the following aggravating factors that should be taken into account when applying the above principles:

- a resulting death: 'Generally where death is the consequence of a

criminal act it is regarded as an aggravating feature of the offence';
- a 'deliberate breach of the health and safety legislation with a view to profit'; and
- a 'failure to heed warnings'.

This guidance has probably encouraged courts to impose higher fines. In particular the taking into account of the 'defendant's resources and the effect of the fine on its business' may have helped to address the fact that, until this guidance, fines were rarely influenced by company profits or turnover.[20] It should also be noted that new legislation has been promised in 2006 to give enabling powers to strengthen the penalty regime for employers' breaches of business-related laws.

No court has so far imposed an order on an employer under section 42 of the HSW Act to 'remedy the cause of the offence'. Indeed, as far as anyone knows, no HSE inspector has ever suggested to a court that such an order should be made. Recent years have, however, seen a small number of prison sentences imposed on individual managers. Virtually all stemmed from manslaughter charges laid against the directors of small companies.

Enforcement and health: the Employment Medical Advisory Service

Despite growing recognition of the problem of work-related ill-health – cases of work related ill-health outweigh sudden deaths and injuries by a factor of at least 10 (see chapter 2) – there is comparatively little enforcement activity on the subject. This is partly because the link between work and ill-health (rather than work and safety) is often difficult to prove. Nevertheless, EHO and HSE inspectors are supposed to enforce health standards along with their work on safety. They have been helped in this task by the Employment Medical Advisory Service (EMAS).

EMAS was first established in 1972, and its existence was continued by section 55 of the HSW Act. When EMAS first started, most of its work centred on conducting medical surveillance of workers as well as supporting, advising and encouraging health professionals in the field of occupational health. To this end, Employment Medical Advisors (EMAs) were empowered to medically examine workers (without the consent of the employers) when they considered that their work was damaging to health and were also given powers to enter premises, carry out inspections and obtain documents and other relevant information from employers.

It was originally intended that EMAS would employ 120 doctors,

along with nursing and support staff. It has, however, never employed this number of doctors; in 1978, at its height, for example, there were only 86 doctors (along with 85 nurses). Since then, the numbers of staff have been steadily declining. By 2004, the service employed only 15 doctors and 27 nurses.

There have been recent changes in EMAS. First, the EMAs have become Medical Inspectors, and Employment Nursing Advisors, HMIs of Health and Safety (Occupational Health). Secondly the post of Chief Medical Officer has been abolished.

EMAS inspectors have powers to impose enforcement notices and all EMAS staff are given training in general inspection and enforcement techniques. However, it is not envisaged that they will normally need to use their enforcement powers, as decisions on enforcement continue to be a matter for the inspector responsible for day-to-day inspection of premises. As a result the specialist expertise of EMAS only indirectly influences HSE enforcement action.

Resources required to undertake enforcement actions around work-related health are likely to be even greater than those required for actions around more familiar and more tangible occupational safety issues. In this context, a reduction of the HSE's own specialist resources for occupational health advice and inspection is therefore a major cause for concern. Although it is not doubted that HSE needs to work more closely with other stakeholders to gain a better understanding of what works best in managing occupational health issues, its own role as a regulator in this respect is of primary importance. Establishing partnerships and voluntary occupational health support services, such as those represented by recent pilot studies (see chapter 5), should therefore not be a substitute for continued HSE commitment to the resourcing of its regulatory functions in relation to occupational health.

The liaison protocol on workplace deaths and the issue of 'corporate killing'

One of the most prominent debates around crime and punishment in health and safety over the past 20 years has concerned the appropriate judicial responses to work related fatalities.

HSE inspectors only have jurisdiction over health and safety offences; they have no responsibility to conduct investigations into other crimes that may have been committed, like that of manslaughter. However, this offence – which requires evidence of gross negligence – may well have been committed (in relation to a workplace death) by a director or senior company officer.

We pointed out in 1999 that there had been considerable change

in HSE's policy towards this offence over the previous 10 years. In 1989, for example, John Rimington, the then Director General of the HSE wrote, in an article about corporate accountability, that:

> '[HSE inspectors] receive thorough training in all aspects of criminal law which they need for their work including guidance on when to refer a case to the police. Discussions between the HSE inspectors and police or the Crown Prosecution Service (CPS) will take place if the most appropriate charge is one not available to an HSE Inspector.'

By 1993, however, the HSE had provided its inspectors with new guidance on when to refer a possible case of corporate manslaughter to the police. This guidance stated:

> 'Evidence which points towards a manslaughter charge should be referred to the police. They will decide whether the evidence warrants referral to the CPS. A copy of all the papers sent to the police should be sent to the HSE Solicitors office. HSE's solicitor will consider the papers and if the evidence appears sufficiently strong may refer the case directly to the CPS and inform the police accordingly'.[21]

Despite this, relatively few cases were referred to the CPS, in contrast with the potential number of referrals identified by independent studies and legal advice.[22]

In 1998, the HSE and the Association of Chief Police Officers (ACPO) published a new protocol of liaison on workplace death. It gave the police a formal investigative role and required a police detective of supervisory rank to attend the scene of every workplace death to make an initial assessment about whether 'the circumstances might justify a charge of manslaughter'. The protocol further provided that the police would investigate 'where there is evidence or a suspicion of deliberate intent or gross negligence or recklessness on the part of an individual or company rather than human error or carelessness'.

We noted in 1999 that while this was progress, it was unclear how effective the new manslaughter protocol was likely to be.[23] As, although formal police involvement was an important step forward, the protocol merely required the police to make 'initial assessment'. Since it would be highly unlikely that without a formal police investigation, a police detective would find the 'circumstances that might justify a charge of manslaughter', we noted that the system in practice relied on HSE inspectors deciding, during the course of their investigations, whether to refer a case back to the police. We also pointed out that HSE inspectors were already under huge work pressure and that in investigating workplace deaths, they were constantly aware that their investigation was at the expense of other pre-

ventative inspection work. Unless director culpability was staring them in the face, therefore, they might often neither have the time, or the forensic experience, to uncover the complicity of senior managers and directors, particularly if the death took place in a large company. As a result we noted that there was a great likelihood that many appropriate cases may not be referred.

More recently the protocol has been further revised and it now would appear to go some way to meet these concerns. In 2003, a revised protocol was agreed by the previous signatories, the Local Government Association (LGA) and the British Transport Police (BTP). As well as including these additional signatories, it also indicates that the police will be involved in an investigation from the outset and, in clarifying their functions, states that they will only stop investigating when 'it becomes apparent during the investigation that there is insufficient evidence' that manslaughter has been committed. In addition, it contains a commitment to 'thorough and appropriate investigation' and 'taking account of wider public interest'. It is too soon to assess the effect of these changes but there is some optimism that they will contribute to an improved approach to the investigation of possible manslaughter cases.

At the same time as the liaison protocol was being introduced in 1998, the newly elected Labour government had committed itself to new legislation on 'corporate killing'. This commitment was reiterated in 2000 in the DETR/HSC Strategy Statement *Revitalising Health and Safety* and has remained a feature of HSE policy statements ever since. However, nearly 10 years later, no such legislation has yet found its way to the statute book. The Work and Pensions Select Committee expressed concern about this delay in introducing the measure in 2004 and recommended that the government should implement legislation forthwith. Since then a new round of public consultation has been undertaken by the Home Office on its most recent legislative proposals (ending in June 2005). It is to be hoped that this in turn will lead to legislative action. However, as we detail later in the present chapter, there are some concerns about the eventual form such provisions will take and whether they will result in a workable law on corporate killing.

HSE and Local Authorities

HSE is responsible for supervising the enforcement activities of 410 local authorities. It has a Local Authority Liaison Unit that is, among other things, charged with auditing local authority performance. However, only one person is used for this task. This is despite the fact that, according to the findings of a study undertaken

by the CCA/Unison, marked variation occurs in levels of inspection, enforcement notices issued and numbers of health and safety inspectors employed.[24]

Clearly, the capacity of a single person to audit enforcement activity across 410 authorities is limited. The paucity of the resource becomes even more apparent when compared with that which the Food Standards Agency uses to carry out a similar task. In the latter case, the FDA employs 40 staff to audit the performance of local authorities in enforcing the Food Standards Act. Moreover, the Food Standards Act provides a straightforward mechanism for the Agency to report on the performance of an enforcement agency and to issue guidance on actions to improve it. The comparable section of the HSW Act (Section 45), provides the HSC with a far more unwieldy procedure and it is not clear that it has ever been used. Indeed, this unfavourable comparison led the Work And Pensions Committee to recommend that:

> '...additional powers should be made available to allow the HSC/E to take actions against any local authority manifestly failing in its duty of enforcing health and safety regulations'.[25]

Research

In 1999 we argued that HSE research funding had fallen in real terms by £5.8 million since 1993/94. We pointed out that this fall in expenditure needed to be considered alongside the more general decline that had occurred nationally in health and safety related research.

It was noted that research into occupational health in Britain had increased rapidly in the immediate post-war period, resulting in British scientists becoming world leaders in subjects such as pneumoconiosis, industrial ergonomics, occupational psychology and occupational cardiovascular disease by the early 1950s. Subsequently, however, the scale of occupational health (as well as safety) research declined significantly, with, for example, world-renowned centres of research into occupational health and safety closing and not being replaced. The loss of these centres was, further noted, to have been compounded by the closure of a number of industry-based research departments, notably as a result of the privatisation of large, formerly state-owned corporations, such as the National Coal Board.

This decline in occupational health research has had adverse consequences for the treatment of some forms of ill health because British specialists continue to argue about points settled decades ago in Scandinavia, North America and Australia. It has also resulted in a situation where those pursuing personal injury claims face, often

insurmountable, difficulties as a result of an absence of specialists who can give evidence in support of their case. For example, victims of solvent exposure often have to seek the support of Scandinavian experts because of a lack of sufficiently qualified expert British witnesses.

The current HSE research budget is spent on research it commissions from private industry, consultants, government laboratories, universities and the Health and Safety Laboratory.[26] Such research is required to support HSE's priority business, which is focused on delivering performance targets that it is committed to achieving through its own strategic plans such as *Revitalising* and the *Strategy for Workplace Health and Safety to 2010 and Beyond,* and also those set in Public Sector Services Agreements that are part of the annual Public Sector Spending Reviews undertaken by the Treasury. Thus, areas in which significant health and safety improvement is perceived to be required are a focus. These include, musculoskeletal disorders, stress, falls from heights, slips, trips and falls, workplace transport, construction, agriculture and health services. In addition, ensuring that an effective regulatory regime exists in major hazard sectors, ensuring compliance more generally, modernising and simplifying the regulatory framework, providing information and advice, promoting risk assessment and obtaining the technical knowledge necessary to operate statutory schemes are further current priorities.

In combination with the more general decline in research already noted, the exclusive focus on supporting HSE priority business has acted to limit the breadth and depth of research work that the Executive commissions. For it implies a highly instrumental approach to research that makes it more difficult to justify necessary funding for work that is pioneering new issues that may well be important for future policy and to undertake more cross-cutting evaluative work that is arguably necessary in relation to present policy.

The way forward

IN general the creation of the HSC as a central authority for health and safety at work and the establishment of the HSE as its operational arm, has received widespread support. Nevertheless, as the above review has demonstrated, major problems exist with regard to the operation of the present administrative system. In 1999 we argued for a number of proposals for reform. They related to four main issues: the structure of the HSC, the role of local authority inspectors, enforcement strategies and powers, and HSE resources. None of these reforms have been realised and since we made our

original proposals, similar calls for reform have been made by numerous other concerned observers – most notably in the 2004 report of by the Work and Pensions Parliamentary Select Committee on the Work of the HSC and HSE. Collectively they represent a powerful case for revisiting some of our original suggestions for strengthening the system for administering health and safety in Britain, as well as for adding some new ones.

Structure of the HSC

There are undoubted strengths in the basic principles of representation underlying the structure of the HSC and its industry and subject based advisory committees. However, in the light of recent economic and labour market changes – these as business restructuring, the growth of small enterprises, the change in the balance between core and peripheral labour, as well as the crisis in trade union representation – such structures are in need of review in relation to both their representativeness and their effectiveness.

The creation of these structures some 25 years ago, well in advance of current approaches to public consultation and social dialogue on environmental risk, was facilitated by what was largely a closed system in which the economic interests of employers, the protection of employees and the administration of the state could be expressed through a tripartite system for consultation. At the same time tripartism in health and safety, established at the zenith of the political corporatism of the post-war British state, while being an opportunity for the representation of workers' interests, did little in itself to upset the already established power relations of the scientific/medical/industrial complex. Thus, industry was still able to employ the highest level of professional advice, award the most prestigious research contracts and probably mount the most effective political lobbies to prevent damage to its economic interests.[27]

Although the health and safety establishment has tended to view the 1974 Act and the structures it created as a success, in fact there is little unqualified empirical evidence of either this success or the possible contribution tripartite consultation may have made towards it. As a result, precisely what progress has occurred, and what has supported or constrained this progress over the last 25 years are both unclear. It is notable that in this respect there has never been any serious attempt to research the effectiveness of tripartism in health and safety in Britain. This is unfortunate because such evidence would have been helpful to the development of future strategies. It would be useful to know, for example:

- how far the system's intentions, as seen from the perspective of

the HSE, were implemented in practice. In particular, how much was it possible to separate issues of science from those of economic interest as John Locke, the HSE's first Director General, argued would occur through the operation of tripartism?[28]

- what was the nature of the role of expertise in health and safety and what use was made of it by the different interests represented in the tripartite committees? It could be argued, for example, that there would be a tendency for the closed structures of tripartism to perpetuate a system in which the vested interests of the powerful were maintained through the accommodation and neutralising of dissent;
- what were the most successful strategies adopted by workers' representatives and what was the role of trade union organisation in supporting and promoting them? and
- what was the effect of political change on the outcomes of discourse at this level and how did the various interest groups adapt their strategies to deal with the influence of the enormous change in the broader political situation which occurred following the passing of the 1974 Act?

In 2004, the Parliamentary Work and Pensions Committee added its own voice to these questions with a recommendation that 'a wide ranging and open review of the role and effectiveness of HSC's Industry and Advisory Committees' be undertaken.[29] The Select Committee's recommendation was made, in part, to help address concerns aired by a number of witnesses during its inquiry that the Advisory Committees were being downgraded by HSC/HSE – some were being disbanded, while others were losing the balance of their representative constitution through piecemeal reform undertaken by HSC. The government response to this recommendation was to deny that there were any plans to downgrade them and to endorse the HSC's role in reviewing and periodically reconstituting the Committees. It further suggested that it was 'also important to be sure that an Advisory Committee as a specific form of stakeholder engagement is the most appropriate for a particular sector'.[30] Such comments do little, however, to address the call for an independent and in-depth review of the effectiveness of the tripartite structures or to allay trade union fears that their role as representatives of workers on the committees is in fact being downgraded by the HSC's reconstitution processes.

However, if such an in-depth review were to be undertaken and the tripartite system was shown to have led to effective results, then perhaps its extension to include further public and consumer interests may be a way to further advance democratic debate over health and

safety regulation. Of course, there are other aspects of representation which need to be addressed before such a view can be confidently advanced. In particular, there are important questions concerning the wider context of such debate and the extent to which economic issues concerning production, profit and markets, not to mention the threat of unemployment and social dumping, underlie decision-making on health and safety issues. There are also many questions about the interests to be included and the support that these interests need in order to make an informed contribution to decision-making on health and safety issues. It is these latter questions to which some trade unions argue the HSC is paying insufficient attention.

Fundamental to all these questions is the nature of the power relations involved and the extent to which worker and public interest in issues of health and safety can engage with the interests of capital on anything remotely approximating an equal footing. Between the articulation of different perceptions of risk and the acceptance of an eventual decision on its tolerability, lies a complex process in which the strength of interest groups, the allegiances and support they command, and the economic ramifications of possible decisions all figure in influencing outcomes. Where trade unions have been successful in this process in the past, it has been at least in part because they have been a single channel for the representation of organised labour which carried with it not only an unchallenged legitimacy but also significant economic influence and political strength. This is not the case with regard to the many representatives of social, consumer, small business and professional interests that potentially would have a role in a broadened structure for dialogue on decision-making in health and safety.

At the same time, tripartism is not simply about representing the interests of particular groups. In achieving trade union aims at the level of national decision-making on health and safety, trade union strategies also benefit unorganised workers. Although the decline in trade union recognition and membership over the last two decades weakens their industrial and political strength, arguably, they still remain the only organised and credible voice of workers. While it is desirable to extend consultation structures to include the increasing numbers of unorganised workers engaged in peripheral, temporary or atypical work, as well as wider public, professional and small business interests, it is not clear how this could be best achieved or how their involvement would effect outcomes which would be beneficial to those at risk.

Nevertheless, perhaps there are some lessons that can be learned from the experience of environmental regulation. The success of

environmental interest groups in drawing attention to their concerns and influencing wider public opinion suggests that the tripartite model as originally conceived may not be the only way to promote participation in issues concerning occupational and public risk arising from economic activities. Government has gradually come to understand that risk communication involves more than reassurances that experts know best. This has occurred, not because of a unilateral awakening of understanding on the part of the regulators, but precisely because society has demonstrated an increasing lack of confidence in government regulatory decisions based on the old formulae and has placed questions concerning freedom of information, accountability and participation on the political agenda. There are many issues that arise from this. One, for example, is the composition of the governing body of the Environment Agency, which is drawn from a wide range of backgrounds and includes representatives from green pressure groups. Whether this kind of approach represents a way forward for participation in decision-making about work-related risks is dependent on a more thorough evaluation of both the experience and potential of this and similar systems.

As we also argued in 1999, a further area in which change could be effected is through the regionalisation of the HSC's consultative structures along the lines of the regional advisory committees set up by the Environment Agency. Such regional committees for health and safety could be set up to mirror the HSE regional structure and could have a statutory right to be consulted and to make representations, thus *inter alia* increasing the local accountability of the HSE.

The role of EHOs

Just over one thousand full-time equivalent EHO personnel are engaged in health and safety inspection activities. They have enforcement duties in respect of more workplaces than their HSE counterparts; although these workplaces, for the most part, contain lower risk activities.

The Robens Committee paid attention to the question of whether the enforcement responsibilities of local authorities, which then related to the requirements of the Offices, Shops and Railway Premises Act 1963, should be included in its proposed new central inspectorate. It, however, concluded that this was neither feasible nor desirable. Thus, the Committee argued that local authority enforcement in the health and safety field was a logical extension of its public health role and that combining these two areas of enforcement was economical. It further drew attention to the value of such an enforcement role in stimulating local interest in workplace health and safety.[31]

The argument that it is both logical and cost-effective to combine the enforcement of statutory requirements relating to health and safety and public health continues to have some force. At the same time, it also needs to be recognised that the current division of enforcement responsibilities between HSE and local authorities has certain disadvantages. First, it means that across much of the economy health and safety provisions are enforced by inspectors who spend only part of their time dealing with health and safety issues and hence who do not possess high levels of specialist competency. Secondly, it is confusing to both employers and unions. Thirdly, it serves to work against the espoused principle of focusing inspector resources on those areas where the risks are highest, notwithstanding the work of HELA in trying to ensure a consistent approach towards enforcement on the part of HSE inspectors and EHOs. This is because the division precludes any consideration of whether the resource currently deployed on enforcement in local authority areas might not be better focused on those activities for which the HSE has responsibility.

There would consequently seem to be a case for looking again at the desirability (and scale) of the local authority role in the enforcement of health and safety law. In the meantime, given the points made earlier on the marked variation that exists in enforcement action undertaken in different types of local authorities and other official figures indicating similar variation in the ratios between EHOs and the number of premises for which they are responsible, two more immediate actions appear necessary.[32] These are the taking of further steps to ensure consistency between authorities in the way in which enforcement activities are approached, and the development of national guidance on how EHO staffing levels should be determined.

Any move to remove or reduce the enforcement role of local authorities would clearly be vulnerable to the argument that it represented a reduction in local democracy. This argument could, however, be countered if the above proposal concerning the establishment of HSC regional consultative committees were implemented.

Enforcement strategies and powers

A number of issues appear to merit attention in this area. They concern the:

- nature and scale of inspections and investigations;
- current approach adopted towards the use of enforcement notices and prosecutions;
- present provision made for the prosecution of directors and other senior office holders;

- sentencing powers and approach of the courts; and
- future role for corporate killing prosecutions.

Each of these is considered below.

Inspections and investigations. HSE inspectors and EHOs, as has been noted, conduct routine preventive inspections, investigate the causes of injuries and other incidents and also conduct investigations into complaints received. In response to criticism that it was failing to undertake sufficient investigative work the HSE altered the balance of its activities in these areas in recent years. However this, in turn, created difficulties in resourcing preventive inspections. Recognition of these difficulties helped to lead HSE policy in the direction of paying greater attention to so called 'softer approaches' to achieving improved compliance, with a strong emphasis on its advisory, educative and informative role. There have been indications that the planned resourcing of these approaches was to be at the expense of inspection and investigation.

At the same time, the HSE has commissioned a number of research studies to better understand which strategies are most effective in securing improved health and safety performance from duty holders.[33] Most observers agree that the findings of these studies have been somewhat inconclusive in relation to the effectiveness of the HSE's 'softer' approaches to regulation, while also drawing attention to the importance of face-to-face contact between inspectors and duty holders and the existence of a credible threat of enforcement action being undertaken where they fail to comply with their duties. It is therefore quite clear that, whatever combination of approaches the regulatory agencies adopt, they should not be at the expense of one another. This is especially so in relation to the work of inspection and investigation, for which there is strong support for its effectiveness and widespread agreement that HSE is resourced insufficiently to adequately undertake it.

The HSE has tried to deal with the problem of limited resources for inspection by focusing greater attention on 'higher risk' workplaces. In recent years this approach has been further accentuated by a tendency to devote more resources to the carrying out of more in-depth inspections in the larger of such workplaces. In the context of limited resources, focusing inspections on the more hazardous workplaces makes sense. Such an approach, however, is not a substitute for an adequate programme of preventive inspections. Indeed, the presence of such a programme is a necessary pre-condition for the development of an informed approach to targeting. This is for two, related, reasons. First, it provides the 'intelligence' needed to

identify 'high risk' workplaces. Secondly, it provides a means of ensuring that the data so gathered is regularly updated and in this way ensures that any change in the nature and level of the risk of the activities undertaken in a particular premises is recorded and fed back into the targeting process.

In short, while 'targeting' helps ameliorate the consequences of inadequate staffing levels, it does not provide an effective long-term solution to them. Given this, there seems no alternative other than to significantly increase the number of inspectors available to carry out inspections and investigations. As the Work and Pensions Committee recommended in 2004, the solution to these problems of deployment of limited resources, is therefore to abandon the current government strategy of cutting the HSE's budget and reducing resources overall for inspection and investigation. Instead, as it further recommended, HSE's resources should be increased so that they are sufficient to undertake its investigative and inspecting activities at appropriate levels, while at the same time pursuing additional educative, advisory and informative approaches and exploring other means of bringing pressure and persuasion to improve the health and safety performance of duty-holders. Indeed, the Work and Pensions Committee recommended that the number of (FOD) field inspectors should be doubled (at a cost estimated to be £48 million a year after six or seven years). Although the government rejected this advice, reiterating the current HSC/HSE policies on interventions outlined above, all the available evidence, in our view, supports the Work and Pensions Committee case.

At the same time, the activities of HSE inspectors and EHOs could usefully be supplemented through the imposition of statutory requirements aimed at stimulating greater 'independent' monitoring of employer health and safety arrangements. These developments have been much canvassed by professional bodies representing the interests of health and safety practitioners, as well as by companies marketing 'off the shelf' safety management systems (SMSs), and have been the subject of some debate in the international socio-legal literature in recent years. Suggested developments have included, for example a two-track approach to the regulation of health and safety management in which employers who introduced SMSs could be rewarded through the provision of various 'incentives'. These might include a reduced likelihood of inspections and prosecutions, less prescriptive regulatory requirements and lower penalties, if prosecutions take place. In contrast, the activities of employers, who do not adopt SMSs, would continue to be regulated in the traditional way.[34]

This approach could potentially enable inspectors to devote more time to those employers who manage health and safety in a less sophisticated and comprehensive way. However, the risks of what Gunningham and Johnstone refer to as 'implementation failure' seem to us too great, particularly as employers engaged in high risk areas of activity may be tempted to introduce SMSs to reduce the degree to which they are externally regulated. Nevertheless, one aspect does seem worth exploring. This is the imposition of requirements on employers, or at least those who are above a specified size and/or who are engaged in particularly high risk types of activity, to have their health and safety arrangements regularly audited by accredited outside bodies. Such bodies could include the sectoral insurance associations proposed in chapter 5, and which would be under a duty to carry out their work with 'due diligence'. The results of these audits, could then be made available to the HSE (as well as worker representatives) and be used to guide future inspection and enforcement action.

Finally, with regard to the investigation of accidents and other incidents, it is a truism to say that inspectors need to know that they have occurred in order for them to initiate an investigation. At present HSE inspectors and EHOs rely on employers to report injuries, dangerous occurrences and occupational diseases in accordance with the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR). Unfortunately, as already noted, the majority of incidents that should be reported are not. This may, in part, be due to the fact that employers are unaware of their reporting obligations. It may also be partly due to their concluding that it is not in their interests to make a required report. In any event it is clear that the self-reporting system is not working adequately. As a result there seems a need for HSC/HSE to consider stricter enforcement of existing provisions on reporting and, at the same time, to further develop systems to encourage people, other than employers, to report injuries to them – like doctors, hospitals, solicitors, trade unions, insurance companies and the police.

However, such measures do not appear to be part of HSC current thinking. In a 2005 Discussion Document that proposes changes to RIDDOR, employers' duties to report occupational diseases would be scrapped, the current duty to report dangerous occurrences would be abandoned, and reporting major injuries would be merged with a new system to record absences of more than three days.[35]

Notices and prosecutions. As we have seen, it is relatively uncommon for an enforcement notice to be issued following an inspection and even rarer for a prosecution to be instigated. This is despite the

fact that the available evidence indicates that many employers remain unaware of their legal obligations and hence are not likely to be complying with them (see chapter 2).

Neither the HSC or the HSE are concerned about this situation. The HSC, for example, takes the view that its priority is prevention and that this objective is best served by an inspector at first working with duty holders to gain compliance with the law. Only when advice has not been taken should an inspector consider the imposition of notices or prosecution.

This philosophy of compliance reflects the approach taken by the Robens Committee which concluded that 'only flagrant breaches of the law' should be prosecuted. In doing so it observed that:

> '...the process of prosecution and punishment by the criminal courts is largely an irrelevancy. The real need is for a constructive means of ensuring that practical improvements are made and preventive measures adopted. Whatever the value of the threat of prosecution, that actual process of prosecution makes little direct contribution towards the end. On the contrary, the laborious work of preparing prosecutions... consumes much valuable time which inspectorates are naturally reluctant to devote to such little purpose.
>
> 'Technical problems of safety organisation and accident prevention are matters for experts in the industrial field rather than the courts... the weight of the evidence points to the conclusion that the lengthy process of investigation, warning, institution of criminal proceedings, conviction and ultimate fine is not a very effective way of producing an early remedy for known unsatisfactory conditions. In sum we do not believe that the traditional sanction demands any widespread degree of respect or confidence in this field.'[36]

The HSC's current enforcement policy differs in several respects from the approach advocated by the Robens Committee. Most critics agree that it represents a substantial improvement on previous approaches in terms of the clarity and transparency of the principles it lays down. In relation to prosecution, it states that while the primary purpose of the enforcing authorities is to ensure that duty holders manage and control risks effectively, *prosecution is an essential part of enforcement.* It goes on to state:

> '...enforcing authorities should normally prosecute or recommend prosecution, where following an investigation or other regulatory contact, one or more of the following circumstances apply. Where:
> - death was the result of a breach of the legislation;
> - the gravity of an alleged offence, taken together with the seri-

ousness of any actual or potential harm, or the general record and approach of the offender warrants it;

- there has been reckless disregard of health and safety requirements;
- there have been reported breaches that give rise to significant risk, or persistent and significant poor compliance;
- a duty holder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk;
- there has been failure to comply with an improvement or prohibition notice; or there has been a repetition of a breach that was subject to a formal caution;
- false information has been supplied willfully, or there has been an intent to deceive, in relation to a matter that gives rise to a significant risk;
- inspectors have been intentionally obstructed in the lawful course of their duties.'

It further says that, in the public interest, enforcing authorities will consider prosecution where it is appropriate as a way to draw general attention to the need for compliance with the law and a conviction may deter others from similar failures. It also indicates that a prosecution will be considerd where a breach that gives rise to significant risk continues despite warnings from employees, their representatives or others affected by a work activity.

Nevertheless, HSE enforcement activity incorporates relatively limited use of prosecutions as well as enforcement notices. This approach is problematic for a variety of reasons. First, it constitutes more an article of faith than an approach to enforcement that has been empirically demonstrated to be the most effective. As we have already pointed out, HSE's own commissioned research into whether advice or more formal legal action is the most effective method to ensure improvements take place has been inconclusive on the role of advice but has demonstrated that the threat, or reality, of prosecution is itself a powerful motivator for employers – including those in small companies. Secondly, and relatedly, it is far from clear that enforcement notices are any less cost-effective than the provision of informal advisory letters. Thirdly, it seems strange that a state agency should in effect adopt an enforcement strategy premised on effectively providing a free consultancy service to those who choose not to find out about the law and fail to take the action needed to comply with it. Finally, the appropriateness of such a philosophy to an environment where inspector numbers are simply not adequate to ensure that advice is provided regularly to a large proportion of

employers must be questionable. For such advice is essentially a private matter between an inspector and employer and hence, unlike a prosecution, or even an enforcement notice, is unlikely to draw the attention of other organisations to the need to accord health and safety a higher priority.

This is not to argue that all breaches of the law should be prosecuted. Indeed it is recognised that inspectors need to possess some discretion as to whether or not prosecution constitutes the most appropriate action in a given situation. Rather it is to suggest that a much more rigorous approach to enforcement needs to be adopted. Clearly there is scope for debate about the nature of such a revised approach. However, in our view it should encompass:

- the issuing of an enforcement notice in all cases where a serious risk of personal injury exists;
- more frequent use of prosecutions combined with a greater willingness to take cases on indictment; and
- a policy of prosecuting wherever a breach of the law is found to have resulted in a major injury or death on the grounds that unlawful conduct which results in harm requires retribution in a way that other such conduct does not.

It is recognised that the taking of more prosecutions, particularly on indictment, would entail the use of more HSE and EHO resources – an issue to which we return below. It is also acknowledged that some trade-off will always exist in terms of the allocation of inspection time between prosecutions, on the one hand, and inspections and investigations, on the other. However, the scale of this trade-off could be reduced, although probably only to a limited degree, by the government allowing any fines imposed, and costs awarded, to be given to local authorities and the HSE. Its potentially adverse consequences could also be ameliorated by providing workers and unions with the right to bring private prosecutions without needing to obtain the consent of the Director of Public Prosecutions.

Prosecution of directors: At present, British health and safety law does not impose any explicit duties on company directors that can give rise to criminal liability in respect of how they manage health and safety. Directors can, however, accrue such liability under section 37(1) of the Health and Safety at Work Act where an offence committed by a corporate body is found to have been committed with their 'consent or connivance' or to have stemmed from their 'neglect'. Furthermore, if so convicted, the potential exists for them to be disqualified from holding such office under the Company Directors Disqualification Act 1986.

As noted earlier, few prosecutions are currently brought against

directors and other senior officers of corporate bodies. The importance of bringing directors to account through the criminal court therefore is too often overlooked. Apart from it being important that directors should not be seen to be above the law and escape criminal accountability, the backbone of any system of deterrence, in relation to preventing corporate harm, must be action against those in control of the company. As Braithwaite and Geis have stated:[37]

> *'White collar criminals are among the most deterrable types of offenders because they satisfy two conditions. They do not have a commitment to crime as a way of life, and their offences are instrumental rather than expressive. Corporate crimes are almost never crimes of passion; they are not spontaneous or emotional, but calculated risks taken by rational actors. As such they should be more amenable to control by policies based on the utilitarian assumption of the deterrence doctrine... Individual corporate criminals are also more deterrable because they have more of those valued possessions that can be lost through a criminal conviction, such as social status, respectability, money, a job and a comfortable home and family life.'*

An Action Point contained in the *Revitalising health and safety strategy statement* indicated that the lack of explicit directors duties would, in due course, be addressed. Thus, in Action Point 11 of the statement, it was stated that:

> 'The Health and Safety Commission will develop a code of practice on Directors' responsibilities for health and safety, in consultation with stakeholders. It is intended that the code will, in particular, stipulate that organisations should appoint an individual Director for health and safety or a responsible person of similar status (for example in organisations where there is no board of Directors). The Health and Safety Commission will also advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. It is the intention of Ministers, when Parliamentary time allows, to introduce legislation on these responsibilities.'

In the light of this Action Point, in June 2001, the HSC published guidance on the health and safety responsibilities of directors. Later, in October 2003, however, it decided not to go further with drafting legislation to impose statutory duties and, in January 2004, went on to advise Ministers, in accordance with this decision, that legislation was not, in its view, now needed. This decision to eschew the imposition of such duties was accepted by the government, but generated much criticism in other quarters. In particular, the House of

Commons Work and Pensions Select Committee recommended that the 'government reconsiders its decision not to legislate on directors duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament'.[38] In response to this recommendation, the government announced that it would ask the HSC to re-consider the issue and provide further advice to Ministers by the end of 2005; advice that at the time of writing was in preparation.

It is to be hoped that this new advice will encompass the recommendation that the decision to not proceed with legislation be reversed for both positive and negative reasons. On the negative side, it is clear that major difficulties surround the successful prosecution of directors of large companies under section 37(1) largely because of the difficulty of showing the necessary fault on their part – a point that is reinforced by the fact that those who have been prosecuted under the section have invariably been directors of small firms – and that these difficulties exist alongside, as noted earlier, evidence that points to the fact that in a substantial minority of organisations directors take no direct responsibility for health and safety and, where they do, the level of their involvement is often very superficial.[39]

On the positive side, there is ample evidence that the attitudes and behaviour of directors do exert an important influence over the health and safety management and performance of their organisations and that potential individual personal liabilities do act as a motivating force for them.[40] Indeed, one review of the international evidence on the factors that act as 'CEO and supervisor drivers' concluded that *'the key to motivating CEOs and senior management to improve safety is to make them liable to personal prosecution and to actually enforce such provision'*.[41]

Sentencing: Almost all parties with an interest in health and safety are in agreement on one point: courts impose far too lenient sentences. The decision in *R v Howe* may, as noted earlier, have had some impact in terms of addressing this situation.[42] But it needs to be recognised that the *Howe* decision does have its limitations. Though the court did state that any 'fine should reflect not only the gravity of the offence but also the means of the offender', it specifically ruled out that the fine 'should bear any specific relationship to the [company's] turnover or net profit'. It further did not suggest that the courts should, on a routine basis, receive information about the financial affairs of the company, but merely observed that a company may choose to supply this information to the court when it 'wished to make any submission... about its ability to pay a fine'.

Since that time, there have been substantial fines in a few cases,

however, as noted previously, average fines remain ludicrously low in comparison with the damage that often led to them as well as in comparison with the guilty parties' turnover and profit. Our original advocacy of 'proportionate' or 'percentage' fines for companies therefore remains appropriate.[43] This concept is well known under European Community law – now enshrined in British law. Thus, under the competition law provisions, a (civil) fine of up to 10 per cent of the company's previous global turnover can be imposed.

Sentencing companies to large 'cash' fines does have one potential drawback – the problem of 'overspill'. This means that companies can pass the fine on to workers, through redundancy or wage cuts, or to customers through increasing the price of goods or services. As we also pointed out in our earlier text, equity fines are one solution to this 'overspill phenomenon' for publicly listed companies. Thus, John Coffee has suggested that when 'very severe fines need to be imposed on a corporation, they should be imposed not in cash, but in the equity securities of the corporation'. The convicted would be required to issue a particular number of shares – equivalent to an expected market value of the cash fine necessary. Coffee then suggests that these shares would be placed in the state's crime victim's compensation fund to be used when required. This would allow much higher fines to be imposed since, the court,

> '...seizes not just whatever cash the company has available to pay a fine or monetary penalty but also a share in future earnings, as well as ownership rights in the company's plant, equipment and property investments'.

Monetary sentences – whether expressed as cash or equity fines – nevertheless do have limitations; they do not deal with the 'rehabilitation' of the company. Unlike the minds of individuals, which can't be re-modelled, the components of a company can be analysed and reformed. New polices can be adopted, new job positions created and new systems of organisation set up. The organisational defects of a company – its 'psyche' – can be taken to pieces and put together again. Unsafe companies can be turned into safe ones.

Since the enactment of the 1984 Sentencing Reform Act in the United States, companies are frequently sentenced to 'corporate probation'. The Act allows probation orders to be used as a substitute, or an addition, to fines. Conditions of probation no longer need be limited to rehabilitative ends and can be imposed for the purposes of increasing punishment or deterrence.

Before a court can issue a probation order, a pre-sentence report must be prepared. This report can address sources of illegal behaviour by a corporate defendant and recommend terms of a probation

sentence. Should a sentencing court want more information it may order a study of the offender by qualified professional consultants; these reports need not be limited to factual inquiries, but can also include analyses of possible probation sentences. Consultants qualified to perform such studies include business professionals or academics with expertise concerning management techniques. Pre-sentencing reports and studies can therefore provide a court with key information about the internal management processes that led to the defendant's illegal conduct and hence the changes that would help prevent a recurrence.

In Britain, such a power might be considered unnecessary since the HSE has the power to impose changes on the companies after the incident leading to the conviction. However, inspectors often only have the power to require superficial changes to a company's operations. Yet company procedures may need deep-rooted reforms to ensure that the offence does not happen again. Corporate probation provides a potential means of securing such reforms. For example, new training schemes could be required, management structures revised, and new safety officers employed or new standing orders drafted, and indeed, the HSW Act does, as already noted, give courts the power to issue a 'remedy order' which could provide the basis for a more sophisticated probation order.

One of the Action Points of the HSC's *Revitalising* strategy was the commitment to provide advice to Ministers on the feasibility of introducing more innovative penalties for health and safety offences, such as fines linked to the turnover or profits of a company, the prohibition of Director's bonuses for a fixed period of time, suspended sentences pending remedial actions, community service orders and fixed penalty notices for specific offences. However, no firm proposals to make use of innovative penalties have resulted and no significant changes have taken place as a consequence. In response to this situation, the Work and Pensions Committee observed:[44]

> '...that maximum penalties should be increased by means of a Bill in the next session of Parliament (in 2004/05) and further recommends that proposals to introduce alternative and innovative penalties in addition to those already available to the courts should be examined and the reasoned conclusions published'.

Neither has occurred by the time of writing and once again therefore, we believe that the case for our original proposals remains unanswered. As previously noted, Gordon Brown announced in May 2005 that legislation to be enacted in 2006 would give Ministers enabling powers to strengthen penalties and it is anticipated that these measures would include means to ensure penalties are

proportionate to the consequences of non-compliance as well as the introduction of further administrative penalties. However, at the time of writing the details of such proposals have yet to be announced.

Corporate killing: As already noted, legislative action on a new offence of corporate killing has been New Labour policy since coming into office in 1997. It has become apparent that however laudable this policy may have been, the government has not found putting it into practice entirely straightforward. As well as much diverse opinion on what exactly is being achieved by such a law, there are several difficult legal issues to confront. In addition there are entrenched vested interests in opposing such measures in sections of the business community and, given the present government's business friendly credentials, it has been wary of alienating these interests while at the same time trying to maintain its position on the necessity for such a law. In the course of the debates surrounding the introduction of legislation on a new offence of corporate killing, the government has therefore consulted widely and notably with the sections of industry in which the majority of fatalities occur.[45]

Amongst the difficult legal issues to be confronted are those that concern how to identify the responsibility of a company's 'guiding mind and will'. Under existing law, this needs to be an identifiable individual and therefore the guilt or innocence of the *company* rests upon the guilt or innocence of this individual – who must be a director or senior manager. If this person is guilty as an individual for the offence in question, the company is automatically guilty (assuming it has been charged).

As we pointed out in 1999, this doctrine – known as the 'identification' doctrine – has been the subject of great criticism. It allows companies whose policies and procedures are 'reckless' or 'grossly negligent' to remain unconvicted simply because there is insufficient evidence against a senior officer. Even if there was a director who could be prosecuted for this offence, a combination of inadequate investigation by the authorities and the absence of clear cut duties can often make it difficult to pinpoint criminal responsibility upon directors or other senior officers. The doctrine therefore allows companies – with grossly negligent management operations – to escape conviction simply because there is insufficient evidence to convict a director or senior company officer.

In 1996, the Law Commission proposed the enactment of a new offence of 'corporate killing' – which would replace the existing offence of corporate manslaughter. Under this a company would be

convicted if it can be shown that 'a management failure by the corporation is the cause or one of the causes of a person's death' and 'that failure constitutes conduct falling far below what can reasonably be expected of the Corporation in the circumstances'.

Although the Law Commission's concept of 'management failure' was at the heart of its proposals for the new offence and it is arguably a clever way of removing the need to consider individual guilt, while getting to grips with the 'corporateness' of company culpability, there are nevertheless problems with deriving workable legislative proposals based on this idea – as the Home Office has discovered in its various attempts to do so.

In the most recent version of its proposals, tests are proposed to establish 'senior management failure'. The distinguishing of *senior* management in this regard is apparently intended to ensure that prosecutions of companies are not brought in cases in which failures at lower levels of management have occurred. However, the Law Commission has expressed doubts that the present wording is satisfactory, stating in response to the consultation on the recent proposals:

'Making large organisations accountable was one of the original intentions of law reform and one area in which the draft Bill fails'.

Other responses have called for a more explicit definition of senior management – that for example includes the management of large units such as construction sites or factories.

Additional concerns in relation to the most recent proposals include their limited application to public administrative bodies – for although they seek to remove Crown immunity, the number of exemptions included for public bodies has led critics to suggest that in effect the removal of such immunity is only partial. Also argued for by some, is the inclusion of all employing organisations within the remit of the proposals. At present, non-incorporated bodies are excluded. Others have argued that the proposals should be further extended to situations where management failure may have occurred in the UK but the death to which it could be linked happened outside the UK.

The major weakness in the Home Office proposals, however, is their failure to link the provisions on the offence of corporate killing to measures that we have previously argued are necessary to ensure that individual directors are adequately accountable for their failures.

HSE resources

It seems entirely obvious to us that a substantial increase in HSE resources is required. During the first 13 years of the Conservative

government, the HSE's budget was significantly reduced in real terms. Moreover from 1993 onwards, it was effectively frozen, resulting in much lower rates of recruitment and the early retirement of a number of the most experienced inspectors. With the Labour government's return to power, this position was initially reversed, with the government providing the HSE with an additional £63 million over three years, an increase which resulted in a rise in the number of inspectors. But as we saw previously, the reversal of the fortunes of the HSE did not last and more recently its resources have been significantly reduced in real terms.

As many observers agree, a substantial increase in the resources of the HSE is required if any impact is to be made on the number of workplaces inspected or incidents investigated. As the Work and Pensions Committee stated in the Summary of its Report:

> 'We endorse the view of Prospect that the numbers of inspectors in HSE's Field Operations Directorate should be doubled (at a cost estimated by them at £48 million a year after six or seven years). We recommend that substantial additional resources are needed in the next three years.'

We previously noted that the government has made it clear in its response to the Committee's recommendation that it has no intention of supporting such action. There remains, therefore, a fundamental weakness in the current British approach to the administration of the statutory framework – there is widespread agreement amongst virtually all stakeholders in the health and safety system, *except the government,* that the regulatory agency is not resourced sufficiently to deliver the outcomes required of it. No amount of tinkering with the balance of its activities will change this. Moreover as we, and others have demonstrated, the case for diverting attention towards 'alternative non-regulatory approaches' to achieving health and safety improvement has simply not been made. It is paradoxical that a government that sets great store in convincing industry of the economic benefits of investing in improved health and safety measures cannot apply this logic to its own activities. Without it doing so, however, we fear that the present situation will not improve and, as we demonstrate elsewhere in this book, there are good reasons for supposing it will deteriorate.

Conclusion

THE way in which a statutory framework of law is administered exerts a crucial influence over both its operation and effectiveness. In Britain, three main groups of actors are involved in this administrative process – the HSC, the HSE and EHOs employed by local

authorities. This chapter has examined the roles, resources and activities of these actors. It acknowledges the important contribution that was made by the HSW Act in terms of creating the HSC, as a central authority for health and safety at work, and establishing the HSE as its operational arm. At the same time, however, it draws attention to a variety of problems that exist in relation to the administration of the legal framework established by the Act. These include, inadequate levels of preventive inspections and investigations; the placing of too great a reliance on the provision of advice and the use of other informal methods of securing legal compliance; the imposition of overly low penalties following successful prosecutions; insufficient levels of research funding; and a lack of occupational health expertise within the HSE.

The proposals we put forward in 1999 to remedy these problems have not been adopted, notwithstanding that others have subsequently proposed similar remedies. Instead, the present government remains resolutely opposed to any reforms that imply increased resources for its regulatory agencies or more stringent requirements on duty holders. It has also spent the best part of a decade dragging its feet on the relatively limited proposals for reform that have formed part of its own political policies since 1997. In our view the reforms that we put forward in 1999 remain both valid and appropriate and we therefore once again summarise their main features. They relate to five main issues: the structure of the HSC; the responsibilities of the HSE in respect of public health and safety; the role of local authorities in enforcing health and safety law; the adequacy of current enforcement strategies and powers; and HSE resources.

Summary of key points

- Proper investigation into the effectiveness of the tripartite structure of the Health and Safety Commission (HSC) and its advisory bodies;
- Establishment of a system of HSC regional consultative committees along the lines of those set up by the Environment Agency;
- Investigation into the desirability (and scale) of local authority involvement in the enforcement of health and safety law;
- Action to achieve greater consistency between local authorities in terms of enforcement action and Environmental Health Officer staffing levels;
- Adoption of a more rigorous enforcement policy on the part of HSE and local authority inspectors, and, within this, the placing of more emphasis on the use of prosecutions combined with a greater willingness to take cases on indictment;
- Supplementation of HSE and local authority inspections by the introduction of statutory requirements on the carrying out of 'third party' audits of employer health and safety arrangements and performance;
- Imposition of an explicit health and safety duty on company directors;
- Investigation of the possible introduction of 'proportionate' and 'equity' fines for health and safety offences and the use of presentencing reports;
- Provision of court powers to make probation orders requiring organisations to take specified steps to improve their health and safety arrangements;
- Introduction of a robust new law on 'corporate killing' which provides for the prosecution of directors;
- Enhanced right for workers and their trade unions to initiate private prosecutions in respect of breaches of health and safety laws;
- Considerable expansion of HSE resources to support a substantial increase in inspectors, support the adoption of a more rigorous enforcement policy and an expansion in internal and commissioned research.

Notes

1 P James and D Walters, *Regulating Health and Safety at Work: the way forward,* (eds), 1999, Institute of Employment Rights, 49-81.
2 See Health and Safety Commission/Department of Environment, Transport and the Regions *Revitalising Health and Safety, Consultation Document,* 1999, DETR; Health and Safety Commission/DETR *Revitalising Health and Safety, Strategy Statement,* 2000, DETR.
3 Health and Safety Commission, *A Strategy for Workplace Health and Safety to 2010 and Beyond,* 2004, HSE Books.
4 See P James and D Walters, *Health and Safety Revitalised or Reversed?* 2004, Institute of Employment Rights.
5 Health and Safety (Enforcing Authority) Regulations 1998 (SI 1998 No.494).
6 Workplace contact officers are a category of HSE administrative staff whose functions include contact with firms to gather and supply information supporting the work of inspectors. They are not inspectors.
7 House of Commons, Work and Pensions Committee: *The Work of the Health and Safety Commission and Executive,* Vol. III, 2004:290.
8 HSC, *National Statistics, Health and Safety Activity Bulletin, Inspection and Enforcement in Local Authority Enforced Sectors,* 2003, HSE Books.
9 Prospect estimates this to represent a 10 per cent cut in real terms after inflation and other rising costs are taken into account.
10 See: http://www.hm-treasury.gov.uk/consultations_and_legislation/hampton/consult_hampton_index.cfm
11 See, for example, P James, "Occupational health and Safety: The Impact of European Requirements", *Review of Employment Topics,* 3(1), 1995, 74-102.
12 Work and Pensions Committee Report, Vol. 1 *(op cit)* 2004:25.
13 In a paper to an HSE board meeting in September 2003 Justin McCracken, the Deputy Director of the HSE, stated that the HSE was considering whether it should "put more emphasis" on the "educate and influence" aspects of its work acknowledging that to do so would necessitate using "a smaller proportion of total front line resource for inspection and enforcement aspects of work". The Consultative Document, *Regulation and recognition,* published by HSE in September 2004, further promotes this approach and when repeatedly pressed by the Chairman of the Work and Pensions Committee as to whether the HSE needed more resources and what they would do with them, the Director General of the HSE and the Chairman of the HSC both failed to indicate they would increase the number of their inspectors, instead opting for spending more on information and guidance. (Work and Pensions Committee Report, Vol. 11 *(op cit)* 2004:137.
14 Work and Pensions Committee Report, Vol. 1 *(op cit)* 2004:43-46.
15 CCA/Unison, *Safety last? The under-enforcement of health and safety law,* 2002, Unison.
16 Work and Pensions Committee Report, Vol. 1 *(op cit)* 2004:44.
17 See Evidence of the CCA to the Work and Pensions Select Committee, Work and Pensions Committee Report, Vol. III (op cit) 2004:314-315.
18 See K Hawkins, *Law as Last Resort. Prosecution Decision Making in a Regulatory Authority,* 2002, Oxford University Press.
19 *R v F Howe & Son (Engineers)* [1997] 28 IRLR 434-438.
20 For example, an analysis of information on the annual profits of 65 of the 260

companies sentenced between 1987 and 1993 revealed that the five companies with average profits of between £1-10,000 received an average fine of £750 per offence, which amounted to 16 per cent of their profits; companies with profits of between £100-150,000 received fines of £1,290 per offence, amounting to 0.5 per cent of their profits; and the five companies with profits of over £10 million received average fines of £1,185, equivalent to 0.002 per cent of their profits. See D Bergman, *The Perfect Crime? How Companies can Get away with Manslaughter in the Workplace,* 1994, West Midlands Health and Safety Advice Centre.

21 *Guidance to Inspectors on Possible Manslaughter Cases,* para 7, HSE Document OC 165/5

22 In 1999, for example, we pointed out that only 56 of over 1,600 workplace deaths has been referred in this way, and only 24 of these referrals related to potential manslaughter on the part of directors or senior managers. Of these, three led to a subsequent conviction - one relating to a workplace death and two others to the deaths of members of the public. (James and Walters, *op cit,* 1999:59).

23 In 2000/2001 the police referred 26 cases of work-related death to the CPS to consider possible prosecution, six of which were commenced. Since the introduction of the protocol there has been a rise in the number of directors and businessmen convicted of manslaughter following work-place deaths – by 2005 there had been 10 such convictions.

24 See CCA/Unison *Safety Lottery: How the level of Enforcement of Health and Safety Depends on Where you Work,* 2003, CCA/Unison.

25 Work and Pensions Committee Report , Vol. 1, *op cit,* 2004:58.

26 An in-house agency which competes for contracts on the same basis as external contractors and also provides scientific and technical support to other HSE activities, such as accident inquiries.

27 See for example, A J P Dalton, "Lessons from the United Kingdom: Fightback on workplace hazards", *International Journal of Health Services,* 22(3), 1992, 489-495.

28 See J Locke, *The Politics of Health and Safety,* Sir Alexander Redgrave Memorial Lecture, IOSH; also summarised in *Protection,* July 1981.

29 Work and Pensions Committee Report, Vol. 1, 2004:83 *op cit.*

30 See House of Commons Work and Pensions Committee, *Government Response to the Committee's Fourth report into the Work of the Health and Safety Commission and Executive* (HC1137), 2004, Stationary Office.

31 See Robens *op cit.*

32 For further details of recent evidence see CCA/Unison, *How the level of enforcement of health and safety depends on where you work,* 2003, CCA.

33 See, for example M Wright, S Marsden and A Antonelli, *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, 2004, HSE Books; M Wright, A Antonelli, J Norton Doyle, R Genna and M Bendiq, *An Evidence Based Evaluation of how Best to Secure Compliance with Health and Safety Law,* HSE Research Report 334, 2005, HSE Books.

34 N Gunningham and R Johnstone, *Regulating Workplace Safety: Systems and Sanctions,* 1999, Oxford University Press.

35 See B Allen, "Occupational disease reporting has audit function, HSC told", *Occupational Health Review,* 117, 8-9.
36 Lord Robens, 1972, para 261.
37 J Braithwaite and G Geis, "Theory and Action for Corporate Crime Control", *Crime and Delinquency,* 1982, at 302
38 House of Commons Work and Pensions Committee, *The Work of the Health and Safety Executive and Commission.* Volume 1. 2004, Stationary Office.
39 C Davis, *Making Companies Safe: What Works?* 2004, Centre for Corporate Accountability.
40 P James, *Directors' Responsibilities for Health and Safety – a peer review of three key pieces of published research,* HSE Books, forthcoming.
41 N Gunningham, *CEO and Supervisor Drivers: Review of Current Literature and Current Practice,* 1999, National Occupational Health and Safety Commission
42 See HSE press release, 30 July 1999 "Record of three big health and safety fines this week".
43 See James and Walters, 1999, 72-73, *op cit.* See also J Coffee, "No Soul to Damn: No Body to Kick. An unscandalised inquiry into the Problem of Corporate Punishment", *Michigan Law Review,* 79, 1981.
44 House of Commons Work and Pensions Committee. 2004, Vol 1 p 5 *(op cit).*
45 As Tombs and Whyte noted in 2003, "in its most recent consultation exercise, the Home Office, odd as it may sound, has singled out the eight industries that kill and seriously injure the most workers to consult over the impact of this law." (see S Tombs and D Whyte, "Two steps forward, one step back: towards accountability for workplace death", *Policy and Practice in Health and Safety,* 1(1), 2003, 9-30.

Chapter 4

Worker representation

THE collective involvement of workers in the monitoring and development of health and safety arrangements at the workplace has long been viewed as a valuable means of improving standards of worker protection. Available research evidence indicates that this view is well-founded. A variety of studies, conducted both in this country and overseas, have found the collective representation of workers to have beneficial consequences for standards of worker protection, particularly when it is trade union based.[1]

Statutory provisions designed to support and encourage such representation were first introduced in Britain in the coal mining industry at the end of the nineteenth century. However, a general legal framework on representation was only established following the advent of the HSW Act. Subsequently, this framework has been amended in a number of important respects, most notably through its extension to non-unionised workplaces and workers. Since the election of New Labour in 1997 there has been an on-going debate concerning further reform.[2] However, to date no such reforms have reached the statute book.

Any study of whether current health and safety laws should be reformed must, given the above research findings, pay attention to the adequacy of their provisions on worker representation and possible means of improving them. The present chapter provides such an evaluation. It first briefly outlines the present legal framework for worker representation and consultation. What such a framework might be expected to achieve is discussed and the preconditions for its effectiveness are identified, including the existance of supporting regulatory provisions. The evidence on the operation of the present statutory framework is then reviewed against these criteria. Its strengths and weaknesses are thus identified and various ways in which it could be improved are considered. The chapter then goes

on to outline the recent development of the debate on reforming the law around worker representation and consultation in health and safety, before ending with a resume of the proposals for reform that we believe to be both pertinent and now long overdue.

The present legal framework

THE Robens Committee laid great emphasis on the importance of workforce involvement in health and safety matters and indeed saw such involvement as a central component in the development of greater self-regulation within industry.[3] It recommended that its use should be encouraged by placing a statutory duty on all employers 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'.

In the event, a rather different approach to the issue of workforce involvement was adopted in the HSW Act. Instead of imposing a general duty of consultation on employers, the Act, via sections 2(4), 2(5) and 2(7), provided for regulations to be made 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. In addition, where safety representatives were so appointed or elected, it further, by virtue of section 2(6), obliged an employer to consult them 'with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures'.

Subsequently, as a result of pressure from the trade union movement, section 2(5) was repealed and along with it the power to make regulations for the workforce election of safety representatives. Provisions relating to the appointment and role of safety representatives appointed by recognised trade unions were, however, introduced in the form of the Safety Representatives and Safety Committees (SRSC) Regulations 1977. These regulations, which are supported by two ACOPs, remain in force.[4] However, as shall be seen, they have been amended in several ways.

The SRSC Regulations

The SRSC Regulations enable a union to appoint safety representatives from among the employees of an employer by whom it is recognised; although the need for representatives to be appointed

from amongst employees does not apply in the case of the British Actors' Equity Association and the Musicians Union.[5] Once appointed in accordance with the Regulations representatives acquire a number of 'functions'. These encompass representing employees in consultation with employers under section 2(6) of the HSW Act; investigating potential hazards and dangerous occurrences; examining the causes of accidents; investigating complaints; making representations to the employer; carrying out workplace inspections; representing employees in consultations with inspectors; receiving information from inspectors in accordance with section 28(8) of the HSW Act; and attending safety committee meetings.

Workplace inspections may be conducted at least every three months. In addition, a further right to inspect arises if there has been a substantial change in the conditions of work or new information has been published by the HSE relevant to the hazards of the workplace. Inspections can also be conducted to determine the cause of notifiable accidents, dangerous occurrences or diseases and representatives are additionally entitled to inspect and take copies of statutory health and safety documents.

Employers are required, subject to certain qualifications, to make available to representatives information which is necessary to enable them to fulfill their functions. They are also obliged to provide representatives with paid time off to perform their functions and to undergo such training as may be reasonable in the circumstances, having regard to the provisions of a supporting ACOP on the subject. Finally, employers must establish a safety committee if requested to do so by two or more representatives.

Non-SRSC rights of representation

There have been two significant developments since the advent of the SRSC Regulations which have attempted to extend the rights of employees to consultation and representation on health and safety. However, since both were adopted under Conservative governments, whose wider political agenda on employment relations was overtly hostile to trade union representation, it is not surprising that these developments contained little to encourage trade unions.

In 1990, as a result of the Piper Alpha disaster, the Offshore Installations (Safety Representatives and Safety Committees) Regulations 1989 were introduced, after many years of disagreement between government, trade unions and the offshore oil industry about the application of British health and safety provisions offshore.[6] These regulations make provision for safety representatives to be elected from all workers in a constituency system and accord

those so elected with a variety of rights which, in broad terms, equate with those laid down under the 1977 Regulations.

A further development, the introduction of the Health and Safety (Consultation with Employees) (HSCE) Regulations 1996, occurred as a result of the need to bring domestic law into line with the requirements of the EC Framework Directive relating to workforce consultation and participation. The recognition of this need was, however, rather belated.

Initially the view was taken, by the HSC, as well as the CBI and the TUC, that the Framework Directive's requirements merely required amendments to be made to the SRSC Regulations and the provision of certain employment protection rights. Representatives and safety committee members, who had been either appointed in pursuance of statutory requirements or recognised by an employer as fulfilling such roles, were therefore, under the Employment Rights Act 1996, given a right of complaint to an employment tribunal if they were dismissed or subjected to a detriment in certain circumstances.[7] In addition, the Schedule to the MHSW Regulations made two changes to the 1977 regulatory regime. First, a duty was imposed on employers to provide 'such facilities and assistance as safety representatives may reasonably require for the purpose of carrying out their functions'. Secondly, it was made clear that the duty of consultation laid down under section 2(6) of the HSW Act extended to consulting representatives in 'good time' over the following matters: the introduction of measures which may substantially affect the health and safety of employees; the arrangements for appointing or nominating competent persons in accordance with the MHSW Regulations; any health and safety information that had by law to be provided; the planning and organisation of any, similarly required, health and safety training; and the health and safety consequences of new technologies.

Two European Court decisions concerning the UK's failure to fully implement the EC's Acquired Rights and Collective Redundancy Directives subsequently highlighted the fact that the above changes were insufficient.[8] For they left in place a situation under which employers were only required to consult in situations where unions were recognised. As a result the 1996 HSCE Regulations were introduced to deal with this problem.

The HSCE Regulations require employers to consult with employees not covered by representatives appointed in accordance with the SRSC Regulations. This duty of consultation encompasses the same matters as those specified in the latter Regulations. However, employers are given discretion as to whether they consult

employees directly or via elected representatives, known as Representatives of Employee Safety (RES).

If the representative route is chosen, employers are required to provide representatives with such information as is necessary to (a) enable them to fully and effectively participate in consultations, and (b) carry out their functions of making representations and consulting with inspectors. They are further required to provide them with such training as is reasonable in the circumstances; such other facilities and assistance as they may reasonably require to carry out their functions; and paid time off to perform these functions and undergo training. The functions of representatives, however, do not include the carrying out of workplace inspections, the inspection of statutory health and safety documents and the investigation of notifiable accidents, diseases and dangerous occurrences. Nor do they provide representatives with a right to request the establishment of a safety committee.

In addition, in contrast to the offshore regulations, the Regulations say little on how employers should make arrangements for the election of worker representatives. In particular, they are silent on such matters as the frequency with which elections should be held, the defining of electoral constituencies and the way in which elections should be conducted. These weaknesses are, in turn, compounded by the fact that the Regulations are supported by official guidance rather than an ACOP.

In short, the HSCE Regulations represent a minimalist and essentially cosmetic approach to bringing domestic law into line with the requirements of the Framework Directive. As a result, as shall be discussed in more detail below, they cannot be seen to provide a regulatory base for the establishment of effective workplace representation over health and safety matters.[9]

The meaning of representation and consultation

Before turning to the evidence of the effectiveness of the operation of the statutory framework it is important to be clear about what we understand to constitute effectiveness. Consultation is a key term that embraces most of the activities of health and safety representatives and therefore a measure of effectiveness can be gauged by comparing their activities with what might be anticipated from its legal meaning. In the current British legislative provisions, employers, as noted above, are required to consult safety representatives *in good time.*

Consultation in good time refers to situations in which workers and/or their representatives are:

- informed by their employers/managers about health and safety matters in sufficient time;
- the information provided is adequate; and
- the process allows workers and or their representatives an opportunity to digest, understand and respond to the information.

Furthermore there is an implication that employers should listen to what workers and their representatives have to say on health and safety issues and also respond.

The application of these requirements to consult also has an order of preference in law. Where there are recognised trade unions, consultation is with the representatives appointed by the unions under the SRSC Regulations 1977. Where there are no such unions recognised, employers are required to make arrangements to consult, either directly with workers or through representatives that the workers have elected for these purposes. Where union recognition exists at an establishment, therefore, consultation will be with the representatives of that union, and it is for the union, in accordance with its own procedures to determine whom such representatives may be. Where there is no recognised trade union, however, it is left to the employer to choose who is to be consulted – workers or elected representatives – and how this consultation is to take place.

Having established some working definitions for representation and consultation in health and safety we now turn to consider the effectiveness of worker representation and consultation and the role of legislative requirements in making it work.

The effectiveness of worker representation and consultation

RECENT reviews separate studies of the effectiveness of representation and consultation on health and safety into those that use objective indicators of occupational health and safety (OHS) improvements associated with representation and consultation, such as injury rates and similar indicators and those that concentrate on proxy indicators of the same improvement, such as the extent of OHS management arrangements in place or indicators of OHS awareness. In addition there are other studies that focus on links between the institutional supports for representation and consultation, such as the presence of trade unions in establishments, and these measures of health and safety performance. While the quality of the research evidence and its interpretation in all these studies varies enormously, there are some common themes that can be discerned.

Studies of joint arrangements and their relationship with objective indicators of OHS performance suggest that such arrangements lead

to better outcomes than those in which management deals with health and safety in their absence. Beyond this, however, the conclusions of the literature are mixed. Nevertheless, they broadly support the idea that the mere existence of joint arrangements is in itself not sufficient to guarantee improved health and safety outcomes, but rather such outcomes are associated with particular facets of their operation, such as the presence of trade unions, the systematicity of OHS management arrangements generally and the provision of relevant training.

Perhaps the largest concentration of quantitative studies on the effectiveness of arrangements for representation and consultation in the past decade come from Britain. They have been made possible by data collected through the series of surveys known as the Workplace Industrial/Employee Relations Surveys (WIRS/WERS), which began in 1980.

Several studies have used the results of the 1990 WIRS to examine associations between injury performance and the presence of joint arrangements.[10] Their findings have, broadly, been in keeping with those mentioned above. By far the most influential of these was undertaken by Reilly *et al*, who in 1995 attempted to assess the role played by union-appointed safety representatives and joint health and safety consultative committees in reducing the frequency of workplace accidents.[11] On the basis of their analysis, they claimed that their modeling showed that establishments with joint health and safety committees, on which employee representatives had been appointed by trades unions, could be expected to have fewer serious injuries than those where other forms of joint arrangements existed, as well as in establishments where health and safety was managed in the absence of any form of joint arrangements.

These findings were widely cited by researchers, trade unions and regulatory policy makers, in support of participative arrangements and the role of trade unions in improving health and safety performance, with for example, the HSC citing the research as showing:

> 'workplaces with trades union safety representatives and joint health and safety committees have significantly better accident records – over 50 per cent fewer injuries – than those with no consultation mechanism'.

More recent research has cast doubts on the reliability of the detailed findings of Reilly *et al.* In their broader study of the effectiveness of health and safety representatives, Walters *et al* failed to replicate the results they obtained, while also providing some support for the idea that when management alone deals with health and safety this is likely to be less safe than when, other things being

equal, joint arrangements exist.[12] Secondary analyses of the WERS 1998 data set have also done little to support the findings of Reilly *et al.* Indeed, findings with respect to the effects of trade unions and joint arrangements in one recently published study are essentially the reverse of those of Reilly *et al*, leading the authors to claim that 'the number of reported injuries and illnesses are higher as a consequence of such mechanisms'.[13]

Despite the inconclusiveness of the British research, it nevertheless, generally, supports the idea that joint arrangements for representation and consultation are more associated with better health and safety outcomes than situations in which such arrangements are absent. When this finding is considered alongside the great majority of the studies from other countries, it also lends broad support to the notion that joint arrangements, trade unions and trade union representation on health and safety at the workplace are all associated with better health and safety outcomes than when employers manage OHS without representative worker participation. This becomes especially apparent when a further range of studies is taken into account – those that consider the association of arrangements for the representation and consultation of employees with proxy indicators of health and safety performance such as arrangements for risk management, health and safety training, and employee's awareness of OHS.

One reason why researchers have used such indicators of health and safety outcomes in preference to more objective ones, such as injury data, is because they recognise that the latter have significant limitations when used to measure the influence of different kinds of arrangements to improve health, safety or well being. Thus, for example, statistics on reported injuries, are seen to provide a very narrow and incomplete picture of overall health and safety outcomes as a result of inherent problems with the reliability of their recording and their interpretation. Most significantly in this respect, it is often extremely difficult to be sure what is cause and what is effect in the association between injury data and the particular influence that is of interest. Especially problematic here is the role of trade unions. For if the presence of trade unions is a response of workers to existing poor health and safety conditions, how can this response be accounted for in studies that simply try to measure the relationship of such a presence with improved health and safety outcomes?[14]

It is for these reasons that researchers have investigated the relationship between the presence or absence of worker representatives, trade unions, joint health and safety committees or health and safety clauses in collective agreements and specific aspects of OHS man-

agement activity undertaken by employers. The measures of such activity vary between studies but include such things as, the presence of health and safety policies and their communication to workers, provision of health and safety information and training, the use of health and safety practitioners, presence of written evidence of risk assessment, health and safety audits and inspections, accident investigations and so on. Generally, they indicate that participatory workplace arrangements are associated with better OHS management practices of this sort that, in turn, could be expected to lead to improved OHS performance outcomes.

These studies include investigations on the role of joint safety committees in Britain in which improved health and safety management practices, such as those mentioned above, were found to be associated not only with the presence of joint health and safety committees but with well trained committee members and the use of established channels for relations between management and workers. Several Australian studies, using similar indicators of health and safety management activity, generally support the positive relationship between the presence of representative participation and better health and safety management arrangements. In addition, however, they conclude that the introduction of such representative arrangements also leads to major changes in attitudes towards health and safety on the part of both workers and management.

British studies indicate that (trained) representatives stimulate workplace OHS activity through engagement with management structures and procedures, tackling new OHS issues and 'getting things done' to help resolve health and safety problems. Even in small workplaces, regional representatives have been found to stimulate 'activation' of health and safety, as well as engaging with employers and workers in more prescriptive aspects of their tasks such as inspecting workplaces, as is amply shown in the Swedish experience.[15] The evaluation of the Worker Safety Advisor pilot scheme in Britain similarly provides detailed evidence on how 'the activity of Workers' Safety Advisors can make a difference to the standards of health and safety practice at small workplaces'. In particular, it found that:[16]

- Nearly 73 per cent of employers said awareness had increased on health and safety matters and a third of them stated that communications had improved;
- Over 75 per cent of employers said they had made changes to their approach to health and safety as a result of the pilot with those changes taking place including:
  - Revising or introducing new policies and procedures (61 per cent);

  - Regular health and safety discussion with staff (21 per cent);
  - Risk assessments being carried out (11 per cent);
- Nearly 70 per cent of workers observed an increase in the amount of discussion on health and safety;
- The pilot facilitated the creation of safety committees in some workplaces and joint working on risk assessments and training for workers in others.

These findings are further supported by reviews of experiences in other European countries, such as Norway, Italy and Spain, which indicate that trade unions and peripatetic workers' representatives are influential in raising awareness and contributing to the establishment of better OHS arrangements in small firms. There is also evidence that the presence of workplace trade union organisation influences the enforcement of OHS regulation[17] and the work of preventive services has also been shown to be enhanced by such local union presence.

In a recent study, Walters *et al* (2005) combined several proxy indicators of health and safety performance, including aspects of employee awareness, and OHS management with recorded injury data at establishment level to examine the relationship of such indicators with the presence and detailed activities of employee health and safety representation in a small number of establishments in the chemicals industry. They demonstrated a strong relationship between the presence of, and support for, active employee health and safety representatives, management commitment to, and arrangements for, health and safety, employee awareness and satisfaction with arrangements for both management generally and OHS specifically, and positive health and safety outcomes in terms of better than average injury performance. In other words, they showed that where the management of establishments is supportive of representation and consultation and the arrangements to achieve it under the SRSC Regulations are operational, not only is there a perception of improved health and safety performance and management arrangements generally, but measures of performance, in terms of injury rates, are also above average.

Preconditions for effectiveness and the role of legislative powers

IN their review of the international literature on worker participation and the management of occupational health and safety, Walters and Frick note that features held to promote effectiveness include:

- adequate training and information;
- opportunities to investigate and communicate with other workers;

- channels for dialogue with management on existing problems and planned changes.

They argue that the more such criteria are met, the more worker participation can be a major influence on detecting and abating work hazards. This means that such participation is unlikely to occur in an effective or sustainable way without support.[18]

Earlier British research reviewed in 1996 indicated that this support for the effectiveness of health and safety representatives and joint arrangements for improving OHS included:[19]

- legislative provisions for worker representation;
- management commitment both to better health and safety performance and participative arrangements coupled with the centrality of the provision for preventive OHS in strategies for ensuring the quality and efficiency of production;
- worker organisation at the workplace that prioritises OHS and integrates it into other aspects of representation on industrial relations;
- support for workers' representation from trade unions outside workplaces, especially in the provision of information and training;
- consultation between worker health and safety representatives and the constituencies they represent;
- well-trained and informed representatives.

More recent research in Britain has confirmed that such preconditions for effectiveness remain relevant.[20] Since our main concern in this chapter is with the extent to which the statutory framework for representation and consultation provides relevant and adequate support, we now turn to an examination of its relationship with these known preconditions for the success of employee representation and consultation in health and safety.

There are several reasons why legislative provisions are important. They set out minimum legal requirements that the parties involved are obliged to follow and provide a useful framework for trade unions and employers to build on in their agreements concerning the detail of arrangements for representative participation. They also help to raise the profile of worker representation on health and safety, strengthen workers' representatives' position and encourage them to act in situations where otherwise fear of victimisation could prevent them from doing so. Moreover, the legitimacy that a legal framework can give the existence of representatives and their support structures may be quite a powerful factor in determining their acceptance by other actors such as employers, regulatory inspectors and OHS specialists.

In this context, the current British requirements are broadly in line with those found elsewhere, as well as with the Framework Directive and ILO Convention 155. They do, however, have some notable omissions. In some countries, legislation provides representatives with significant powers, including for example, the right to stop dangerous work (as in Sweden), to issue provisional improvement notices (as in some Australian states), and to engage with employers over the appointment and use of prevention services, such as in other EU countries like Germany and France. Reviews of practices in these countries demonstrate that such additional powers are used effectively and responsibly and have added considerably to the perceived authority and legitimacy of worker health and safety representatives.[21]

Operation of the statutory framework

IN this section two aspects of the operation of the current statutory framework for worker consultation and representatives are explored. First, the extent to which they, in practice, operate within British workplaces and hence provide workers with access to representatives. Secondly, in those workplaces where they do operate, how far they do so in accordance with the laid down legal framework.

The coverage of the legislative provisions

There is no doubt that the SRSC Regulations have been helpful in establishing representative participation in health and safety. Surveys on the extent of coverage of joint health and safety arrangements suggest that in the years following their implementation in the late 1970s the access of workers to such representation increased considerably across all sectors of employment.

The history of participative approaches to health and safety also indicates that such arrangements were extremely slow to develop in the absence of legislative measures.[22] Indeed, even the threat of legislation had a significant impact on the extent to which employers set up arrangements for joint consultation on health and safety – as various British surveys had shown from the 1930s onwards. It was for this reason that the demand for them became the subject of increasingly focused campaigns by concerned trade unions and sympathetic members of the legislature – a pattern that has repeated itself across many industrialised countries and which has been further supported by international legal requirements such as those of the Framework Directive in the European Union and by the requirements of ILO Convention 155 elsewhere. It is fairly evident that the legislative measures on worker representation in health and safety

have also had a substantial influence on workplace industrial relations structures. It is currently estimated, for example, that there are some 200,000 trade union health and safety representatives in Britain and substantial numbers of joint health and safety committees now exist, with the majority of large organisations claiming to have such committees – even where they are non-unionised.

However, the uptake of the statutory provisions should not blind us to the equally pertinent observation that coverage is by no means complete and indeed has declined since achieving its peak in the late 1970s. The strongest set of provisions governing employee representation and consultation, and the framework for the 'preferred' scenario for its operation, the SRSC Regulations, apply in a diminishing proportion of workplaces and while it is not known to what extent the HSCE Regulations have been implemented, it is unlikely that their implementation has been at all extensive.

In 1979 the HSE undertook a survey which indicated that approximately 79 per cent of employees had access to safety representatives and 75 per cent of them worked in enterprises where joint health and safety committees were present. A subsequent HSE commissioned survey carried out in 1987 suggested that the coverage of representatives and committees over the intervening period had fallen to 75 per cent and 70 per cent respectively and further revealed that the coverage of safety representatives had declined in smaller workplaces and sectors such as construction and agriculture. In 1995, the TUC estimated that 60 per cent of workers had potential access to a safety representative. This was, however, an indirect estimate based on the proportion of workers in workplaces where trade unions were recognised by employers. It is therefore likely to have been overly optimistic. Moreover since it was made the extent of trade union recognition has fallen further and it is therefore probable that access to safety representatives has also declined. Certainly, support for this view was found in results from the Second European Survey on Working Conditions which found that only 25 per cent of British employees had access to a worker representative on health and safety.[23]

The decline in the coverage of union safety representatives clearly reflects the dramatic fall that has occurred over the last two decades in the extent of union recognition. However, this decline, in turn, is itself the result of a number of other factors. These encompass the growth of employment in SMEs and smaller workplaces, the creation of more devolved management structures, the greater use of 'non-standard' forms of employment, and shifts of employment away from sectors where union organisation has traditionally been

relatively strong. They also include, the rise of anti-collectivistic management strategies, often associated with the concept of human resource management, and, until recently, a hostile political environment marked, most notably, by the passing of a range of anti-union legislation.

In short, therefore, it is clear that the extent to which the statutory framework facilitates access to the 'preferred' model of representation on health and safety provided under the SRSC Regulations is limited. Moreover, its coverage especially does not extend to the vulnerable groups of employees who are arguably most in need of such representation. The weaknesses in the HSCE Regulations, furthermore, mean that they do not provide an effective substitute in these situations.

Application of the regulatory framework

While the legislative framework is clearly an important source of guidance on what employee representatives might expect to be able to undertake in carrying out their functions, as well as the access that they will have to relevant facilities and training, it is another matter as to whether the framework actually ensures that such functions and supports are in place. Indeed, research on the operation of the SRSC Regulations questions the extent to which the legislative provisions are actually achieved in practice in anything more than a minority of the situations to which they apply.

Such findings have been the outcome of several studies and confirmed most recently in a study undertaken on behalf of the HSE in two very different industries, chemicals and construction.[24] In both cases it was apparent that effective participative arrangements for health and safety do not automatically exist in establishments to which the relevant legislation applies. In the chemicals sector, although union recognition meant that the SRSC Regulations applied in all case studies, it was found that in most of them worker representation operated at a level some way below that which might be anticipated from the provisions contained in the Regulations. In the construction industry the situation was even worse because low union density meant that the SRSC Regulations applied in only a minority of establishments. There was as a consequence no need for the employers in the majority of the construction case studies to implement them. The need to address such situations was in part the reason for the introduction of the HSCE Regulations. However, little evidence of the use of these Regulations was found.

These recent findings support those from earlier surveys that show that even where safety representative arrangements operate

well, they tend to function at the standard implied in the statutory provisions and only rarely do they work at levels beyond this. Such evidence further suggests that in all too many cases their operation falls someway short of this standard. For example, a 1998 TUC survey found that only 24 per cent of safety representatives were automatically consulted by management on a frequent basis and 21 per cent were never consulted. This same study also revealed that the majority of representatives did not carry out formal inspections of the workplace as frequently as they were entitled to by Regulation 5 of the SRSC Regulations. Furthermore, other surveys suggest that a large percentage of safety representatives do not receive information on health and safety from their employer in accordance with Regulation 7, and that it has become more difficult for them to obtain paid time off to carry out their functions.[25]

More generally, the 1998 TUC survey found that less than 30 per cent of safety representatives were satisfied with the extent of their involvement in drawing up risk assessments and 40 per cent had not been involved at all in their preparation. This is despite the fact that risk assessment is central to the approach to health and safety management advocated by the Framework Directive and forms a fundamental part of a number of current regulatory packages, such as the MHSW Regulations and those dealing with asbestos, display screen equipment, noise and the control of substances hazardous to health.

A major role played by trade unions in supporting health and safety representatives in Britain is in relation to their training. The significance of both the quality and quantity of trade union training has emerged very clearly from European surveys as crucial to both the development and integration of health and safety representation at the workplace level. In these surveys, training offered by, or on behalf of, trade unions, or designed by trade union educators – using labour education techniques for its delivery – was widely regarded as successful and supportive of health and safety representative needs.[26] Similarly, in Britain, many studies have established that there is a perception shared by managers, worker representatives and regulatory inspectors alike that trained health and safety representatives make for better participative practices. In their study of the impact of TUC education and training, Walters *et al*, for example, concluded that the form of training provided by, or on behalf, of the TUC and trade unions was especially significant in supporting the activity of health and safety representatives.[27]

However, despite trade union training for safety representatives being one of the success stories in the development of worker representation on health and safety since the coming into force of the

HSW Act, the current situation with regard to the training of safety representatives is far from perfect. In particular, a significant proportion of safety representatives remain untrained. The exact balance of reasons for this is unclear, but research findings show that an inability to obtain sufficient time-off from employers, as well as perceptions on the part of representatives that they cannot afford the time away from their jobs, remain significant barriers.

Findings on the relationship between health and safety representatives and their constituents also have several implications for the support of effective practice. First, they add weight to the importance of appropriate training to enable health and safety representatives to relate effectively to constituents. Second, they imply that this effective communication between representatives and their constituents requires access and time. Walters *et al* found that, as with time to attend training, this can be problematic for health and safety representatives who are operating in the intensified work situations and shift patterns that are the common experience in the modern world of work.

All this implies a role for regulatory inspection in supporting effective employee representation and consultation. But there is no evidence that the implementation or operation of either of the two sets of on-shore regulations have been influenced in any way by the intervention of the regulatory agency. This is even the case in relatively high profile industries such as chemicals and construction, which tend to be subject to greater than average scrutiny by the HSE. Thus, in the recent study by Walters *et al* there was no indication that the close relationship with the regulatory agency had ever involved any action or advice by inspectors on the implementation or operation of arrangements for joint consultation on health and safety in either sector. It also appeared that in all of the establishments studied in both sectors inspectors had followed the traditional approach of the HSE towards the implementation and operation of the 1977 Regulations.

Paragraph 3 of the Approved Code of Practice accompanying these Regulations states:

> 'The employer, the recognised trade unions concerned and safety representatives should make full and proper use of the existing agreed industrial relations machinery to reach the degree of agreement necessary to achieve the purpose of the Regulations and to resolve any differences'.

Guidance from the HSE to its inspectors issued in 1978 with regard to the application of the Regulations stated that inspectors should not consider enforcement action until they were satisfied that all vol-

untary means of resolving disagreement have been used.[28] It also encouraged them not to become involved in disputes over the application of the Regulations but rather to leave their resolution to industrial relations processes at the workplace. Although in recent years, HSE guidance has encouraged a more proactive role for its inspectors in their dealings with health and safety representatives, in practice this rarely appears to extend to formal interventions on the application of the regulations and there are virtually no examples of enforcement actions under the regulations on record.

The implementation and operation of the SRSC Regulations is therefore more dependent on the wider relationship between trade unions and management than any external enforcement pressure. A consequence of this is the under-implementation of certain requirements. In the recent study by Walters *et al* this was seen repeatedly throughout all the establishments. Even in the case study where arrangements were the best developed, they fell short of what is provided for in the regulations in a number of important respects. These included, for example, a lack of consultation over the appointment of competent persons, training and the introduction of new technologies. In the other case studies, health and safety representatives' experiences of the operation of the legislative requirements were even more problematic. They ranged from experiencing difficulties in obtaining the information, time and facilities needed to undertake practically all aspects of their functions, to not taking part in more specific activities such as risk assessment or joint inspections.

This is an important observation for two reasons. First, because it must be borne in mind that in Britain the model provided for by the SRSC Regulations is, in legal terms, 'the preferred approach' to representative participation. Second, because underlying the legal model on which the development of these regulations was based were a set of assumptions about the capacity of their beneficiaries to ensure their application without the further intervention of either the law or the regulatory agencies.[29]

Given the above findings on the coverage of the provisions supporting union safety representatives, the advent of the 1996 HSCE Regulations was to be welcomed. However, this welcome must be a very qualified one. For, as already noted, they introduced a much weaker regulatory framework than that provided under the 1977 Regulations. In particular, they do not require employers to put in place any representative arrangements, but allow them instead to consult with employees directly, accord elected representatives fewer rights, and entrust employers with the task of identifying training needs and meeting them. These weaknesses are accentuated by two

further problems. First, the fact that elected representatives will not have access to the types of support and advice provided by trade unions and secondly, they may well operate in isolation from broader systems of workplace representation All of the research evidence on the factors that contribute to representative effectiveness referred to previously only serves to further support a pessimistic view of the impact of representatives elected under the HSCE Regulations.

Therefore, two issues are paramount concerning the support that the current regulatory framework provides for employee representation. First is the relevance of the provisions to the acknowledged changed world of work and second is the adequacy of them – and the way they are enforced – in terms of supporting effective employee representation and consultation in all of the scenarios to which they apply. In the case of the acknowledged stronger statutory provisions found in the SRSC Regulations, these concerns imply a need to address the continued relevance of the Regulations to the realities of the modern world of work in which the situations they were intended to address are found with increasingly less frequency. It further means dealing with situations where the Regulations apply, but where preconditions for their effectiveness are absent or incompletely present. In the case of the HSCE Regulations, it is evident that while in principle they extend to situations not covered by the SRSC Regulations, the loopholes that allow employers almost complete discretion about the form of consultation they choose, coupled with the limited functions they grant to elected representatives, mean that in practice, these regulations provide virtually no support for achieving a level of either representation or consultation beyond that which is entirely at the whim of the employer.

Both situations suggest the need for regulatory reform and it is to this that we now turn.

Options for reform

THE research evidence discussed above indicates that trade union safety representatives appointed under the SRSC Regulations exist only in a minority of workplaces and that this coverage has been declining. It has also shown that the presence of such representatives varies between sectors and is lower in smaller workplaces. It has further drawn attention to the fact that where they do exist, it is rare for the SRSC Regulations to be fully implemented. In addition, it has raised major doubts about the value of the HSCE Regulations as a mechanism for supporting the development of effective worker representation.

Given these conclusions, this section goes on to examine possible

ways in which the structure and operation of the present legal framework could be improved. It does so by considering five, inter-related, issues: the role of safety representatives in health and safety management; their training; the issue of time off; the encouragement of representation in small enterprises and in situations of fragmented work organisation; and the establishment of linkages with broader systems of worker representation.

Safety representatives and health and safety management

Safety representatives are intended to play an active role in the development and monitoring of health and safety arrangements at the workplace. Research on the role of health and safety representatives in OHS management shows that there is still a long way to go to achieve this, both with regard to their involvement in systematic health and safety management and in mechanisms for the accountability and control of preventive services. In fact, unlike in other EU countries, there is no evidence that the latter occurs to any significant extent even at the most minimal level of involvement that is represented by the requirements on employers to consult representatives on the matter of how 'competent persons' are to be appointed or nominated for the purposes of the MSHW Regulations.

A further example of the way in which the current legal framework does not provide adequately for safety representatives to be centrally involved in the management of health and safety relates to their role in multi-employer workplaces, including those where subcontracting arrangements operate. In some such workplaces well-organised trade union safety representatives do in practice deal with health and safety problems that arise. For example, by negotiating agreements which extend representation to members no longer under the aegis of the central employer, or by influencing the nature of the contractual obligations imposed on subcontractors, including the provision to be made for health and safety consultation.

Unfortunately, despite their obvious potential value, agreements of this type appear to be relatively uncommon. Part of the explanation for this seems likely to be that neither the SRSC Regulations, or their general supporting ACOP, lay down requirements or guidance on the role that representatives are entitled to play in workplaces where activities are undertaken by a number of different employers. For example, nothing is said about the need for a 'third party' employer to cooperate with safety representatives to enable them to carry out their functions. This is despite the fact that the duty on employers sharing a workplace under the MHSW Regulations to

cooperate with each other in order to enable them to fulfill their respective statutory duties would appear to indirectly require such cooperation. This absence of any legislative steer on what is becoming an increasingly common situation can be contrasted with the approach in other countries, such as in Australia, where recent regulatory reforms in states like Victoria have made explicit efforts to address it.

Indeed, and more generally, while employers have obligations regarding consultation with representatives and are frequently exhorted to engage in such consultation in ACOPs and official guidance, no precise guidance is given on how this should be structured and facilitated. For example, what measures should be put in place to involve representatives in the planning and operation of auditing procedures, the design and carrying out of risk assessments, the adoption of new working methods and equipment, and the content and delivery of health and safety information and training?

Safety representative powers

A comparison of the rights and functions of worker representatives in Britain with those in other advanced market economies in Europe, Australia and North America reveals that there are a number of further ways in which they could be improved. For example, in many countries the right of worker representatives to call upon the aid of independent outside experts is more explicitly stated; the relationship between regulatory agency inspectors and worker representatives is the subject of more prescriptive provision; and in some European countries they are afforded more protection against victimisation.

In addition, in some countries, such as Sweden, representatives have the right to demand that work is stopped on processes which they believe to pose serious risks to health and safety – a right which is widely regarded as one of the most effective of the provisions on worker representation laid down in Swedish law. Similarly, in some Australian States, including Victoria and Queensland, representatives have the right to issue Provisional Improvement Notices and as a result are effectively able to prevent the continuation of dangerous work. Again, positive views about the effectiveness of this system are widespread.[30]

In fact this Australian approach could be taken further and extended to the provision of rights to representatives and their unions to initiate private prosecutions for breaches of health and safety law and/or to bring complaints to an employment tribunal that their rights have been infringed. For example, the TUC has

argued that the SRSC Regulations should give trade unions the right to bring complaints to a tribunal where they believe employers have demonstrated a sustained failure to consult. It has further proposed that this right should apply in respect of trade union members who work for employers that do not recognise unions. A similar role for employment tribunals could be developed in cases where employers refuse to release safety representatives to attend training courses and consistently fail to supply information requested by them under Regulation 7 of the SRSC Regulations. In this latter case, access to information could be further enhanced through the development of a system in which safety representatives' rights to information were extended by obliging suppliers to provide it when employers are unwilling or unable to co-operate.

Such rights of legal action could, in turn, be supported by two further developments. First, the adoption by inspectors of a more rigorous approach to enforcing the statutory provisions on worker representation. Secondly, the placing by the HSE of greater emphasis on the need to make contact with representatives during workplace visits.

Safety representative training

Many of the studies on worker representation in health and safety in Britain and elsewhere confirm that trade union approved training is a key support for effective representation. Further studies show that such representation improves health and safety performance. It follows from this that resources invested in training health and safety representatives are likely to produce significant benefits in both the reduction of injuries and ill-health and the economic costs associated with them. Such investment is therefore cost-effective. However, while trade union approved training for health and safety representatives has been an enormous influence on their success, the history of its resourcing has been fraught with uncertainties concerning both the level and continuity of funding. It is clear that if representation is to fulfill its potential, such uncertainties need to be removed and training adequately and continuously funded.

Other important questions in the training area centre on the provision of training to non-union representatives. In particular, it seems clear that action is needed to both increase the access of such representatives to appropriate and adequate training, and to identify appropriate means of providing and funding this training. One approach to dealing with these issues would be to take action to link representation over health and safety to broader legally-based mechanisms of representation that apply equally to both unionised and

non-unionised settings – an approach discussed in more detail below. Another, not necessarily mutually exclusive one, would be to utilise the sectoral insurance associations proposed elsewhere in this book to both develop and provide training to representatives in much the same way that Work Environment Funds have been used to do so in Scandinavia and insurance schemes have been utilised in other countries (such as in New Zealand for example).

Aside from the question of the sustainability of the resourcing of training provision, research studies show that the main barrier to its role in supporting the effectiveness of representation and consultation on health and safety is the ability of representatives to obtain sufficient time away from their normal jobs to enable them to take advantage of training opportunities. Some strengthening of legislative provisions here and their greater coverage of non-union representatives would consequently seem necessary. But, perhaps, even more significant would be a stronger steer from the regulatory agency to encourage employers to make such time more readily available and to provide cover for individuals while they are away from their normal job undertaking training. It is clear from the research findings that a prominent reason why representatives do not avail themselves of their training entitlements is not only because employers openly resist this but because they themselves do not perceive that they are able to undertake such activity without causing a considerable burden to themselves and their colleagues by leaving their normal work.

Time-off and the role of safety representatives

If employers are to be encouraged to see the participation of workers' representatives more positively, then the language used to describe their activities needs to reflect a more positive approach. The term 'time-off' is not helpful in this respect. Safety representatives who undertake health and safety tasks are not 'having time off' but making an important contribution to improving health and safety standards. As with training, research indicates that safety representatives often experience a conflict between undertaking their normal job and finding time to carry out their functions as safety representatives, especially in situations in which work arrangements have become both more flexible and more intensified. Here again a clear steer is required from regulatory agencies to employers concerning the practical support required to enable representatives to undertake their functions effectively. An Approved Code of Practice detailing such matters would be especially useful.

Safety representatives, small enterprises and other 'hard to reach' scenarios

The special problems confronting worker representation in small enterprises need particular attention given the role that it could play in improving their poor health and safety performance and the fact that they are resistant to many of the established means of achieving effective participative health and safety management. Indeed the question of how to overcome the obstacles facing the development of worker representation in such enterprises is one of the most important issues confronting current and future health and safety regulation. At the same time, many of the challenges presented by small enterprises are also evident in other hard to reach situations created by the increased fragmentation of work and the multi-employer worksites referred to previously.

Trade union regional health and safety representatives (also known as mobile, roving or territorial representatives) provide a potentially valuable means of addressing these challenges, both in relation to small enterprises specifically and also in similar hard to reach situations. Certainly, other countries have considered that such representatives can play an important role. For example regional safety representatives have tackled health and safety in small workplaces with considerable success in Sweden and in Norway there are long-standing legislative provisions for regional representatives in construction work. Similarly, in Spain regional worker representatives and committees for health and safety are reported to be active in some industries and regions and in Italy legislative provisions and collective agreements create territorial health and safety representatives and support their work.[31]

Such approaches helped to inform the Worker Safety Adviser scheme introduced in Britain and resourced by a so-called Challenge Fund, which was set up to support initiatives undertaken by various stakeholder partnerships with the aim of improving health and safety in small enterprises and related situations. Evaluation of the projects supported under this scheme has been positive. However, collectively these initiatives amount to a very small number of individual schemes, the coverage of which is miniscule in relation to the enormous number of situations that could potentially benefit from such approaches. In the first of the three years for which the scheme is to be funded, for example, it supported the appointment of only 49 worker safety advisors for the whole country. As a model for more widespread representation of workers' interests in health and safety in small firms, therefore, it has severe limitations and provides no justification for the HSC's apparent

belief that it could have widespread application without further regulatory support. It is also significant that a substantial and increasing number of the initiatives supported under this scheme do not involve trade unions or roving health and safety representatives.

It is, therefore, far from clear whether, or to what extent, such initiatives have the capacity to increase their coverage in the future. A further significant problem for the expansion of these approaches is that their voluntary nature presupposes willing participants. By definition therefore, the scheme is unable to address the representation of workers' interests in situations in which employers are resistant to considering preventive initiatives involving their employees. Since it is in these situations that the health and safety of workers in small enterprises is most vulnerable it is important that initiatives aimed at improving health and safety arrangements address them. However, it is hard to see how a scheme that relies on the voluntary participation of all its participants can be expected to achieve this.

The primary way in which this problem has been tackled in other countries is through legislative intervention. As indicated above, in several European countries, such as Sweden, Norway and Italy, there are statutory requirements in place to enable workers in small enterprises to have access to representation on health and safety. In other countries, such as in Australia, for example, recent legislative requirements provide trade union representatives with rights of access to workers in small enterprises and related workplaces, and require employers in multi-employer worksites to ensure consultation on health and safety between all employers and workers.

While recognising that increased statutory provisions on representation are unlikely to be a complete solution to the challenge of increasing participatory health and safety arrangements in small firms, there are strong grounds for believing that such measures would greatly enhance the spread and sustainability of present British approaches. Evaluation of schemes in other countries however, indicates that such measures would also need to be supported by:

- the agreement of the social partners and the regulatory authorities;
- adequate but cost effective resourcing;
- a clear and unambiguous definition of the task of the representative;
- a clear strategy for trade union support;
- inter-union co-operation and co-ordination with regard to the coverage and activities of such representatives; and
- special training and support for them.

Linkages with broader systems of worker representation

Legislation on worker representation in most European countries gives employers specific duties to facilitate and support the election of worker health and safety representatives within a broader legislative framework in which employers have obligations to honour workers' rights to representation. In contrast, in Britain a 'two track' approach is utilised. Thus, on the one hand, recognised trade unions have the power to appoint safety representatives and, on the other, employers who do not recognise unions are required to consult employees either directly or via elected representatives. Moreover if such representatives are elected, they have inferior rights to their union counterparts and have to carry out their functions in the likely absence of any broader mechanisms of representative support.

This approach is an untidy one that does not embody any sense of a planned or holistic strategy to the provision of legislative support for the representation of workers' interests. It is also one that, as we have seen, is unlikely to extend effective representation over health and safety issues to non-unionised workers – even, if the requirements on representation in the HSCE Regulations were to be made equivalent to those laid down in the 1977 regulatory regime. As a result any discussion of the future of worker representation on health and safety cannot be separated from the question of trade union recognition and worker representation in general.

Under the Employment Relations Act 1999 new union recognition procedures were put in place and unions acquired rights to represent workers in formal disciplinary and grievance hearings in workplaces where they do not have negotiating rights. At the time it was thought that this legislation might help to stimulate trade union representation in the field of health and safety. It is not clear whether this has occurred. Even if it has however, it certainly has not lead to the kind of framework for worker representation commonly found in other European Union countries.

We argued in 1999[32] that if these reforms of employment law did not significantly improve the support for worker representation in health and safety, then more radical action would be needed. This, it was suggested, should entail the introduction of a framework for linking systems of health and safety representation with broader representative mechanisms like the works council based systems found in other European countries. We continue to advocate this approach while at the same time recognising that it has in the past been strongly resisted by some trade unions, not least because of fears that measures of this type could be used to undermine union recognition and organisation. These concerns are clearly important but

they must be weighed against the fact that there is no evidence that the wider remit of the legislative requirements in other European countries has negatively affected trade union influence. Indeed there is quite a lot of evidence from these countries to suggest that it constitutes a platform on which trade union influence can build.

A decade with New Labour

THE recommendations in the previous section do not differ substantially from those we made originally in 1999. At that time the election of a Labour government in 1997 had led to widespread optimism that regulatory reforms, including those to consolidate and strengthen the existing statutory provisions on worker representation and consultation in respect of health and safety, were likely during the new government's term of office. Since that time two New Labour governments have come and gone. Currently, New Labour enjoys an historically unprecedented third term in office. Yet the optimism of the late 1990s concerning these particular reforms has proved unjustified. Despite much discussion, the current statutory framework for worker representation on health and safety remains that inherited from the Conservative administration. This does not invalidate further calls for reform such as those made in the previous section but it does make it important to understand the reasons why such reform has not taken place.

In 1999, following the publication of the IER's contribution to the public debate on the reform of the law on health and safety at work and in the midst of pronouncements from government ministers concerning the importance of the role of health and safety representatives, the HSC produced a discussion document that identified what it perceived to be the problems with the existing system.[33] It offered a variety of possible legislative approaches to overcome these problems, including some that addressed the recommendations we had made previously. Subsequently, new government strategies were announced in which targets for improvement in health and safety performance were laid down and once again the virtues of employee representation in approaches to their achievement were extolled.[34] However, concrete development on the promised new regulatory proposals was tardy. Finally, in July 2003 a set of regulatory proposals, drafted by the HSE, were put before the HSC. Normally it would be anticipated that their discussion at this level would result in an amended set of draft regulations being the subject of a published Consultation Document. By this means public opinion would be sought and then, following further discussion and possible amendment by HSC, a final set of draft regulations would be agreed

for submission to Ministers. However, in this case, the HSC failed to agree to the HSE draft proposals and, instead, decided to drop the idea of regulatory reform.

Subsequently, the HSC adopted the view that a voluntary approach was the way forward. In November 2003, it announced that further efforts to reach agreement on revised regulations were a poor use of resources, and declared that such regulations would risk introducing a more bureaucratic system that would have little effect on what should be their main target – workers and employers in small and very small companies. In the place of the anticipated regulations, the HSE was instead charged with seeking agreement on an evidence-based statement as the basis for securing greater worker involvement as part of a proposed HSC strategy promoting a non-regulatory approach to workplace health and safety.[35] The resultant statement placed great emphasis on the government's financial support for the development of voluntary arrangements through the much-vaunted Worker Safety Advisor scheme, referred to previously.

When the Parliamentary Work and Pensions Select Committee undertook an inquiry into the work of the HSC/HSE in 2004, it heard evidence from a large number of interest groups which refuted the notion that best results on worker representation could be achieved without further statutory interventions.[36] In the light of this outcome, it therefore recommended that:

> '...by October 2005 the HSC publishes proposals to develop improved rights to consultation for employees, particularly in non-unionised workplaces, including rights of enforcement through its employment tribunal and private prosecution routes'.

The government response to these recommendations was to reiterate the HSC commitment to voluntary approaches, extol the virtues of the Worker Safety Advisor Scheme and its funding and expressly reject the need for further regulatory reform, stating:[37]

> 'The government considers that current legislation concerning worker involvement and consultation on health and safety is adequate and it does not believe that further legislation, including new rights on enforcement, to be either beneficial or likely to attract the necessary wide ranging stakeholder support to be effective'.

Despite the apparent intransigence of the government's espousal of voluntarism and its unwillingness to contemplate actions that might be seen as less than business-friendly, there are signs that mounting pressure for a legislative response to the recommendations of the Work and Pensions Committee may yet yield some results. Following complaints to the HSC and government Ministers by

angry trade union leaders, a placatory desire on the part of their recipients seems to have led to behind the scenes negotiations in which options for some limited regulatory reforms have been placed once again on the HSC agenda.[38]

In a paper to the February 2005 meeting of the HSC, a project to consider developing new legislative proposals on duties to consult safety representatives on risk assessment and to respond to representations from safety representatives, as well as to clarify the circumstances where a safety representative need not be a fellow employee of the workers represented, was presented and agreed.[39] Where this may lead in the future, remains to be seen.

The way forward

IN this chapter we have demonstrated that statutory provisions for the appointment and operation of trade union health and safety representatives have been remarkably effective in creating a system for worker representation in health and safety during a period when the wider determinants of employment relations were becoming unfavourable towards trade union activity. However, the restriction of the SRSC Regulations to recognised trade unions has increasingly constrained access to effective representation.

The workplaces in which the SRSC Regulations are known to work best – large workplaces with well-developed trade union organisation and a management sympathetic towards representative participation – have become less frequent since the measures were introduced. The result is large numbers of workers without access to representation and increasingly fewer workplaces in which the best conditions for the operation of the provisions are to be found. More recent requirements introduced to comply with European requirements come nowhere near addressing these problems in practice because they take no account of the factors that are known to support the effectiveness of worker representation in health and safety.

Following our review of this situation in 1999, we argued that to improve it, two types of change were necessary. The first involved modifications to the existing law and official guidance. The second encompassed actions to amend the wider context within which this law and guidance operates. Since that time neither have occurred. Nevertheless, we believe our recommendations remain as valid now as they were then and as we have shown in previous pages, research evidence that has accumulated since 1999 serves to support our case. We therefore make no excuse for repeating our original proposals largely unchanged.

Modifications to law and guidance

The modifications we have in mind concern amendments to the existing statutory provisions and the development of an enhanced role for ACOPs in supporting these provisions. In the case of the former they include:

- an increased recourse for representatives and trade unions to employment tribunals in situations where employers demonstrate a sustained refusal to consult, deny representatives facilities to support their functions, or consistently refuse to supply statutory health and safety information to health and safety representatives;
- measures to allow trade unions to represent members, whether or not they work for an employer who recognises them for the purposes of collective bargaining;
- action to provide for mobile health and safety representatives for small firms. Initially such measures could be introduced in sectors of employment in which there is a demonstrable case to support their likely effectiveness with a view to further extension to other sectors at later dates;
- amendments to other health and safety provisions to ensure that they impose specific obligations on employers to facilitate and undertake consultation with representatives;
- extension of the rights of worker representatives to issue 'provisional improvement notices' where they believe there to be a serious infringement of health and safety standards and to 'stop the job' where they believe there is an imminent and serious risk to health or safety;
- stronger measures to ensure consultation of health and safety representatives by employers when they are deciding on the type of preventive services required and to ensure a role for representatives in the oversight of the activities of such services;
- more onerous obligations on employers to release representatives for training and to make provision for covering their absence, and a similar strengthening of requirements on the release of representatives to carry out their health and safety functions at the workplace;
- the introduction of a right for safety representatives, as representatives of users, to require information from suppliers on the safe and healthy use of articles and substances; and
- the creation of compatibility between the rights accorded to representatives under the SRSC and HSCE Regulations and a reduction of the scope for employers to consult directly with employees under the HSCE Regulations as an alternative to making arrangements for worker representation.

With regard to ACOPs, which hitherto have been under-utilised in the regulation of worker representation in health and safety, we further propose that these be used to:

- set standards of competence for health and safety representatives;
- provide more support for trade union training through setting training quality standards that are linked to competence;
- provide systems for the accreditation and certification of representative training provision;
- deal with issues concerning the recognition and operation of representatives in multi-employer worksites, including those where subcontracting is undertaken;
- oblige inspectors of regulatory agencies to consult with representatives;
- provide more structured and detailed requirements concerning employers' obligations to facilitate the election of health and safety representatives and the creation of joint safety committees;
- improve the practical operation of measures to protect health and safety representatives from victimisation by employers; and
- make clear that the role of representatives extends to include the protection of workers from psycho-social harm.

The broader regulatory context

The above changes, however desirable, will not provide a framework of law within which all workers could reasonably expect to have access to effective representation on health and safety. We believe, therefore, that there is a need to create a general legal framework for worker representation, along the lines of the works council systems used in other European countries, in which specific obligations on health and safety can be located.

In this context, it is to be regretted that the last Labour government chose to adopt a minimalist and grudging approach to the transposition of the European Information and Consultation Directive which entailed neither expanding the issues over which employers have to consult to encompass health and safety nor obliging all employers to establish consultative bodies.[40] For the Directive's transposition effectively provided the government with a perfect, and now missed, opportunity to create the type of framework referred to earlier whereby systems of health and safety representation are linked to broader mechanisms of representation.

There seems little doubt, against this background, that attempts to overcome these weaknesses of the current Information and Consultation of Employees Regulations 2004 will be strongly resisted. Nevertheless, they need to be made since it is, we believe, only

with such a system of general representation rights that provisions for non-trade union health and safety representatives stand any chance of being effective.

However, careful thought would still need to be given to how to facilitate and develop trade union support for non-union representation since, ultimately, there is no substitute for such support. Indeed, the encouragement of this support should, in our view, form a central consideration in the design of any broader mechanism of worker representation of this type.

It also needs to be recognised that such measures would still not deal effectively with the issue of worker representation in very small undertakings. As a result they would not represent a substitute for the system of regional/mobile safety representatives that we have proposed. In addition, and more generally, such a wider framework for worker representation would not avoid the need for two other developments that we have identified as desirable. First, the adoption by HSE and local authority inspectors of a more rigorous approach to the enforcement of representational rights and within this, a greater recognition of the need for representatives to be supported to adopt a more 'holistic' role in respect of the protection of worker health and safety. Secondly, the provision, either through sectoral insurance associations or a work environment fund, of resources to support both mobile safety representatives and the more general expansion of worker representation and associated training.

Conclusion

THIS chapter has provided a critical evaluation of the present statutory requirements on worker representation in respect of health and safety laid down under the SRSC and HSCE Regulations. The evaluation has revealed a number of weaknesses in both the structure and operation of this legislative framework.

In the case of the SRSC Regulations the chapter has drawn attention to the fact that the coverage of representatives appointed under the regulations has been declining with the result that most workers, and particularly those in small workplaces, are not covered by them. It has also shown that where such representatives have been appointed, it is relatively rare for them to make full use of their legal powers and that employers frequently do not comply with either the letter or spirit of the law. This latter failing has, in turn, been noted to have been compounded by the failure of inspectors to adequately enforce the 1977 Regulations.

As regards the HSCE Regulations, a number of fundamental

weaknesses in their provisions have been highlighted. Notable among these being, the scope they give employers to avoid the establishment of representative systems and the limited powers that they make available to representatives who are elected under them. A variety of problems have also been identified with regard to employer awareness of and compliance with, the Regulations. In addition, doubts have been expressed about the likely effectiveness of non-union representation that is divorced from adequate training and other forms of support.

A range of proposals have been put forward to address the above problems. They remain essentially unchanged from those we first made in 1999, because little has happened in the intervening years to address the problems they were intended to remedy.

Our proposals fall under two broad headings. First, modifications to the current law, along with the provision of an enhanced role for ACOPs. Secondly, the establishment of a broader framework of worker representation within which representative systems for health and safety can be located.

In the former area the changes proposed include, the provision of new rights to both representatives and unions to bring complaints before an employment tribunal; the establishment of a system of mobile safety representatives aimed at enhancing representation in small workplaces; and the provision of enhanced powers to representatives, including rights concerning the overseeing of preventive services, the issuing of provisional improvement notices and the stopping of dangerous work.

In the latter area it is suggested that health and safety representation be integrated into works council style arrangements and that this move be supported by the adoption on the part of inspectors of a more rigorous approach to the enforcement of representative rights.

While it is perhaps unduly optimistic to imagine that the present government, with its apparently immovable commitment to voluntarism and business-friendly political strategies, will act on all of these suggestions, it is to be hoped that the HSC and its political masters in New Labour will pay some attention to the evidence we have offered. Indeed, it is further hoped that, now in its third term of office, New Labour will have sufficient confidence to finally enact a small piece of the 'evidence based' policy it claims to want. For, in so doing it could strengthen the law on worker representation and consultation in ways that address the known deficiencies of the existing provisions and go some way to meeting the challenges for health and safety presented by the new world of work.

Summary of key points

Worker representation

- increased rights to safety representatives and trade unions to enforce statutory provisions on worker representation;
- introduction of measures to allow trade unions to represent members, whether or not they work for an employer who recognises them for the purposes of collective bargaining;
- legislative action to establish systems of mobile safety representatives covering small firms;
- provision to safety representative of powers to issue 'provisional improvement notices' where they believe there to be a serious infringement of health and safety standards and to 'stop the job' where they believe there is a serious and imminent risk to workers;
- introduction of legal rights to safety representatives regarding the establishment, role and operation of occupational health and safety services;
- imposition of more onerous obligations on employers to provide safety representatives with time off to undergo training and carry out their statutory functions;
- introduction of a right for safety representatives to require information from suppliers of articles and substances;
- adoption by HSE and local authority inspectors of a more rigorous approach to the enforcement of representational rights and within this, the according of greater recognition to the need for safety representatives to adopt a more 'holistic' role in respect of the protection of worker health and safety; and
- establishment of a general legal framework for worker representation (along the lines of the works council systems used within other European countries) to act as a 'fall back' position in situations where trade unions are not recognised to ensure that health and safety representation is located and supported by broader mechanisms of worker representation.

Notes

1 For a recent review of this literature see D Walters, T Nichols, J Connor, A Tasiran and S Cam, *The role and effectiveness of safety representatives in influencing workplace health and safety,* Research Report 363, 2005, HSE Books, Sudbury.

2 In 1999 the contribution of the Institute of Employment Rights to this debate formed a significant part of the reforms it called for in *Regulating Health and Safety at Work: the way forward.*

3 Lord Robens, Safety and Health at Work: Report of the Committee 1970-72, Cmnd 5034, 1972, para 70.

4 See Safety Representatives and Safety Committees, 3rd edition, 1996, HSE.

5 Special arrangements apply in these cases that are designed to enable members of the unions to be represented by trade union health and safety representatives who do not work for the same employer.

6 M Spaven and C Wright, *The Effectiveness of Offshore Safety Representatives and Safety Committees: A Report to the HSE,* 1993, HSE. Also see C Woolfson, J Foster and M Beck, *Paying the Piper: Capital and Labour in Britain's Offshore Oil Industry,* 1996, Mansell.

7 See "Victimisation on health and safety grounds", *Industrial Relations Law Bulletin,* 546, June 1996, 2-7.

8 *EC Commission v United Kingdom: C-383/92* [1994], IRLR 412; and *EC Commission v United Kingdom: C-382/92* [1994], IRLR 392.

9 See P James and D Walters, "Non-union rights of involvement: the case of health and safety at work", *Industrial Law Journal,* 26, 1997, 35-50.

10 See P B Beaumont and R Harris, "Health and safety in union and non-union establishments", *Occupational Health and Safety,* 23 (7) 1993; N Millward, M Stevens, D Smart and W R Hawes, *Workplace Industrial Relations in Transition, the ED/ESRC/PSI/ACAS Surveys,* 1992, Dartmouth; T Nichols, A Dennis and W Guy, "Size of employment unit and industrial injury rates in British manufacturing industry: a secondary analysis of WIRS 1990 data", *Industrial Relations Journal,* 26, 1995, 45-56.

11 B Reilly, P Paci and P Hall, "Unions, Safety Committees and Workplace Injuries", *British Journal of Industrial Relations,* Vol. 33, 1995, 273-88.

12 See Walters *et al* (2005) *op cit.*

13 See P Fenn and S Ashby, "Workplace risk, establishment size and union density", *British Journal of Industrial Relations,* 42(3), 2004, 461-480.

14 Current econometric modeling goes some way to answer these questions by testing variables for the existence of such relationships that are said to be "endogenous". Where "endogeneity" is known to occur corrections can be made to the modeling techniques to account for it. However, the study by Reilly *et al* used no such techniques and those that do, such as Fenn and Ashby and Walters *et al* referred to previously, still do not produce entirely consistent or comparable findings.

15 See D Walters, *Health and Safety in Small Enterprises,* 2001, Peter Lang.

16 See N Shaw and R Turner, *The Worker Safety Advisors Pilot,* HSE Research Report 144, 2003, HSE Books.

17 See for example D Weil, "Enforcing OSHA: The role of the labour unions", *Industrial Relations,* 30, 1991, 20-36 and D Weil, "Building safety, the role of construction unions in the enforcement of OSHA", *Journal of Labor Research,* 13(1), 1992, 121-132.

18 The same kind of determinants of effectiveness would apply whether representation and consultation operate with or without trade union support, but it is important to note that in most such situations sustaining support in the absence of trade unions is problematic. See P James and D Walters, "Non-union rights of involvement: the case of health and safety at work", *Industrial Law Journal,* 26, 1997, 35-50.
19 See D Walters, "Trade unions and the effectiveness of worker representation in health and safety in Britain", *International Journal of Health Services,* 26, 1996, 625-641.
20 See Walters *et al* (2005) *op cit.*
21 See D Walters, A J P Dalton and D Gee, *Worker representation on health and safety in Europe,* 1999, European Trade Union Technical Bureau for Health and Safety (TUTB). Also, Johnstone *et al* (2005) *op cit.*
22 See for example, J Williams, *Accidents and Ill-Health at Work,* 1960, Staples Press; and J Grayson and C Goddard, *Industrial Safety and the Trade Union Movement,* Studies for Trade Unionists, 1 (4) 1975, WEA.
23 See Walters *et al* (2005) *op cit* for further details and sources.
24 See Walters *et al* (2005) *op cit.*
25 P Kirby, *TUC Survey of Safety Reps,* 1998, Trades Union Congress.
26 A Raulier and D R Walters, *Trade Union Training in Health and Safety: A Survey of European Practice in Training for Worker Representatives,* 1995, Trade Union Technical Bureau.
27 See D R Walters, P Kirby and F Daly (2000) "The Impact of Trade Union Education and Training in Health and Safety on the Workplace Activity of Health and Safety Representatives", *HSE Contract Research Report* 321, 2001, HSE Books.
28 See Walters and Gourlay (1990) *op cit* 124-128.
29 Wedderburn refers to them as auxiliary legislation in common with other measures on employment rights and industrial relations from the same period. Such measures developed "individual intermediate rights" contingent upon trade union membership and encouraged collective bargaining and trade union recognition as the preferred means of regulating relations between employers and employees. See K W Wedderburn, "Industrial relations and the courts", *Industrial Law Journal,* 9, 1980, 65-96.
30 See for example, P Bohle and M Quinlan, *Managing Occupational Health and Safety : a Multi-Disciplinary Approach,* 2000, Macmillan.
31 See Walters (2001) *op cit* and D Walters, *Working safely in small enterprises in Europe,* 2002, ETUC for a detailed review of such arrangements in other EU countries.
32 See James and Walters (1999) *op cit* 97-99.
33 Health and Safety Commission, *Employee Consultation Discussion Document,* 1999, HSE Books.
34 DETR/HSC, *Revitalising Health and Safety: Strategy Document,* 2000, Department of Trade and Industry.
35 HSC, *Statement of principle on worker involvement and consultation,* 2004, HSE.
36 House of Commons, Work and Pensions Committee, *The Work of the Health and Safety Commission and Executive,* Fourth Report of Session 2003-2004, Volume 1, 2004, Stationery Office.
37 House of Commons, Work and Pensions Committee, *Government Response to the Committee's Fourth Report into the Work of the Health and Safety Commission and Executive,* 2004, Stationary Office, London.

38 B Allen, "HSE reopens door on safety rep rights", *Health and Safety Bulletin,* 338, 2005, 5.

39 See www.hse.gov.uk/aboutus/hsc/meetings/2005/080205/c16.pdf. 2005

40 In transposing the Directive the government chose to follow the Directive and exclude from the coverage of the transposing regulations employers with fewer than 50 employees and also only require them to engage in negotiations over an "information and consultation procedure" if they received a request to do so from at least 10 per cent of employees. See Information and Consultation of Employees Regulations 2004 (SI 2004/3426).

Chapter 5

Amelioration of work-related harm

EACH year it has been estimated that around 25,000 people leave employment as a result of work-related injury and illness.[1] Available figures further suggest that work-related ill health results in the loss of 30 million working days each year and that during many more workers experience limitations on their daily activities which stem from work-related illnesses.[2]

These figures, when considered in conjunction with those provided in chapter 2 on the scale of deaths, injuries and ill health caused by work, point to the fact that work activities continue to impose enormous costs on both workers and their families via loss of income, pain and suffering, and disruption of social and domestic life. They further point to the fact that this harm imposes a heavy burden on the taxpayer through medical treatment provided by the National Health Service and the payment of social security benefits.

In fact, it has been estimated that around three-quarters of the costs of work-related illness are borne by individuals and the wider society, rather than by employers.[3] As a result, the taxpayer and workers and their families bear a substantial proportion of the costs that arise as a result of the failure of employers to protect adequately the health and safety of workers. This is surely not only immoral but also undesirable. For, insofar as employers do not bear the full consequences of the harm they inflict on workers, they are receiving a subsidy that reduces their economic incentive to avoid work-related injury and illness.

In the first edition of this book a range of proposals for reform were put forward to radically change this situation through the introduction of revised arrangements for compensating and rehabilitating those harmed through their work. This chapter is consequently concerned with considering how far these proposals remain valid.

Initially, it re-examines and critically discusses what employers currently do to ameliorate work-related harm through the provision of financial support and rehabilitation services aimed at assisting workers to return to work and remain in employment. It then goes on to critically discuss recent government initiatives aimed at improving current arrangements for compensating and rehabilitating ill and injured workers before going on to re-visit the reforms recommended previously.

Employer provided financial support

EMPLOYERS currently provide financial support to those suffering work-related injury and ill health through three main means: occupational sick pay; occupational pensions; and employers' liability insurance. Each of these sources of support are, however, very partial in terms of the support they provide.

Sick pay. Beyond the requirement to pay statutory sick pay (SSP) of £68.20 per week for a period of 28 weeks to employees who earn above the national insurance lower earnings limit, employers have complete discretion as to the sick pay arrangements they put in place. As a result, while some workers are covered by relatively generous arrangements, such as 104 weeks on full-pay, others receive much less and indeed may receive nothing more than SSP.[4] For example, a Law Commission study of the experiences of a sample of compensated accident victims found that a third of those who had returned to their pre-accident job had received full pay during their absence, a quarter had not received any pay at all and the remainder had either received only part-pay or a combination of full and part-pay.[5]

Moreover where an employer does have a sick pay scheme, it frequently will not extend to cover temporary workers. A graphic illustration of this has been provided by a study of contract workers on two offshore oil platforms. Thus this found that if such workers, who form a large component of the offshore workforce, were sent home because of an illness or injury, they received only a small retainer from their employer and as a result immediately lost a large proportion of their income.[6]

Pensions. It is similarly left to employers to decide not only whether to provide an occupational pension scheme, but also the nature of the scheme to be made available and the conditions that determine employee access to it. The net result of this is that only a small minority of private sector employers possess such schemes and a significant proportion of employees are not covered by them. For example, a survey undertaken for the Department for Work and

Pensions found that, in 2003, just seven per cent of employers in the private sector had an occupational pension scheme and their membership covered only 52 per cent of employees.[7] Furthermore, fewer than half of these schemes were of the final salary type and hence potentially enabled employees to retire early on ill health grounds and receive credit not only for accrued service but for the future service which would have been completed had they continued in service until normal retirement age.

Some employers do admittedly provide Permanent Health Insurance (PHI) under which employees receive regular payments which normally provide them, in conjunction with state benefits, with close to full earnings, during periods when they are unable to work, either fully or partially, up to normal retirement age. However, the available evidence indicates that only a minority of employers take out such insurance, and where they do, it normally only covers certain grades of more senior staff.[8]

Employers' liability insurance. As regards employers liability insurance, this does ensure, providing that employers comply with their statutory obligation to have such insurance, that employees are able to receive any compensation awarded as a result of personal injury litigation.[9] It also provides an important and valuable means of financial support. Indeed, as a result of cuts to the Industrial Injuries Scheme (IIS), a policy of only uprating the benefits provided under it by reference to price rather than earnings inflation, and the Department of Work and Pension's policy of clawing back benefits paid to those compensated through employers' liability insurance, payments by insurers now exceed those made under this state scheme.[10]

At the same time the current system of compulsory employers' liability insurance does have a number of weaknesses. For example, it does not extend to cover non-employees, doubts exist as to whether the minimum level of required insurance cover is sufficient, and no 'guarantee fund' exists to provide compensation in cases where employers have failed to comply with their legal obligation to insure.[11] In addition, the role of such insurance is limited by the fact that personal injury litigation provides compensation to only a small proportion of those harmed as a result of their work activities. For example, one study found that only a quarter of work accident victims consulted a solicitor and just one in five eventually obtained damages. The Pearson Committee found that just 10.5 per cent of those suffering 'reportable' injuries received tort compensation and a recent TUC analysis suggests that this proportion is even lower today.[12] Finally, employers' liability premiums are in most cases

determined solely by reference to the type of activities undertaken. Consequently they are not generally influenced by the health and safety performance of employers and hence do not provide them with a clear incentive to reduce levels of work-related injury and ill health.

More generally, the current system of personal injury litigation also has a number of limitations. First, while it can provide workers with substantial damages and access to compensation for conditions not covered by the IIS, courts are precluded from awarding punitive damages where employers have recklessly exposed workers to danger. Secondly, it is at present not possible to initiate actions in respect of breaches of the general duties of the HSW Act. Thirdly, such litigation is of little value to workers who suffer from ill health the origins of which is multifactorial and those who have conditions that are the outcome of chronic incremental damage incurred through employment with a variety of employers – a common situation, for example, among construction workers. Fourthly, it is both expensive and time-consuming.

Employer provided rehabilitation

THE term rehabilitation can be seen to encompass two main elements. The first is the provision of medical treatment aimed at maximising recovery from physical or mental illness. The second is the provision of vocational services, such as functional evaluations, training and work adaptations, intended to enable workers to retain or obtain employment. Rehabilitation can therefore require contributions from a number of different types of specialist, for example, doctors, nurses, physiotherapists, occupational therapists, psychologists and ergonomists.

At present, British law imposes only limited obligations on employers regarding the provision of rehabilitative support to workers. Those that exist are to be found within two, somewhat overlapping, legal frameworks. First, the provisions of the Disability Discrimination Act 1995 relating to the making of reasonable adjustments to accommodate the needs of those who are defined, under it, as possessing a disability. Secondly, the legal framework for unfair dismissal which requires employers to go through certain processes in order to ensure that any dismissal carried out on the grounds that an employee is incapable of fulfilling their work duties because of ill health is held to be fair. In particular, this framework requires employers to consult with employees over their situation, obtain relevant medical information and consider whether it is possible to make an alternative job available.

Existing evidence indicates that, against this legal background, few employers have formal, explicit, policies relating to the provision of rehabilitative support to workers, but, instead, largely address the issue through more general absence management and disability/ equal opportunities policies.[13] It also further indicates that the support provided is often very limited and provided on a rather *ad hoc* and unsystematic basis.

In the case of workplace adjustments, for example, while there is evidence to suggest that many employers are willing to make them in order to assist those who are sick or disabled, this willingness has been found to vary considerably between different sectors and sizes of organisations.[14] It has also been found that attempts to provide such adjustments are often only made after employees have been away from work for some considerable time, and hence in circumstances where they are less likely to successfully support a return to work. The scope for making adjustments is frequently constrained by budgetary restrictions, a lack of relevant knowledge and expertise as to those that can potentially be made, and a tension, in the case of absent employees, between a desire to help them return to work, on the one hand, and cost pressures acting, on the other, to encourage the adoption of a disciplinary approach towards them.[15] Indeed, it would seem that the approach adopted by far too many employers is to accept the absence of employees for a certain period of time and then consider whether their employment should be terminated; in effect, therefore, adopting a policy of doing little or nothing and then passing the 'problem' on to the employee and the state (through the provision of social security benefits and medical treatment).

The situation regarding the provision of medical support seems even more problematic. Such treatment can potentially be provided via a number of avenues – private medical insurance, PHI cover (since most insurers underwriting this type of policy provide access to rehabilitation) and in-house or externally contracted occupational health personnel. The existing evidence, however, suggests that none of these avenues are widely used. The 1998 Workplace Employee Relations Survey, for example, found, for a representative sample of establishments with 25 or more employees, that in 16 per cent of workplaces employees in the 'largest occupational group' were covered by private health insurance.[16] Meanwhile, an HSE survey of occupational health provision carried out in the early 1990s not only found that there was access to occupational health professionals in just eight per cent of private sector workplaces, but that in only a small minority of cases did their role extend to include the treatment of injury and illness and a subsequent HSE funded study similarly

obtained findings pointing to the fact that only a small minority of employing organisations provide employee counselling and possess rehabilitation programmes.[17]

Against this backcloth, it is consequently unsurprising that a number of studies suggest that many employers accord the rehabilitation of ill and injured workers a relatively low priority. For example, only 24 per cent of union safety representatives in a survey conducted by the Labour Research Department indicated that their employer would 'definitely' actively encourage rehabilitation and an even more recent study, concerned with examining how employers managed long-term absence, concluded that the use of 'rehabilitation services was not strongly evident'.[18] It is also, similarly, unsurprising that another, recent, HSE funded study reached the conclusion, on the basis of available evidence, that only a small proportion of employers have in place the types of management processes and practices which contribute to the development and operation of effective workplace rehabilitation programmes, namely the:[19]

- early and timely identification of vulnerable workers through information obtained via such means as recruitment and selection procedures, health checks and medicals, staff appraisals and other forms of performance discussions, absence statistics, the maintenance of regular contact with absent workers and return to work interviews and fitness for work assessments;
- provision of rehabilitation support in the form of medical treatment and the provision of various 'vocational services' such as functional evaluations, training, 'social support' and workplace adjustments;
- co-ordination of the rehabilitation process by the creation of systems that facilitate sufficient communication, discussion and 'joined-up' action between all potentially relevant actors, including human resource staff, safety practitioners, occupational physicians and nurses, psychologists, disability advisers, equal opportunities personnel, trade union and other workplace representatives and external medical personnel;
- access to worker representation as a means of ensuring that attempts at rehabilitation are made in an environment of openness and trust;
- establishment of policy frameworks that clearly detail what can and should be done to support the rehabilitation of workers and also make clear who is responsible and accountable for carrying out the various laid down requirements;
- systematic action, including the provision of required training, to ensure that any laid down policy frameworks are implemented

properly and hence do, in practice, influence how particular cases are handled;
- adoption of mechanisms that enable any weaknesses in the content and operation of established policy frameworks to be identified and addressed.

This conclusion is, to say the least, disturbing, for it suggests that many ill and injured workers remain absent from work for longer than necessary and that many others lose their jobs simply because they are not provided with access to appropriate and needed rehabilitative support. The findings of a number of international studies serve to graphically reinforce this point.

For example, one study, which utilised survey data from 1,850 workers who had been assessed for permanent disability assessment by Ontario Worker Compensation Board physicians and had returned to work, on either a temporary or permanent basis, following an absence stemming from a permanent partial impairment, found that those who had received accommodations, such as reduced working hours, and the provision of modified equipment and light work loads, were both significantly more likely to permanently return to work and were significantly less likely to experience further periods of absence stemming from their impairment.[20] In a similar vein, a comparative study which examined the experiences of workers who had been off work for more than three months with lower back pain in six countries found that there was a higher propensity for Dutch workers to return to work with their original employer and that this was, to some degree, related to the fact that they were more likely to receive working hours adaptations, changes to job design/processes and therapeutic work resumption interventions.[21] In addition, and more generally, on the basis of a review of 13 studies which had, between them, examined the impact of a diverse range of 'modified work programs' on the return to work experiences of workers who had suffered either temporary or permanent disabling injuries concluded that not only do programmes of this type cut the number of working days lost by a half, but that workers offered such programmes are twice as likely to return to work than those who are not.[22] Furthermore, some indirect evidence to support the above findings is provided by a British survey of the labour market position of workers who had a current long-term disability or health problem that limited the work that they could do or which had a substantial adverse affect on their day-to-day activities.[23] Thus, this found that over 24 per cent of those with disabilities who had lost their job as a consequence of their condition believed that they could have remained in employment if they had been provided with necessary workplace adaptations.

The case for a new approach

THE above evidence on present employer-based arrangements relating to rehabilitation and compensation reveals a complex and highly differentiated situation. Some, but an all too lucky few, workers have access to occupational sick pay, private medical treatment, PHI cover, and early retirement through 'final salary' occupational pension schemes. Others have access to some, but not all of these benefits, most notably sick pay, while yet others, including presumably many of the growing army of temporary and self-employed workers, have to rely solely on SSP, state benefits and rehabilitation through the NHS and other government agencies. Even this, however, doesn't capture fully the highly differentiated nature of the present arrangements since it takes no account of the marked differences that exist in occupational sick pay and pension schemes and the fact that only a small proportion of those injured or made ill through their work succeed in obtaining damages through personal injury litigation.

This situation is clearly inequitable, particularly when it is borne in mind that it is the workers most likely to be harmed by their work who are frequently among those in the least favourable position. It is also unacceptable. For it cannot be right that workers whose earnings are reduced, whether temporarily or permanently, through no fault of their own should suffer financial loss.

These failings in employer compensation and rehabilitation arrangements are, in turn, compounded by weaknesses in the existing state provision in respect of both compensation and rehabilitation. In the case of the former, the only state support provided specifically in respect of work-related injury and disease is the Industrial Injuries Disablement Benefit (IIDB) provided under the IIS. This benefit, which is not means-tested and is provided on a no-fault basis after 15 weeks of disablement, is relatively generous compared with other social security benefits. It is nevertheless very low. Thus, the maximum benefit payable for 100 per cent disablement is £123.80 per week for those over 18 or under 18 with dependents – a figure which goes down to £75.85 for those under 18 without dependents.

In addition, access to IIDB is restricted in three important respects. First, in terms of work-related illness, it is only available in respect of certain 'prescribed diseases'. Secondly, workers in most cases only qualify to receive the benefit if the extent of their disability is assessed at 14 per cent or more. Thirdly, it is not available to self-employed workers. These qualifying criteria, in combination with a lack of awareness among workers of their rights to claim

IIDB, mean that most work-related harm is not compensated under the IIS – a situation illustrated by the fact that only around 20,000 successful claims are made each year. In particular, only rarely will workers suffering from musculoskeletal disorders and stress-related conditions, which as was noted in chapter 2, are the most common forms of work-related illness, qualify to receive IIDB.

The impact of this is that many victims of work-related ill health are forced to rely on other, less generous, income- or disability-related state benefits. The potentially most valuable of these, Incapacity Benefit is, however, only available to those who have made the necessary national insurance contributions. In addition, continued receipt of it after 28 weeks is dependent on claimants passing an 'All-Work Test', a test, which as its name implies, requires workers to demonstrate that they are unable to undertake work of any kind.

As regards state provided rehabilitation, the National Health Service (NHS) of course provides universal access to medical treatment through both primary and secondary care. Unfortunately, workers often experience long delays in receiving the treatment they need, during which time they may be experiencing financial loss and the threat of losing their employment. This problem is, in turn, accentuated by the fact that there is a marked absence of occupational health expertise within the NHS. Thus, only limited occupational health training is provided by medical schools, many GPs have chosen not to study the subject as part of their continuing medical education, and few primary health care teams have any specialist expertise in occupational health. As a result there are very few clinical occupational health specialists employed in hospitals or within NHS regions.

It is therefore no surprise that support groups for occupational disease sufferers frequently complain about the difficulties they face in getting their diseases first recognised and then appropriately treated. For example, a study by the North Derbyshire Trade Union Safety Committee of workers exposed to the carcinogen vinyl chloride monomer (VCM) found that while many of the workers contacted had symptoms consistent with the long-term effects of VCM exposure, none had been followed up and there was no knowledge of the effects of such exposure among the doctors they encountered.

The NHS does provide a range of other services relevant to the rehabilitation of ill and injured workers, including specialist help for people with sensory impairments, assistance through community mental health teams, and the work of physiotherapists and occupational therapists. The latter forms of support are, however, often very limited. For example, total membership of the Chartered Society of

Physiotherapy currently stands at just over 30,000, a proportion of whom work in the private sector and very few of whom have specialist occupational health expertise and, more generally, the rehabilitation services so provided are focused on improving functioning and living skills and are therefore only indirectly concerned with current and future employment.

Furthermore, although the above NHS provision is also supported by a variety of schemes run by the DWP which both assist workers to remain employed and offer help to those wishing to re-enter employment, such as the network of Disability Employment Advisers which provides support to disabled people who are having difficulty getting a job because of their disability or who are concerned about losing their job as a result of it, and the Access to Work scheme that makes available various forms of financial and other support to disabled people in employment, these are not well integrated with the work of General Practitioners. The degree of co-ordination that exists between this part of the health care system and other avenues of worker support is consequently, often, poor, with one government study concluding that '*GP's seldom made referrals to agencies outside of the health care field*' and another finding them to have a very limited awareness of the DWP provided services.[24]

Recent government initiatives

THE present Labour government has acknowledged the potential role that compensation arrangements can play in providing employers and insurers with greater financial incentives to prevent the occurrence of work-related harm and ameliorate its consequences, and has also launched a number of initiatives aimed at improving worker access to rehabilitation. As will be seen, however, the action taken to date has been relatively limited in terms of scope and it seems unlikely that potential future actions will be sufficient to overcome the weaknesses in current rehabilitation and compensation arrangements identified above.

With regard to the provision to employers of greater financial incentives, the government has consulted over draft regulations, to be made under the Health and Social Care (Community Health and Standards) Act 2003, which will enable the recovery of NHS hospital and ambulance service costs from employers' liability insurers and, therefore, indirectly, from policy holders, in all cases where personal injury compensation is paid.[25] In addition, it has argued that businesses with better than average health and safety practices should be able to obtain favourable terms for employers' liability insurance.[26]

As regards the rehabilitation of those injured and made ill by their work, the DWP launched a Job Retention and Rehabilitation Pilot in 2003 under which two-year pilot projects were to be run in six areas of the country through which workers in employment who had been off work because of sickness or disability for between six and 26 weeks would receive rehabilitative support.[27] It has also published a national Framework for Vocational Rehabilitation and within this committed itself to considering how the IIS could be modified to support rehabilitation and also noted the role that the insurance industry could potentially play in improving current rehabilitative support.[28] Meanwhile, the HSE is piloting a Workplace Health Direct service aimed at providing occupational health support to both employers and workers, including in the area of return to work, and the DWP, in its recently published five year strategy, refers to the need to ensure that the SSP system provides employers with the right incentives to rehabilitate people and get them back to work and to the reform of the Incapacity Benefit system in order to facilitate returns to work through the provision of better support and rewards.[29]

This activity on the part of the government is to be welcomed, given the problems with current compensation and rehabilitation arrangements noted earlier. Nevertheless, considerable doubt must be expressed as to whether the outcomes which ultimately flow from it will be sufficient.

The plan to allow the NHS to reclaim costs in cases where personal injury compensation is paid, by definition, does not cover either the overwhelming majority of work-related injuries for which no such compensation is paid or apply to cases of ill health arising from work activities. In addition, the potential that exists for reforming the present system of employers' liability insurance to provide a greater degree of performance-rating would, for several reasons, also seem relatively limited. First, because of the problems associated with using claims experience to determine the premiums of smaller employers who, statistically, would only rarely be the subject of personal injury claims. Secondly, the likely inability of insurers, given the precarious financial position of the employers' liability market, to finance a more sophisticated system of evaluating health and safety performance through workplace inspections.[30] Thirdly, the fact that, notwithstanding recent rises in premiums, they continue to remain relatively low and hence provide limited scope to incentivise employers through performance-rating them.

The aggregate impact of reforming the IIS to support rehabilitation action will also, almost by definition, be highly constrained

given the relatively small number of claims made and the fact that the scheme does not, as pointed out earlier, compensate some of the major forms of work-related ill health; a problem that, the existing evidence suggests, is unlikely to be significantly overcome by the introduction of an option, that has been supported in some quarters, whereby it would be possible for workers with 'non-prescribed' conditions to prove that they were work-related.[31] In a similar vein, and notwithstanding the steps that some insurers have taken to do something in the rehabilitation area as a means of assisting workers to return to work more speedily and thereby reducing the size of subsequent compensation claims, it must be questioned how far the insurance industry is willing to go down this road in respect of claims where the issue of employer fault, and hence likely liability, is unclear. In addition, it should also not be forgotten that, insofar as they are willing to, the rehabilitative support provided would still only extend to the small proportion of those harmed at work that make personal injury claims.

These doubts about the likely adequacy of future government actions are, furthermore, compounded by several more general, and inter-related, problematic features of the policy initiatives described above. One of these is that, as illustrated by the DWP's Job Retention and Rehabilitation pilots and the HSE's Workplace Health Direct initiative, they embody a marked reluctance to actually *require* employers to themselves be proactive with regard to the provision of rehabilitative support and to pay all, or a substantial proportion of the costs of this support – a feature, perhaps, exemplified by the way in which the *revitalising health and safety* Action Point relating to legal reform in the area seems to have been dropped (see Appendix). Other doubts are that no consideration is being given to placing less reliance on expensive and time-consuming, fault-based, personal injury litigation and taking action to radically reduce the extent to which workers and the taxpayer, rather than employers, bear the costs of work-related injury and ill health, thereby ensuring that those harmed as a result of work activities, as well as their families, do not effectively financially subsidise employing organisations.

This unwillingness to burden employers with new legal duties and additional financial liabilities can be, sharply, contrasted with the government's willingness to reform Incapacity Benefit in a way which will mean that access to the benefits that will be available to new claimants will be dependent on their undergoing a more detailed assessment of potential future work capacity and engaging in work-focused interviews and activities to help them prepare to return to work. It therefore seems that while the imposition of com-

pulsion on those suffering from work-related conditions is politically acceptable, similar action towards employers is not. Given the point already made about workers often suffering financial loss as a result of work-related harm caused by their employer's failings, this disparity of treatment must surely be viewed as morally unacceptable.

The way forward

RECENT government initiatives to reform present arrangements relating to the compensation and rehabilitation of ill and injured workers have, then, not only led to few concrete changes (if the carrying out of exploratory pilots are discounted). Furthermore, it is far from clear whether any improved and permanent arrangements of general application will flow from the various pilot schemes currently in existence. It also seems unlikely, even if they do, that these arrangements will significantly overcome the weaknesses which the current ones embody. Weaknesses that include workers (and their families) suffering financial loss for injuries and ill health for which they bear no responsibility, employers effectively passing on a significant part of the costs of their failures to workers and taxpayers, an over-reliance on fault-based personal injury litigation, low levels of State benefits, inadequate worker access to rehabilitative support, both at the workplace and via the NHS, and the absence of any comprehensive legal framework relating to the provision of such support by employers.

In short, nothing much has changed since the first edition of this book was published to challenge the view that a more radical approach to reform is required which encompasses the following types of action:

- the imposition of legal duties on employers to fund both the provision of 'short-term' and 'long-term' benefits to the victims of work-related harm that are sufficient to cover a significant proportion of lost earnings;
- the establishment of mechanisms within this compensation system to encourage employers to prevent the occurrence of work-related harm;
- the placing of legal duties on employers regarding the provision and/or funding of rehabilitation for ill and injured workers; and
- the provision of much greater job security for ill and injured workers in order to facilitate the rehabilitation process.

Employer-funded compensation

International experience shows, as the 1999 IER book highlighted, that a variety of different mechanisms can potentially be utilised to establish a new employer-funded, no-fault, system of compensa-

tion for work-related harm: self-insurance, private insurance cover, sectoral insurance associations, and a national compensation fund. It further highlights the fact that these mechanisms do not have to be viewed as mutually exclusive and also draws attention to the fact that different arrangements can be used to provide 'short-term' (ie. sickness) and 'long-term' (ie. disability) benefits.

The evaluation of these options is a complex and far from easy task. It is, however, one that clearly needs to be carried out as a necessary first stage in the establishment of an equitable and just compensation system. We consequently continue to urge the government to initiate such an evaluation, perhaps as part of a wider review of the legal framework relating to occupational health and safety (see chapter 6).

We also continue to suggest that this evaluation extend to encompass two other important and related matters. First, the question of whether there is a case for introducing a common compensation system for work- and non-work-related illness and injury as a means of avoiding the difficulties that surround the determination of the work-relatedness of many forms of ill health, including musculoskeletal disorders and stress. Secondly, the issue of what role should be played by personal injury litigation in the future.

In the meantime we put forward, as we did in 1999, the following proposals for discussion:

- the introduction of a requirement on all employers to provide (either directly or through insurance cover) full sick pay for a period of a year to those who execute work or labour for them, unless this work is carried out as part of the activities of an economically independent business;
- the establishment of a system of employer-funded sectoral insurance associations to administer the provision of longer-term (pre-retirement) benefits which are sufficient to cover a significant proportion of the earnings lost by workers as a result of illness and injury (see below). This system might be restricted to work-related harm, defined to encompass all conditions currently covered by the IIS and the European List of occupational diseases. Alternatively, it might extend to cover all forms of illness and injury, regardless of their cause;
- the creation of a 'fall-back' state compensation system which provides equivalent benefits to those workers, who for one reason or another, are excluded from the coverage of these benefit arrangements; and
- the retention of personal injury litigation as an option for workers who either cannot obtain compensation under the above arrange-

ments or feel that it offers them a means of obtaining higher levels of compensation. This compensation should continue to be funded by a compulsory system of employers' liability insurance – albeit one that has been amended to address the weaknesses identified earlier in the current statutory framework.[32] However, courts should be empowered to award punitive damages and to consider breach of statutory duty claims under the general duties of the HSW Act.

These proposals may be seen by some as being overly generous. However, for the most part, they would simply place British workers on a similar footing to those in other leading economies. For example, in the Canadian province of Ontario, permanent disability benefits provide 75 per cent of gross earnings, except in the case of back injury, in Germany workers receive 80 per cent of regular gross earnings during periods of 'curative treatment' and two-thirds of earnings in the case of permanent incapacitation, and in Australia the Comcare workers' compensation scheme for government employees provides weekly benefits of 100 per cent of normal earnings for the first 45 weeks and then between 75 per cent and 100 per cent, depending on a worker's degree of capacity to work.[33]

Employer supported rehabilitation

Rehabilitation has, by definition, to be geared to the needs of the individual concerned. Consequently, the identification of what rehabilitation is required is arguably best done at the workplace level where detailed knowledge exists on such issues as current work tasks, possible alternative jobs and the types of work adaptations that can be made. Two ways of achieving this workplace focus can be identified. One is to place duties on employers with regard to such matters as the appointment of rehabilitation coordinators and the development of rehabilitation plans – issues which are addressed in other national systems, such as those in Australia (New South Wales), the Netherlands and Sweden. The other is to follow the approach in Germany and entrust these tasks to officials from the body (or bodies) that provide no-fault compensation to ill and injured workers.[34]

Both of these approaches have potential strengths and weaknesses. However, if, as suggested above, employers were required to provide sick pay for a year, then the former would seem to be preferable.

In many cases ill and injured workers will require medical treatment. An important role of 'rehabilitation coordinators' will therefore be to liaise with relevant medical practitioners. However, given

the inadequacies in the vocational rehabilitation services offered by the NHS and other government services identified earlier, there is a clear case for employers to also be required to themselves provide or fund such rehabilitation. Once again two broad ways of doing this can be identified which parallel those described above in respect of the determination of rehabilitation needs. These are via employer use of multi-disciplinary occupational health and safety services, supplemented where necessary by outside providers, or through rehabilitation services provided by the organisation(s) responsible for administering the compensation system. As with the initial evaluation of rehabilitation needs, however, the former approach would seem the more appropriate in a system under which employers are responsible for the payment of short-term sick pay.

Whichever of these approaches, however, is considered more appropriate there is a clear need for workers to have some say over the services they receive and some protection against attempts to pressure them back to work before they are ready. Consequently, it is important that the arrangements concerned be placed under the joint control of employer and worker representatives.

Employer provided rehabilitation could be funded directly by large employers. The costs involved, however, would be likely to be too great for many smaller employers. As a result some mechanism would need to be put in place to subsidise their costs. One way of doing this would be to establish regional occupational health and safety services, perhaps within the NHS. Another would be to utilise the no-fault compensation system to support the establishment of multi-disciplinary occupational health and safety services containing the necessary expertise. Once again, however, these services should be controlled jointly in order to ensure that they operate in an appropriate and supportive manner.

The role played by the industry-based insurance associations in Germany serves, in turn, to raise a further issue of considerable importance, namely whether there is a case for incorporating the provision of medical treatment into any future no-fault compensation system. Unfortunately, we remain unclear as to the desirability or otherwise of this, not least because the question raises a host of fundamental issues concerning the future role of the NHS, including that of GPs. It does, however, appear to merit serious discussion, particularly if a work-related compensation scheme was preferred, given the observations made earlier about the current inadequacies in NHS provision and the degree to which the service currently subsidises employers.

We are, however, clear on two further related matters. First, that

the obligations imposed with regard to the funding of rehabilitation should apply to all ill and injured workers because of the problems associated with identifying work-relatedness mentioned earlier. Secondly, that the current provision made for the treatment of occupational ill health within the NHS needs to be urgently reviewed and improved. For even if arrangements were established under which much of the responsibility for organising its treatment were moved elsewhere, there would still be a substantial role for the NHS in respect of the self-employed and other categories of workers who, for one reason or another, fell outside the scope of the new arrangements and in relation to those who feel too vulnerable to report their conditions to employer provided occupational health and safety services. It therefore seems desirable that Directors of Public Health be required in future to evaluate the scale of work-related ill health falling within their areas in order to (a) advise those who commission primary and secondary care of the specialist treatment services that need to be put in place; and (b) identify the additional specialist skills that are required to meet those needs.

Encouraging prevention

A move to a no-fault compensation system which not only provides much improved benefits but requires employers to fund them would seem likely to encourage employers to examine ways of keeping their costs down. Certainly there is some evidence from North America to suggest that the cost of workers' compensation premiums, which also cover the costs of medical treatment, have led employers to take action to prevent accidents at work.

However, the no-fault compensation systems employed in the USA, as well as the other countries mentioned earlier, Australia (New South Wales), Germany, the Netherlands and the USA, all attempt to further encourage employers to reduce worker injury and illness by experience-rating their contributions. In an HSE funded review of existing evidence concerning the impact that such rating has on employer health and safety motivation it was concluded that, on balance, they can positively influence the management of occupational health and safety and that this is particularly so where new conditions, such as lower back pain, are recognised under them and benefit levels fully compensate employees.[35] However, it was also noted that small firms were less influenced in this way, an observation in line with the point made above concerning the application of performance-rating to such firms, and that the cost of premiums/insurance need to be perceived as high in absolute terms to attract the attention of employers.

Given this, there would seem grounds for making use of experi-

ence-rating. However, given the difficulties of applying such a rating process to small employers, there would also seem a case for more directly encouraging the prevention of work-related harm by linking employer contributions to an evaluation of the standards of their preventive organisation and arrangements. One option in this area would be to impose an obligation on the proposed sectoral insurance associations to conduct periodic inspections of all workplaces and to utilise their results when setting premiums. Another would be for them to offer a service whereby employers could submit themselves to an audit and thereby potentially make themselves eligible for a premium discount.

More generally, it should be noted that sectoral insurance associations could make an important contribution to the implementation of a number of the recommendations put forward in previous chapters. First, by providing an infrastructure to support the greater use of industry-based regulations and ACOPs. Secondly, if placed under the joint control of employers and trade unions, by substantially strengthening the joint regulation of workplace health and safety at the industry level. Thirdly, by funding industry-based systems of roving safety representatives and, as already noted, regional occupational health and safety services which could be utilised by SMEs. Fourthly, by providing employers with an additional source of health and safety advice and in doing so supporting a shift towards a more rigorous approach to enforcement on the part of HSE and local authority inspectors.

Conclusion

THIS chapter initially provided a review of the current provision made by employers in respect of the compensation and rehabilitation of workers injured and made ill by their work activities. This review revealed that the provision made in both of these areas is often very limited and in doing so drew attention to the fact that it is the workers most likely to be harmed by their work who are frequently among those in the least favourable position. It further highlighted the fact that the current weaknesses in employer activities in these two areas is compounded by weaknesses in existing, and related, state arrangements.

Recent government initiatives to improve existing compensation and rehabilitation arrangements were, then outlined and critically discussed. It was concluded that, although providing a welcome recognition of the need to improve certain aspects of these arrangements, they had led to little concrete action and were, ultimately, likely to prove insufficient to address the weaknesses that exist, notably the fact that workers (and their families) frequently suffer

financial loss for injuries and ill health for which they bear no responsibility, the ability of employers to pass on a significant part of the costs of their failures to workers and taxpayers, an over-reliance on fault-based personal injury litigation, low levels of State benefits, inadequate worker access to rehabilitative support, both at the workplace and via the NHS, and the absence of any comprehensive legal framework relating to the provision of such support by employers.

In the light of this analysis, we see no reason to depart from our previous call to adopt a much more radical approach to reform that encompasses the following:

- the imposition of legal duties on employers to fund both 'short-term' and 'long-term' benefits to victims of work-related harm that are sufficient to cover a significant proportion of lost earnings;
- the establishment of mechanisms within this compensation system to encourage employers to prevent the occurrence of work-related harm;
- the placing of legal duties on employers regarding the provision and/or funding of rehabilitation for ill and injured workers; and
- the provision of much greater job security for ill and injured workers in order to facilitate the rehabilitation process.

We also see no reason to withdraw our previous suggestions that employers be required to provide full sick pay for a year; that a system of sectoral insurance associations be established to provide longer-term benefits, either in respect of work-related injuries and ill health or all forms of worker injury and illness; that the role of these associations extend to their involvement in the development of industry-based regulations and ACOPs, and the establishment of regional occupational health and safety services for use by SMEs; and that employers be required to appoint rehabilitation coordinators and to use such services to provide workers with access to appropriate vocational rehabilitation, regardless of the source of their injury and illness. Nor do we feel the need to withdraw the previous call we made for urgent action to be taken to improve the NHS's current provision for the treatment of occupational injuries and ill health, and for the government to undertake a major evaluation of the viability of the above proposals and other alternative means of achieving the objectives that underlay them.

Summary of key points

Amelioration of work-related harm

- introduction of a requirement on all employers to provide full sick pay for a period of a year to those who execute work or labour for them, unless this work is carried out as part of the activities of an economically independent business;
- establishment of a system of employer-funded sectoral insurance associations to administer the provision of longer-term, earnings-related, benefits to either those suffering from work-related harm or those suffering from any form of illness and injury;
- creation of a system under which employer contributions to these associations vary according to their claims experience and/or standards of health and safety prevention;
- use of the above associations to provide health and safety advice to employers, fund regional occupational health and safety services and industry-based systems of roving safety representatives, and support the development of industry-based regulations and ACOPs;
- retention of personal injury litigation as an option for workers who either cannot obtain compensation under the above arrangements or feel it offers them a means of obtaining higher levels of compensation;
- empowerment of the courts to hear breach of statutory duty claims in respect of the general duties of the HSW Act and to award punitive damages in cases where an employer has recklessly exposed workers to risk
- imposition on employers of duties concerning the appointment of rehabilitation coordinators and the development of rehabilitation plans in respect of all ill and injured workers whose absence exceeds, or is likely to exceed, a specified length of time;
- introduction of duties on employers to provide vocational rehabilitation through occupational health and safety services;
- action to improve the current provision made for the treatment of occupational ill health within the NHS; and
- investigation into the future role of the NHS in treating ill and injured workers.

Notes

1 *Revitalising Health and Safety,* HSC/DETR Consultation Document, July 1999.

2 See J R Jones, J T Hodgson, T A Clegg and R C Elliott, *Self-reported Work-related Illness,* 1998, HSE Books; and J R Jones, C C Huxtable and J T Hodgson, *Self-reported Work-related Illness in 2003/2004: Results from the Labour Force Survey,* 2005, HSE Books.

3 Health and Safety Executive, *The costs to Britain of Workplace Accidents and Work-related Ill Health in 1995/96,* 1999, HSE Books.

4 SSP is set at a level which means that the compensation which workers receive is below that which would be payable under the National Minimum Wage – a, surely, extraordinary situation.

5 Law Commission, *Personal Injury Compensation: How Much is Enough?,* Report No.225, 1994, HMSO.

6 D Collinson, "Shifting Lives: Work-Home Pressures in the North Sea Oil Industry", *CRSA/RCSA,* 35(3), 1998, 301-324.

7 A Cebulla and S Reyes De-Beaman, *Employers' Pension Provision Survey 2003,* 2004, Stationary Office. Also see, more generally, Pensions Commission, *Pensions: Challenges and Choices – The First Report of the Pensions Commission,* 2004, Stationery Office.

8 See A Pilkington, M K Graham, H A Cowie, R E Mulholland, S Dempsey, A S Melrose, and P A Hutchinson, *Survey of Use of Occupational Health Support,* 2002, HSE Books; and M Cully, S Woodland, A O'Reilly and G Dix, *Britain at Work, as depicted by the Workplace Employee Relations Survey,* 1999, Routledge.

9 See Employers' Liability (Compulsory Insurance) Act 1969.

10 See C Parsons, "Employers' Liability Insurance – How Secure is the System?", *Industrial Law Journal,* 28(2), 1999, 109-132.

11 For a more detailed critique of the statutory framework see Parsons, 1990, *op cit.*

12 *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury,* Cmnd 7054, 1978, HMSO; and Trades Union Congress, *The Compensation Myth,* 2005, TUC.

13 Labour Research Department, *Rehabilitation – The Workplace View.* 2002, LRD.

14 C Goldstone, *Barriers to Employment for Disabled People,* 2002, Department for Work and Pensions.

15 P James, I Cunningham and P Dibben, "Absence Management and the Issues of Job Retention and Return to Work", *Human Resource Management Journal,* 12(2), 2002, 82-94. It should also not be forgotton, in the context of these findings, that a weakness of the current statutory definition of 'disability' is that it does not cover those with impairments which have a substantial and long-term adverse effect on 'work activities', as opposed to 'normal day to day activities'.

16 M Cully, S Woodland, A O'Reilly, and G Dix, *Britain at Work, as depicted by the Workplace Employee Relations Survey,* 1999, Routledge.

17 K Bunt, *Occupational Health Provision at Work,* 1993, HSE Books; and A Pilkington, M K Graham, H A Cowie, R E Mulholland, S Dempsey, A S Melrose, and P A Hutchinson, *Survey of Use of Occupational Health Support,* 2002, HSE Books.

18 Labour Research Department, *Rehabilitation – The Workplace View.* 2002, LRD; and K Nice and P Thornton, *Job Retention and Rehabilitation Pilot: Employers' Management of Long-term Sickness Absence,* Research Report No. 277, 2004, Department for Work and Pensions.

19 P James, I Cunningham and P Dibben, *Job Retention and Vocational Rehabilitation: the development and evaluation of a conceptual framework,* Research Report 106, 2003, HSE Books.

20 R Butler, W Johnson and M Baldwin, "Managing Work Disability: Why First Return to Work is not a Measure of Success", *Industrial and Labor Review,* 48(3), 1993, 452-467.

21 B Cuelenaere, T Veerman, R Prins, and A van der Giezen, *In Distant Mirrors: Work Incapacity and Return to Work – A Study of Low Back Pain in the Netherlands and Five Other Countries,* 1999, College van toezicht sociale verzekeringen.

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24 See A Mowlam and J Lewis, *Exploring how General Practitioners Work with Patients on Sick Leave,* Research Report No.257, 2005, Department for Work and Pensions; and J Loumidis, B Stafford, R Youngs, A Green, S Arthur, R Legard, C Lessof, J Lewis, R Walker, A Corden, P Thornton, and R Sainsbury, *Evaluation of the New Deal for Disabled People Personal Adviser Service Pilot, Research Report No. 144,* 2001, Department for Work and Pensions.

25 Department of Health, *The Recovery of NHS Costs in All Cases Involving Personal Injury Compensation: A Consultation on the Draft Regulations,* 2004, Department of Health.

26 See Department for Work and Pensions, *Review of Employers' Liability Compulsory Insurance: Second Stage Report,* 2004, Department for Work and Pensions.

27 See N Stafford, C Farrell, L Natarajan and J Lewis, *Taking Part in a Randomised Control Trial: A Participant's Eye-view of the Job Retention and Rehabilitation Pilot,* Research Report No. 273, 2005, Department for Work and Pensions.

28 Department for Work and Pensions, *Building Capacity for Work: A UK Framework for Vocational Rehabilitation,* 2004, Department for Work and Pensions.

29 Department for Work and Pensions, *Department for Work and Pensions Five Year Strategy: Opportunity and Security Throughout Life,* 2005, Stationery Office.

30 See Department for Work and Pensions, *Review of Employers' Liability Compulsory Insurance: Second Stage Report,* 2004, Department for Work and Pensions.

31 See S Sugarman, "Personal Injury Law Reform: A Proposed First Step", *Industrial Law Journal,* 16(3), 1987, 30-45. Also see, more generally, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury,* Cmnd 7054, 1978, HMSO.

32 However, since the proposed compensation arrangements would be likely to reduce substantially the use of personal injury litigation, it would seem reasonable to argue that the cost of such insurance should fall.

33 See M Wright and S Marsden, *Changing Business Behaviour: Would Bearing the True Cost of Poor Health and Safety Performance make a Difference?* HSE Research Report, 2002, HSE Books.

34 The following reports provide useful, if somewhat dated, reviews of the arrangements in these countries: M Albrecht and H Braun, *International Research Project on Job Retention and Return to Work Strategies for Disabled Workers: Study Report – Germany,* 1998, International Labour Organisation; B Cuelenaere and R Prins, *International Research Project on Job Retention and Return to Work Strategies for Disabled Workers: Study Report – Netherlands,* 1998, International Labour Organisation; H Biggs, *International Research Project on Job Retention/Return to Work Strategies for Disabled Workers: Australia – Interim Report,* 1998, International Labour Organisation; A Karlsson, *International Research Project on Job Retention and Return to Work Strategies for Disabled Workers: Study Report – Sweden,* 1998, International Labour Organisation. Also, more generally, see Wright and Marsden, *Changing Business Behaviour – Would Bearing the True Cost of Poor Health and Safety Performance Make a difference?,* HSE Research Report, 2002, HSE Books.

35 M Wright and S Marsden, *op cit.*

Conclusion

The way forward revisited

DEBATE about how the current toll of work-related injury, ill health and death can be reduced effectively has continued in recent years. On one side of this debate have been those who see the way forward as laying down the establishment of a more rigorous and effective system of legal regulation. On the other, have stood advocates of a rather different approach which emphasises non-legal solutions rooted in a fear of imposing additional regulatory burdens on employers and an expressed, although not necessarily authentically held, belief that they can be persuaded to accord a higher priority to the protection of worker health and safety on market and business-related grounds.

This last view has come to incorporate a number of related notions. These include the idea that society has become too 'risk averse', that further regulation threatens human freedom and stands in the way of economic progress, and that such regulation encourages a 'compensation culture' which acts to engender the adoption of unnecessarily extreme precautions that deny people the opportunity to express their full potential – whether for pleasure or economic gain.

The, often sensationalist, arguments used to support these notions are easily refuted. Nevertheless, the powerful political and economic lobby behind them, which includes the insurance industry, employers' organisations and sections of the media, continue to use the deployment of these arguments to support a neo-liberal and deregulatory agenda in which the freedom of capital to exploit labour is reasserted. Similarly, the present government continues to use the same arguments to support its own cost-cutting and business-friendly approach to regulation. Indeed, only recently, the Prime Minister called for a 'sensible' debate on risk and went on to state that:

'Instead of the "something must be done" cry that goes up every time there is a problem or scandal, we make it clear we will reflect first and regulate only after reflection'.

What we are seeing, therefore, is a Labour government that proudly endorses a continuation of the neo-liberal view of regulation that, unsurprisingly, held sway during the period of Conservative rule between 1979 and 1997.

This volume has provided an evidence-based challenge to this viewpoint by updating and re-visiting the arguments and recommendations advanced in the book *Regulating Health and Safety at Work: the way forward,* which was published by IER in 1999 following a detailed critical evaluation of the, then, legal framework for occupational health and safety. Thus, on the negative side, the analysis provided has shown that the scale of work-related harm remains massive and that there is no sign of recent policy initiatives serving to reduce it. Meanwhile, more positively, it has highlighted that there is ample, new evidence to indicate that the imposition of demanding legal standards and their rigorous enforcement can act to prompt employers to better manage workplace health and safety.

In short, the analysis provided has both questioned the validity of neo-liberal arguments as to how standards of workplace health and safety can be improved and served to reinforce the rationale for reform articulated in the Institute's 1999 publication. It has further confirmed the continuing relevance of the specific proposals for reform that were detailed in its pages.

Rationale for reform

OVER a million workers each year experience an accident at work, more than two million people suffer from an illness which they believe has been caused or made worse by their work, and in excess of 25,000 workers permanently leave the labour force each year as a result of work-related injuries and illnesses. Moreover, while the shift of employment away from such sectors as mining and manufacturing has resulted in a reduction in fatal accidents, a number of other economic and social changes, including a growth of employment in SMEs, a reduction in trade union membership and recognition, a rise in the use of 'non-standard forms of employment', and the utilisation of more intensive work patterns, have not only created an environment very different to that which prevailed at the time of the Robens Committee, but one that is far less conducive to a legal framework that is premised on encouraging voluntary, self-regulatory, behaviour on the part of employers and workers and their representatives.

More generally, evidence continues to indicate that many employers, particularly in small and medium-sized enterprises (SMEs), have neither the capability or willingness to put in place the arrangements that are seen as central to the effective management of health and safety, and to cast doubt on the validity of the self-regulatory philosophy advocated by the Robens Committee and subsequently incorporated into the provisions of the HSW Act.

In the earlier book, this lack of effective health and safety management was linked to a range of weaknesses relating to the structure and operation of the statutory framework in place for regulating health and safety at work. Notable among these were the lack of statutory requirements on the appointment of occupational health and safety specialists, insufficient regulatory guidance on how health and safety should be managed, inadequate arrangements for compensating the victims of work-related harm and providing them with rehabilitative support, the adoption of an enforcement policy which placed too great a reliance on the provision of advice and persuasion, and grossly inadequate numbers of HSE and local authority inspectors.

Against this background, the previous book went on to argue that the regulatory regime should be reformed in order to:

- lay down clearer and more onerous statutory duties on employers, particularly with regard to the management 'organisation and arrangements' that need to be put in place;
- ensure that employers have access to necessary specialist expertise through the imposition of requirements concerning the use of multi-disciplinary occupational health and safety services;
- encourage and enable employers to adopt a broader and more holistic approach to the issue of 'health and safety at work' which accords adequate recognition to the fact that much of the work-related harm experienced by workers stems not just from accidents or 'traditional' occupational diseases, but musculoskeletal disorders and stress-related illnesses. In other words, an approach which gives adequate recognition to the fact that the protection of workers encompasses not only preventing exposure to dangerous machinery and hazardous substances, but the creation of working environments that take adequate account of their physical and mental capabilities; and
- encourage employers to accord health and safety at work a higher priority by (a) increasing the likelihood of non-compliance being identified and meaningfully penalised; (b) extending the coverage and effectiveness of systems of worker representation; and (c) creating a compensation system that provides employers with a financial incentive to reduce work-related harm.

It was recognised that the reforms needed to achieve these objectives would impose additional costs on both employers and government. However, it was argued that these costs could be defended on the grounds that the current scale of pain, suffering and financial loss inflicted on workers through work-related injuries and ill health was morally and socially unacceptable. It was further argued that, on the basis of estimates indicating that, in 1990, work-related accidents and ill health cost the British economy between one and two per cent of Gross Domestic Product, they could actually pay for themselves through securing a reduction in these costs.[1]

In the event, however, neither of these arguments prompted governmental action along the lines desired, notwithstanding the fact that the second of them can be seen to embody the type of 'health and safety pays' argument that the government is so keen to promulgate to employers. Instead, as already detailed, what the intervening years have seen is a continued reiteration of the validity of the self-regulatory philosophy advanced by the Robens Committee and the essential soundness of the framework of law established by the HSW Act, and a governmental approach to regulation which cautions against 'risk adverseness' and endorses, as the acceptance of the recommendations of the Hampton Review illustrates, an increasingly business-friendly philosophy towards the control of employer activities.

These views, however, have become even more, rather than less, questionable. As will be recalled, in its *revitalising health and safety* strategy the government committed itself to achieving a number of targets for health and safety improvements by 2010 – a 30 per cent reduction in the number of working days lost from work-related injury and ill health per 100,000 workers, a 10 per cent decline in the incidence rate of fatal and major injury accidents, and a 20 per cent fall in the incidence of work-related ill health – and went on to state that, in the case of each of these targets, half of the improvement should be achieved by 2004. It will be further recalled that the strategy detailed a range of actions that would be taken to facilitate the achievement of these targets and that while a number of these held out the prospect of legislative action, no such action has so far been taken. As a result, the strategy has effectively been implemented through the undertaking of a variety of voluntaristic measures.

Given this, it is interesting to note that, according to the HSE's own November 2004 analysis, there is little sign, that any progress has been made with regard to the achievement of the revitalising targets. Thus, this analysis concludes that there is *'no clear evidence of*

change' since 1999/2000 in either the incidence rate of fatal and major injury or in the incidence of work-related ill health and further observes that the figures for 2003/04 for working days lost per 100,000 workers *'shows no significant change since 2000/02'*.[2]

The data available on progress with regard to the achievement of the revitalising targets does not, then, provide any evidence to support the view that standards of workplace health and safety can be secured by means of an essentially voluntary approach. Rather, it would seem to reinforce the view expressed earlier, namely that a significant improvement in such standards can only be achieved through the introduction of radical reforms to the current regulatory framework for health and safety at work. Moreover, it is not just the present authors who believe this to be the case, but also the House of Commons Select Committee on Work and Pensions. For, in its recent report on the work of the HSC/E, this Committee expressed concern about *'the limited progress that appears to have been made'* with regard to the revitalising targets, and observed that this *'lack of progress must, inevitably, raise questions about the present system's capacity to secure significant future improvements in standards of workplace health and safety'*.[3]

The reform proposals: summary of key points

IN light of the above observations, it is, therefore, unsurprising that, in preparing the current edition, the authors have found it unnecessary to revise the recommendations for reform put forward in its 1999 predecessor; other than by extending them to incorporate the additional proposal that, in some areas of the economy, regulatory frameworks be established under which organisations at the head of supply chains are required to ensure that those lower down them have adequate health and safety management arrangements and to report any instances of legal non-compliance to the relevant enforcing authority. Consequently, the summary provided below of the recommendations advanced in the earlier chapters relating to employers and their legal duties, the administration of the statutory framework, worker representation, and the amelioration of work-related harm differs little to that which was provided six years ago.

Employers and their legal duties

- amendment of the general duties laid down under sections 2 and 3 of the HSW Act so that they specify in broad terms the management 'organisation and arrangements' that employers need to put in place in respect of the management of health and safety at

work, as well as the preventive principles that should inform their development;

- removal of the qualification of the above duties in terms of reasonable practicability and its replacement by one that requires employer actions to be evaluated in terms of their adequacy;
- the introduction of an Approved Code of Practice (ACOP) to provide detailed guidance on these revised duties;
- making of new regulations on the management of road transport risks, temporary working and sub-contracting, and the ergonomic design of work tasks and schedules;
- establishment, in some areas, of regulatory frameworks under which those at the top of supply chains are required to ensure that adequate standards of health and safety management exist in those organisations lower down them and to report any failings with regard to legal compliance to the relevant enforcing authority;
- creation of a statutory framework under which all employers would be required to have access, either internally or through accredited external providers, to occupational health and safety services of a specified quality;
- the placing of these services under the joint control of employer and worker representatives;
- reduction in the reliance placed on goal-orientated regulatory duties; and
- the increased use of sectoral-specific regulations and ACOPs.

Administration of the statutory framework

- investigation into the effectiveness of the tripartite structure of the Health and Safety Commission (HSC) in order to evaluate whether there is a case for expanding its membership to encompass a wider range of interest groups;
- establishment of a system of HSC regional committees along the lines of those set up by the Environment Agency;
- investigation into desirability (and scale) of local authority involvement in the enforcement of health and safety law;
- action to achieve greater consistency between local authorities in terms of enforcement action and Environmental Health Officer staffing levels;
- adoption of a more rigorous enforcement policy on the part of HSE and local authority inspectors, and within this the placing of more emphasis on the use of prosecutions combined with a greater willingness to take cases on indictment;
- supplementation of HSE and local authority inspections by the introduction of statutory requirements on the carrying out of

'third party' audits on employer health and safety arrangements and performance;
- imposition of explicit health and safety duties on company directors;
- removal of current restrictions on the use of imprisonment as a penalty for breaches of health and safety law;
- possible introduction of 'proportionate' and 'equity' fines for health and safety offences and the use of pre-sentencing reports;
- provision of court powers to make probation orders requiring organisations to take specified steps to improve their health and safety arrangements;
- a robust new law on 'corporate killing' which provides for the prosecution of directors;
- enhanced right for workers and their trade unions to initiate private prosecutions in respect of breaches of health and safety laws;
- considerable expansion of HSE resources to support a substantial increase in inspectors, the adoption of a more rigorous enforcement policy and an expansion in internal and commissioned research.

Worker representation

- increased rights to safety representatives and trade unions to enforce statutory provisions on worker representation;
- introduction of measures to allow trade unions to represent members, whether or not they work for an employer who recognises them for the purposes of collective bargaining;
- action to establish systems of mobile safety representatives covering small firms;
- provision to safety representatives of powers to issue 'provisional improvement notices' where they believe there to be a serious infringement of health and safety standards and to 'stop the job' where they believe there is a serious and imminent risk to workers;
- introduction of legal rights to safety representatives regarding the establishment, role and operation of occupational health and safety services;
- imposition of more onerous obligations on employers to provide safety representatives with 'health and safety' time to undergo training and carry out their statutory functions;
- introduction of a right for safety representatives to require information from suppliers of articles and substances;
- adoption by HSE and local authority inspectors of a more rigorous approach to the enforcement of representational rights and

within this, the according of greater recognition to the need for safety representatives to adopt a more 'holistic' role in respect of the protection of worker health and safety; and

- establishment of a general legal framework for worker representation (along the lines of the works council systems used within other European countries) to act as a 'fall back' position in situations where trade unions are not recognised to ensure that health and safety representation is located and supported by broader mechanisms of worker representation.

Amelioration of work-related harm

- introduction of a requirement on all employers to provide full sick pay for a period of a year to those who execute work or labour for them, unless this work is carried out as part of the activities of an economically independent business;
- establishment of a system of employer-funded sectoral insurance associations to administer the provision of longer-term, earnings-related, benefits to either those suffering from work-related harm or those suffering from any form of illness and injury;
- creation of a system under which employer contributions to these associations vary according to their claims experience and/or standards of health and safety prevention;
- use of the above associations to provide health and safety advice to employers, fund regional occupational health and safety services and industry-based systems of roving safety representatives, and support the development of industry-based regulations and ACOPs;
- retention of personal injury litigation as an option for workers who either cannot obtain compensation under the above arrangements or feel it offers them a means of obtaining higher levels of compensation;
- empowerment of the courts to hear breach of statutory duty claims in respect of the general duties of the HSW Act and to award punitive damages in cases where an employer has recklessly exposed workers to risk;
- imposition on employers of duties concerning the appointment of rehabilitation coordinators and the development of rehabilitation plans in respect of all ill and injured workers whose absence exceeds, or is likely to exceed, a specified length of time;
- introduction of duties on employers to provide vocational rehabilitation through occupational health and safety services;
- action to improve the current provision made for the treatment of occupational ill health within the NHS; and

- investigation into the future role of the NHS in treating ill and injured workers.

As noted before, some of the above reforms could be introduced through regulations and ACOPs made under the HSW Act. Others, notably those concerning employer health and safety 'organisation and arrangements' and penalties for breaches of statutory duties, could be implemented by amending, albeit significantly, the Act itself. A number of the remainder, however, such as those relating to the establishment and role of sectoral-insurance associations and employer obligations in respect of the rehabilitation of ill and injured workers, could less easily be accommodated through either of these avenues.

Given this, there would, as also argued previously, seem two options available as regards the implementation of the proposals put forward in these areas. The first is to introduce them by means of a separate statute. The second is to replace the HSW Act by a broader-based statute that addresses not only the prevention of work-related harm, but the provision of compensation and rehabilitation to the victims of such harm. On balance, we continue to feel that the second of these options is to be preferred for three main reasons. First, it would be tidier and hence more clearly create an awareness on the part of employers that the management of health and safety, and the costs and benefits associated with it, need to be viewed in a much wider context than is currently the case. Secondly, it would consequently be more likely to stimulate the adoption of a more integrated approach to health and safety management which embodies a much greater degree of coordination between safety specialists, occupational health practitioners and human resource staff. Finally, it would facilitiate a role for the HSE in monitoring the operation of the sectoral-insurance associations and employer compliance with their obligations relating to the rehabilitation of workers.

Notes

1 Health and Safety Executive, *The Costs to Britain of Workplace Accidents and Work-related Ill Health in 1995/96,* 1999, HSE Books.
2 Health and Safety Executive, *Achieving the Revitalising Health and Safety Targets: Statistical Progress Report,* November 2004.
3 House of Commons Work and Pensions Committee, *The Work of the Health and Safety Commission and Executive, Volume 1,* 2004, Stationary Office.

Appendix

Revitalising health and safety – action points

This Appendix lists the 44 Action Points that were detailed in the joint Department for the Environment, Transport and the Regions/Health and Safety strategy document[1]. Reference has been made at a number of points in the preceding text to the progress that has been made with regard to their implementation. However, a more detailed discussion of this progress can be found in the Institute's booklet *Health and Safety: revitalised or reversed?*[2]

Action point 1

The Health and Safety Commission will publish and promote a Ready Reckoner supported by case studies to drive home the business case for better health and safety management.

Action point 2

The Health and Safety Commission will promote publication of guidance by March 2001, to allow large businesses to report publicly to a common standard on health and safety issues. The government and the Health and Safety Commission challenge the top 350 businesses to report to these standards by the end of 2002, and will then work to extend this to all businesses with more than 250 employees by 2004.

Action point 3

The Health and Safety Commission will undertake a fundamental review of the health and safety incident reporting regulations.

Action point 4

The Health and Safety Commission will advise Ministers on what steps can be taken to enable companies, if they wish, to check their health and safety management arrangements against an established 'yardstick'. This work will include examination of the implications for small firms and the role standards can play in addressing their needs.

Action point 5

The Health and Safety Commission will consider how best to involve the insurance industry more closely in its work, including the possibility of representation on the Commission's advisory committees.

Action point 6

The government will work with the Health and Safety Executive to ensure that a large number of inspectors have powers to enforce the Employers' Liability (Compulsory Insurance) legislation.

Action point 7

The government will seek an early legislative opportunity, as Parliamentary time allows, to provide the courts with greater sentencing powers for health and safety crimes. The key measures envisaged are to extend the £20,000 maximum fine in lower courts to a much wider range of offences which currently attract a maximum penalty of £5,000; and to provide courts with the power to imprison for most health and safety offences.

Action point 8

The Health and Safety Executive will monitor and draw public attention to trends in prosecution, convictions and penalties imposed by the Courts, by publishing a special annual report. This will 'name and shame' companies and individuals convicted in the previous 12 months. This information will also be available on the Health and Safety Executive's Website.

Action point 9

The Health and Safety Commission will advise Ministers on the feasibility of the consultees' proposals for more innovative penalties.

Action point 10

The government will consider an amendment to the 1974 Act (when Parliamentary time allows) to enable private prosecutions in England and Wales to proceed without the consent of the Director of Public Prosecutions.

Action point 11

The Health and Safety Commission will develop a code of practice on Directors' responsibilities for health and safety, in consultation with stakeholders. It is intended that the code will, in particular, stipulate that organisations should appoint an individual Director for health and safety or a responsible person of similar status (for example in organisations where there is no board of Directors). The Health and Safety Commission will also advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. It is the intention of Ministers, when Parliamentary time allows, to introduce legislation on these responsibilities.

Action point 12

Ministers and the Health and Safety Commission will endorse a health and safety checklist (along the lines of the one at Annex B), subject to consultation

with the relevant trade unions and other relevant stakeholders, for circulation to all government departments and all public bodies, including local authorities and health authorities, as a catalyst for improvement. Ministers will be advised of the results of this exercise.

Action point 13

All public bodies will summarise their health and safety performance and plans in their Annual Reports, starting no later than the report for 2000/01.

Action point 14

The Department of the Environment, Transport and the Regions, in partnership with the Health and Safety Executive, will pioneer a High Level Forum to provide leadership on health and safety management issues within the Civil Service.

Action point 15

The government will seek a legislative opportunity, when Parliamentary time allows, to remove Crown Immunity from statutory health and safety enforcement. Until immunity is removed, the relevant Minister will be advised whenever Crown censures are made.

Action point 16

The Health and Safety Commission will consider further whether the 1974 Act should be amended, as Parliamentary time allows, in response to the changing world of work, in particular to ensure the same protection is provided to all workers regardless of their employment status; and will consider how the principles of good management promoted by the Construction, Design and Management Regulations approach can be encouraged in other key sectors. Ministers will be advised accordingly.

Action point 17

The government will ask the Learning and Skills Council, in consultation with the Health and Safety Commission, to undertake an early review of the funding and provision of training for safety representatives. In light of the conclusions of this work, the Scottish Executive and the National Assembly for Wales will consider whether to change the arrangements in Scotland and Wales.

Action point 18

The Health and Safety Executive will take further action to publicise the right of workers to contact them, particularly in the context of the new protection provided by the Public Interest Disclosure Act 1998.

Action point 19

The new Client's Charter to be launched later in the year as part of the Movement for Innovation in the construction industry will include targets on health and safety to drive up standards. Government departments, and their sponsored bodies will sign up to the Charter, as part of their Achieving Excellence action plans and in demonstration of their support for the Health and Safety Commission's Working Well Together campaign. The government will consider how this approach can be rolled out to other areas of procurement.

Action point 20

The Local Government Construction Task Force will consider how health and safety issues can be most effectively factored into construction procurement by local government.

Action point 21

The Health and Safety Executive will produce guidance for government departments and other public bodies on how best to achieve exemplary standards of health and safety in construction projects with which they have an involvement.

Action point 22

The Health and Safety Commission will take action, consulting the new Small Business Service in England, to improve arrangements for ensuring that the views of small firms are fully taken into account in policy formulation; and will seek to identify areas of regulation that affect small firms and can be simplified without lowering standards.

Action point 23

With the framework set by the Nolan procedures for public appointments, the government will seek to enhance representation of small firms on the Health and Safety Commission.

Action point 24

The Health and Safety Commission and the new Small Business Service will work in partnership to secure an effective profile for occupational health and safety within the Small Business Service both centrally and at local level. Similar work will also be undertaken in partnership with Scottish Enterprise, the Scottish Executive and the Business Connect network in Wales.

Action point 25

The Health and Safety Commission and Executive will promote positive models of how small firms can benefit from effective health and safety management, through a range of information products including clear, straightforward sector-specific guidance supported by case studies.

Action point 26

The Health and Safety Commission will advise Ministers on the design of a grant scheme to encourage investment by small firms in better health and safety management.

Action point 27

The Health and Safety Commission will work with local authorities to propose an indicator against which the performance of local authority enforcement and promotional activity in England, Scotland and Wales can be measured.

Action point 28

The Health and Safety Commission will work with a range of government departments and other partners to promote and implement fully the new Occupational Health strategy for Great Britain.

Action point 29

The government will encourage better access to occupational health support, and promote coverage of occupational health in local Health Improvement Programmes and Primary Care Group strategies in England, as recommended by the Health and Safety Commission's Occupational Health Advisory Committee.

Action point 30

As part of the next stage of the New Deal for Disabled People, the government is considering how best to strengthen retention and rehabilitation services for people in work who become disabled or have persistent sickness.

Action point 31

The Health and Safety Commission will consult on whether the duty on employers under health and safety law to ensure the continuing health of employees at work, including action to rehabilitate, where appropriate, can usefully be clarified or strengthened. For example, organisations might be required to set out their approach to rehabilitation within their health and safety policy.

Action point 32

The Health and Safety Commission will work in partnership with the Department for Education and Employment and the Disability Rights Commission to ensure that health and safety law is never used as a false 'excuse' for not employing disabled people, or continuing to employ those whose capacity for work is damaged by their employment, for example by highlighting this point in relevant publications and guidance.

Action point 33

The revised National Curricula in England (from September 2000) and Wales (from August 2000) will include more extensive coverage of risk concepts and health and safety skills at every level.

Action point 34

The government and the Health and Safety Commission will act to ensure that safety-critical professionals such as architects and engineers receive adequate education in risk management. This will be delivered through a programme of direct approaches to relevant further and higher education institutions and professional institutions.

Action point 35

The Health and Safety Commission will work with the Scottish Executive, the National Assembly for Wales and Regional Development Agencies in England to ensure that:

- health and safety considerations are taken into account in policy making at national and regional level, for example in economic policy and public health initiatives; and
- national and regional interests are appropriately reflected in the Health and Safety Commission's work.

Action point 36

In line with the requirement of the Modernising Government White Paper, the Health and Safety Executive will consider the feasibility of reorganising its regional structure in England so that it is co-terminus with that of the Regional Development Agencies, with the aim of facilitating more effective regional and sub-regional liaison.

Action point 37

Within the Nolan procedures for public appointments, the government will seek to ensure a balance of representation on the Health and Safety Commission from Scotland, Wales, and the English Regions.

Action point 38

The Health and Safety Commission will hold some meetings in public each year.

Action point 39

To enable greater openness, the Health and Safety Commission aims to take the opportunity presented by the powers in the Freedom of Information Bill to remove restrictions on disclosure of information imposed by Section 28 of the Health and Safety at Work etc. Act 1974.

Action point 40

The government will develop proposals for sharing with health and safety regulators information about business start-ups held by other authorities, by March 2001.

Action point 41

The government will incorporate health and safety guidance into the new Cabinet Office integrated policy appraisal system, and establish a 'virtual health and safety network' of key Whitehall contacts to enable rapid electronic dissemination of information.

Action point 42

The Health and Safety Commission and the government will act in partnership to increase the number of staff secondments between the Health and Safety Executive and central or local government, industry or trades unions.

Action point 43

In implementing this Strategy Statement, the government and the Health and Safety Executive will ensure that all sections of society – including women, ethnic minorities and disabled people – are treated fairly; and will work in partnership with the Cabinet Office to pilot a new approach to gender mainstreaming.

Action point 44

The government and the Health and Safety Commission will work together to explore options for organisational change to address these issues.

Notes

1 Department for the Environment, Transport and the Regions/Health and Safety Commission, *Revitalising Health nd Safety: strategy document,* 2000, Department for the Environment, Transport and the Regions.
2 P James and D Walters, *Health and Safety: revitalised or reversed?,* 2004, Institute of Employment Rights.

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UK media market-place *by Lionel Bently* (£8/£30)

REGULATING HEALTH AND SAFETY AT WORK: AN AGENDA FOR CHANGE?

Workers need health and safety standards that are properly regulated and effectively enforced. This book offers policy ideas on both and highlights the central role safety representatives can play in delivering a safe and healthy working environment

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THE INSTITUTE OF EMPLOYMENT RIGHTS

"The current enthusiasm for a voluntary approach to health and safety means that the alternative view put forward in this updated publication from the Institute could not have come at a better time. This book makes a coherent argument, based on the evidence, that the way forward on health and safety at work is to develop robust regulation and enhanced collective rights at work."

Alan Ritchie *General Secretary, UCATT*

"All too often the voices of workers go unheard and their safety concerns are ignored. In an industry like railways, whose safety culture has been so seriously undermined and fragmented thanks to privatisation and where responsibility for safety has effectively been handed over to private-sector employers, it is essential that trade union safety reps have a clear role to play in securing the health and safety of workers and the public. We welcome the Institute's excellent report and hope the government will adopt the many useful recommendations it contains."

Bob Crow *General Secretary, RMT*

"In 2004 the Work and Pensions Select Committee reported on the activity of the Health and Safety Commission and Executive and expressed severe concerns about how the administrative structure was performing. In particular, the Committee highlighted the low level of investigations and inspections taking place and recommended that resources for both be increased. This Institute report reaffirms those concerns and puts forward realistic proposals for reform."

Mick Clapham MP

"The government chose to ignore the many recommendations contained in the first edition of this
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Carolyn Jones *Director, IER*

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