



# Health and Safety Law Developments

AOSH/IOSH

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# Triennial Review of Health and Safety Executive

- Young, Lofstedt now Triennial
- Government policy to have an ‘independant’ review of non-departmental public bodies at least once every three years
- Martin Temple of EEF
- 110 pages

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# Triennial Review



HSWA 1974 gave HSE 5 functions:

- Standard-setting and making regulations
- Enforcement
- Research
- Guidance and advice
- Ministerial advice

Should they all continue?

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# Triennial Review



“nearly universal praise for HSE from those responding”

“.... there is real strength and advantage in having a single regulator with a common professional view of work-related health and safety”

“the functions of HSE remain necessary and interdependant”

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# Triennial Review



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Interesting issues:

the time it takes to investigate accidents,

- Vital that get quicker
- Rec 95% of non-fatals within 12 months
- Suitable target for fatals

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# Triennial Review



## Interesting issues:

- the balance between HSE's proactive and reactive role – See later
- Broad support for Loftstedt
- Relationship with other enforcement bodies, e.g. LAs, ORR, Enviro Agency

# Triennial Review and Fees for intervention



- *“I am very concerned at the strength of feeling from stakeholders that FFI has damaged the HSE’s reputation for acting impartially and independently, and therefore its integrity as a regulator”*
- *“(FFI) is having a negative effect on the relationship between the HSE inspectors and businesses.”*

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# Triennial Review and Fees for intervention



*“I recommend that, unless the link between ‘fines’ and funding can be removed or the benefits can be shown to outweigh the detrimental effects, and it is not possible to minimise those effects, FFI should be phased out”*



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# HSE Inspectors and Fees for intervention?



Prospect – website says that it represents 1600 HSE inspectors, HSE specialists and nuclear regulators

*“ we warned about fee for intervention and the government didn’t listen ”*

# Fees for intervention



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- Previous Position: HSE could recover 'just and reasonable' costs from a convicted defendant under R v Associated Octel Limited (Costs) [1996] 4 All E.R. 846
- Health and Safety (Fees) Regulation 2012 came into force October 1st 2012
  - HSE recover costs of its regulatory work
  - Material breach – committing pen to paper
- How much is the fee
  - £124 per hour
- Consequence
  - 3 in 5 businesses will be less likely to approach the HSE for advice.
  - Relationship will be less collaborative

# Fees for intervention



- HSE estimate fees range from £750 for inspection and letter, £1500 for inspection and enforcement notice – multiple thousands for investigation
- Estimated £31million in first year (HSE to keep £10 million),
- £37m 2013-2014 (HSE keeping £17m)
- £39m 2014-15 (HSE keeping £23m)
- HSB Nov 13

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# Fees for intervention



- HSE June 2013 board paper - £2,673,733 (first 6 months)

# Fees for intervention



- Monthly total increasing as progress – legacy work reducing?
- Average invoice reducing (£513 to £428 – but long investigations?)
- 145 (2.5%) queried, 67 resolved without altering invoice, 38 with change (2 reached level 1, 1 reached level 2)
- Increased number of incidents where inspectors felt threatened (7 before – 25 now).

# Refurbishment and Repair Blitzs



September 2013

- 2,607 sites visited
- basic standards were not met on 1,105 sites (42%);
- enforcement action being taken on 644 sites (24%) 539 prohibition notices and 414 improvement notices
- most common = work at height, dust exposure, welfare.

Chief Inspector of Construction, Heather Bryant “disappointing”

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# Refurbishment and Repair Blitzs



February 2013

- enforcement action being taken on 18% sites

Chief Inspector of Construction, Philip White “the majority of construction employers do take their responsibilities to their workers seriously”

# Triennial Review and Inspections



Gov's 'Good Health and Safety, Good for Everyone' (March 2011) – reduce inspections but target high risk and poor performers

## HSE figures

- 10/11 – 33,000 proactive inspections
- 11/12 – 21,603
- 12/13 – 22,240 (3,020 PNs, 5,660 Ins)



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# Triennial Review and Inspections



- LA figures fall off a cliff
- 09/10 – 118,000 proactive inspections
- 11/12 – 71,000ish
- 12/13 – 14,400

Inconsistencies – dissatisfaction

"My personal view (Martin Temple), supported by many, remains that H&S should be enforced in all workplaces by HSE" Not happening, but HSE oversight role

National H&S Enforcement Code (May 13)

# Post 2008 Offences Act report



- 86% now, 70% then cases heard in Mags
- Average fine imposed by lower courts for regs increased by 60% (£4,577 up to £7,310)
- Average fine imposed by lower courts for HSWA increased by 9% (approx £11k up to £12k)
- Average fine imposed by lower courts for HSWA and regs combined increased by 25% (£13,334 up to £16,730)
- Custodial sentences increased from 2% of relevant offences to 7% in lower and higher courts (1% to 5% in lower – 4% to 18% in higher)

# CDM Regs 2007



Specifically criticised by Professor Lofstedt

- *“...Concerns...over the effectiveness of the regulations in minimising bureaucracy, bringing about integrated teams and addressing issues of competence...”*
- CDM goes further than required by the EC Directive
- Proliferation of accreditation schemes
- ACoP over complicated.

# CDM Regs



- HSE planning to amend the CDM Regs 2007 in ~~2014~~ 2015
- 2012 HSE's, "Evaluation study, Evaluation of Construction (Design and Management) Regulations 2007"

The study demonstrated that:

- CDM 2007 gone a long way to meeting their objectives but still concerns
- Site practices improved between 2006 and 2010.
- Cost in complying with the CDM 2007, but benefits outweigh the costs.
- Industry practices have "significant influence" on CDM 2007, especially during the current economic downturn when price / competence balance influential.

# CDM Regs



Where we are at:

- No CD in sight – was supposed to January
- HSE Board – 25th September 2013
  - ❑ Structural simplification – easier to navigate, particularly for SMEs
  - ❑ Removal of ACOP – core guidance doc, supported by practical guidance doc, suite of sector specific docs (CONIAC July 13)
  - ❑ Removal of Coordinator – design phase coordination = ‘Principal Designer’ and construction phase “Principal Contractor” (APS Nov 13)

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# CDM Regs



- ❑ Domestic clients – 30 days and more than one contractor duties to fall on ‘first appointee’ designer or contractor
- ❑ Domestic client key duties default to designer or contractor
- ❑ Competence and resources checks – ‘copy out’

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# Lofstedt Review review



"All the recommendations in my report have been delivered already or are on track to be completed by the agreed date, although in some cases the government has gone further than I proposed".

- ACOP and Guidance reviews continue apace
- Work at Height reprieved

# Combat Compensation Culture



- Stark v Post Office
  - defect in bike
  - Thorough examination would not have revealed the defect.
  - Reg 5 PUWER (strict liability) – ‘shall’ be maintained, efficient working order, good repair
- Civil liability causes ‘over compliance’?
- Compensation culture



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# Enterprise and regulatory Reform Act 2013 (ERRA)



Lofstedt proposed:

- strict liability offences reviewed & qualified by either 'reasonably practicable' or to exclude civil liability for any breach

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# Enterprise and regulatory Reform Act 2013 (ERRA)



Loftstedt – too hard for government imposes: Section 69 ERRA 2013.

- No civil liability on H&S regs (exceptions pregnant, breastfeeding)
- Claims for compensation will require negligence regardless of strict liability October 2013

# ERRA



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Viscount Younger on behalf of the government in the House of Lords stating,

*“...The codified framework ..... placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence.”*

# ERRA



Conservative peer, Lord Faulks, stated:

*“A breach of regulation will be regarded as strong prima facie evidence of negligence. Judges will need some persuasion that the departure from a specific and well-targeted regulation does not give rise to a claim in negligence.”*

But no HSWA regs – no s40 reversal of the burden of proof, now it will always be the Claimant who has to prove the case

# Exemption for self employed in low risk occupation and other madness



- Draft Deregulation Bill July 2013, amends HSWA s3(2) scrutinised in January
- Exempting from health and safety law the self-employed in low risk occupations (i.e. office workers) – 800,000 people, saving business £300,000 annually (HSB Nov 13)
- Where activities do not risk safety of others
- Self employed construction workers – still be regulated
- 2.3 million self – employed workers still covered
- August 2012, the HSE launched a consultation on implementing this change – Consultation 242
- HSL Study of 60 Self-employed, 55 thought they had no obligations anyway

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## Exemption for self employed in low risk occupation and other madness



- Draft Deregulation Bill July 2013, amends HSWA s3(2) – scrutinised January
- Duty on regulators to have regard to the desirability of promoting economic growth
- Must not undermine the independence of regulators
- HSE not excluded

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# RIDDOR



Going to save business over £5.9 million over 10 years

- Classification of Major injuries – replaced with shorter list of specified injuries
- 8 classes of work related illnesses instead of sched of 47 types
- Fewer types of dangerous occurrence

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# Mid Staffs – report of public inquiry



- Robert Francis QC report – Feb 2013
- Enforcement gaps between Care Quality Commission (CQC), HSE, Healthcare Commission
- HSE is only one with powers to prosecute and has much to commend it, but "not the right organisation to be focusing on healthcare"
- CQC given powers to prosecute under HSWA or new offence created for the CQC to prosecute
- Not follow the Off-shore and Railway pattern



# Management of Health and Safety at Work Regs ACOP



- Lofstedt said 'review'
- 52% - keep
- Gone!
- New HSG 65 – completely refurbished and enhanced – 'Managing for Health and Safety'
- Plan, Do, Check, Act (not POPMAR)
- HSE advises that following HSG65 = complying with the law



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## And so farewell

- MHSW ACOP ("refreshed" HSG65)
- Factories Act (well most of it)
- Offices Shops and Railway Premises Act
- Docks regs
- Trevor Kletz

# Questions

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