

A timely critique of the British regulatory system. Regulating health and safety at work: the way forward

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This article outlines the main findings of a project that has reviewed the structure and operation of the present legal framework for occupational health and safety in the United Kingdom. It describes the background to the study and the rationale behind its recommendations, which are often in sharp contrast with the largely complacent and self-congratulatory celebration that characterises other contemporary assessments of the supposed success of the Health and Safety at Work Act.

Why a Review?

The Health and Safety at Work Act 1974 constitutes the core of the current legislative framework for occupational health and safety in the UK. Its introduction stemmed from the 1972 report of the Robens Committee, which identified fundamental defects in the legal system then in place and made a range of recommendations aimed at remedying them. In particular, the committee called for:

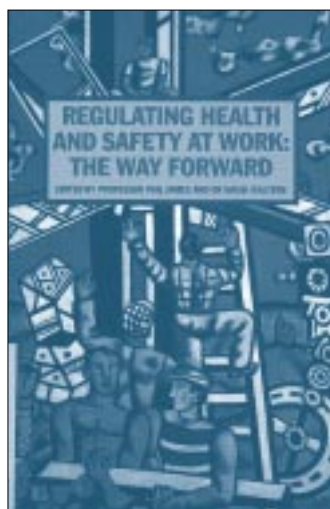
- the creation of a central national authority for health and safety at work;
- the introduction of a set of general duties on employers, and others, which would set out the standards of protection to be provided and place more emphasis on health and safety management;
- less reliance on prescriptive regulatory requirements and greater use of goal-orientated requirements and codes of practice;
- the establishment, more generally, of a legal system which placed more emphasis on self-regulation by employers and workers;
- new powers for inspectors to issue enforcement notices.

The Robens Committee's recommendations, although far from universally accepted, received substantial political support and subsequently provided the basic building blocks for what was to become the Health and Safety at Work Act. At the time of its introduction the Act was seen to represent a radical departure from the previous approach to the regulation of workplace health and safety, and to provide the basis for securing substantial improvements in standards of worker protection. Since its introduction, its measures and its philosophy have come to represent the quintessence of the British approach to regulating health and safety and have been influential in legislative reforms in other countries, particularly those whose legal systems are based on the British model, such as Australia and New Zealand.

How far the Act has in practice delivered on this promise of improved standards is an issue on which widely differing views are expressed. For example, while it is true that fatal and serious injuries have fallen considerably over the years since the Act was introduced, it is also the case that during the same period employment in high-risk industry has also drastically reduced. Indeed, the HSE attributes at least half of the reduced injury rate to changes in the pattern of employment. Whatever the cause of its improvement, it is clear, however, that the scale of work-related harm suffered by workers remains enormous, as do the costs associated with it. For example, the available evidence indicates that thousands of workers and former workers die each year as a result of work-related injuries and ill health. It also suggests that over a million employees, representing around 4% of the workforce, suffer a work-related injury each year; that more than two million people, or around 5% of the population of workers and ex-workers, suffer from an illness which they believe was caused or made worse by their work; and that in excess of 25,000 workers who have been injured or made ill by work leave the workforce each year.

Such harm imposes enormous costs on both workers and their families via loss of income, pain and suffering and disruption of social and domestic life. It also imposes a heavy burden on not only employer finances, but the taxpayer through medical treatment provided by the National Health Service and the payment of social security benefits. Indeed, the Health and Safety Executive estimated that in 1990, work-related injuries and illness cost British employers between £4.5 and £9.5 billion and that the total costs to the economy amounted to between £11 and £16 billion. That is, between 1-2% of Gross Domestic Product. More recently, the HSE has revised these estimates upwards, indicating the total costs of failure in health and safety to be in excess of £18 billion.

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These statistics alone clearly suggest that there is a strong case for re-considering the current legal framework for occupational health and safety. This case is strengthened when account is taken of the changes that have occurred in the world of work during the twenty-five years that the Health and Safety at Work Act has been in force.

The Robens report was prepared at a time when a large proportion of work activity was undertaken by male, full-time employees working for large, unionised companies in the manufacturing and extractive industries. The world of work has changed dramatically since then. Employment in the services sector and small and medium-sized enterprises, for example, has become far more important, trade union membership and recognition has fallen significantly, and there has been a marked growth in "non-standard" forms of employment, such as self-employment and part-time and temporary working. In addition, within larger organisations, management structures have tended to become much more decentralised and devolved, with the result that the degree of central co-ordination of work activities has often been reduced, and the intensity of work has increased considerably.

In addition to these changes to the structure and organisation of work and the labour market there have also been marked shifts in societal expectations and public perceptions and awareness concerning the relationship between work and worker and public well-being. Such shifts can be demonstrated in a number of ways. For example, during the last two decades there has been:

- growing intolerance of risk on the part of the public;
- a shift from concern about workers' health and safety per se to a wider concern about the impact of business activity on the public;
- greater media attention to health and safety issues, such as the control of asbestos, occupational asthma, work-related upper limb disorders and the psychosocial effects of the intensification of work;
- an increased readiness to press for retribution and compensation where harm has been caused by work activities;
- widespread public and media interest in the development of corporate manslaughter law particularly in the aftermath of work-related incidents in which members of the public have died;
- increased public expectation of access to information, and demands for transparency and accountability;
- greater demand for public involvement in decision-making processes affecting public safety.

Some of these changes result from changed perceptions of the nature and acceptability of work-related risks. Some represent changes in public values and an increased unwillingness to accept the pronouncements of Government, employers and experts at face value. They reflect growing concern with environmental risks which sociologists argue is symptomatic of a society in which the social production of wealth is systematically accompanied by the social production of risk. Others reflect societal resistance to the global economic, social, personal and cultural changes occurring as a result of the massive impact of new technology in post-industrial society. Whatever its causes, a shift of societal expectation in relation to health and safety at work represents a major challenge to the existing system for the regulation of work-related risks that requires a response from Government and health and safety regulators.

Such changes, when considered alongside the evidence relating to the current scale and nature of work-related harm, therefore raise major questions about the appropriateness of the present legal framework. For example:

- are goal-orientated general duties understandable and useful to small and medium-sized employers ?
- are traditional methods of enforcement sufficient to combat work-related illnesses, such as musculoskeletal disorders and stress-related conditions, which are intimately connected with the way in which work is designed ?
- are health and safety duties still appropriate and relevant to the risks of the modern work environment ?
- are duty holders sufficiently accountable for their transgressions ?
- are penalties sufficiently deterrent ?
- is self-regulation still a viable approach to regulation in an environment marked by diminished trade union recognition, greater use of non-standard forms of employment and a growth of employment in SMEs ?
- do employers currently have sufficient economic and legal incentives to manage health and safety effectively ?

The Organisation of the Project

It was to answer these and other questions that the Institute decided to launch its project. It commenced with the establishment of a steering committee of trade unionists, lawyers and academics. An interim report was produced in which the case for a review was developed¹. Following its publication in 1998, the steering committee established a number of working groups to address the

¹ Walters, D. and James, P., *Robens Revisited, The Case for a Review of Occupational Health and Safety Legislation*, Institute of Employment Rights, London, 1998.

following issues in detail:

- the current architecture of the law;
- the way in which the present legal framework is administered;
- the arrangements in place for trade union and worker representation;
- the adequacy of health and safety management; and
- the compensation and rehabilitation of the victims of work-related harm.

The work of these groups, which in combination involved over 30 health and safety specialists, was supplemented by a number of committees of enquiry. These provided the opportunity for individuals and organisations representing a wide range of people affected by health and safety issues at the workplace to give evidence of their experiences and concerns. They also allowed other specialists, including staff from the Health and Safety Executive, an opportunity to give their views on a number of central issues. Finally, each of the groups prepared a report, the contents of which form the basis for the book.

Fundamental Conclusions

The working groups' reports identified a host of problems in respect of their areas of interest and put forward recommendations as to how these problems could be addressed. Altogether there are over forty recommendations on reforms aimed at employers and their legal duties, administration of the statutory framework for health and safety regulation, worker representation on health and safety and the amelioration of work-related harm. In essence these recommendations, are aimed at six main objectives:

- laying down clearer and more onerous duties on employers, particularly with regard to the management 'organisation and arrangements' that need to be put in place to ensure improved health and safety performance;
- ensuring that employers have access to necessary health and safety expertise;
- encouraging employers to adopt a broader and more holistic approach to 'health and safety at work' that recognises the need to create working environments that take adequate account of the physical and psychological capabilities of workers;
- strengthening the effectiveness and coverage of systems of worker representation;
- increasing the likelihood of non-compliance with the law being identified and meaningfully penalised;
- creating a compensation system that provides employers with a financial incentive to reduce the scale of work-related harm.

Some of the specific recommendations within these broad categories include :

- On employers' "organisation and arrangements":

- removal of the qualification of employers' duties in terms of reasonable practicability and its replacement by one that requires employers' actions to be evaluated in terms of their adequacy;
- creation of a statutory framework requiring employers to have access to prevention services of specified quality under the joint control of employers and workers' representatives.

- On compliance:

- expansion in the resources of the regulatory agencies to provide for more inspection and control;
- introduction of decentralised measures to promote greater regional and sectoral activity;
- statutory measures requiring 'third party' auditing of employers' health and safety arrangements and performance;
- a wider range of penal sanctions including, proportionate and equity fines, the use of pre-sentencing reports, probation orders and the removal of current restrictions on the use of imprisonment;
- enhanced rights for workers and their organisations to initiate private prosecutions.

- On worker representation:

- increased rights for worker representatives to stop the job and to issue provisional improvement notices;
- action to establish mobile health and safety representatives covering small firms;
- removal of the scope for employers to claim they consult directly with employees as an alternative to making arrangements for worker representation;
- establishment of a general legal framework for worker representation to cover situations where trade unions are not recognised and to ensure that health and safety representation is located and supported by broader mechanisms of worker representation;
- adoption by the regulatory agencies of a more rigorous approach to enforcing the operation of measures on worker representation in health and safety.

- On compensation and prevention systems:

- establishment of a system of employer-funded sectoral insurance associations to administer earnings-related benefits to those suffering from work-related harm;
- creation of a system under which employers' contributions to these associations vary according to their claims experience and/or standards of health and safety prevention;
- use of the sectoral associations to provide

health and safety advice to employers, fund regional occupational health and safety services, and industry-based systems for roving safety representatives;

- imposition of duties on employers to appoint rehabilitation co-ordinators and rehabilitation plans for workers harmed by work;
- introduction of duties on employers to provide vocational rehabilitation through occupational health and safety services.

Linking the book's key objectives is a recognition of the underlying need to establish a much closer synergy between the systems in place to prevent work-related harm, to provide compensation to those who suffer such harm, and to rehabilitate ill and injured workers. In this respect it relates to an approach increasingly advocated in current British Government thinking in which, in common with social democrat governments in many other EU countries, a renewal of social democracy is sought at the same time as the creation of a revitalised, and globally competitive economy. One of the central arguments in the book is that workers' health and safety are most constructively viewed as one aspect of this much wider scenario - which includes the response to the globalisation of the economy, societal perceptions of risk and environment, the transformation of the welfare state and the role of the state in the protection of workers and regulation of business. It suggests that as a result, perhaps uniquely in its history, the governance of health and safety currently has the potential to emerge from its traditional peripheral role to join issues which occupy the centre stage of social and economic policy development. In its recommendations, the IER urges the Government and its regulatory authorities as well as the representatives of employers, workers and others affected by health and safety, to take up this challenge.

The lexicon on which the Government has drawn to construct its current policies in these areas is replete with references to forging "new partnerships", engaging and involving "stakeholders", and undertaking more "joined up" working across government Departments. The same is true of its policy on health and safety, in which much is made of partnership and linkages across traditional barriers.

However, the book's message indicates that to keep pace with wider political and economic changes, any project for health and safety reform will require more than mere dipping into a politician's thesaurus. Meaningful results will not be achieved by merely tinkering with existing statutory frameworks and relying on a continuation of the British voluntary tradition

and the discretion of employers. To create an environment in which social investment, socially responsible business and new partnerships can contribute effectively to improved health and safety outcomes, it is important that the relevance and usefulness of the existing regulatory framework is carefully scrutinised and its appropriateness redefined. Thus it is argued that while greater synergy could be created theoretically through the establishment of closer administrative linkages between the different elements of the systems for preventing, compensating and ameliorating work-related harm, it would be most effectively achieved by repealing the Health and Safety at Work Act and replacing it with a statute that simultaneously:

- lays down the core responsibilities of employers with regard to the management of health and safety and the protection of workers;
- provides meaningful enforcement and penalties;
- contains comprehensive rights for workers and their representatives to participate in matters which affect their well-being at work;
- creates a system of employer-funded sectoral insurance associations to provide compensation to ill and injured workers; and
- imposes obligations on employers regarding the rehabilitation of such workers.

The book concludes by arguing that such a broader-based statute would address not only the prevention of work-related harm, but also the provision of compensation and rehabilitation to the victims of such harm. This would 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 needs to be viewed in a much wider context than is currently the case. It would be more likely to stimulate an integrated approach to health and safety management embodying greater co-ordination between health and safety specialists, occupational health practitioners and human resources staff. It would also facilitate a role for the HSE in monitoring the operation of the recommended sectoral-based insurance associations and employer compliance with their obligations relating to rehabilitation alongside those relating to prevention. ■