Royal Society for the Prevention of Accidents
Submission to the Löfstedt Review of Health and Safety Legislation
(http://www.dwp.gov.uk/docs/lofstedt-call-for-evidence.pdf)

Contents

1. Introduction

1.1. This paper sets out information, ideas and suggestions which RoSPA believes should be considered by the Löfstedt Review Team. Our answers to specific questions posed by the Team are set out at annexe one.

2. About RoSPA

2.1. RoSPA is a charity established over 90 years ago whose mission is '*to save lives and reduce injuries*' through preventing accidents whether on the road, in the home, at work, or in water and leisure activities, and to promote safety and risk education.

2.2. In the field of occupational safety we provide extensive services (including training, events and auditing); we deliver a major awards scheme; we publish journals and disseminate information to our member organisations; and we also support an independent national network of health and safety groups which work to raise awareness of health and safety issues at local level, particularly among small and medium size enterprises (SMEs). Through our National Occupational Safety and Health Committee (NOSHC), which includes experts from key stakeholder organisations, we seek to lead the way on key policy issues and contribute to national level discussions on health and safety strategy as well as the development of new law, standards and guidance. Over the last three years we have undertaken an intensive review of sources of help and assistance to SMEs which has led, inter alia, to the introduction of a new RoSPA award in this area. Recently we have also contributed views to the Lord Young review of health and safety and to debates which are flowing from the Government's statement '*Good health and safety, good for everyone*' made by DWP minister Chris Grayling on March 21 (http://www.dwp.gov.uk/docs/good-health-and-safety.pdf).

3. General perspective

3.1. RoSPA accepts that there is a strong view in some quarters (including among some SMEs and organisations that represent them) that health and safety law is too complex and burdensome. On the other hand, little if any suitably rigorous research has been carried out to map and quantify the basis of this perception. RoSPA is keen to help understand and address the roots of this apparently widespread impression but at the same time we do not believe that, generally speaking, action on health safety has gone too far. Indeed, data on injuries, work related ill-health and incidents – including data on the massive costs which these impose on individuals, families, businesses and the wider community – suggest that action on health and safety has still not gone far enough. Thus while there is much anecdotal evidence of apparently disproportionate health and safety effort ('over-hitting'), there is prima facie evidence that many businesses are still not doing enough to ensure that safe and healthy systems of work are in place ('under-hitting'). HSE commissioned research suggests there is little evidence of disproportionate responses by employers to their duties under health and safety law (see RR536 – '*Evidence based evaluation of the scale of disproportionate decisions on risk assessment and management*' at http://www.hse.gov.uk/research/rrhtm/rr536.htm). Inspector and auditor experience indicates that even in the best run businesses there are still significant gaps in risk control (see '*Trends in risk control*' at http://www.hse.gov.uk/statistics/riskcontrolind.pdf).

3.2. While action is needed to curb and reduce 'over-hitting' on health and safety (particularly to avoid damage to 'the health and safety brand'), from a national perspective 'under-hitting' remains a much bigger problem. Health and safety effort properly directed saves lives and pays major dividends. Claims about 'over-hitting' on health and safety in this sense need to be kept in perspective.

3.3. A major part of the challenge stems, in our view, from the goal setting nature of health and safety law that has evolved since the Robens Report of 1972 and the ability of SMEs particularly to respond successfully to it. Successive reviews of health and safety legislation that have been

undertaken since the 1980s have generally confirmed the appropriateness of this approach to regulation, which, by embracing the proportionality through the doctrine of 'reasonable practicability', avoids the difficulties that would otherwise arise from a more prescriptive approach (see annexe two). Small firms and their representatives however have tended to express simultaneously contradictory views about 'goal setting' - rejecting what they might consider as inappropriate prescription while at the same time calling for more activity/sector specific requirements - but then deploring the expansion of detail in the regulatory/guidance lexicon that this involves.

3.4. Goal setting law demands a higher level of competence of duty holders. In comparison with larger organisations which can employ advisers and afford training and support, SMEs find themselves at a distinct disadvantage and also prey on occasions to bad and inappropriate advice and also excessive requirements from third parties (see below), including those focused on civil liability rather than prevention.

3.5. In RoSPA's view the 'burden' facing SMEs arises not from the requirements of the law itself - which has proportionality at its heart - but primarily from the challenge which duty holders face of navigating the overall body of regulation and guidance, the breadth and depth of which has increased steadily as it has sought to embrace the great diversity of hazard and risk management issues that are to be found in the contemporary world of work.

3.6. Even within a single sector there can be a seemingly bewildering array of hazards. Successfully assessing the risks to which they give rise and implementing - and sustaining - the right risk control measures demands expertise. Common knowledge and 'common sense' can achieve a great deal but equally 'the devil is often in the detail' and many basic measures are actually quite counter-intuitive. The world is complex. The law seeks to generalise. Expertise is needed to make what are often quite fine judgements about the extent of action required to meet general duties of care.

3.7. In light of these considerations, RoSPA would urge the Review Team to:

- adopt a suitably holistic, rigorous and evidence-based approach to their work;
- consider the evolution of the regulatory framework in the context of UK health and safety history;
- review approaches to and outcomes of previous reviews of regulation as well as relevant conclusions of past Select Committee enquiries; and
- seek out robust evidence of costs and benefits of health and safety regulation, including the extent of inappropriate or excessive responses to legal duties as well as the scope for enhancing prevention and reducing the overall cost of injuries, ill-health cases and incidents.

3.8. In our view the Löfstedt Team will need to commit to doing a lot of preparatory work if they are to understand fully the background to what they have been asked to review. And if they do not coordinate closely with other

'simplification' initiatives that are now underway, there is a real danger of confusion. These include a wider project by the Health and Safety Executive (HSE) which is looking at how it brigades its overall range of guidance, including its guidance on health safety management, and the Government's initiative inviting the wider public to suggest ways of cutting 'red tape' burdens, including in health and safety. Logically the latter might have been better informed if it had followed the outcome of the Löfstedt Review. And any attempt to revise and restructure the HSE guidance lexicon should also perhaps await the team's recommendations. Health and safety law is important. People's lives and health depend on it.

3.9. The existing body of regulations and guidance represents the result of literally thousands of hours of detailed study, discussion and careful public consultation that have gone on over decades. Tasking a team of non-specialists (however experienced and however well supported) with having to make snap judgements in the space of a few months about particular features of hundreds of particular measures is not appropriate, particularly if the intention is to achieve better health and safety outcomes. Any review needs to be carried out professionally and not rushed.

Issues that should be considered by the Löfstedt Review Team

4. Health and safety law

4.1. In theory there is supposed to be a logical flow in UK health and safety legislation, from the general duties of care in the HSW Act (establishing key objectives), through the Management of Health and Safety at Work Regulations (MHSWR) (setting out essential management ingredients) to other specific hazard and sector related regulations (specifying essential controls and processes). Guidance documents (which are what most people actually read) then support all this. But as is more or less self evident, the elegance and logic of this flow that were envisioned in the 1972 Robens Report have been corrupted over time by adaptations to implement EC directives and so on.

4.2. From the standpoint of transparency and proportionality, both health and safety law and supporting guidance need to be focused on the 'big' issues. In some hazard areas like chemicals and physical hazards, the law is well developed but in others like psychosocial risks (ergonomics, stress, violence etc. which affect millions of workers) it is still quite vague. Huge areas of hazard like work-related road safety, for example, (more people are killed while at work on the road than in all other workplace accidents) are addressed only by the most generic guidance.

4.3. Arguably the balance between what is covered in regulation and what is addressed in guidance could be readjusted. On the other hand, options here have been limited. Much of the problem has been due to the UK's inability to use Approved Codes of Practice (ACoPs) to transpose EC directives. Robens had high hopes for ACoPs since they were intended to combine both authoritative advice and flexibility. But this vision was not widely shared. On one side the TUC has always tended to see ACoPs as too weak and imprecise. The CBI on the other has always tended to view them as prescriptive 'regulation by the back door'. And the European Commission has

refused to accept them as a vehicle for transposition of EU Directives into national law anyway. This whole debate ought to be revisited in our view.

4.4. What made the HSW Act and the post Robens architecture different from earlier Factories Act law was not just its goal setting nature, bounded by 'reasonable practicability' but its attempt to describe the essential ingredients for arriving at and sustaining safe systems of work in an organisational setting. In other words, it was not just a long list of dos and don'ts related to particular hazards but in a suitably general way; it set out the people/policy/procedures needed to ensure that hazards were routinely identified, risks assessed, appropriate controls applied and refined, taking into account advances in knowledge and lessons from operational experience. Thus, whereas earlier law had sought only to prescribe measures to be taken in various (actually quite limited) settings, the 1974 Act (later augmented by the MHSW Regulations) tried to indicate what employers needed to do to be able to work this out for themselves, using risk assessment and supported by competent people/advice, consultation with workers and so on. In theory, regulations and guidance introduced subsequently to regulate specific risks and activities were designed to support this underlying core. In reality, however, what we now have is an architecture of law that is in many ways both quite cluttered but also incomplete. And it is not easy to understand the detail without going on a training course and/or reading quite a lot of guidance. (But this is true also of law affecting business in many other areas including, planning, tax, environment, employment and so on.) On the other hand, in contrast to lawyers, health and safety advisers and trainers, for whom the detail of legal texts can be very important, few business owners and managers actually read raw, undigested health and safety law. They tend to rely instead on guidance and advice. Rationalising the exposition of duties in the law will not help small businesses directly. In the longer term though it might help to some limited extent with training and teaching.

4.5. The challenge the Löfstedt Team face in conducting this review is not only to consider how we can return to the essence of the Robens vision, stripping out any confusing duplication and overlap of duties in the different sets of regulations (without reducing essential protections) but how we can ensure that the architecture of the law really reflects the principles which underlie effective risk management in all undertakings - regardless of their size or hazard burden. Do we actually have a clear set of goal setting duties in law which reflect the different elements in the risk management challenge? At present these are scattered across the top of the legal structure and do not flow logically downwards and outwards in other subsidiary law and guidance. Some like risk assessment and training, are repeated at several levels. Other really important ones like investigation and organisational learning from accidents and incidents are not very clear at all.

4.6. RoSPA hopes that the Löfstedt Review will:

- ♦ review any significant gaps in key risk management requirements and/or the address by legislation of key categories of hazard;
- ♦ review the extent of duplicatory requirements;
- ♦ examine the balance between general duties, regulations and guidance from different stakeholder standpoints;

- examine again the scope for the use of ACoPs, including the legal basis of the European Commission's refusal to accept them as a means of transposition of Directives; and

- ensure that necessary protections are maintained, having regard to Section 1 (2) of the HSW Act.

4.7. This however would represent a major programme of work. The Review Team should take time to undertake a thorough review and resist the temptation to pursue regulatory consolidation simply to re-brigade existing duties for purely cosmetic effect into a smaller number of statutory instruments.

4.8. The review should also consider HSE's current project to simplify and re-order its guidance lexicon. There are several key objectives here: better 'doctrine management' to ensure conceptual and technical consistency between linked documents; use of clear language and style; ensuring ease of navigation and cascading from introductory texts to relevant detailed guidance; and clear indication of reasonably practicable standards. The Review Team should examine the original Robens doctrine relating to guidance which envisaged the evolution of an inventory of authoritative guidance that was to be shared between HSE and other bodies such as technical organisations, trade associations, joint industry committees etc. HSE cannot be expected to produce detailed guidance on every hazard or risk management issue. The detail is too great and the volume of material that could be produced virtually without limit. It is for consideration therefore whether or not HSE should pass ownership of parts of its guidance inventory back to other bodies. But equally this raises questions of doctrine management, consistency, ease of navigation etc. This might be addressed by developing a set of consensus principles for the development and maintenance of health and safety guidance that could be used by all parties, not just HSE.

4.9. Of course law and guidance on their own provide only part of the answer since by themselves statutorily required systems and risk control measures (even when supported by detailed requirements) are not enough to guarantee desired outcomes. To ensure the 'fine fit' between systems/standards and operational reality there also needs to be an effective 'health and safety culture'. Nationally and sectorally there need to be effective systems of promotion, education, training, advice, and support to enable smaller businesses particularly to respond effectively. And of course there is also a need for effective enforcement to deal with the criminally non-compliant. Good law is clearly necessary but by itself it is clearly far from sufficient to deliver safe and healthy working conditions.

5. The small firms test

5.1. Ministers will insist, with justification, that any proposals that emerge from the Review pass what is called 'the small firms test'. There is continuing debate as to whether in reality there is some sort of size threshold in today's businesses below which ideas about formal risk management have no meaning in practice. It is often said that small firms 'run' their businesses, whereas large firms 'manage' them. (And small firms of course are not just large ones that haven't got big yet!)

5.2. The Löfstedt team will need to consider at the outset whether current risk management duties in law are actually 'scaleable' in different settings.

5.3. On the other hand, what RoSPA and most other stakeholders in the health and safety system continue to argue is that it is the level of risk to workers (and others) and not size of the organisation that must be the guiding principle. (The same applies here in relation to application of health and safety law to the self employed many of whose activities can pose risks not just to themselves but to others, particularly when, for example, they are working on projects as part of a team.) The rather loose division of businesses into 'high risk/low risk' (or high hazard/low hazard) which was used in the Lord Young review does not adequately reflect the complex risk exposure profile of many kinds of employment. Retail or teaching environments, for example, may appear 'low hazard' but may still be associated with particular higher risk issues that need adequate attention (for example, violence, transport, fire, asbestos management, Legionnaires' disease etc).

6. Understanding 'burdens'

6.1. Much of the criticism of health and safety regulation at present is focused on the idea that smaller businesses particularly are having to spend too much time on health and safety administration. The Association of British Chambers of Commerce, for example, in '*Health and safety, a risky business?*' launched last month have described this as 'Yellow Tape'.

6.2. Perceptions of an increasing 'compensation culture' (although not borne out by Government data on trends relating to claims and settlements) have undoubtedly been fuelled by lawyers advertising their services following the ending of legal aid for personal injury and reliance instead on 'conditional fee' arrangements. This has heightened anxieties unnecessarily and on occasions created false perceptions of the extent of legal obligations, which in turn create unnecessary burdens on industry.

6.3. Ideally, action to regulate and clarify the framework for personal injury related compensation under civil law, as being carried through, for example, in the Jackson reforms, should not be confused with the need to retain and enhance effective regulation to deal with work related risks. On the other hand, it needs to be understood that to be able to demonstrate compliance with their common law duties of care for their employees, employers need to be able to show that they have taken reasonably practicable measures to comply with health and safety regulations. The auditable evidence trail suggested in the Woolf pre-action protocols which came into force in April 1999 (http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_pic.htm) suggests that employers need to maintain a longer list of documents and records than that which might required by HSE inspectors. The Review Team need to establish if in practice this leads businesses to devote time to record keeping and other administration which has no real health and safety benefit.

6.4. Also, liability in common law cases is established by evidence of fault that is based on the 'balance of probabilities' level of evidence rather than the 'beyond all reasonable doubt' standard used in criminal prosecutions.

Research is needed to establish whether in reality this difference is significant in relation to the action taken to manage the most common risks associated with claims. If the difference in practice is small or non-existent this fact must be widely publicised.

6.5. Another problem in addressing concerns about 'burdens' is working out how to disaggregate health and safety effort from day-to-day operations such as gathering information, training staff, planning, implementing and checking to ensure the delivery of goods and services to customers' specifications. Health and safety considerations should be inextricably marbled into all this. If, on the other hand, there are meaningless administrative rituals which add nothing to safety, then obviously these should be curtailed, if not abolished. But if, like risk assessments and resulting method statements, they actually support business processes which the duty holder adopts anyway, then they cannot reasonably be described as 'burdens'.

6.6. If the review is to address these questions seriously and from a research-based perspective, the team will need to differentiate different dimensions of the 'burden' and gather much better quality data on the extent to which it stems from uncertainty and lack of clarity and also how much time SMEs in particular actually spend on administration, particularly effort which has little or nothing to do with ensuring the safety of operations. Some businesses may be doing too much to address their risks but undoubtedly many others will be doing little or indeed nothing at all. The figures quoted in the Lord Young Review from an earlier Forum of Private Business member survey on time spent on health and safety administration were inadequate in our view. New work is needed, based on properly structured samples.

7. Third parties

7.1. Also, if the focus is on excessive bureaucracy the Review needs to encompass much of the administration in health and safety which is created not by statutory regulators like HSE but by third parties such as clients, main contractors, insurers, investors and others who seek assurance of health and safety in their supply chains, for example. RoSPA and many others in the health and safety community thoroughly support the positive leverage that can and should be exerted via supply chain relationships to raise standards of organisational health and safety competence. However, such arrangements have in effect created a whole array of 'semi-regulators' who, unlike HSE, are not accountable through processes of appeal - other than resort to the common law (which generally in our view would not be helpful). The Review Team should ask specifically for views about this since, from the SME viewpoint, it does not matter who is imposing excessive requirements. It can all waste time and money and also give legitimate health and safety a bad name.

7.2. For example, ensuring subcontractors and suppliers are providing their employees with relevant health and safety training to an approved standard sounds fine in theory but making sound and balanced decisions about what is relevant and what should/can be approved in particular circumstances can sometimes be quite a fine judgement. Sometimes assurers can over-specify.

7.3. We have argued to HSE that there ought to be appropriate independent mediation/appeal processes to enable firms to appeal about allegedly

inappropriate health and safety requirements imposed by third parties such as advisers, clients, main contractors, insurers etc. Employers have the right of appeal to an Employment Tribunal against HSE/LA enforcement notices. Following the Lord Young review, citizens who disagree with the decision of local authorities on health and safety matters can ask for an explanation in writing. However, there is no such right in a commercial setting. Firms often seem afraid to make a fuss for fear of the consequences.

7.4. This sort of problem cannot be resolved by changing or abolishing regulations but only by helping to establish better support mechanisms in the wider health and safety system. A good example here would be '*Safety Schemes in Procurement*' (SSIP) which RoSPA helped to get underway through recommendations in its second NOSHC report on this issue (http://www.rospa.com/occupationalsafety/adviceandinformation/info/sme/core-criteria.pdf). This scheme has been set up to eradicate unnecessary duplication in health and safety pre-qualification assessments and thus to provide a means for businesses to benefit from mutual recognition in this area.

8. The need for support

8.1. So, as stated above, we do not believe that the issues faced by small firms stem primarily from 'clutter' or a lack of elegance in the contemporary legal architecture. That is not an argument against the need for good regulatory housekeeping but simply to say that, so far as SMEs are concerned, the far greater need is to address the health and safety support scene where there is still no overall strategic approach that links - and seeks to enhance - all the various sources available (see the first NOSHC report on the SME support map, available online at http://www.rospa.com/occupationalsafety/adviceandinformation/info/sme/osh-map.pdf).

8.2. HSE is undergoing a major cut in its resources and is having to concentrate more than ever on reactive as opposed to proactive work. HSEline is being closed. Reliance on the HSE website alone will not be sufficient to offset this. SMEs need face-to-face support and mentoring. The Occupational Safety and Health Consultant's Register (OSHCR) will meet only a small part of the need here. There is a massive need to support and develop the role of many other players such as trade associations and local health and safety groups. And there is also a need to help those intermediaries such as business advisers who give SMEs 'advice about advice'.

8.3. RoSPA believes that recently developed on-line risk assessments may have helped but there is a need for yet further change. We strongly favour the idea of lower risk SMEs being able to develop bespoke health and safety action plans instead of separate heath and safety policies and risk assessments. A template for this already exists (at http://www.hse.gov.uk/risk/risk-assessment-and-policy-template.doc). (See also a simpler example from RoSPA, which is available online at http://www.rospa.com/occupationalsafety/adviceandinformation/smallfirmshealthandsafety/advicepack/sheet6.aspx). Both these examples probably need further work. However we have argued that the option of developing such an action plan, which would be recognised by regulators and third parties like clients etc., should be open to all lower-risk SMEs as a way of reducing

and simplifying paperwork, increasing transparency and keeping effort focused on priority issues.

9. Gold plating?

9.1. When considering allegations that the UK has been inappropriately 'gold plating' EU Directives when transposing them into UK law, the Review Team need to take as their key starting point the Robens model of goal setting law. The objective in the original 1992 'Open Market' project was to achieve a minimum degree of harmonisation between the laws of Member States. This was to help create a level social and economic playing field, particularly to avoid what was termed 'social dumping'. This meant in effect not the repeal of existing national law but the progressive adaptation of such law to enable it to conform or approximate to certain common European requirements. From the beginning, the UK faced a challenge from the European Commission over whether our goal setting approach, qualified by 'so far as is reasonably practicable' (SFAIRP), was adequate for the transposition of Directives - but they did not oppose significant differences between the Health and Safety at Work Act and the Framework Directive. These differences included, for example, extension of health and safety duties to the self employed, Section 3 and the protection of the public, and the Section 6 duties of manufacturers and suppliers etc. The UK fought for its right to retain its regulatory approach, including SFAIRP, and was eventually vindicated. But what is not so well recognised is the extent to which for over two decades HSE and UK stakeholders have been able to spread UK health and safety influence in the other direction, often informing the content of particular EU measures during the various stages of negotiation.

9.2. That said, in RoSPA's view it would be a profound mistake to insist as a matter of principle that the way we implement Directives should be limited to transposition of the precise wording of each instrument and that no flexibility should be allowed to enable adaptation to occur in a sensible and coherent way. Often rigid compliance with the letter of particular Directives would prove unworkable in a UK setting. As argued above, the team should take a broad strategic view here and be alive to the risk of just tinkering at the edges for effect and thus creating even less clarity. If particular measures are alleged to be 'gold plated' then we would recommend revisiting UK briefs used during negotiations to help understand the views of stakeholders at the time and the extent to which the UK Government was able to secure requirements that were compatible with our legal structure and overall approach.

9.3. Similarly there should be detailed consideration of the results of HSC/E public consultation on proposals for transposition, a review of any relevant correspondence with the EC and review of any accompanying cost benefit analyses to check assumptions/conclusions in the light of experience.

9.4. Finally, in considering if any particular measure is 'gold plated' the team need also to consider the shape and content of SFAIRP standards that would have applied under the HSW Act and related statutes (albeit perhaps through guidance) in the absence of EC law.

9.5. Revisiting the terms of transposition of particular Directives will require a sense of perspective as well as appropriate rigour and attention to detail.

10. Learning from other countries

10.1. It is often said that the UK has one of the best health and safety records in the world. The justification for this is usually our relatively low rate of notifiable fatal and major injuries. Some recent EU work has also supported the view that we have a relatively high level of engagement by managers and workers (The European Survey of Enterprises on New and Emerging Risks - ESENER – which is available online at - http://osha.europa.eu/en/publications/reports/esener1_osh_management/view). Our legal structure has been widely adapted if not copied, for example in Commonwealth countries. HSE's substantial body of guidance and research is widely respected internationally and referenced across the world. Despite this, our occupational ill-health record is still very poor and our provision of health and safety services, mainly through an open market system, is patchy and does not compare favourably with other forms of service provision, for example, in some Scandinavian countries.

10.2. There is much that we in the UK could learn from a comparative review of health and safety regimes in other countries, not simply limited to regulatory and enforcement structures but wider support structures needed to secure effective outcomes. There is significant literature in this area but, as with the other tasks the team have to undertake, ensuring the review is suitably comprehensive will be a major challenge. Any comparative review should include not only law and enforcement strategies but issues such as approaches to: the roles of key bodies in law and standards making; various sectors; occupational health; research, education and awareness raising; information management; training; management of contractors and so on, and include not only EC member states but the USA, Canada, Australia, New Zealand, Japan and South Korea besides emerging policy and trends in India, Brazil etc.

10.3. Done properly, this would be a major piece of work and could be used to address not just areas for development in the UK but the role of bodies such as EU OSHA and the ILO in spreading good health and safety practice internationally, as well as perhaps as a spur to integrating health and safety into UK overseas development and aid work.

11. Regulation and positive health and safety outcomes

11.1. Understanding the relationship between regulation and positive health and safety outcomes is a question that can only be addressed through a review of existing literature on health and safety regulatory regimes. At the same time it needs to be accepted that establishing meaningful and comparable measures to be able to compare 'inputs', 'outputs' and 'outcomes' is fraught with methodological challenges. From national data and also from data such as those reviewed in the RoSPA Occupational Health and Safety Awards, it is clear there are wide variations in performance between different organisations. There are many 'drivers' at work. Yet even those higher performing organisations that are internally self motivated and achieve results well above average will admit that legal compliance plays a major part in driving their efforts. Less well motivated firms may well respond only to regulatory persuasion, but understanding the extent to which the behaviour of those businesses that choose to operate as amoral calculators is influenced by regulation is very hard to determine. The population of duty holders is far

from homogeneous. There are many confounding variables. RoSPA would caution against too narrow an approach here. Full consideration of all the factors which help to deliver effective risk control (including not just regulation but support mechanisms) is needed.

12. Inappropriate personal injury litigation

12.1. Questions of inappropriate personal injury litigation in RoSPA's view should not be addressed by altering law whose prime purpose is prevention. If there is evidence of inappropriate litigation or unjust outcomes then any such problems should be addressed by changes to the rules underpinning civil litigation. As with the other tasks that have been set for the Review Team there needs to be a full review, including of the extent of claiming and under-claiming for fault-based work-related injury and health damage and analysis of the main categories of claim and the main legal bases of claim. There also needs to be an analysis of the evolution of case law, including a review of criteria used for apportionment of liability.

12.2. These are not RoSPA's main areas of focus but we recognise that anecdotage, particularly such as that arising from particular claims and settlements, can adversely affect perceptions of liability and lead possibly to inappropriately risk averse behaviours. On the other hand, HSE-funded research on control of occupational risk does not confirm a link between compensation and excessive risk aversion (http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmconst/754/754we11.htm).

13. Employees acting in an irresponsible manner

13.1. We are not convinced that changes to legislation are needed to clarify the legal position of employers in cases where employees act in an irresponsible manner. Investigations confirm that rarely, if at all, do individuals set out to have an accident but on occasions some employees do, for various reasons, act with disregard for their own or others' health and safety. In recent years, there has been an encouraging growth in understanding of human factors and in particular of 'human error' as reflected, for example, in excellent publications (such as HSE's '*Reducing error and influencing behaviour*' - HSG48). At the same, perhaps curiously, there has been a resurgence of interest in crude behaviourist models of safety management which see accidents as being caused mainly by 'unsafe workers' and this is related in part to a continuing appetite for over-simple behavioural safety programmes.

13.2. Error, both individual and organisational (the two are invariably linked), is a highly complex phenomenon. Before considering particular cases or even trends, the team need to familiarise themselves (in the outline at least) with theories of accident causation, including causal factors in accidents (job, person, and organisational factors) as well as human factors doctrines (including the taxonomy of error types) and research findings on balance of 'fault' in accidents. (It might even be worth here looking again at original HM Factory Inspectorate work and findings of the HSE's old Accident Prevention Advisory Unit.)

13.3. Traditionally, it has been HSE policy to prosecute the employer following significant breaches of health and safety law that have resulted in serious outcomes – but in recent years there has also been a growth in prosecutions

of individuals found to have been seriously at fault. It might be worth undertaking a review of prosecution trends data around Section 7 of HSW Act etc. and also consider the way HSE applies the criteria in its Enforcement Policy Statement in this context.

14. Ways forward

14.1. RoSPA is concerned that this current 'review of regulation' is being conducted in an atmosphere where there is a growing but unproven perception that health and safety law is unbalanced and burdensome and that it represents a major barrier to future investment and business success.

14.2. It needs to be remembered that accidents and work-related health damage impose massive costs on individuals, communities and society as whole. In 2004, the HSE prepared updated estimates of the costs to Britain of workplace accidents and work-related ill-health (see http://www.hse.gov.uk/press/2004/e04139.htm). These indicated that in 2001/02, health and safety failures cost: employers between £3.9billion-£7.8billion; individuals between £10.1billion-£14.7billion; the economy between £13.1billion-£22.2billion; and, society as a whole between £20billion-£31.8 billion. The general consensus is that there is a very substantial business case for effective health and safety management (see RoSPA guidance at http://www.rospa.com/occupationalsafety/adviceandinformation/business-case.aspx, our video at http://www.youtube.com/watch?v=oDBG5OPlPmk and also http://www.iosh.co.uk/news_and_events/campaigns/life_savings.aspx).

14.3. We do not share this view and indeed we consider that core duties in existing law are fairly well structured and that, properly applied, they guarantee a good standard of protection for workers and others affected by work activities.

14.4. Of course, it would be foolish for us to argue that all existing legal duties are fully optimised or that the balance between what is in regulation and what is in guidance is absolutely perfect. And it would be arrogant to argue that the whole field is now so complex that lay people are unlikely to be able to make a meaningful contribution. But equally, opening the entire inventory of regulation and guidance up to a process of review - in which personal prejudices of the poorly informed have equal status with carefully developed positions based on research and professional judgement - seems not only unhelpful but potentially very dangerous. Imperfect as it may be in some respects, the existing legal architecture has proved relatively effective and if it is to continue to evolve successfully the tasks before the team need to be undertaken with skill and above all with great care.

14.5. In this context, much will depend on the role played by HSE. Not only does it need to be allowed to bring some structure and discipline to what comes out of the various stages of the review process and make suggestions on how work can be prioritised - it also needs to be able to play a strong leadership role by helping stakeholders and politicians to understand the background to issues under discussion, putting evidence on the table and dispelling myths and misunderstandings. HSE, despite the cuts that have been imposed on it (and a significant loss of corporate memory through early retirements), is still a major national asset - a unique concentration of knowledge and expertise.

14.6. We are urging all our members and contacts to play their part in the Löfstedt Review by contributing their views and coming forward with creative ideas which can help improve our ability as a nation to save lives and reduce injuries.

Roger Bibbings (Email rbibbings@rospa.com)

Occupational Safety Adviser **20th July 2011**

Annexe one
Answers to specific questions

Question 1: *Are there any particular health and safety regulations (or ACoPs) that have significantly improved health and safety and should not be changed?*

Answer: RoSPA takes the view that the existing inventory of health and safety regulations and associated guidance have played a decisive and influential role in raising and maintaining standards of health and safety – although, as stated above, regulations and guidance on their own are only part of a much wider mix of ingredients needed to help ensure safe and healthy conditions at work. The existing body of regulations has already been subject to much simplification by the Health and Safety Executive. Together with the Health and Safety at Work Act itself, the Management of Health and Safety at Work Regulations should be regarded as the capstone legal instruments to which other regulations are linked and from which other more specific requirements flow. It is very important that the MHSW regulations align with key elements in HSE's guidance on health and safety management. Some like risk assessment, the hierarchy of control, training and information are well established. Others such as the duties of directors or the requirement to undertake suitable and sufficient investigation of accidents and incidents are weak or missing altogether. And there still major gaps in the regulatory/guidance inventory in relation to several broad and very significant classes of hazard. The review should also take time to consider gaps in health and safety law and options for addressing these.

Question 2: *Are there any particular health and safety regulations (or ACoPs) which need to be simplified?*

Answer: There may be a case for some mergers (see below) but the team need to consider whether the conceptual neatness that this might produce would actually enhance clarity and understanding. Many duty holders have become used to dealing with regulations that in reality are subsets of other broader measures. Any changes would necessitate retraining, briefings etc., all of which would take up time without necessarily producing additional benefits.

Question 3: *Are there any particular health and safety regulations (or ACoPs) which it would be helpful to merge together and why?*

Answer: There might be a case for merging certain regulations into the MHSW Regulations/guidance structure that relate to issues such as consultation, accident reporting and so on. Alternatively, the Safety Representatives and Committees Regulations could be merged together with the Consultation Regulations, the

Offshore Safety Representatives Regulations and similar provisions with legislation relating to mines and quarries. There also might be a case for combining or amalgamating certain regulations that relate to a particular sector. This might have the effect of reducing the number of titles in the regulatory inventory but would not necessarily reduce the overall extent of specific requirements. The danger would be that some regulations would become very long. The cost of such merger (including the educational effort needed to explain it) should be weighed against the extent of any real benefits. There might also be a case for combining regulations dealing with noise and vibration since often both are linked. Regulations dealing with lead and asbestos might be merged within COSHH but again this might lead to COSHH becoming an even longer set of regulations and it could just as easily lead to confusion among those who have become familiar with the way these substance specific measures operate.

Question 4: *Are there any particular health and safety regulations (or ACoPs) that could be abolished without any negative effect on the health and safety of individuals?*

Answer: If there are historic measures that remain on the statute book but merely duplicate more comprehensive measures introduced subsequently, then there may be a case for abolition. Care should be take however to guard against unintended consequences, including confusion among those who continue to refer to such measures rather than to later, more generic requirements.

Question 5: *Are there any particular health and safety regulations that have created significant additional burdens on business but that have had limited impact on health or safety?*

Answer: The operation of 'reasonable practicability' ought to mean that health and safety law is by definition 'burden proof'. This is not to deny that, on occasions, prescriptive or absolute duties are merited, but equally care must be taken to ensure that in practice they do not lead to action which has no health and safety benefit. A system needs to be permanently in place to flag up such instances so they can be examined.

Question 6: *To what extent does the concept of 'reasonably practicable' help manage the burden of health and safety regulation?*

Answer: It is the cornerstone of the UK's approach to health and safety regulation (see annexe two).

Question 7: *Are there any examples where health and safety regulations have led to unreasonable outcomes, or to inappropriate litigation and compensation?*

Answer: See discussion in the above submission on whether evidence of fault that is based on the 'balance of probabilities' level of evidence rather than the 'beyond all reasonable doubt' standard used in criminal prosecutions actually leads in practice to differences between action required by HSE and action recommended by lawyers and other advisers.

Question 8: *Are there any lessons that can be learned from the way other EU countries have approached the regulation of health and safety, in terms of (a) their overall approach and (b) regulating for particular risks or hazards?*

Answer: See discussion in the above submission.

Question 9: *Can you provide evidence that the requirements of EU Directives have or have not been unnecessarily enhanced ('gold-plated') when incorporated into UK health and safety regulation?*

Answer: The term 'gold plating' needs closer definition and should not for example, encompass reasonable adaptation to ensure consistency with UK health and safety law when implementing EU requirements (see above).

Question 10: *Does health and safety law suitably place responsibility in an appropriate way on those that create risk? If not what changes would be required?*

Answer: See discussion in the above submission relating to division of responsibilities for health and safety.

Annexe two
'Parting Shot' (for 'OS&H', Sep 2011)

Goldilocks rules! OK?

Among the questions posed in his call for evidence which ended on July 30, Professor Löfstedt asked (See question 6 at http://www.dwp.gov.uk/docs/Löfstedt-call-for-evidence.pdf) ***'To what extent does the concept of 'reasonably practicable' help manage the burden of health and safety regulation?'***

There is much confusion about the concept of reasonable practicability (RP) and its application in practice. It is nevertheless a cornerstone of the UK approach to regulation of work related risk and has been successfully defended against legal challenges from the EU which claimed that it undermined or weakened European health and safety law because it allowed for the consideration of cost when assessing compliance with legal requirements.

As is widely recognised, the principle was originally established in the now famous common law judgement of Edwards versus the National Coal Board in 1949.

Lord Justice Asquith said, "*Reasonably practicable is a narrower term than 'Physically possible' and implies that a computation must be made... 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 time, trouble or money) is placed in the other and that, if it be shown that there is a great disproportion between them – the risk being insignificant in relation to the sacrifice – the person upon whom the obligation is imposed discharges the onus which is upon him*."

In practice, what this means is that, provided that residual risk levels are not intolerable, an employer's duty to continue to provide additional preventive and protective measures is exhausted once a point of gross disproportion has been reached between the cost of such measures - in terms of time, money and trouble – and further reductions in risk. In other words, for things to be considered safe 'so far as is reasonably practicable' (SFAIRP) you have to go on trying to make them safer until you reach a point where it is not worth doing more (a point of diminishing safety returns) – AND the risks which still remain must not be too great.

Making such safety judgements with confidence is often quite difficult. If the consequences of failure are high, uncertainty about the efficacy of measures to reduce its probability of occurrence will tend to result in a precautionary ('belt and braces') approach.

There is often confusion about costs. Many people seem not to appreciate that the affordability of specific measures does not relate to the financial status of the individual duty holder but is a broad social judgement – for example, looking at what might be generally affordable, say across a sector. You cannot plead poverty and get away with a lower standard of safety.

There is often confusion about the extent to which - and in what way - opportunity costs can be factored into risk/cost computations, for example, the longer term costs of restricting a particular activity or of unintended consequences such as risk transfer. But such costs are often very real considerations.

Critics say that the concept allows too much flexibility and leads to weak or inadequate precautions being taken. Evidence suggests, however, that, properly applied, RP guarantees a high standard of safety. Investigations, for example, tend to confirm that very few accidents occur where RP measures have been taken.

The real importance of the concept is that it allows scaling and proportionality of response to risk, taking account of relevant variables. The alternative to this might be a rising scale of prescriptive solutions laid down in statute but this would be very cumbersome and might well lead to both 'under-hitting' and 'over-hitting'. RP allows for fine tuning.

On the other hand, making sound judgements about risk/cost optimisation can pose real challenges for those duty holders who lack necessary skill or access to professional expertise, particularly where options have to be chosen from a range of possible solutions set out in guidance. For example, to take a case related to public safety, RP water edge treatments to ensure prevention of drowning can vary from little or no action, to shelving and/or planting edges, signage, through to extensive physical barriers. Factors such as population density and foreseeable behaviours can influence whether control measures are minimal or otherwise. The uninformed can sometimes have difficulty in understanding why maximum measures have been taken in one setting but not in another.

What is useful about RP however is not only that it allows for flexibility and thus avoids extensive prescription to cover every circumstance but it provides a constant reminder to risk creators, risk takers and regulators that safety is not an absolute but always matter of judgement. In RoSPA we try to express this simply by saying that things need to be '*as safe as is necessary, not necessarily as safe as possible'*. On the other hand, RP can give rise to conflicting responses. On the one hand firms tend to welcome the flexibility it provides but when faced with lack of clarity they can then turn round and demand official advice about exactly what would constitute a minimal standard of compliance.

Although the Robens philosophy of health and safety regulation was to move away from prescription (unless it was really necessary) and to promote a goal setting/general duties approach (thus reducing the volume of detailed law), the demand for clarity and certainty about compliance has led to a proliferation of official HSE and industry guidance about RP standards. RP standards in health and safety tend to be agreed in consensus guidance developed jointly between stakeholders on the basis of the best evidence. Such guidance however is often wrongly perceived as

having prescriptive ('regulatory') force and in turn this can induce a marked reluctance by many duty holders to adopt alternative approaches even though in practice these may be just as suitable and guarantee a similar if not a better standard of safety.

The fundamental ideas in our health and safety law about risk/cost optimisation had their origin in the philosophy and practice of radiological protection developed in the 1940s and subsequently. Here the core doctrine was '*justification, optimisation, risk limits*'. In other words 1) if an exposure is 'tolerable', is it justified by sufficient benefits? 2) has exposure been optimised? (in other words, has a point of diminishing returns been reached in terms of further dose reduction?) and 3) have upper bounds been set? (or put another way, have suitable dose limits been established?). This approach can be applied to all kinds of risk decision making in health and safety.

In practice the workability of an RP approach to safety depends on skill in undertaking suitable and sufficient risk assessment. Initially this means establishing if risks are trivial, moderate or high and, if they fall into the last two categories, deciding if control measures are adequate or if more needs to be done (including, in the extreme, terminating the activity). Assessments also enable duty holders to prioritise risks for attention and they can be generic, specific and/or dynamic.

In many cases however those managing risk may actually carry out very little real assessment. Much of what is called 'risk assessment' is really little more than hazard identification and involves minimal exercise of judgement as to the probability or consequences of failure. If this simple approach enables standard but quite satisfactory solutions to be selected from the overall health and safety guidance lexicon then this does not necessarily matter, particularly if it leads to people adopting sufficiently safe systems of work. On the other hand, there is always a danger of 'over-hitting' if the level of risk actually presented by the hazard is trivial and the standard solution selected is substantially more than is really required.

Duties in health and safety law qualified by RP include those that relate directly to control measures (guards, values for controlling harmful exposures etc.) as well as procedural duties, for example, the steps necessary to achieve the right level of organisation, training, information provision etc. (in other words, the essential things that need to be done to enable hazards to be successfully identified, risks assessed, the right measures selected and implemented and so on.) Grappling with what is RP when dealing with 'the software' of health and safety management is often more intellectually challenging than deciding on the level of physical risk control measures to be adopted.

A simple approach to finding the right balance is what I have called 'iterative triage' or 'The Goldilocks Principle'. (In her search for porridge and beds, Goldilocks found examples that were too hot/hard and too cold/soft and this enabled her to find ones that were 'just right'.)

What all this demonstrates are two awkward truths. These are: 1) that there is probably no practical regulatory alternative to a goal setting approach supported by RP, especially in the complex risk environment of our contemporary world of work ; and 2) if this approach is to be successful in practice, duty holders need to be suitably informed and competent or have access to suitably competent advice.

Those daunted by the challenges posed by an RP approach to work related safety and health often demand regulatory simplification or a return to 'common sense'. The

reality however is that the risk profile of even apparently benign settings such as shops, offices and schools can often be quite variegated and complex; the devil is invariably in the detail; and the right solutions are sometimes quite counter-intuitive. In other words, an RP approach to regulating and managing health and safety risks is undoubtedly a more mature approach than one based on prescription but it is one that only works in practice if the challenges involved are matched by necessary competence.

Getting health and safety judgements right is not always easy but if they help to save lives, reduce injuries and safeguard health but without wasting scare resources, then the effort involved is surely worthwhile.
As ever, readers' comments are invited and should be sent to me at rbibbings@rospa.com.

Roger Bibbings
Occupational Safety Adviser **7th July 2011**