(1st draft) *Parting Shots*

Guidance not consolidation

As part of his commission to help clarify health and safety regulatory requirements, Professor Ragnar Löfstedt recommended in his recent review *'Reclaiming health and safety for all'* (http://www.dwp.gov.uk/docs/lofstedt-report.pdf) that HSE should commission '.. *research by January 2012 to help decide if the core set of health and safety regulations could be consolidated in such a way that would provide clarity and savings for businesses*..'.

In part this was a response to comments he had received from sections of the business community (and which were also voiced in the Government's on-line Red Tape Challenge) – that there seemed to be just too many health and safety regulations and that having fewer would make things easier for business.

The HSE have now commissioned this review from a lawyer, Richard Matthews QC, who is well versed in health and safety issues. His report, which is accessible at http://www.hse.gov.uk/legislation/assets/docs/consolidation-report-2012.pdf, is a very comprehensive piece of work examining the various options for consolidation of UK health and safety regulations that were put forward by Löfstedt.

Readers should be warned that, because it is legally thorough, it is not a particularly easy read. It examines a range of possibilities, from wholesale amalgamation of all H&S statutes, to just those ones enforced by HSE, down to sector and hazard specific consolidations. Matthews in the end comes down against consolidation. Both he and HSE seem to be suggesting that, for a number of reasons, this is not really worth the candle. While it might be possible to create neatness for lawyers, consolidation would create several monstrously long sets of regulations with numerous schedules attached. At present there might well be 208 statutory instruments the Herculean task of reducing them to 150 would actually achieve little for most businesses, most of which only need to know about a relatively small number of key requirements relevant to their sector/activity. The work involved would be considerable with a significant opportunity cost attached for HSE. They would have to withdraw already scarce resources from other work without any certainty about affecting outcomes.

Along with a range of industry and departmental representatives I was invited to take part in a workshop meeting in London on 7th January to discuss Richard Matthews' report. He stressed that, in whichever way it was approached, consolidation was likely to produce a series of regulatory Leviathans which would be hideously complex for even lawyers to understand, let alone busy SME managers.

This looks like a sensible conclusion but I was disappointed that neither he nor Löfstedt had taken time to stand back and look at the evolution of our regulatory regime and in particular to compare where we have arrived at to date with the radical vision of a simplified regulatory architecture of H&S law

that was set out in 1972 in chapter five of the Robens Report. This novel approach, which set out the Committee's thinking about the future of regulation, provided a framework to overhaul the piecemeal and prescriptive patchwork of law that had evolved up to that point. It proposed an overarching set of general duties of care in an enabling Act, elaborated in more detail in subsidiary goal setting regulations dealing with specific hazards and activities, with these supported in turn by Approved Codes of Practice (ACoPs) and guidance. And it did indeed set the pattern for UK health and safety legislation very successfully until overtaken in the 90's by the EU 'Six Pack' and numerous subsequent piecemeal EU directives. Despite the dense thicket of regulations and guidance that now smothers the original Robens vision, it is arguably still highly valuable and relevant. Although the possibility of returning to Robens' original regulatory renewal plan is now virtually zero (because so much EU prescriptive regulatory water has since flowed under the bridge) we still need to hang on to its essence because it is a proven and uniquely British approach based on risk and 'reasonable practicability'.

Equally we should not forget our constructive influence in Europe, given that many of the more positive EU measures such as the H&S Framework Directive (EC Directive 89/391) were in fact very much inspired by the UK's and the HSE's approach.

The main point I tried to get across in discussion was that the model of the architecture of UK H&S law in the Lofstedt review (see also Figure 4 in the Matthews report) is wrong (or at least not quite right). The Act with its general duties is the capstone text; the Management of Health and Safety at Work Regulations (MHSW Regs) forms a single supporting pillar underneath; and the inventory of activity and hazard based regulations (COSHH, Noise, LOLER, PUWER, CDM etc, etc) are the base. ACoPs and guidance are not (as shown in Figure 4) a further foundation layer beneath these but actually comprise a separate and highly practical parallel structure in their own right. My suggestion was that, following the HSE's review of ACoPs and guidance, they needed to commend to ministers the idea of re-launching this revised canon of guidance as the UK's way of explaining in everyday language exactly what our H&S laws mean in practice.

Of course EU law trumps national legislation and while some Member States have simply copied out directives, we have worked hard in this country to try to make them fit our system. Obviously, because of our treaty obligations we have no choice but to transpose the requirements of EU directives into our law but perhaps we should avoid pursuing a separate consolidation exercise in the UK until it is perfectly clear what direction a proposed EU regulatory review exercise will be taking. Given Ragnar's view about embracing Europe it would be better to try to influence that exercise from within rather than without. Clearly, if it is agreed as a result of the review that there <u>is</u> a case for simplifying and rationalising EU H&S law, then this needs to be accepted not just as a technical matter but as a high level political challenge which ministers need to take up in earnest with their opposite numbers at a European level. The challenge will be to see if the European Commission now recognise that it is unhelpful to go on regulating endlessly hazard by hazard,

activity by activity. That it is why it is so important to revisit and revalue the Robens vision to see if it can be used as a model to help guide the EU exercise. And surely that will depend on the UK's advocacy.

Löfstedt says he sees the EU review as a 'great opportunity' to ensure that the 'so far as is reasonably practicable' (SFAIRP) principle remains at the centre of UK health and safety law and Matthews too agrees strongly with that. But equally the European Commission may well regard the EU review as a great opportunity to reopen their challenge to the UK's use of SFAIRP and to question the way in which we have adapted some EU law to fit the UK's legal approach. SFAIRP is certainly not at the centre of EU law. Most EU member states seem perfectly content with absolute duties but have ways of treating these flexibly in their courts.

Ours however is a much older common law and judge based approach (going back to master and servant duties set down by Alfred the Great). It is not based, as are most continental systems, on the Napoleonic Code. (Richard Matthews observed wryly in the meeting that if Napoleon had been tactically more adroit at Waterloo, we might not be having this argument now!)

On the other hand I think it would be very unwise for HSE to respond to concerns, such as those expressed during the Red Tape Challenge, by simply saying consolidation would be too difficult. They need to explain obviously that Löfstedt's first recommendation is pie in the sky - you might just as well tear up the 1974 Act and start all over again the work of the last forty years. Reducing somewhat the sheer number of separate directive-led regulations might meet the political demand for fewer titles; it shouldn't be too difficult to merge hardware regulations like LOLER and PUWER but as Matthews says, it is likely to result in a colossal bundle of underpinning technical guidance, as demonstrated, some would say, by the recent Irish consolidation exercise.

What is certain is that in both business and politics it is bad practice (and dangerous too) to offer only problems and not solutions. HSE will need to demonstrate that they are indeed doing something to respond to the concerns that lie behind Löfstedt's consolidation recommendations. It would be disastrous if Richard Matthews' highly competent report was seen as HSE engaging a suitably qualified lawyer to lose a Löfstedt recommendation in the legal long grass.

My personal view is that, in the short term, while it may not be feasible to purge and reorder the existing regulatory inventory, this ought to be taken as an opportunity for revaluing a revitalised set of ACoPs and guidance as the most practical way to explain to managers etc how the various duties flow into and connect with one another. So rather than adopting a very minimalist approach to ACoPs HSE should actually be selling them hard as the UK's way of both preserving and adapting our unique approach to regulation. Instead of ditching it (as proposed by Löfstedt) HSE need to advance again the case for a revitalised MHSW Regs ACoP as the capstone document in a rationalised HSE guidance hierarchy. This would create in effect a 'Highway Code' for good health and safety risk management that was scaleable to

businesses of all kinds. In the spirit of Robens this simplified approach to authoritative guidance ought to be brought back centre stage and the actual regulatory texts with their EU based imperfections allowed to sit for the time being in the background.

There was wide agreement around the table on 7th January that SMEs particularly do not read law but they may study guidance and seek information from the web as well as advice from outside advisers. From this point of view a more logical and transparent guidance architecture would provide a much better way of showing busy managers and safety reps, particularly during H&S training, the general logic and flow of duties in H&S law. It would be far more easily understandable than monster regulations designed simply to reduce the number of titles. Encouragingly everyone, including the small firms' organisations, seemed agreed about the numbers point since, while superficially this might satisfy the ideologically driven de-regulators, it would do nothing to help business, in fact the very reverse.

As ever, readers' views are welcome and should be sent to me at rbibbings@rospa.com.

Roger Bibbings
Occupational Safety Adviser **8th January 2013**

1,800 words approx