Chapter 5

Motivation

February 1999

'...to encourage the others'

Quite clearly it was the disaster experiences of the 80s which led to a general demand that, in future, those ultimately responsible for failing to prevent tragedies such as Zeebrugge, King's Cross and Clapham should be punished.

It was such pressure, that led the present Government, both now and when in opposition, to look at the question of establishing culpability and prosecution of both individuals and organisations in relation to death at work.

In the light of their pledges prior to the General Election, the Government are committed to introducing new offences in this area. For this to be effective, however, it will need to involve reform of the law on 'involuntary homicide', including both 'corporate killing' (under which organisations could be charged) and 'reckless killing' (aware of risk) and 'killing by gross carelessness' (risk obvious to a reasonable person) under which directors of corporations could also be charged, found guilty and punished. However, the new offence of 'corporate killing', as currently proposed does not address the culpability of directors.

The essential problem in past manslaughter cases, exemplified particularly by the collapse of the prosecution of P&O following the Zeebrugge disaster (where both the subsequent inquest and the public enquiry found major evidence of corporate safety failure) has been the difficulty of establishing 'mens rea' - that is, whether the offence alleged was due to the acts and/or omissions of the 'controlling mind' of the organisation.

Many have taken the view that even gross failures to prevent harms caused by organisations are not the same as other crimes since they are rarely attributable to the wilful recklessness of individuals. Rather they are thought to be the result of chance events for which no single individual can be held solely responsible.

In some ways this view is not so different from defences offered by those accused of participation in human rights abuses. Those in positions of command claim that they could not have been expected to know about the excesses of those beneath them - while those at the bottom claim that they were 'simply following orders'.

Yet to be forced to admit that dreadful and clearly preventable events such as man-made disasters are simply the product of chance operating within inanimate organisations is quite clearly a counsel of despair. If followed to its logical conclusion, it would allow the assertion that organisations (which have no soul to be damned and no body to be killed) are beyond all possible blame and punishment.

Similarly, useful as it is to discourage over-simple attribution of accident causation to the errors of individuals, the 'no blame' approach, if followed to its logical conclusion would also result in the absolution of every possible duty holder from liability for breach of their responsibilities.

One of the problems in proving the culpability of individual directors of companies following disasters has been that their responsibilities tend to be mediated via several subsidiary levels of management control and accountability - meaning that evidence of only a thin veneer of safety leadership is likely to be sufficient to enable their lawyers to mount a successful ‘due diligence’ defence on their behalf. It seems ironical therefore that existing powers to prosecute directors under the *Health and Safety at Work Act*, which ought to be capable of tackling major dereliction of safety duties by directors in large organisations, have generally only been used successfully in cases where those accused have had a 'hands-on' involvement in decisions that led up to the accident - as in fact happened in the prosecution of OLL Ltd following the Lyme Bay disaster.

We in occupational safety and health need to be quite clear about the case being advanced for new offences to allow for successful prosecution of safety offenders at the top of organisations.

It was Voltaire who wrote of C18th France 'In this country we find it pays to shoot an admiral from time to time to encourage the others'. To what extent, one might ask, is this relevant in the late C20th UK industrial and commercial context?

The argument most often advanced for a new offence to allow for the prosecution of individuals in charge of organisations is that it would stiffen the resolve of those directors who presently either 'don't know and don't care abut OS&H' or worse still, 'do know but still don't care'. Yet, it is probably the case that most senior directors, 'do care but don't know' how to discharge their OS&H responsibilities successfully. For them the question to be addressed is the extent to which simply enhancing their level of anxiety about the possibility of fines, imprisonment or possible disqualification as a director, will actually help. Would they actually convert 'care into knowledge' by devoting more time to managing OS&H. One could argue that, if shopfloor workers cannot be motivated successfully to participate in safety as a result of threats and coercion, why, in this respect, should senior directors be any different?

On the other hand, one thing which the disaster experience of the eighties did establish is our contemporary understanding of the power of safety management systems to address hazards and control risks. Thus, however physically remote they may be from the events leading up to disasters, the levers to ensure effective management of prevention (policies, people, procedures) should at all times be very directly in top management's hands.

The real question to be addressed is not so much about whether senior safety management failure is a crime (it clearly is) but what to do with those who are found guilty of it. Of course the loss of reputation which guilt itself involved in these cases can be immense. Yet, in contrast to Voltaire's France where life was cheaper than it is now, the best approach has probably got to be one of compulsory reform and re-education of offenders with the threat of more severe punishment reserved for those

who remain obdurate and defiant in the face of what the law has deemed to be a serious failure of duty towards those who had every right to expect protection.

Let's see more directors sent on high quality safety management courses following major accidents (augmented perhaps with suspended sentences and with follow-up auditing of their performance) and avoid the mistake of demanding severe penalties.

April 1999

Costs v values

I was pleased to see that in the January edition of *Management Today*, Sir Neville Purvis, Director General of the British Safety Council has made a strong and impassioned plea for companies to take on board the 'business case' for occupational health and safety. Like RoSPA, BSC obviously understands the need to support one of the key messages developed by the HSC/E in recent years in its publications such as *Costs to the British Economy of Work Accidents and Work Related Ill Health and Costs of Accidents at Work.*

In his article Sir Neville quite correctly seeks to combat the notion that modern health and safety requirements are an unacceptable cost or 'burden' on business and that they inhibit economic growth and competitiveness. Defeating this simplistic, anti-regulatory position has been one of the main challenges facing the occupational health and safety world over the past decade and a half. And yet there are still too many people in business today who continue to perceive the subject as a lower order technical issue associated with prescriptive regulation.

At the same time, the 'business case' as developed so far by HSE and others, is not without its limitations. For example:

- It is much stronger for accident prevention than it is for the prevention of work related ill-health. Not only is ill health now a much bigger problem than accidents, but a greater part of the costs associated with work related health damage - particularly for forms of ill health with long latency where disease and early death occur following retirement - is borne by victims and the tax payer not by the employer.

- Even when limited to accident prevention there is the problem of the payback period. Investment in safety in this year's budget may not show a return for some time, even if it happens to be on the same internal budget line.

- There is the more general problem of lack of good data. How many companies have good systems for capturing all their accidents and near misses let alone meaningful data on costs? So how well can they verify the argument by measuring costs and benefits over time?

Notwithstanding the value of the 'Good Health and Safety is Good Business' message in helping to overcome the argument about 'regulatory burdens', one of the effects of having had to rely so heavily on this strand of reasoning is that many of us in the safety field seem to have forgotten that it was only ever a secondary and supporting argument for accident and ill health prevention anyway. So safety influencers now need to adjust their message emphasising that the primary arguments for prevention must always be moral and ethical, based on the duty of care we owe to one another (both corporately and individually) and the unacceptability of human beings being sacrificed in the pursuit of productive endeavour however necessary and desirable such activity might be.

Some may feel that this is a touch idealistic. Yet some recent HSE sponsored research by the consultants, ENTEC UK (see *OS&H*, Oct 98) which has examined what motivates managers to take action on health and safety issues, suggests that, in reality, business based arguments may not be as persuasive as one might imagine.

The ENTEC findings imply that, while managers making health and safety decisions seek to derive comfort from 'business case' arguments, in practice, they are much more likely to be motivated by factors such as company values, peer expectations and risk to individual and corporate reputation. In short, the risk of being (and being seen to have been) in the wrong is still at the forefront of managers' minds.

While the figures about the cost of accidents and ill health which HSE, RoSPA and Sir Neville continue to quote are dramatic, there is also the danger that they can give the strong impression that those bearing the 'costs of accidents' message view employers as 'amoral calculators', only driven to act by pure cash logic. No manager will be too impressed if he senses that health and safety campaigners see him as greedy and careless and incapable of responding to any other kind of imperative save that to make money.

Notwithstanding the chronic ignorance about health and safety still to be found in many smaller businesses, the closeness of relationships in such firms often means that there is also a very strong sense of mutual care - although the knowledge about how to put that care into practice, for example, by assessing and controlling risks, is often completely missing. Thus I have often heard owner managers in small firms admitting to themselves the sense of guilt they would suffer if they knew an injury to a member of their staff had been caused by their failure to insist on precautions being taken or ensuring that a piece of work equipment was safe to use.

Measuring everything in purely monetary terms is all very well but the time is now right to find new ways to highlight the massive human (and by definition unquantifiable) costs of work related injury and ill health - including the wide ranging psychological as well as physical consequences which accidents and disease have for people affected, whether directly or indirectly.

It is rare for accidents and cases of industrial disease to receive anything but the slightest national media coverage, unless, that is, there have been multiple casualties - and, even then, the emphasis is very much on the extent of fatalities and acute physical trauma and not longer term effects, for example on workers' health. Most harm due to work, particularly that occurring in small firms, receives no publicity at all - and yet, taken as a whole, it represents a tragedy of massive proportions, made worse arguably by the fact that its victims suffer largely in silence and in isolation.

Also, accidental injury and work related health damage are generally much more prevalent in disadvantaged socio-economic groups. Major blocks of occupational health detriment which are now in the pipeline are heavily concentrated among those who are already heavily disadvantaged in health terms.

Current initiatives on health and safety management have helped to show a way ahead in raising awareness but unless arguments for fresh action on health and safety proceed in the first instance from a human and ethical, starting point, there is no

guarantee that they will be effective in engaging with managers' current perceptions, values systems and motivations. And they may even be seen as naive and simplistic.

August 2000

Corporate killing... now make it stick!

The Government's proposals to introduce a new offence of corporate killing are clearly to be welcomed. Whatever uncertainties still surround the detail of the proposals and their application, the announcement in itself signals the Government's intention that the criminal justice system should, in future, bear down harder on those organisations and their directors which pay scant regard to the safety of those they employ or who are affected by their operations.

The proposals will give effect broadly to the 1996 recommendations of the Law Commission, that the law should be changed so that an offence of corporate killing could be held to have been committed in cases where it could be demonstrated that the defendant's conduct had fallen well below what could reasonably have been expected. The Commission took the view that, unlike the offence of manslaughter by an individual, a new offence of corporate killing would not require proof that failings were obvious to the company, merely that death had been caused by a failure in the way in which the corporation's activities had been organised to ensure the health and safety of persons employed in or affected by them.

The introduction of the new offence comes after a long series of battles by victims, their families and friends - as well as campaigning organisations - following disasters large and small. There has been a growing public expectation that both organisations and those in charge of them should be punished where it can be shown that they have failed to prevent such events.

Yet the courts have failed to respond effectively. Besides the failure of high profile cases such as that which followed the *Herald of Free Enterprise* disaster, there have been many other cases in which it has been impossible at law to prove negligence by companies and their directors, even though the clear findings of public enquiries have shown that the roots of these tragedies lay in weak or non-existent safety management and culture.

Indeed, the only cases in which directors have been prosecuted successfully under the *Health and Safety at Work Act* have tended to be those where the companies and operations involved were small and the director(s), as the 'controlling mind' of the company, was obviously so because he or she was actually directing the work at first hand - if not doing it!

It has always been argued by those opposed to enhanced director liability that it is extremely difficult to show reckless disregard of safety by those in overall charge, particularly of larger organisations. Some argued that a failure to prevent an accident at work was unlike other crimes committed by individuals. Few if any directors set off for work in the morning with the clear intention of allowing people to fall into machines or be poisoned by noxious substances, they said. Such events were unplanned and tended to happen because of deficiencies in the way delegated management tasks were carried out, if not by the way in which work tasks themselves were executed by individuals.

Thus directors, who by definition as individuals could never be omnipresent, omniscient nor omnipotent, could not be held directly accountable for everything which went wrong. Within this view, unplanned events leading to harm, even when they were foreseeable and preventable, tended not to be seen as culpable failure by any individual (or group of individuals) in charge of the organisation involved but simply as failure by an impersonal collectivity which, 'having no body to be punished and no soul to be damned' was effectively beyond the scope of prosecution for manslaughter.

Needless to say it was this view which has been constantly challenged in the aftermath of disasters, particularly the long trail of high profile disasters in the eighties - and, in the end, the Law Commission, in its report no 237, agreed that it was wrong.

What happens next however will be crucial in determining whether the new offence will have the desired effect in enhancing board room perceptions and behaviour in relation to corporate risk management and stimulating the achievement of higher levels of corporate safety performance. Whether it is delegated to the Crown Prosecution Service or to HSE (or to both jointly), the responsibility for bringing prosecutions will need to be exercised carefully to ensure that cases are only taken (at first anyway) where there is clear evidence of negligence and at director level and where it will be hard, if not impossible, for defendants to mount a successful 'due diligence' defence.

Indeed, there is a fear expressed by some, that directors charged with the new offence might still be able to elude conviction by arguing that they had signed off the company's health and safety policy, employed a health and safety consultant or adviser and so on - delegating responsibility to others lower down the chain who were obviously more expert than themselves in specific features of risk management.

A number of important principles need to be kept in mind here:

- If the creation of the new offence is to engender public confidence that corporate neglect of safety will no longer be tolerated, it is of fundamental importance that a significant number of cases should be taken, that few if any should fail and that penalties imposed should be seen to be appropriate. (Here the Government is also proposing the option of compulsory remedial action, something strongly argued for by RoSPA in recent years).
- There needs to be a clear focus on the fundamental purpose behind the creation of the offence. This should not just be to exact retribution - although clearly needs for 'justice' will have to be served. Rather the way in which cases are taken must be such that it gives a very clear to signal to directors not only of what henceforth will be regarded as unacceptable but of what they need to do to be able to demonstrate competent board level leadership of health and safety management in their organisations.
- It will be necessary to establish a much stronger understanding in the courts that failure by boards to put appropriate policies, people and procedures for safety in place is likely to have the effect of exposing workers and others to unacceptable risk.

- Beyond this, courts will need to develop a clear understanding of typically what it is that directors need to 'understand, know and do' to lead the whole process of risk management. They will need to be able to appreciate, for example, that directors are required not only to take a 'helicopter view' of risks and their management but that they must be able to show that they are monitoring and reviewing what is going on. On occasions this may mean 'going down into the depths' of their organisations personally to test the gap between ‘safety theory espoused’ and 'safety theory practised'.

April 2002

Justice and remedies

The Health and Safety Commission (HSC) have issued a new strategy statement about their approach to enforcement, reiterating the general principles which govern their approach to use of their enforcement powers, including prosecution in the wake of accidents and serious breaches of health and safety law (http://www.hse.gov.uk/pubns/hsc15.pdf). The statement is part of the HSC's wider Revitalising Health and Safety (RHS) programme, which, while recognising the importance of enforcement, has also sought to identify other steps that can be taken to motivate and support the improvement of health and safety management by employers.

In another related initiative the Centre for Corporate Accountability (CCA) have also launched their 'Charter for Safety' (www.corporateaccountability.org), setting out their ideas for enhancing duties, penalties, sentencing and enforcement in relation to health and safety law. It is an interesting contribution to the on-going debate about raising standards of health and safety at work, although, because it concentrates very much on law and enforcement issues, it has not set its proposals in the context of the wider RHS strategy discussion.

CCA's proposals have been heavily influenced by a perceived 'justice gap' in the wake of a number of high profile cases, reflecting a feeling that the Health and Safety Executive (HSE) and local authority (LA) health and safety enforcers are failing to investigate and to prosecute sufficiently in the aftermath of serious accidents, particularly those which could easily have been prevented if employers had taken their duties more seriously. If employers 'who don't know and don't care' are not taken to court, victims as well as friends and relatives can feel aggrieved and cheated.

On the other hand, if HSE were to devote all their available resources to prosecution, leaving nothing over to help disseminate information and advice and to raise awareness among 'do care but don't know' employers, then overall health performance could actually deteriorate. Like CCA, RoSPA takes the view that more HSE resources are needed both to enforce current legislation and to promote health and safety but that in the short to medium term, a necessarily imperfect balance has to be struck between reactive and proactive work.

Where RoSPA might differ from CCA is that it sees enforcement as only one ingredient (albeit a major one) in a rather more complicated recipe for change. In that sense, during the consultation exercise, which preceded RHS, the Society strongly welcomed the HSC's invitation to stakeholders to identify other forms of leverage, which could be used to influence employers' efforts to raise standards. Ideas on these lines which have since been woven into fabric of RHS include: enhancing workforce involvement in H&S via safety representatives; involving insurers in stressing the 'business case' for better H&S; encouraging major clients (including Government as a major procurer) to exert pressure for better standards via the supply and contracting chain; 'naming and shaming' offenders; and building health and safety into business advice services such as the 'Small Business Service'.

The HSC has also sought to respond to suggestions made by consultees during the RHS consultation phase about the use of innovative forms of penalty following convictions for health and safety offences. Many commentators have suggested that not only are most fines for health and safety offences far too low but that more creative approaches to sentencing are needed to help achieve the purposes of health and safety law. HSE are understood to be following these ideas up with a view to advising ministers (Action Point 9 in RHS) - although one of the possible vehicles for change, the Home Office *Review of Corporate Sentencing*, has now been shelved.

One of the ideas raised in RoSPA's input to the RHS consultation was that greater use should be made of the existing 'remedy order' (RO) powers contained in Section 42 of the *Health and Safety at Work (HSW) Act*. These provisions were inherited in part from pre '74 health and safety legislation. Section 42 (1) states '*Where a person is convicted of an offence under any of the relevant statutory provisions in respect of any matters which appear to the court to be matters which it is in his power to remedy, the court may, in addition to or instead of imposing any punishment, order him, within such time as may be fixed by the order, to take such steps as may be specified in the order for remedying the said matters*'. In practice however this provision is never used because courts are advised that HSE and LAs can achieve improvements more effectively by use of their improvement notice powers (under Section 21 of HSW Act). These can be used to require employers to take action within specified timescales, not just to tackle specific risks, but, where appropriate, to make changes to key aspects of their organisation and, arrangements for managing health and safety, for example, risk assessment, training, monitoring and so on.

What RoSPA has argued is that, given limited HSE and LA enforcement resources, the RO powers in Section 42, far from being redundant, could actually be used very effectively following successful prosecutions for health and safety offences, as part of an innovative sentencing package to help promote longer term improvements in offenders' health and safety management systems and practices.

In the Society's view, what needs to be explored is the practicability of courts appointing competent organisations or individuals **from outside HSE** to act as advisers and rapporteurs who would indicate the steps guilty employers needed to take to upgrade their management of health and safety within timescales set by the court.

This approach would have several advantages:

- It could be combined with the imposition of suspended sentences (fines or even imprisonment) which would be imposed in full by the court if the appointed rapporteur were unable to confirm that necessary improvements had been made.
- By focusing on health safety management systems, it would address the fact that invariably the real causes of particular accidents are rooted in poor management.
- It would help ensure a closer connection between punishment and the purposes of health and safety law, namely protection of workers and others at risk from work activities.
- It would help to mobilise additional professional health and safety expertise in the cause of enforcement with the employer in question bearing the costs involved.
- In the wake of serious accidents and incidents it would act as a spur to a change of attitudes and culture which often does not happen automatically as a result of the

imposition of traditional penalties such as fines (which in any case tend to be quite low); and
- very significantly (against the background of Government reluctance to introduce new law) the RO powers already exist in the HSW Act and no new legislation would be required.

On the other hand, establishing such a system would not be without its challenges.

Firstly, there would need to be a robust process through which courts could identify suitable candidate organisations which might be appointed in the adviser/rapporteur role. These might include, for example, recognised health and safety organisations and consultancies but it might be necessary to establish some sort of central panel to issue a call for applications and to scrutinise applicants to ensure their suitability.

Secondly, some sort of protocol would be required to prevent possible conflicts of interest, for example, where the appointed organisation was also a provider of proprietary H&S services. For example, it would clearly be unacceptable for the appointed organisation to interpret compliance with an RO as equating with the use of its own training courses. Equally, if the organisation were prohibited from supplying its own services, it might take a prejudicial view of services sourced from a rival organisation, for example, use of proprietary health and safety management auditing systems which would be an important source of evidence when reporting back to the court.

Thirdly, and more importantly, how would the court be able to check out the appointed organisation's suggestions concerning the terms of an RO and the criteria that would be used to assess whether or not these had been met?

These and similar issues would require a lot of hard work.

Although the RO powers could be used in circumstances where employers had been found guilty of quite specific offences (say, an unguarded machine), their most effective use in innovative sentencing might be in cases where the employer had been found guilty of non-compliance with wider general HSW Act duties and evidence presented during the case showed that there was a clear case for requiring root and branch improvements in his overall health and safety management regime.

RoSPA would very much favour exploration of this sort of idea being fed into work on Action Point 9 but there is also a possibility that its practicability could be tested initially, not in the criminal courts but as part of innovative approaches to settlements in common law cases for damages following injury at work. Often, for example, parents of young persons killed at work will pursue a damages claim against the employer concerned, not to secure financial compensation (no amount of money can compensate for the loss of a son or daughter) but to secure what they see as 'justice'. Often relatives will say things like, 'we are taking action because no-one should have to go through what we have been through'.

In such cases the plaintiff's lawyers could ask the judge to direct that the defendant make an undertaking to make changes to their health and safety management regime, as recommended by an independent, mutually agreed expert (individual or

organisation) on the understanding that, if these changes were not achieved in an agreed timescale, the defendant would become liable for payment in full of damages that would otherwise have been awarded.

Surprisingly, ROs do not seem to be part of the armoury of sentencing options in other areas of law affecting corporations, although quite why is still unclear. Perhaps, their use in the field of health and safety might even serve as a test bed for other areas where courts might want to influence longer-term corporate behaviour.

The important principle in all this is that 'justice' is not just a matter of meeting the needs (however imperfectly) of those who have been harmed, for example by securing damages or ensuring offenders are punished. In the real world of work, 'justice' also means ensuring that those potentially exposed to risk are guaranteed 'just treatment' by being afforded safe working conditions - which in turn are delivered through effective health and safety management systems.

Potentially the means already exist to enable courts to play a much stronger role in helping to achieve this kind of 'justice'.

June 2004

‘Thinking harder about enforcement’

RoSPA has been invited to feed in its views as part of a review by the Health and Safety Commission (HSC) of Health and Safety Executive's (HSE) enforcement policy statement (http://www.hse.gov.uk/pubns/hsc15.pdf), which sets out the principles which govern HSE's approach to use of their powers under the Health and Safety at Work Act. This exercise is obviously timely, coming as it does immediately following the publication by the HSC and the Government of their wider strategy up to 2010 and beyond (http://www.hse.gov.uk/aboutus/hsc/strategy.htm). Enforcement plays a vital role in the ‘health and safety system’, indicating Government's (and ultimately Parliament's) determination that employers should meet their obligations to comply with legal requirements and deliver effective protection of people at work and others from work related harms. Without at least the perception of HSE's determination to bear down on those employers who disregard the law, there is a danger that health and safety requirements will be viewed as a 'dead letter'. That said, enforcement needs to be seen as only one (albeit a very important) influence in securing compliance and thus enforcement policy and practices need to be integrated effectively within a wider strategy to designed to secure both the commitment and capacity of employers to manage work related risks successfully.

A major concern at the present time however is that, whatever the principles governing enforcement, there are simply nowhere near enough inspectors on the ground to get out and engage with the hundreds of thousands of businesses throughout the country which need to be visited. HSE are feeling the effect of the swathe which the Government is cutting through the Civil Service. In the context of the HSE, this is far from saving British tax payers money; it is wasting it. Investing sensibly in health and safety, whether at the level of an individual business or indeed the nation as a whole, is 'spending to save' and thus Government cannot be allowed to get away with lecturing business about the 'business case for health and safety' while not applying the same logic to the way it invests in the prime mover in the 'health and safety system', namely the HSE.

Ultimately however the quality of enforcement is just as (if not more) important than the quantity of action taken. The principles underpinning HSE's approach to enforcement set out in the statement (proportionality, targeting, transparency, consistency, accountability) are essentially sound and have been rightly recognised by the Cabinet Office as a model of good regulation. It is more their application in practice perhaps that needs to be revisited. In other words it is not just a matter of how many visits are undertaken, how many pieces of advice are given, or how many notices and prosecutions are taken. It is also a question of how inspection is targeted, what objectives HSE are seeking to achieve, how they use the powers available to them and so on.

Looking at proportionality for example, it is vital that HSE targets major risk issues and not minor ones. In this sense it is important that HSE makes clear what kinds of unsafe condition or act constitute serious and imminent risk meriting use of Prohibition Notices (PNs). Similarly HSE need to make clear their approach to the issuing of Improvement Notices (INs). If HSE adopt an approach of 'picking low hanging fruit' by issuing INs in relation to 'easy to spot' but relatively minor

infractions when major and more complex issues remain un-addressed, this is not only a misuse of resources but can seriously damage their credibility. HSE also need to avoid giving the impression that standards set out in guidance have mandatory status. They need to be prepared to acknowledge and examine alternative approaches adopted by employers to tackling specific risks, asking duty holders to explain how their measures achieve ALARP ('as low as reasonably practicable') risk reduction. Where there are differences of view, instead of an HSE inspector issuing a notice and leaving it open for the duty holder to appeal to an Employment Tribunal, there could be agreed (and more rapid) procedures for independent technical mediation. Inspectors do not always 'know best' and use of their enforcement powers without technical validation where appropriate can seriously undermine their credibility.

When it comes to targeting, HSE obviously need to focus their scarce enforcement resources so that they address really serious issues, concentrating on the most critical and prevalent health and safety problems and focusing on those employers whose approach is poorest. To free up more resources to this end, RoSPA would favour a system whereby acknowledged 'higher performers' could be put 'on trust' to manage their health and safety risks without HSE intervention - unless there was an accident or a case of serious health damage or a serious complaint which could not be resolved internally - and provided that the organisation made use of appropriate periodic, independent, professional audit. Such an approach however would need very careful piloting to ensure that effective safeguards were built in, including for example, consulting workforce representatives before putting such arrangements in place. (This idea was set out in detail *'Parting Shot',* August 2003).

'Revitalising Health and Safety' has set out some clear priority topics (currently: falls from height, slips trips and falls, site transport safety, stress and musculo-skeletal disorders). While these are important at a national level, when they are targeting enforcement effort within any organisation, HSE need to ensure that they need to focus on the risk profile of that organisation, rather than looking only at these priority topics. In general HSE's approach to enforcement needs to involve a challenge to the employer to explain their own approach to prioritisation and their timescales for planned action to address the issues involved. In this context HSE will undoubtedly need to focus more proactive inspection effort towards assessing employers' approaches to managing work related road risk since, in very many organisations, this will be the most significant safety risk faced by most employees.

More importantly, other than in circumstances where risks are so imminent and so serious as to merit the issuing of PNs, HSE need to target their enforcement effort towards the rectification of underlying health and safety management weaknesses such as absence of professional advice, absence of appropriate management and skills training, absence of risk assessment, absence of active and reactive monitoring, absence of consultation and performance review etc. In this sense far more effort needs to be placed on rectifying those weaknesses in management systems and capability within organisations which have allowed unsafe acts and conditions to go unnoticed and unchallenged in the first place.

Transparency in the use of enforcement powers is vital if duty holders and other key stakeholders are to have confidence in the overall enforcement regime. In the main this can be achieved by HSE making clear their reasons for following a particular

enforcement path, for example, whether or not to issue a notice rather than provide simple advice in a letter or whether or not to prosecute and what to prosecute for, for example, failure to provide a safe system of work or failure to put 'arrangements' in place which would have enabled the organisation to have correctly assessed and controlled a risk or class of risk. Some typical (but anonymised) case studies of reasoning underpinning enforcement decisions which were easily accessible via the HSE website or sector sites could do much to help in this area.

When it comes to consistency, it is vital, particularly within individual sectors (and especially in large, multi-site organisations) that HSE enforce in a uniform way. Different standards and different levels of enforcement action in different parts of the country on the same issues do nothing to inspire confidence and lead to the impression that HSE lack expertise and internal consistency. RoSPA would favour the idea of employers' associations providing secure web-based facilities for their members (accessible also to HSE) to flag up issues, spot possible problems and help facilitate the rectification of any inconsistencies in enforcement performance before these can become a wider issue of concern in the sector concerned. There is a particular the case for this to deal with instances in which it is alleged that local HSE inspectors adopt different enforcement approaches to those which have been agreed at a high level with 'lead inspectors' charged with co-ordinating enforcement across large, multi-site organisations.

Similarly, in the cause of accountability, HSE should be prepared to put their own internal ratings (for the purposes of prioritising proactive enforcement) of organisations in the public domain with an explanation of the criteria used so that such organisations can develop some sense of what they might be required to do to achieve a superior rating. Also, to ensure accountability to the workforce, it is vital that HSE inspectors always meet with workforce representatives during their visits to premises to explain to them the approach they are taking and to report to them on what they have found and any action which they may be taking. Workers' representatives not only have right to be fully involved but they also may have much useful information which can assist inspectors in their work.

Desirable as it might be for HSE to be as proactive as possible, the reality is that they are increasingly reactive. And they are under considerable pressure to investigate a higher proportion of serious injuries and complaints. This is understandable but equally HSE need to be firm in explaining the way in which they use their scarce resources selectively and to best effect when investigating accidents, incidents complaints and cases of work-related ill health. Non-compliance and incidents leading to harm are in reality so prevalent in the economy on a daily basis that HSE could devote all their resources to investigation and still leave the vast majority of such cases untouched. RoSPA has long held the view that, however desirable an increase in investigation by HSE might appear to be, if they were to move too far in this direction at the expense of proactive inspection and the provision of information and advice, health and safety standards might actually fall. In this sense it is a simplistic fallacy to believe that more and tougher enforcement and penalties will automatically lead to an upward shift in standards. Many other inputs - and not just from HSE but from other parts of the health and safety system - are needed to motivate, support and sustain performance improvement.

On the other hand, investigation is vital not just as a precursor to securing successful prosecutions where this is needed, it is also a vital source of intelligence for HSE which can point the way to change and improvement. From this point of view it is vital that HSE are far more insistent that employers, as the primary duty holders, carry out adequate and suitable investigations of all accidents and incidents and cases of health damage and that in doing this they: involve professionals and employee representatives; follow minimum standards for evidence gathering and integration; formulating and testing hypotheses as to causation; and generate and act on lessons learned. Except in circumstances where it is clearly merited, HSE should not move to investigate themselves but call for a copy of the employer's investigation report within a specified time scale. Employers would need to understand that failure to investigate objectively (or worse still, to conceal vital facts) could attract HSE action, including making prosecution of both the organisation and individuals more likely. Conversely open and fair investigations leading to positive remediation would need to be recognised by HSE as obviating the need for further enforcement action.

As with pressure to increase investigations, HSE also face pressure to take more prosecutions, not only to heighten their exemplary effect on other defaulting employers but to meet the public's (and often victims') needs for 'justice'. RoSPA agrees that HSE and the Government need to signal their determination to bear down even harder on cases of blatant and serious non-compliance - with the introduction of a new offence of corporate killing (action on which has been delayed for far too long). This is important but again HSE must a) make clear that they cannot prosecute for every infraction and b) that they will explain their reasons for bringing prosecutions in some cases rather than others. Again, prosecution should not just be seen in quantitative terms (how many? levels of fines? etc.) but in terms of its overall effectiveness in helping to deliver sustainable changes in performance, whether at the level of an individual business, a specific sector or the economy as a whole.

In this sense prosecution policy cannot be divorced from sentencing. In general fines are still far too, low and imprisonment (even in the worst cases) is very rare. Yet punishment, while necessary in many cases, may not always be the answer. RoSPA, for example, has made radical proposals (see *'Parting Shot'* September 2003) for remedial sentencing (as developed to deal with other areas such as motoring offences and youth offending) to bring the expertise of health and safety professionals outside HSE into play to act as supervisors appointed by the courts to help promote and sustain improvement among failing employers. This approach could be used to require persistently non-compliant employers to undergo training and to implement improvement programmes or face having to pay large suspended fines. Developed in the right way it could bring another important layer of professional health and safety expertise into the enforcement process.

HSE also need to make clear their approach towards prosecuting individuals as well as (or instead of) organisations. RoSPA firmly believes that HSE should not seek to secure the prosecution of an individual where it cannot secure the conviction of the organisation for which they work. Equally RoSPA has a very clear view that, where the faults of an organisation are very clearly due to the wilful acts or omissions of controlling individuals such as its directors, they too should be prosecuted. HSE should be sparing however in prosecuting individuals within organisations who have little or no power or influence to affect the conduct of operations - although clearly

employees at all levels should understand that they may be liable to be prosecuted by HSE where they blatantly disregard their duties under health and safety law.

Ultimately however it is not just the ground rules governing enforcement which are critical but the men and women charged with doing the enforcing. HSE inspectors need special skills and experience to carry out their role effectively. There is much evidence that the average age and experience of HSE's Field Operations Division has dropped in recent time as a result of a disastrous thinning of its ranks due to a policy early retirement. The result all too often is that inspectors cannot match the knowledge and expertise of professionals with whom they have engage in dialogue when inspecting. To be fully effective every in the field, every HSE enforcement officer needs to have some first hand familiarity with the sector, business or risk issues they are being asked to address. There are strong arguments to suggest that every HSE inspector must have had some experience (if only indirectly) of managing health and safety in an organisation. HSE staff need to be thoroughly immersed in health and safety management systems thinking, for example, by spending secondment time in individual businesses shadowing business processes. The HSE's career structures need to be made more flexible to allow staff to move between employers in the public, private and voluntary sectors and back into HSE with career prospects and pension rights protected. There also need to be more creative approaches to career breaks and secondments to allow HSE staff 'to get back to the floor'. Every inspector should also have a mentored CPD (Continuing Professional Development) plan in which they are challenged to develop their contacts with business and other key stakeholders.

The Commission's decision to consult about HSE's approach to enforcement offers an opportunity for the health and safety community and other stakeholders to think more deeply about what we really want from this fundamentally important part of the 'system'. After all, the prime purpose of enforcement should not simply be to create the impression that HSE has got teeth and ' is doing something'. It should be to address underlying weaknesses in the management of health and safety risk and ensure that action taken really does lead to a lasting change in the way employees and others are protected long after inspectors have left the scene.

RoSPA hopes that a digest of views received as part of the review and HSC/E's response to these are put in the public domain before any decisions are made about amending the statement.

Parting Shots

Safe start

➤ **In the last issue of OS&H,** RoSPA's occupational safety adviser, ***Roger Bibbings***, examined the growing debate surrounding health and safety and the ageing workforce. This month he discusses young people in the workplace, a topic which is also the focus of this year's European Week for Safety and Health at Work in October.

The slogan for this year's European Week is 'Safe Start' and in the build up to the Week, the Health and Safety Executive (HSE) has already developed much useful information and guidance on their webpages – *www.hse.gov.uk/campaigns/euroweek* The information is aimed at employers, parents and supervisors of young people as well as young people themselves.

Other organisations that are already signed up in partnership with HSE to promote the Week, include the Institution of Occupational Safety & Health (IOSH), which has developed its 'wiseup2work' website (www.wiseup2work.co.uk), the TUC, the manufacturers' organisation – the EEF, and the Learning and Skills Council (LSC) which has also developed a good practice safelearner website (visit: www.safelearner.info).

RoSPA will be contributing to the Week, not only by promoting its 'young worker' site (**www.youngworker.co.uk**) and its work on activities such as LASER schemes (www.lasersafety.org.uk), but by encouraging local health and safety groups to to get involved via the Safety Groups UK network (www.safetygroupsuk.org.uk).

In fact, HSE is challenging all stakeholders to get involved and to raise awareness of the need to focus on the occupational safety and health of young people. It is doing this through the distribution of action packs; by providing links to key webpages and promoting guidance on its website, as well as a new *Basic Hazard Awareness Course*, specific events and competitions.

The new course is currently being piloted and aims to enable young people to spot a hazard and then stop and ask how exposure to it is reduced to an acceptable level of risk. The course endeavours to use health and safety information linked back to the hazard rather than explaining risk reduction measures. The intention is to provide a grounding for subsequent training.

HSE is also committed to revising and merging its existing guidance to employers and others on young people at work, and in the organisation of work experience schemes. *Young people at work: A guide for employers* and *Managing health and safety on work experience* will be combined and be re-launched as a web-based document in the run up to Euro Week.

Ideas for the campaign are also contained on the website of the European Agency for Safety and Health at Work at: **http://ew2006.osha.eu.int** and even include a cartoon character, 'Napo', who is designed to convey key safety messages in a universal language.

Some concerns over young workers are that they could be more at risk in the workplace because they lack experience and trained judgement, and also that they may be over-eager to help and get involved without fully understanding hazards, risks and precautions to be adopted. There is a lack of evidence to support these views.

And the point about lack of experience is not limited only to young people. We do know that new starters are at more risk, and this is borne out through key messages in the Euro Week campaign. HSE research shows, for example, that the accident rate for new starters of all ages in construction is higher than for experienced workers, who are likely to have a better understanding of site conditions and safety procedures.

Thankfully, fatal and serious injuries to young people in the UK are relatively rare. But what makes the health and safety of young people special is that accidents to more mature people are tragic enough, but when they involve those who are just starting out in the world of work, understandably there is much greater public concern.

This has resulted in employers and organisations in the training and development chain having in effect to accept an 'in loco parentis' level of responsibility for ensuring (to use the LSC's key phrase) 'a safe and supportive learning environment'. It is often forgotten, for example, that employers have to provide parents of young workers with copies of any risk assessments.

Supervision

A fundamental part of the *Safe Learner Framework* is a strong focus on effective supervision. Investigations of many of the accidents that have occurred on LSC-funded schemes have shown poor supervision to have been a significant contributory factor.

In many ways, therefore, attention to supervision and the 'soft skills' surrounding the management of young people's health and safety are even more crucial than the physical precautions that need to be adopted. Indeed a balance has to be struck between preventing young people being exposed to workplace hazards and actually teaching them safely how to cope with them.

One of the key points that needs to be grasped in this context is that young workers are not well served by insulating them from all workplace hazards and 'wrapping them in cotton wool' while in the workplace, for fear of enforcement action or claims if things go wrong.

With HSE's principles of 'sensible safety' very much in mind (www.hse.gov.uk/sensiblehealthandsafety), it is important that employers and training providers alike understand the importance of avoiding 'excessive risk aversion'. While protection

Parting Shots

from hazards that require special knowledge and skills is vital, young workers will actually suffer if they are not able to get an introduction to hazards under controlled conditions, and supervisors are not able to explain to them the importance of assessing risks and adopting the right working methods.

In fact, the way in which the whole subject of 'health and safety' comes across to young people when they come into the workplace for the first time is absolutely critical to the way they engage with the subject as they proceed through their careers.

If *'elf and safety'* is experienced as so much finger wagging, endless paperwork (or ticking things on screen), coupled with mindless following of procedures with little scope for them to use their own judgement, it is highly likely that the impression gained will be of something that is bureaucratic, restrictive and burdensome and so much baggage to be dumped at the first opportunity.

Engaging young people positively around health and safety issues has got, within safe limits, to allow for some degree of experimentation. It has got to be more about goals to be achieved rather than rigid prescriptions. It has also got to be more about understanding and managing risk rather than blindly following rules.

That said, there certainly are plenty of occasions when firm advice and clear warnings are necessary to prevent young people unknowingly putting themselves in danger. (I personally can remember several proverbial 'cuffs round the ear' as a callow youth in the workplace for which I was later extremely grateful – although that would not be acceptable practice today!)

24/7 safety

It is also very important that the whole subject of young people's health and safety at work should not be approached only with the workplace in mind. Increasingly, young people will have been exposed to a continuing address of safety and risk ideas throughout the various stages of the National Curriculum, for example, as part of PSHE (Personal, Social and Health Education). In PSHE and Citizenship lessons pupils are encouraged to develop confidence and responsibility in order to make the most of their abilities, to develop a healthy and safe lifestyle and to develop positive relationships. The expectation is that they will become informed citizens who have developed skills of enquiry, communication, participation and responsible action through a range of lessons which provide challenge and fun.

In this sense, supervisors and mentors of young people, whether in training schemes or in work experience, need to engage them on a '24/7 safety' agenda, focussing not just on workplace hazards but where possible on issues such as road safety, safety in sport and recreation, home safety (for example child safety or safety of older people in the family) or even on coping with personal safety, alcohol, drugs or sexual health risks. The safety ethos of the well-managed workplace should be seen as a powerful resource in helping with young people's overall development.

But above all perhaps one of the most practical things which everybody can do during Euro Week is to check up to ensure that what should be happening to safeguard young people, is actually being implemented. Having paper health and safety systems in place is fine; the question is, do they actually deliver healthy and safe working?

- Are schools and training providers actually assessing the capacity of businesses and other organisations to manage health and safety and specifically to respond to young people's needs, particularly in relation to supervision and mentoring? This does not need to be a big paper chase with resources being wasted in assessing firms that have already been assessed for similar reasons by other parties such as clients or insurers. Employers need to be given a range of options to evidence their health and safety status.
- Have risk assessments been carried out, again not to create massive amounts of data but to check up on whether any extra action is needed to safeguard young people?
- Have young people had some form of suitable pre-placement briefing on health and safety before they enter the workplace? Is it meaningful? Is its effectiveness monitored?
- Have supervisors had additional training and guidance on working with young people?
- Are accidents and near misses involving young people being reported and investigated so that lessons learned can be shared and acted on, not just in the organisation concerned but more widely?

Above all, is all this actually delivering knowledge, skills and understanding for young people themselves or is it a strange ritual which adults are engaging in to satisfy the perceived needs of various institutions?

October 23rd–27th will be an excellent opportunity to not only focus on the basics but to ask some radical and far reaching questions as well.

Readers' views welcome. Also, please let me know about your plans for the Week. Email: **rbibbings@rospa.com**