Chartered Institute of Environmental Health

The Löfstedt Review of Health and Safety legislation

Response by the Chartered Institute of Environmental Health

July 2011

The Chartered Institute of Environmental Health

As a **professional body**, we set standards and accredit courses and qualifications for the education of our professional members and other environmental health practitioners.

As a **knowledge centre**, we provide information, evidence and policy advice to local and national government, environmental and public health practitioners, industry and other stakeholders. We publish books and magazines, run educational events and commission research.

As an **awarding body**, we provide qualifications, events, and trainer and candidate support materials on topics relevant to health, wellbeing and safety to develop workplace skills and best practice in volunteers, employees, business managers and business owners.

As a **campaigning organisation**, we work to push environmental health further up the public agenda and to promote improvements in environmental and public health policy.

We are a **registered charity** with over 10,500 members in the UK and increasingly in other countries.

Any enquiries about this response should be directed in the first instance to:

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1. General principles

1.1. The CIEH is in a unique position to contribute to the review by virtue of the fact that its members work in regulation, business, consultancy and training. Members are primarily engaged in activities and businesses in the local authority enforced sector.

1.2. The CIEH believes in the firm application of regulation by competent professionals when necessary. Such application should be proportionate to risk and based on evidence in the form of risk assessments to determine priorities for intervention.

1.3. The Health and Safety At Work Act Etc 1974 ('the Act') is a sound piece of legislation and remains relevant today. However the plethora of regulations that have flowed from it have made health and safety law far more prescriptive (and complex), which has inhibited the flexibility for professional interpretation inherent in the original Act. Such professional judgment and flexibility encourages and fosters proportionality in enforcement.

1.4. The extension of regulations has entailed repetition and duplication of general principles, such as training, record keeping, risk assessment etc. These could be merged and simplified into the Management of Health and Safety Regulations.

1.5. Regulatory activity should be carried out by competent[1] professionals who are adequately supported by their employers (i.e. local authorities – LAs). Such support should be in the form of full compliance by LAs with the provisions of S 18[2] of the Act together with adequate support for staff to achieve and maintain competence.

1.6. Similarly, businesses (dutyholders) should take ownership of their legal responsibilities and be allowed and encouraged to self regulate where appropriate, subject to the provision of adequate information and support from government and regulatory agencies.

1.7. Small and medium size enterprises value their relationship with regulators to guide them as to their legal responsibilities.

1.8. Risk based and evidence based enforcement by competent professionals represents a positive benefit to business.

1.9. Multi-site businesses that can demonstrate sound health and safety policies and practices are entitled to earn recognition from regulators for their efforts.

1.10. It is crucial, when considering amendments to regulations, that the original reasons for their introduction (i.e. to address demonstrable hazards) remain at the core of any decisions. The needs of workers and consumers are also crucial. The CIEH does believe however that some regulations could be simplified, merged or abolished and that some may have been 'gold plated' over time.

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[1] https://regulatorsdevelopment.hse.gov.uk/

[2] Section 18 of the Health and Safety at Work etc Act 1974 (HSW Act) puts a duty on the Health and Safety Executive (HSE) and Local Authorities (LAs) to make adequate arrangements for enforcement of the Act

1.11. A basic principle for the CIEH is that any reduction in regulation should be accompanied by more Approved Codes of Practice (ACOPS) which would facilitate and foster more flexibility and thereby proportionality in enforcement.

1.12. The concept of burdens in connection with the application of health and safety law is inappropriate and unhelpful. The concept is inexact and highly subjective. It is notable that the application of food safety law is not regarded as a 'burden' in the same way as health and safety law.

2. Policy

2.1. Occupational Safety and Health (OSH) policy has to be guided by the stated purposes of the 1974 Act - which is specifically excluded from this current review. However it is impossible to conduct a valid review of regulations without taking account of the provisions of the principal Act. Section 1 (2) says that its *'provisions with regard to making regulations and the preparation and approval of codes of practice shall have effect with a view to enabling enactments ...specified in Schedule 1...to be progressively replaced by a system of regulations and approved codes of practice .....designed to maintain or improve the standards of health, safety and welfare established by or under those enactments'.*

2.2. Section 11 (1) (d) says it is a function of the Commission to submit to the authority having power to make regulations *'such proposals as the Commission considers appropriate.....'.* This has become a function of the HSE Board. It was the Commission's role to give advice to Ministers. The HSE would develop proposals for the Commission and conduct the statutory consultations, so was in a position of influence to, for example, ensure that regulations would be enforceable. It is of course not HSE that makes regulations, but Ministers. It is also Ministers who, in the EU Council of Ministers, can oppose or agree to Directives. So any gold plating, if it has occurred, is ultimately the responsibility of Ministers who could refuse to sign but rarely do.

3. Regulations

3.1. In the years following the passing of the Act, the flow of regulations was slow - for example one of the first actions by the new Commission was to declare that making regulations for safety representatives and committees was a top priority but it took many months to settle disagreements between the CBI and TUC members before proposals could be laid before Ministers. The making of some regulations has been greatly influenced by political considerations, eg the Mines Management Regulations which followed the miner's strike (which were perceived by some as an attack on the power of the mining unions).

3.2. In the early years the UK approach was to develop generic regulations for controlling risks, e.g. hazardous substances and electricity. However the UK is bound, as members of the EU to follow directives, and these supersede UK law. It is noticeable from the list in the call for evidence that since the introduction of the 'Six Pack' the EC regulatory production line has issued a stream of directives usually aimed at specific hazards, such as physical agents. There are plenty more that could be addressed if this approach continues.

3.3. Most of these directives have been implemented in the UK by 'packages' of regulations, ACOPs and guidance. The tide both in Europe and the UK has slowed lately largely due to economic conditions. However, it would be difficult to argue that regulations implementing EU directives should be removed unless there is political acceptance that directives are instead written directly into UK law.

4. Codes of practice

4.1. Codes of Practice were already common in some sectors before the 1974 Act. For example they were well regarded by managers and trade unions as having helped underpin safety culture in the mining industry. It is not surprising that Lord Robens, then Chairman of the National Coal Board, recommended that ACOPs should be introduced to drive improvements. For example, an early ACOP, preceding the COSHH regulations, dealt with vinyl chloride monomer for which evidence had just emerged showing it was highly carcinogenic. ACOPs have a certain legal status under the 1974 Act and they need to be kept up to date with changing technology more readily than regulations.

4.2. Lately however HSE have demonstrated a clear preference for guidance, in line with current 'light touch' regulatory thinking. The Griffin Report[3] on the *E coli 0157* outbreak at Godstone open farm in 2009 recommended an ACOP rather than regulations (similar to the ACOP for children's safety on farms). It would have been relatively easy to revise that ACOP to cover zoonoses including E coli more fully, and the open farm sector was in favour of an ACOP providing clarity and certainty about good practice. However HSE preferred to revise the existing guidance - which the CIEH and the industry had criticised as unclear.

5. Guidance

5.1. It is noticeable from the list in the call for evidence, just how many regulations are still accompanied by both ACOPs and guidance - comprising a so-called regulatory 'package'. A finding in the 1994 review of regulation was that many employers were confused between regulations, codes of practice and guidance.

5.2. The problem with guidance is that while it can be useful as advice it has no legal status and is unenforceable. Guidance from HSE contains the caveat: "*This guidance is issued by the Health and Safety Executive. Following the guidance is not compulsory and you are free to take other action. But if you do follow the guidance you will normally be doing enough to comply with the law. Health and safety inspectors seek to secure compliance with the law and may refer to this guidance as illustrating good practice.*"

5.3. Guidance produced by other bodies, such as trade associations, may also be useful but is no more authoritative. Small firms in particular seem to prefer the clarity and certainty of the advice that an ACOP conveys.

6. Sunsetting

6.1. There would be no need for major reviews if regulations included 'sunset' clauses whereby they expired unless a case were made for their retention, based on clear

[3] http://www.griffininvestigation.org.uk/

evidence. Instead the 'Better Regulation' principle of 'one in, one out' is currently government policy.

6.2. The HSE is abolishing the licensing of adventure activity centres (which was introduced as a political reaction to the Lyme Bay disaster and other accidents involving young people) on the grounds that in the light of subsequent experience the risk at these centres is deemed low. However debatable that may be, provided that the risk has been properly assessed, a thoughtful, risk based approach to regulatory control is clearly preferable to political knee jerk reactions. However inquiries into disasters do tend to reflect public concern demanding that 'something has to be done'. The response is usually (more) regulation.

7. Costs and benefits

7.1. In recent years, HSE has argued strongly in Brussels for cost benefit analyses to justify proposals for Directives. Proposals for UK regulations put to Ministers always contained a regulatory impact assessment including costs and benefits. It is crucial that such assessments continue to form part of a transparent statutory consultation process.

Answers to questions in the call for evidence

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

1. Examples include:

   - Management of Health and Safety
   - Noise at Work
   - Asbestos
   - Workplace transport
   - Gas Safety
   - Manual handling

2. These regulations are fit for purpose and are clear and beneficial for business. It is the view of CIEH that regulations enforced by the LA sector are sound and evidence based.

3. CIEH Trainers have evidenced a fresh perception of health and safety following the introduction of the management regulations.

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

1. There is a general need to remove overlaps and duplication. Regulations that all cover issues such as competence, assessment, training, planning, record keeping etc could be merged and simplified.

2. Simplification should not however dilute necessary standards of safety and businesses must retain ownership of their responsibilities.

3. Examples of regulations where duplication exists:

    - Provision and Use of Work Equipment
    - Display Screen Equipment
    - Manual Handling
    - Lifting Operations and Lifting Equipment

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

1. Examples given in the answer to Q 2 are relevant.

2. Personal protective equipment regulations could be merged with management regulations.

3. It is important however to ensure adequate 'signposting' so that important safeguards are not lost.

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?*

1. Before any decisions are made the effect of regulations should be thoroughly analysed.

2. Display Screen Equipment Regulations could be merged with the Workplace (Health, Safety and Welfare) Regulations 1992.

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?*

1. In the absence of any definition of 'significant' and 'burdens' (which is regretted) it is difficult to make appropriate suggestions although the Display Screen Equipment Regulations are again relevant.

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

1. The concept allows flexibility for businesses and provides the right environment for proportionality, including the length of time of inspections and safety requirements arising therefrom and resultant reduced costs for business.

2. It is well established, supported by case law and in the view of CIEH, should not be abolished.

3. Analysis needs to be made of evidence showing benefits that have flowed from the principle.

4. There is a need to increase understanding by business of the benefits of the principle.

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

1. Unreasonable outcomes are not caused by actual regulations but by undue influence of media, insurance claims and the misapplication of regulation.

2. The requirement for written risk assessments by businesses with more than five employees has caused unreasonable outcomes; the lower limit is an arbitrary figure. The CIEH has evidence of cases where significant risk in a business with fewer than 5 employees; action could not be taken to address a serious case of stress as the business was not required to produce a written risk assessment.

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?*

No.

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?*

No evidence as such except the CIEH has observed the trend in enforcement of the Working at Height Regulations in which the minimum height at which the regulations are applied appears to have become lower over the years – a form of creeping gold plating.

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?*

1. The Act clearly places responsibility where it lies, however the message has been diluted over the years. The pervasive culture of businesses regarding the law as a burden has had the effect of turning attention away from the responsibilities of dutyholders. Some dutyholders place undue reliance on regulators to provide advice at no cost.

2. The responsibility of dutyholders to comply with the law should be made explicit in guidance and/or ACOPS.

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