Regulatory Surrender

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Health and Safety Gone Mad

In October 2010, Lord Young, in his report *Common Sense, Common Safety*, examined the country's "perceived compensation culture and the impact of health and safety regulations on businesses and personal freedom". But in so doing, he is recycling a dangerous myth, using a perception cast adrift from any evidence, save generally apocryphal, endlessly recycled anecdotes, to make some rash conclusions about the over-burdening regulation of 'health and safety'. His report uses a fake problem to propose that we remove the 'burden' of legal protection from thousands of workplaces.

It is one thing to lighten paperwork necessary to take school kids on trips - but a reckless leap from this to Young's subsequent claim that schools are low risk workplaces and should be allowed to comply with health and safety regulations by filling out a check-list. Try telling Michael Lees that Schools are 'low risk' workplaces. He set up *Asbestos in Schools* after his wife died from mesothelioma at the age of 51. She had been a primary school teacher for thirty years in five independent schools and more than eighteen state schools, the majority of which contained asbestos. Most of the decaying buildings that house our schools were built 30-50 years ago contain asbestos. This means that the greatest risk traditionally faced by building workers - the risk of the most horrifically drawn out and painful of industrial diseases - is now faced by an increasing number of children and teachers in 'low risk' jobs.

And this is where the compensation culture is most cruelly revealed as fake. Only half of the 2,000 people officially recorded as dying each year of the asbestos-caused mesothelioma receive government industrial injuries benefit payments. Hardly anyone out of the 20,000 people who suffer from any other work related cancers receives compensation.

As the Hazards Movement, the rank and file organization of trade union safety representatives, has found, fewer than 1 in 10 workplace ill-health or injury victims get awarded any compensation in the common law system. Indeed, the annual compensation bill is less than 10 per cent of the *costs* of occupational injuries and disease borne by the victims and their dependants.

More generally, then, there is no evidence that workplaces are over regulated, but the very opposite: workers are being made more vulnerable by a system of protection that is being very rapidly withdrawn. The real issue that is neatly sidestepped by Lord Young's review of common law compensation claims is the creeping withdrawal of a credible threat of law enforcement from employers who kill and injure their workers.

Regulating for Business

New Labour swept to office in May 1997 determined to break cleanly from its past. Committed to freeing business of its burdens, following its second election victory, New Labour established the Hampton Review in 2004. The Review was to prove a key vehicle for New Labour in rolling out its 'better regulation' agenda, with its central aim of reducing 'burdens on business'.

Having been charged with considering "the scope for reducing administrative burdens on business by promoting more efficient approaches to regulatory inspection and enforcement without reducing regulatory outcomes", Hampton's report - *Reducing Administrative Burdens: Effective Inspection and Enforcement* - called for more focused inspections, greater emphasis on advice and education and, in general, for removing the 'burden' of inspection from most premises. Most fundamentally, inspections were to be cut by a third across the board, equating to one million fewer inspections. Regulators were to make much more 'use of advice' to business.

Hampton's proposals were implemented in the Legislative and Regulatory Reform Act, which passed into law in November 2006. The stated aim of the law was to "enable delivery of swift and efficient regulatory reform to cut red tape". Chapter 1 of the Act creates a remarkable new power for a Minister of the Crown to make an order that removes from government a "regulatory burden", defined in the Act as a "financial cost", an "administrative inconvenience" or "an obstacle to efficiency, productivity or profitability".

The key UK safety regulator, the Health & Safety Executive (HSE), anticipated and helped to develop the Hampton agenda. Indeed, all indications were that HSE saw itself as a leader in New Labour's 'better regulation' agenda. The regulator had already achieved Hampton's target *before* the publication of the report, cutting the number of inspections by a third in the three years leading up to the Hampton Review. The regulator, charged with the duty of protecting the workforce, had anticipated and embraced changes that now leave it virtually unable to do the job with which it is charged - a policy process in which its senior management has colluded.

The Dimensions and Scale of HSE's 'Regulatory Surrender'

The scale of this 'regulatory surrender' is clear if we look at data relating to the various formal enforcement activities of HSE over the past decade.[1] The symmetry of the trends in the decline in all enforcement activity is so striking as to leave it unquestioned that there have been marked changes in HSE's enforcement practices, away from the use of formal measures towards the less tangible forms of advice, education and encouragement - that is, directly in line with the Hampton agenda, even if these changes in HSE practice began before the Hampton review formally kicked in.

Field Operations Directorate (FOD) Inspections
FOD is the arm of HSE which undertakes the vast majority of workplace inspections. Between 1999/00 and 2008/09 there was a drop of 69% in FOD Inspection Records. Put simply, the largest branch of HSE now conducts less than a third of the inspections it carried out ten years ago.

Now, HSE note that the method of undertaking and recording inspections changed from 2004/05 - after this point, inspections records would in any case have declined as inspections became "longer and deeper" - so that data before and after this change are not strictly compatible. However, if we break the period at 2005/06 when the method of recording changed, we still find that:

- between 1999/00 and 04/05, inspection records fell by 39%
- between 05/06 and 2008/09 inspection records fell by 26%

In other words, whatever method of recording, whatever the nature of the inspection, the downward trend has continued apace throughout the decade.

[1] All data is taken from a series of FOI requests supplied by HSE to the authors between February and July 2010. We focus upon data here since 1999//2000 - while data back to 19997/98 were requested, these was not available for all of the indicators discussed here.

HSE Investigations
If we now turn to look at those RIDDOR[2] reported incidents that are investigated by HSE, we find a decline of a similar order to that in the numbers of inspections, so that:

- between 1999/00 to 2008/09, there was a 63% decline in numbers of HSE investigations
- between 1999/00 to 2008/09, the *proportion* of incidents reported to HSE that were investigated fell by 54%

If we look more closely at the decade under examination, we find that:

- investigations peaked in 2000/01 (ie. prior to Hampton), and since then have fallen by 69%

This decline in investigation has occurred across *every category* of RIDDOR reportable incidents which HSE might be expected to respond to - that is, dangeours occurrences, injuries to members of the public, over 3-day injuries, and major injuries. So, between 1999/2000-2008/09, investigations of

- major injuries fell by 49%
- over 3-day injuries fell by 85%
- dangerous occurrences fell by 35%
- injuries to members of the public fell by 75%

By 2008/09, less than one per cent of over 3-day injuries that were reported to HSE were actually investigated. Less than one in ten - 8% - of reported major injuries were actually investigated.

Currently HSE do *not* investigate the following:

- 66% of amputations
- 84% of major fractures
- 96% of major dislocations
- 84% of major concussions and internal injuries
- 90% of major lacerations and open wounds
- 83% of major contusions
- 75% of major burns
- 66% of major poisonings and gassings

HSE Enforcement Notices
Beyond inspection and investigation, if we move to formal enforcement action in terms of notices imposed in response to breaches, we again find a decline during the decade under examination. So, the data indicates that between 1999/00 and 2008/09, we find:

- a 29% fall in the number of all types of enforcement notice issued over the past decade
- a 30% fall in improvement notices
- a 26% fall in prohibition notices

And, again, if we examine the data a little more carefully, we can see the most dramatic following a point which *preceded* Hampton, so:

[2] RIDDOR - Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995

- from their peak during this period, in 2002/03, improvement notices fell by 40% to 2008/09
- from their peak during this period, in 2002/03, prohibition notices fell by 37% to 2008/09

HSE Prosecutions
If there are fewer inspections, investigations and notices during the period we are examining, we might also expect there to have been fewer prosecutions. And that is indeed the case. Thus we find that:

- between 1999/2000 and 2008/09, HSE prosecutions fell by 48%

This decline also applies to those incidents which we might expect are most likely to result in prosecution - fatal injuries to workers. Again, if we examine the data, we find that:

- between 1999/00 and 2006/07 the number of worker deaths that resulted in prosecution by HSE fell by 39% (from 129 to 79).

HSE, Workers and the Regulation of Safety: What Now?

In short, HSE's regulatory approach has been repositioned to accommodate neo-liberal, business-friendly values to the point that it is now unable to maintain a credible threat of enforcement. This leaves workers more vulnerable - the changing regulatory role of the order illustrated here will have the effect of weakening the ability of workers to represent their concerns to management. In the absence of routine inspections, and without a credible threat of prosecution, managements are far less likely to respond to workers' demands to comply with the law. Why, indeed, would they? This draws our attention to a phrase that criminologists don't tend to use very much these days: that the law remains a site of struggle. In this case, the struggle to assert the rights of management and of business more generally through law has been highly successful in the effective decriminalisation of health and safety offences.

There could be no worse time for safety enforcement to have reached this parlous state. However the Yong Review is implemented, whatever the findings of Vince Cable's Reducing Regulation Committee, neither will result in the bolstering of safety enforcement - quite the opposite. Meanwhile, the Comprehensive Spending Review means that funding for the HSE is to be cut by 35% over the next four years, while local authority funding will be cut by 28%, impacting upon health and safety enforcement in the local authority controlled sector. The process of creeping decriminalisation is set to be institutionalised.

This is a crisis to which the trade unions must respond, for in weakening the position of workers to work for the improvement of safety, it also undermines the ability of workers to organise effectively. Trade union members might also legitimately question the purpose of TUC representation on the board of the HSE during this period, a period in which the interests of their members have been consistently undermined. An effective response to the crisis will need to be engaged on a wide range of fronts - but one of these sites of struggle must be law and its enforcement.

A full analysis of the issues raised in this article can be found in Regulatory Surrender *by Steve Tombs and David Whyte, published by the Institute of Employment Rights in July 2010. See http://www.ier.org.uk/node/491 for details of how to order.*