Work and Pensions Committee select committee
Health and Safety enquiry

Submission by Thompsons Solicitors

January 2008

Key points of response:

- **Regulatory burden not disproportionate.**
- **UK law enables employers to avoid health and safety obligations.**
- **Employers should ensure systems 'fit for purpose'.**
- **Voluntary guidance inappropriate.**
- **HSE grossly inadequately funded.**
- **Direct correlation between inspection rates and fatalities.**
- **Balance between prevention and enforcement wrong.**
- **Need higher penalties and more imaginative penalties ie remedial orders.**
- **Greater protection for migrant workers.**

Who are Thompsons?

Thompsons is a firm of solicitors with 21 offices across all three UK jurisdictions, acting at any one time for tens of thousands of accident victims. For over 80 years we have acted only on behalf of trade unions and accident victims.

We closely monitor legal developments relevant to health and safety both for our individual clients, our trade union clients and in the interest of representing, protecting and advancing the position of accident victims and their families. We support any measures that contribute to an improvement in health and safety conditions in and out of the workplace.

The legislative framework

1. Is the health and safety regulatory burden on business proportionate?

- The health and safety duties of employers are not in our opinion disproportionate.

- Effective health and safety reduces time off work, improves efficiency and saves companies money. It is an important and valuable investment. Thompsons is a business and doesn't find it burdensome to ensure the health and safety of our staff. Indeed it less burdensome than having to deal with post-accident forms and procedures or the cost including disruption and the effect on staff morale of occupational illness/ diseases.

- The Hampton Review of regulatory inspections and enforcement (*Reducing Administrative Burdens: effective inspection and enforcement* HM Treasury, March 2005), referring to the Nat West 2003 survey of the amount of time spent by small businesses on government

regulation and paperwork, indicated that for businesses of 50-250 employees the amount of time spent was around one hour per month (15 minutes per week) per person. For smaller companies employing nine persons it amounted to around four hours per person per month (one hour per week).

- These figures are not excessive, may well be over assessments and are likely to include time spent on all regulatory matters, including non health and safety matters, such as Employers' Liability Compulsory Insurance renewal documentation.

- If health and safety regulations are more of a burden in some industries than others, then that is because those industries are more dangerous. It is axiomatic that any health and safety burden is proportionate to the safety of that work and what is required to protect workers.

- Easing health and safety regulations will lead to more injuries and diseases and deaths at work. More injuries would lead to more claims for compensation and as night follows day there would be complaints from business and the insurance industry (the very people calling for less regulation) of a boom in compensation claims and there would be a rise in insurance premiums.

- The complaint by the CBI, the Institute of Directors (IoD) and other business organisations that there is too much form filling may reflect a failure to properly understand the requirements of the Health and Safety at Work Act (HSWA) correctly. There is no need, for example, to produce multi page risk assessments. Many of the health and safety documents, assessments and advices to business that we see are, in our opinion, inaccurate, misrepresentative and over bureaucratic.

- We would question the quality of work being carried out by some health and safety consultants employed by companies. We support the concerns that have been expressed by the Institution of Occupational Health and Safety (IOSH) in the past concerning the lack of regulation of safety consultants and advisers and consider that there should be minimum standards.

- Businesses too often ignore and should be made to consider the benefits of working with trade unions and union health and safety reps. Surveys have repeatedly shown that trade union organised work places are safer workplaces. Engaging with union expertise in health and safety at work can considerably reduce the amount of work an organisation needs to do to keep their employees safe. Full time union officials and lay reps should be called upon to assist.

2. Are EU directives interpreted and translated by HSC into UK law appropriately?

No.

We are the only country in Europe to have insisted that, in most cases, the laws carry a "reasonable practicability" qualification. So an employer can avoid taking measures if they can make out they believe them to be unnecessary or impracticable or if the time they would take, or the cost, would be grossly disproportionate to the risk.

It is far too easy for employers to avoid their health and safety obligations using this get out.

Reasonable practicability also creates legal uncertainty and confusion, results in more cases going to trial and more complex trials over matters of legal interpretation.

3. Are businesses given appropriate guidance by HSE on their obligations under health and safety law?

Yes.

The HSE's website publishes clear guidance (and other guidance literature), in Plain English. It is difficult to see what further guidance would be appropriate.

Guidance should continually reinforce the message to employers that complying with the HSWA is a simple process (made easier and more effective where done in partnership with trade unions) and that it is not necessary for employers to produce multi page risk assessments.

4. What impact will the Corporate Manslaughter and Corporate Homicide Act 2007 have on businesses approach to occupational health and safety?

Too few employers appear to have given proper consideration to the Corporate Manslaughter and Corporate Homicide Act (CMCH Act).

Chief Executives and/or directors need to focus on the more hazardous risks in their workplace. Juries will be able to take into account any relevant guidance given to employers so even IoD voluntary codes will effectively have a legal status so any guidance relied upon, official as well as unofficial needs to be considered by a company.

There is considerable misinformation developing around the Act that will only confuse employers. A recent BBC You and Yours programme trailed its feature on the Act by stating that it would effect everything "from team building away days to the office Christmas party". This is nonsense. The media has its role to play to ensure there is proper understanding of what the CMCH Act will (and won't) do.

We are also concerned at reports that NHS Trusts are advising midwives that they will be unable as an employer to represent any midwife accused of corporate manslaughter under the Act. Again this is nonsense. It will not be the individual midwife who will be pursued and in any event an employer will be vicariously liable for their actions.

If employers take a negative attitude to the CMCH Act and use it as an excuse to avoid their obligations to their workers then the impact of the Act will also be negative. Good employers have nothing to fear from an Act intended to avoid employers killing people.

In our opinion, the CMCH Act offers an opportunity for employers to re appraise their health and safety systems from top to bottom to ensure it is fit for purpose. This does not mean spending more time on health and safety but ensuring that what is done is effective, efficient and carried out by persons who are properly trained. Companies should be re appraising the role played by senior management and directors of companies to ensure there is a seamless health and safety process. Sadly, we see little evidence of this at the present time.

5. Are director's health and safety duties appropriately covered by voluntary guidance?

No.

In a country where last year alone 2.2 million people suffered from work related illnesses and 241 people were killed at work it is difficult to see how a voluntary approach, such as the code launched by the IoD (though in fact a repackaged version of HSE guidance INDG 343 and 417 that have been in existence for the past 10 years), is appropriate.

Voluntary guidance does not make workplaces any safer. Statutory guidelines and laws provide teeth. Health and safety is not a voluntary issue.

The recent IOSH survey carried out by Glasgow Caledonian University (October 2007), which showed that the more firms invest in safety the safer they get, highlights the inappropriateness of a voluntary approach.

In our opinion, directors should be given specific legal responsibilities for health and safety. Failure to comply with codes such as the IoD code should be an offence. We consider the lack of specific and positive safety responsibilities on directors of companies to be a significant lacuna in health and safety law and a major contributory factor to the occurrence of accidents and illness in the workplace.

6. What influence does HSE have as a statutory consultee in local authority planning?

N/A for Thompsons to answer.

Resources

1. Does the HSE have sufficient resources to fulfil its objectives as the health and safety regulator and meet its PSA targets?

No.

As Thompsons stated in its evidence to the one-off evidence session the HSE is grossly inadequately funded and unable to fulfil its primary role of accident prevention.

There are not enough inspectors with the result that there are not enough visits to workplaces meaning that employers can pay lip service to health and safety, safe in the knowledge that the chances of a visit is statistically remote.

- Recent job losses and expenditure cutbacks will significantly reduce yet further the capacity of the HSE to be, in practice, anything other than reactive. Thompsons understands from the trade union Prospect, which represents HSE inspectors, that a 10 per cent cut in staffing has resulted in the organisation being underspent by around £25m. We consider that level of underspend when people are being injured and even dying at work to be a scandal.

- The effect of cuts has been that initiatives started when the organisation enjoyed more funding are either abandoned or run down, such as has happened with Workplace Health

Connect, a pilot confidential service designed to give free, practical advice on workplace health, safety and return to work issues to smaller businesses in England and Wales.

- Lack of resources is in our opinion likely to be a contributory factor to the massive under prosecution of health and safety offences.

Documents disclosed by the Centre for Corporate Accountability under a Freedom of Information request indicates an under prosecution of offences by around 300 per cent. The Department for Constitutional Affair's own statistics show that the infrequency of prosecutions means a magistrate is only likely to hear a case involving health and safety regulatory breaches once every 14 years.

2. Does HSE allocate its budget efficiently? and

3. Are there areas of HSE's operations that require additional investment?

- The HSE's computer system COIN is said by the union Prospect to be so complex and laborious to operate that it effectively prevents inspectors getting out on to sites. At a time when business is complaining of being overburdened by bureaucracy it is hugely ironic that the inspectors of business - the HSE itself - are burdened with poor and bureaucratic systems. Thompsons suggests that the costs and outcomes of the development and implementation of COIN might usefully be examined by the select committee.

We consider additional investment is required to:

- Increase the number of inspections carried out.
- Enable follow up inspections.
- Increase the level of prosecutions.
- Provide advice to the courts and judges in connection with prosecutions under the Corporate Manslaughter Act 2007, in particular with regard to remedial orders (Section 9) whereby a court can make an order requiring a company to take steps to deal with any deficiency as regards health and safety, the organisations policies, systems or practices.

Judges have no experience of this type of power. The act gives the court a virtually unfettered and unlimited power to order a company to take whatever steps the court considers necessary to avoid future deaths and accidents. This could involve training in company structure and similar matters that require specialist knowledge and advice. It is likely to fall to the HSE to provide this advice and to monitor its implementation.

Inspection

1. What impact has the reduction in inspection rates had on standards of occupational health and safety?

There is a direct correlation between the level of inspections and occupational accidents. More inspections and follow up inspections ensure compliance with safety standards.

In the Republic of Ireland inspections have risen by 13 per cent and fatal accidents have dropped by 50 percent. In England and Wales by contrast inspections have gone down and fatalities have gone up.

Recent research by the construction union UCATT, *Bringing Justice to the Boardroom,* shows that for every one extra inspection there are three less injuries.

The HSE's own research carried out in 1998 (and subsequently) indicates clearly that the prospect of enforcement action is a key driver for large and high risk operations as well as for smaller firms.

While increased inspections may require extra resources they will pay for themselves as the cost of prosecutions and enforcement is reduced and there is also a saving for the state in health care and benefits to the injured.

2. Does the HSE get the balance right between prevention and enforcement?

No.

The current balance is wrong. Prevention is always better than enforcement. The ratio of proactive to reactive work should be 60:40.

It is clear from the HSE's own internal audits that enforcement has been too low. There has been significant underenforcement where offences have occurred. Despite the thousands of cases Thompsons handles each year which result in significant compensation being paid out as a result of common law negligence and health and safety breaches, it is rare for there to be a corresponding HSE prosecution.

There are good and proactive employers out there. However their position and competitiveness is undermined by companies which increase profitability at the expense of safety. It is common knowledge in the construction and other industries that low tenders mean reduced terms and conditions for the worker and reduced safety implementation.

Subcontracting is attractive to main contractors if they can increase their profitability by bringing in others to carry out work they have already successfully bid for.

The committee may also want to consider the issue of Section 37 of the HSWA which is ineffective in dealing with large companies because of the need to prove consent, connivance or neglect. It is a provision copied from the 1961 Factories Act and as such needs urgent updating. Whilst employers, the self-employed, employees and all other duty holders are subject to offences of strict liability within the HSWA, s37 means that directors are protected by a higher burden of proof.

This may explain, in part at least, why conviction rates are so low.

3. Are penalties for health and safety offences proportionate?

No.

Whilst we see no benefit to fining a company out of existence or fining a company to such an extent that it cannot implement the necessary health and safety changes required there should be

much higher financial penalties and the introduction of other types of penalty, as contained in the CMCH Act.

Average fines (2003-4 figures) in the magistrates' courts are around £4,000 and in the Crown Court just over £30,000. We consider these to be far too low.

We support the findings of the Hampton review that penalties handed down by the Courts often do not reflect either the severity of offences or the economic benefits a business has gained from its non compliance. Low fines and the low level of prosecutions and inspections has significantly undermined the credibility of the HSE's enforcement role.

We consider that penalties should be twofold:

1. They should deter and punish.
2. They should aim to achieve a change in the way a company operates to avoid further offences and improve health and safety.

In order to achieve these two objectives:

- Fines should bear relationship to the profitability of the company and the potential commercial advantage it has been achieving across the board by cutting back on safety.
- There should be a much more imaginative and varied armoury of penalties to be applied to each situation namely:
    - (a) remedial orders;
    - (b) corporate probation
    - (c) punitive damages;
    - (d) restitution orders;
    - (e) publicity orders;
    - (f) director disqualification

The powers to deal with breaches under the HSWA are essentially limited to fines. We strongly support pro active powers such as that contained in Section 9 of the CMCH Act which gives the court virtually unfettered powers to order companies to make changes necessary to improve safety. We also consider the naming and shaming power contained in the Act to be a positive improvement.

The penalties under the CMCH Act should also be applied to the HSWA. And consideration should be given to providing the courts with a comprehensive armoury of powers that can be appropriately adapted to the company and offence in question.

4. Should the removal of its crown immunity be a priority for HSE?

Yes.

It is illogical that crown immunity has been removed in respect of the CMCH Act but that it remains in respect of the HSWA. This is a significant anomaly.

5. How effectively do HSE and local authorities interact in their inspection roles?

Our submission to the one-off evidence session was that the division of safety enforcement between the HSE and local authorities is an anomaly.

Section 18 of the HSWA requires local authorities to make "adequate arrangements" for enforcement. However, separate funding by each local authority results in widespread variation in performance and enforcement.

UNISON and the Centre for Corporate Accountability produced a report in 2002 *Safety Last: Under Enforcement of Safety Law* which showed that the HSE has little influence in ensuring consistency between local authorities. The report identified significant regional differences in inspection rates. These varied from local authorities who investigated every incident to those which investigated less than 10 per cent.

More recent analysis since the establishment of Health and Safety Executive/Local Authority Enforcement Liaison Committee (HELA), showed that increases in accidents in certain areas namely hotel and catering (30%), bars and clubs (80%), retail and wholesale (15%) were significant (HELA 2005).

The LEA inspection and enforcement side has suffered significant cutbacks over the past decade and it is only in the last few years that resources have begun to increase and, since the Hampton review, that steps have been taken to improve the relationship and monitor performance.

We remain concerned at the plethora of enforcement bodies and remain of the view that the possible advantages of consolidation of all health and safety into one single body should be evaluated

Migrant workers

1 Are migrant workers more at risk of occupational accidents?

Yes.

Migrant workers are more at risk due to the often unlicensed status of their employers, the conditions they work in and the circumstances under which they are employed, their lack of confidence and understanding of their rights due to language barriers and the fact that they are less likely to be trade union members due to the transient nature of the work.

The reality of the employment experiences of many migrant workers means that while there is much anecdotal evidence of injuries at work accidents are rarely reported and personal injury claims hardly ever pursued.

Thompsons is acting on behalf of the union Unite for nine Hungarian workers who were recruited by unlicensed gangmasters in Hungary to work for a UK employment agency supplying labour to the second largest poultry producer in the country. They were not registered to work by the agency until Unite intervened. As unregistered labour they were unable to rely on key rights.

The conditions in which the Hungarians are working are appalling. When the roof collapsed during heavy rain they were made to continue working in soaking clothes. Some of them have been injured at work and denied medical treatment. Accidents are never recorded.

In another case Thompsons won compensation for a Romanian student who suffered brain damage when she was flung from an open back truck as it took her and other Eastern European workers to pick beetroot in the West Midlands. They had been effectively herded into the back of the truck and transported like livestock. The young woman returned to her family and was likely to need care for the rest of her life.

2. Does HSE do enough to protect migrant workers from health and safety risk?

No.

There is an urgent need for more inspections of workplaces, particularly in the agricultural, food production and construction industries where they are most likely to be employed.

There should be an amnesty for any unauthorised worker who blows the whistle on unsafe working practices.

The HSE should work with the TUC and trade unions to produce literature in different languages explaining migrant workers' rights and the health and safety obligations of employers.

We consider the limitations of the Gangmaster legislation to the food processing industry and agriculture an anomaly. We are of the opinion it needs to be extended to all agency workers.

Occupational Health

1. What must HSE do to meet its PSA targets for ill health and days lost per worker?

2. Does HSE do enough to embed vocational rehabilitation in the workplace?

N/A for Thompsons.

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