HEALTH AND SAFETY AT WORK: A CRISIS OF VALUES

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ABSTRACT

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The thesis concludes that, historically, as the aspects of health and safety concerned with the individual relationship between the employer and employee came increasingly to the fore in the policy process , it became less apparent that health and safety is a social welfare provision. Presently, the structures of health and safety policy making and enforcement give no clear place where these welfare aspects are visible. A fundamental review of the health and safety system is needed so that attention can be paid to ensuring adequate consideration to public policy in health and safety policy-making.

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INTRODUCTION

The focus of this thesis is on health and safety policy making. It is important to draw a distinction between this and the substantive issues of health and safety, such as the hazards of stress at work, the handling and storage of chemicals, and industrial diseases such as mesalthelioma.[1] This analysis concentrates on the way in which policy has developed, and, although examples have been taken from substantive issues, an attempt has been made to maintain a balance between these and the main focus, which is on the policy process.

Health and safety is an important area for investigation, because it is a field of social policy which has always been delivered not by the state, but by the employer. In a world where there has been increased private sector interest in, and provision of, public services, an analysis of health and safety policy can provide deeper insight into some of the issues raised by this increased private sector penetration. It is not always easy to see health and safety in this way. In recent years, health and safety has frequently been positioned as an employment issue, concerning the individual relationship between employer and employee. This is true. But it is only one aspect of health and safety, and has often served to obscure the public policy nature of the field. Underpinning the analysis in this thesis is an exploration of this conceptual duality. The ease with which it is possible to loose sight of the public policy aspects of health and safety is arguably strongly related to the way in which health and safety is delivered within the employment relationship, with the state and its primary agencies seen to act either as external enforcers or in a supportive role. Important issues raised by this context have been formulated into the research questions posed. They are:

1.What conflicts arise between the interests of public welfare and the interests of the market in the development of health and safety at work policies?

2. How evident are managerial values in the development of regulation and

enforcement policies on health and safety at work?

3. How pro-active a role should the State take in protecting people from hazards at work?

4. How has the balance between voluntary and state regulation developed in relation to health and safety at work policies ?

5. What is the dynamic of influence in the development of policies on health and safety regulation?

6.Is there any significant non-decision-making in health and safety regulation, where issues remain latent and fail to enter the policy process?

The heart of the thesis lies in Research Question 1, the nature and extent of any conflicts of interest which lie in the development of h&s policies, and Research Question 3, the differing views about the role which the state should play in h&s. The other Research Questioniis revolve around these two. For this reason, a decision was taken not only to examine the policy process, but to contextualise it in relation to enforcement policies. These have been examined broadly, to include not only the legal and governmental aspects of enforcement, but also enforcement through the civil courts and insurance based proposals, plus enforcement through employee participation, for example, through the system of Safety Representatives.

The general methodology used to make the analysis has been a historical one, in order to facilitate an exploration of the development of the policy process. Additionally, interviews were conducted with representatives of interested groups. These were chosen because they had participated in the Parliamentary Select Committee hearings into the working of the Health and Safety Executive and had therefore publicly demonstrated their interest in health and safety processes. The aim of the interviews, though, was not to examine the Select Committee process, but rather to further the examination of Research Questions 5 and 6.

Historically, developments before the Robens Report in 1972[2] are charted in

[2]"Safety and Health at Work" Cmnd 5034 HMSO

Chapter 3. where a general consideration is made of historical development from the genesis of health and safety policies in the early nineteenth century as part of the greater movement to improve public health, towards a concept, which became dominant by the 1950s, of health and safety as an issue firmly embedded in the individual employment relationship, and which has somewhat obscured the 'public' aspect of the issue. The Report itself is then considered. This remains the only attempt at a fully comprehensive review of health and safety at work.. It was of seminal influence, and, although not implemented in its entirely, forms the basis of the present processes. Recent developments of process are examined, where recent policy developments in health and safety are related to changes in overall government policy-making in the "Modernising Government" initiative, and where interviews with representatives of stakeholder groups are evaluated. Finally, the development of enforcement policies since the Robens Report is considered, in each of the three key areas- through the Health and Safety Executive and local authorities, through civil actions for compensation for injury, and through systems of worker participation within the workplace.

The discussion of policy processes is underpinned by the institutional structure of the health and safety system. The implementation of the Robens report was achieved legislatively through the **Health and Safety at Work Act 1974**[3], which is still the primary legislation on health and safety today. It set up the two major related institutions, the Health and Safety Commission (HSC) and the Health and Safety Executive (HSE). The present Commission consists of nine members. It is a tripartite institution, with representatives from both employers and employees organisations and local authorities. One of the present Commissioners has been appointed to represent the public interest. (HSE 2002.4)[4] This is the body with the main responsibility for health and

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[3] 1974 Chapter 37.

[4]The Health and Safety System in Great Britain HSE Books 2002 (3rd edn)

safety. The main function of the HSC is to "make arrangements to secure the health, safety and welfare of people at work, and the public, in the way undertakings are conducted; including proposing new law and standards, conducting research, providing information and advice, and controlling explosives and other dangerous substances" (HSE 2002.4.10). The HSE has two major functions. Firstly, it assists and advises the Commission. This includes the provision of advice on policy, plus technical and professional advice. The HSC also has a system of Advisory Committees upon which it can draw for advice. These are industry based, and mainly recommend standards and guidance for consideration within the policy process. The second area of responsibility for the HSE is the enforcement of health and safety law. This is done through a network of Inspectors, who have the power to prosecute. Local Authorities also have responsibility for enforcement in some areas, notably in the retail and distribution industries, the leisure and catering industries, and offices. This is a substantial area of responsibility, which has received little attention fron writers on health and safety. The HSE liaises with the local authorities through the Health and Safety and Local Authority Enforcement Liaison Committee (HELA). The aim is to ensure consistency of approach in enforcement. Finally, the HSE assists the HSC in its duty to consult concerning the development of policy proposals. This is done in two ways. Firstly, there is an informal process of discussion (HSE 2002.8), which is conducted among interested parties at a very early stage. The interviews revealed that this was an important part of the initial development of policy. Secondly, there is a formal process, where the public generally is invited to participate along with stakeholders. This is consistent with the normal public consultations now expected when regulatory proposals are put forward in government.

The Health and Safety Commission and the Health and Safety Executive, viewed overall (HSC/E) are subject to oversight by a relevant government Minister. Currently, they are the responsibility of the Secretary of State for Work and Pensions. Additionally, other Ministers have oversight of particular health and safety issues relevant to their sectors. This means there is no one

Minister with responsibility for all aspects of health and safety. In some ways, this is a benefit, because it is expected that the issues should be taken into account throughout government. There is also a disadvantage, since it means that health and safety, as a major policy area , maintains a high degree of invisibility. The ultimate accountability of the HSC/E is, via the relevant Minister, to Parliament. This was evidenced in 1999, when the Parliamentary Select Committee on the Environment, Transport and Rural Affairs (then the Department with responsibility for the HSC/E) conducted hearings into the Workings of the Health and Safety Executive, reporting in 2000. These were the Select Committee hearings used in the selection of interviewees.

Finally, the focus on process and on enforcement policies has meant that a number of other important areas have not been examined in depth, but only referred to in the course of other argument. Perhaps the most important of these is the relationship between European Union policies on health and safety and English national policies[5]. European directives, and the commitment to European policies have played a crucial role in the development of national policies, particularly during the 1980s and early 1990s, when there was considerable government pressure to deregulate. This is a very large area to investigate thoroughly, and could form the basis of a further thesis. The same is true of the question of the health and safety responsibility of corporations, and of their directors, including the arguments concerning corporate manslaughter.

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5 The position in Scotland differs, both in relation to the law and the policy process. Since devolution, there are also some differences in process in Wales.. This thesis concentrates on the position in England .

CHAPTER 1 A CRISIS OF VALUES

1.1 How is political, social and economic power distributed within the political system? Ham and Hill (1993 .20) argue that an examination of the effectiveness of policies and the policy process cannot be made independently of an analysis of power relationships. The general aim of this thesis is to examine political and economic power relationships and their impact upon policy- making. The focus is on process, rather than on outcomes. The study will be conducted through an examination of regulatory change in the sector of health, safety and welfare at work. Although this particular sector has not been heavily researched from the point of view of policy analysis, it provides a perspective which is of particular consequence for policy implementation generally. The main piece of modern legislation, **the Health and Safety at Work Act 1974** , was passed at a time when writers such as Hall, Land and Parker (1975), were able to view policy as developing from a philosophy of consensus, founded in a background of political pluralism. However, the political and ideological context of policy-making changed dramatically with the advent of the Thatcher government in 1979, with its emphasis on market regulation. The study of health and safety at work is highly appropriate to a consideration of the implications of this change and its impact on the ongoing process of policy- making, since, in this field, the issues of market regulation have been confronted over a much longer period than is the case in most other welfare sectors. In this thesis, the analysis of the power relationships embedded in these issues is focussed on the following research questions:

1.What conflicts arise between the interests of public welfare and the interests of the market in the development of health and safety at work policies?

2. How evident are managerial values in the development of regulation and enforcement policies on health and safety at work?

3. How pro-active a role should the State take in protecting people from hazards at work?

4. How has the balance between voluntary and state regulation developed in relation to health and safety at work policies ?

5. What is the dynamic of influence in the development of policies on health

and safety regulation?

6.Is there any significant non-decision-making in health and safety regulation, where issues remain latent and fail to enter the policy process?

In this chapter, the major conceptual changes and debates which underpin this analysis will be examined in relation to health and safety policies.

1.2 The primary agent of change in modern health and safety policy was the report of the Robens Committee (1972) "Safety and Health at Work: Report of the Committee 1970-72" [The Robens Report]. This laid the foundation for the modern system of health and safety regulation, and provided a major departure from the older system which was based entirely on legal regulation through the criminal law. The essence of the change is explained when, writing about the older regulatory system based on the Factories Acts, the Report says " The primary responsibility for doing something about the present level of occupational accidents and disease lies with those who create the risks and those who work with them. The point is quite crucial. Our present system encourages rather too much reliance on state regulation, and rather too little on personal responsibility and voluntary, self-generating effort. This imbalance must be redressed." (1972.7.28). While Robens accepts the existence of both voluntary and state regulatory dynamics in the implementation of health and safety policy, the Report advocates that public involvement should be reduced to the minimum. As Wolfson and Beck (1996.175) point out, the Report purported to propose a balance between these two factors, but in fact tipped the scales heavily in favour of voluntary responsibility[1]. This involved not only a change in the perceived role of the State, but also an increased acknowledgement of the responsibility of the private employer as the main provider of health and safety in the workplace.

1.3 Is the shift of responsibility advocated by Robens the best strategy to

[1] In the term 'voluntary responsibility', both Robens and Wolfson and Beck do not distinguish between voluntary regulation and legal self regulation, two concepts examined in para 1.24, (see also Fig1.1).

reduce the number of injuries at work? Has it imported a conflict between public welfare values and those of the market? The principles which underpin the recommendations of the Robens Committee may be broadly summarised as those of compliance, negotiation and participatory inclusion. They are in need of review because, although the number of fatalities and of reported injuries has shown a general reduction since 1972, far too many people are still killed and injured at work. Indeed, the most recent figures show an increase in fatalities for the year 2000/2001 (see Appendix A). The Robens Committee, commenting on the extent of the problem at that time, said "For both humanitarian and economic reasons, no society can accept with complacency that such levels of death, injury, disease and waste must be regarded as the inevitable price of meeting its needs for goods and services" (1972.1.11). This statement remains true today.

Organisational Relationships

1.4 In examining health and safety at work, a primary issue is the question of how to render it more visible as a policy field. A key problem contributing to this invisibility is that the parameters of health and safety at work are unclear. It is only when these are given some definition that the analysis can be focussed. How, for example, is policy development relating to Health and Safety at Work to be distinguished from policy development concerning general health care, or from other employment matters?

1.5 Clarity of definition can be achieved through the identification and consideration of the organising structures of the field. One concept which may be useful in examining these structures is the idea of a `societal sector', which was proposed by Scott and Meyer (1991) as a means of isolating wider organisational systems for study, A 'societal sector' is defined to include all organisations within a society supplying a given type of product or service together with their associated organisational sets: suppliers, financiers, regulators, and so forth." (1991.108). The societal sector does provide a unifying concept for the plurality of provision of health and safety. The `service' of providing a reasonably safe working environment is undertaken by

individual employers, suppliers of equipment and products used at work, owners of workplaces and fellow employees. Regulation of the service takes place through the Health and Safety Commission and Executive (HSC/E), Local Authorities and, in relation to fatalities, through the police and the Crown Prosecution Service. Policy is made through the HSC/E, and through various government departments.[2]

1.6 A problem in using this concept, though, arises from the manner in which Scott and Meyer emphasise the function of organisations in deciding whether an organisation can be attached to a particular societal sector. Unfortunately, modern organisations have tended to move away from having one simple function which will place them squarely in a particular societal sector. Indeed, Scott and Meyer realise (1991.119) that many have diverse functions. Their answer to the problem of function is to use one of the principles underpinning the system of classification used by the United States Bureau of Census- the Standard Industrial Classification. This means that they have decided to classify organisations by their 'primary function'. However, this does not really deal with the issue. Many organisations are multifaceted, and it is difficult to see them as having one primary function. This insistence on the identification of a primary function is clearly inappropriate to an examination of health and safety at work in Britain, which will only rarely be the primary function of any organisation, but which is a secondary function for all employers. However, is it really necessary to identify a primary function? Surely it is sufficient to acknowledge that organisations will have plural functions, and any one organisation may be an actor in more than one societal sector. Seen in this way, the concept of a societal sector becomes a flexible and appropriate vehicle for the analysis of devolved and partially or wholly privatised public service providers since it allows for an examination, not only of the broad range of organisations comprising the 'set' but also of their inter- relationship with other societal sectors. For example, Scott and Meyer (1991.119) illustrate the breadth

[2] Scott and Meyer admit that the hypotheses developed on the basis of this concept have been primarily related to the public sector in the United States. They believe that it is broad enough to be used in the public sector. Here, it is proposed that it is sufficiently general to be adapted to a British context.

of a societal sector with reference to the housing sector "Such a definition would encompass units from many different industries, for example, components of the construction, finance, public administration, and insurance industries". But organisations such as those involved in finance and insurance will also be actors in other sectors, and the interrelationships which result will be of significance in the development and implementation of policies concerned with housing. In a consideration of health and safety policies, similar interrelationships will be endemic, since the implementation of such policies will always be expected to relate to the nature of the employers' enterprise.[3] Such interrelationships will not only affect the interaction between individual organisations and government agencies, but also the cultures within the organisation.

1.7 In developing their concept of a' societal sector', Scott and Meyer have taken the view that a process of increased centralisation can be identified -" An important assumption underlying this model is that contemporary societies increasingly exhibit functionally differentiated sectors whose structures are vertically connected, with lines stretching up to the central nation state"(1991.117). They have drawn an analogy between their idea of' societal sectors' and Wildavsky's view of a public policy sector. Wildavsky (1979.75 et seq.) described sectoralisation in relation to government departments and agencies- a narrower concept than that of the societal sector. He did, though, ascribe a more complex genesis to them. He maintained that total decentralisation is too threatening to government departments which would simply resemble holding companies, shifting resources from those which fail, whereas total centralisation is equally threatening- it would have too much power and too little brain to deal with it. Therefore, "governmental agencies have adapted to greater independence by combining the two approaches: sectors want greater autonomy, thus disaggregating policy by subject matter,

[3]An example of this can be seen in the Health and Safety Executives' investigation into the Texaco Refinery explosion at Milford Haven in 1994.In their report (HSE 1997), the inspectors were clearly making recommendations not only in relation to Texaco as an employer, but also in relation to Texaco as an organisation within the chemical industry.

and, within that, they seek centralisation to encompass adverse effects within their own ever larger jurisdictions." (1979.75). Two important implications of Wildavsky's view are worth considering. On one level, sectors can be seen as a survival mechanism, embodying a resistance against extremes of policy. If this is so, then the HSEs attempts to specify and control the detail of managerial processes, such as risk assessment (Approved Code of Practice, HSE, 1992) could be seen as a defensive act in the face of deregulatory policies rather than as an aspect of support for self-regulation. On another level, sectors can be viewed as the product of a drive towards corporatism. Scott and Meyer anchor their analysis firmly within a liberal corporatist tradition, where "competing, overlapping and pluralist interests within a given sector become more hierarchically organised into 'peak' associations, which in turn have access to and are accorded status and powers by the nation -state". They maintain that there has been a trend towards corporatism, even in the United States, where both the prevailing ideology and the federal structure work against it. In the face of this argument, it is possible to pose the question of what has been the fate of corporatism in Britain? It may be over- simplistic to see it as having suffered a complete demise, despite the prevalence of the ideology of the New Right since 1979. In the health and safety at work sector, the influence of European Union policies and directives may be characterised as enhancing a trend towards corporatism. However, it is necessary to be wary of overstating this view. As Hix (1999. 208) has indicated, policies are never adopted in the European Union without the consent of a large majority of national groups. As a result, neither labour, nor public interest nor business groups can monopolise the process. This means that " viewed from Britain, where business interests dominated the 1980s, the EU policy process appears to replicate the continental corporatist model, whereas from Denmark, where public interests have managed to secure high levels of labour, environmental and consumer protection, the EU appears to favour Anglo-Saxon pluralism." [4] However, EU policies are not the only area where corporatist tendencies may be detected. For

[4]Note, though, that Streek and Schmitter (1991.133 et seq) argue that the small size of the EU budget limits the scope for corporatist policies, the exception being the Common Agricultural Policy before recent proposals for reform.

example, the Robens Report (1972 .66) based its recommendations for the constitution of the Health and Safety Commission and the structures of self-regulation on a view of tripartism where government, employers and workers would have scope for decision-making, placing the structures of health and safety at work firmly within a corporatist context. These formal structures remain, although it will be argued later in this thesis that there are changes in the way they operate and in their relationships with each other which both reflect and resist the changing political and ideological environment.

1.8 It is in the examination of the political and ideological environment that the limitations of Scott and Meyers concepts of the societal sector are found. They are adamant that "we prefer not to link our definition closely to the content of and controversies over current public policies."(1991.I20). This means that their concept is essentially a means of locating and describing the interrelationships in the policy process. But a critical analysis requires more than this. Wildavsky (1979.396) acknowledges this -"If culture is conceived as values and beliefs that bind social relationships, then policy analysis is intimately involved with culture in two ways: (1) solutions to policy problems reflect and are limited by the moral consistency of historical social relationships; (2) solutions to policy problems, by changing the structure of social relationships, alter values and beliefs that support the social structure." As Ham & Hill (1993 .19) have indicated, the values which Wildavsky has in mind are essentially conservative, arising from within the existing structure of social relationships. This point is of particular importance in considering research question 1: the conflicts which may arise between the interests of public welfare and the interests of the market in policy development. It will be argued (see para 1.23) that the emphasis on voluntary compliance by employers in health and safety regulation, with policies heavily biassed towards education and encouragement, has contributed to a developing lack of focus in the definition of public welfare interests in this sector. Therefore, while a view of societal sectors can locate and position relevant relationships, a further analytic framework is needed to explore their nature.

Economic and political power

1.9 The parameters of Health and Safety at Work can also be marked through an analysis of its contextual position within contemporary economic and political relationships. Lowi (1964 . 67-715) provides a relevant framework which can be used to examine the political relationships between business and government. He maintains that three particular types of public policy shape these relationships, and that the political responses of businesses differ according to the type of public policy to which they respond. The three types are: firstly, distributive policies, for example government contracts, tariffs controls; secondly, redistributive policies, such as welfare policies, and thirdly, regulatory policies, exemplified by anti pollution rules imposed by government on industry . The problem with Lowi's theory is that responses will only differ according to type of policy provided that the types are mutually exclusive. Health and safety at work policies demonstrate the limitations of Lowi's view, since they can cross the boundaries of all three types. Health and safety provision is sometimes written into government contract tendering invitations and may be a factor in the award of the final contract, playing a key role in distributive policies. In redistributive terms, the safety and welfare of workers is the central concern of this policy sector, and finally, despite recent moves, there remains a strong regulatory aspect both through direct legislation and through Codes of Practice and guidance offered by the health and safety executive. Despite this inadequacy, though, Lowi's view does provide a basic structure through which some of the complexities of health and safety policy can be examined. Ham and Hill (1993 .103-8) have implicitly criticised the use of this typology in making predictions about policy implementation in each category. Here, it is not intended to develop Lowi's analysis in a predictive way. Rather, it will provide a means of accessing the complexity of health and safety at work policies. Its value lies in its ability to facilitate the examination of the interrelationships within the societal sector of health and safety at work.

1.10 An analysis of the first type, distributive policies, will only be of only limited application in the examination of health and safety at work provision.

Many public contracts contain health and safety clauses. These are likely to be varied in content, and so of mainly local impact.[5] Redistributive and regulatory policies will therefore form the focus of the following discussion.

Redistributive Policies- conflicts between public welfare interests and market interests, and the development of managerial values. (Research questions 1,2&3)

1.11 In the context of redistributive policies in the health and safety at work sector, the main providers have been individual employers. As a result of this, health and safety at work policies have been enmeshed within business culture. This contrasts with other welfare service sectors, such as the provision of health care which was mainly, though certainly not exclusively, focussed upon public provision. It is interesting to compare these two sectors, particularly since the forerunner of both was a societal sector concerned with public health. This, it will be maintained[6], was a perspective which diminished during the early part of this century, when political debate of health issues became centred upon health care provision, while the health and safety at work sector developed a stronger association with debate concerning employment issues. The consequence has been that health and safety at work policies have always had a strong operational base in business cultures. This contrasts with the situation in health care, where, certainly if the public parts of the sector are taken as an example, radical change has been necessary to import business structures and ideas. As Clarke and Newman (1997.4) have explained, the British welfare state which developed after 1945 was structured by a commitment to two forms of coordination - bureaucratic administration and professionalism. The Conservative governments of 1979- 1995 set out to induce radical change. According to Graham (1997.118) they did so " by

[5] 'Revitalising Health and Safety', (1999) the government policy document, proposes that distributive policy should be strengthened in that central government departments should be obliged to include health and safety clauses in government contracts.

[6] See Chapter 3

making the liberty of the individual a central plank of... policy and by linking this to the claim that society could and should be driven by the free choices of individual consumers operating competitively in the market." As Graham also says, Conservative capitalism ultimately failed because it tried to impose a model of capitalism which does not and could not exist. However, the changes which resulted from their attempts to implement their project still have dynamic impact. In terms of direct policy making, one of the most potent vehicles of these changes has been the application of 'public choice theory' in the public sector. Mueller (1989 ch1) has defined 'public choice theory' as the economic study of non-market decision making, based on the methods and assumptions of neo-classical market economics. The key assumption is that markets work through voluntary exchanges between individuals, each pursuing their own private interest. Although markets tend to move towards equilibrium, they are subject to continual marginal adjustment, and so respond spontaneously to consumer demand, achieving `allocative efficiency'. In the context of this theory, the entire political system may be seen as a market for the supply and demand of 'public goods', though outputs are achieved through a political process (voting), rather than a market process (exchange). The problem, according to proponents of this view, is that the individual citizen has less scope for expressing preferences through political process than through the market place. This leads Self(1993.4) to argue that: "Because collective decisions involve coercion and cannot satisfy all individual preferences equally, most public choice writers regard government as being intrinsically a less desirable means of satisfying individual wants than the market place, except for essential public goods."

1.12 Harrison, Hunter and Pollit (1992.1.et seq.) in examining the health service, have charted the cultural change brought about through the application of 'public choice theory', which they maintain has developed partly as a critique of pluralism. In terms of the health service, they characterise the remedies proposed by the exponents of this theory as "first, the sphere of planning must be diminished and that of the market mechanism increased. Thus, private health care should be encouraged, while the provision of any additional

services by public health agencies should be severely restricted." (1992.20).

In the societal sector of health and safety at work, the market mechanism has always been central. The situation is a complex one, because, on the one hand a safe working environment can be seen as a non-market service, `provided' by the employer at the behest of government. On the other hand, it is also a factor in the market mechanism for the provision of labour. The fundamental concept which gives cohesion to the whole sector is that of `employment', which is a contractual relationship. Employers, employees and independent contractors are defined by their relationship to this concept. Here, labour is exchanged for payment. If the contract under which this happens is defined as a contract of employment, then the employer owes a civil duty of care to the employee.[7] The contradiction between the public element and the private contractual element forms is a potential source of conflict. At the moment, though, the dominance of market values has largely neutralised any actual conflict. For example, the major criminal duties found in the Health and Safety at Work Act 1974 (see Appendix B), which express public expectations of health and safety provision, are centred on the existence of a contractual relationship.[8] The contract system has a number of advantages. As Taylor-Gooby and Lawson (1993.134) point out, it is both flexible and responsive to circumstances, leading to decentralisation which "..... makes far greater flexibility in the detail of service provision possible, so that individual providing agencies may operate independently from each other. There is no reason why such agencies need to be part of the government system, and they may include the private or voluntary sector". This is particularly relevant in health and safety, where provision is through a large number of independent employers. Taylor-Gooby and Lawson (1993.ch9) go on to examine the relationships developed in decentralised welfare provision in terms of a `core-periphery' model, based on idea of control. The core functions include strategic thinking, policy making and setting objectives and standards, while actual

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[7] See Wedderburn `The Worker and the Law' (1986.425-439)

[8] Though it does not have to be between the employer and the injured party - See S3.HASAW1974

delivery can be left to the periphery. Health and safety at work provides an extreme example of such decentralisation. The Robens Report emphasises this, and envisages a model operating broadly on core-periphery lines within each firm[9]. However, the model also works on another level. It is possible to view HSC/E, with its strategic and policy-making powers, as a provider of core functions. In this version of the model, the individual employers remain the peripheral implementers.[10] This view emphasises an extra dimension of the HSC/E when it is described as the `Regulator'. It is not only a body which makes Regulations and Codes of Practice, inspects and prosecutes. It is also the managerial controller of the whole sector, and is in some respects also a `provider', in tandem with the employers.

1.13 There are, though, some differences between health and safety and the provision of what Taylor- Gooby and Lawson call `state services'. They argue (1993.132-6) that government can maintain effective control of such services by adopting a philosophy of management which is also a relatively recent innovation in the business sector. This involves the replacement of vertical and horizontal integration within the firm by a complex network of sub contracting, interdependency and exchange - "the point is that new technology and new managerial techniques mean that it is now longer necessary to incorporate a particular process in order to be able to control it" - (1993.134). Here, too, the changes in health service provision of the late 1980s and early 1990s can provide a conceptual comparison with health and safety at work policies. In relation to the health service, the proposals in the White Paper 'Working for Patients' (D.0.H.1989.), enacted in the **Health and Community Care Act (1991**), explained the key concept, which was the introduction of competition through the creation of what Le Grand (1990 .351) has called the 'quasi - market'. In this paradigm the State is simply the funder of services while

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[9]The Robens Report 1972.14-15.46 " Promotion of safety at work is an essential function of good management. .... The job of a director or senior manager is to manage. The boardroom has influence, power and resources to take initiatives and set patterns."

[10]The problem with the model is that the HSC/E has no direct budgetary control over providers. However, it can issue Regulations which can force firms to implement provisions (and have the effect of forcing them to cover the cost of doing so).

private and voluntary organisations compete for finance and custom. The Health Service reforms meant that District Health Authorities and fund-holding general practitioners became purchasers of services and could choose, in theory at least, the most efficient services from the hospitals, most of which would be self- governing N. H. S. hospital trusts, or independent hospitals. Comparatively few providers would remain under direct control of district health authorities. The N. H. S. trusts could compete for private as well as N. H. S. patients. In this move to a more organic structure the issue of control received great attention. In the White Paper, the internal market was seen as the primary instrument of control within the system, while within each organizational component managers assumed greater responsibility as agents of control.

1.14 The health and safety at work sector contrasts with this in a number of ways. Perhaps the most important is that the state does not fund health and safety provision. Rather, the state imposes obligations which are privately funded by the duty holder. This essentially changes the power relationship between the state and the providers. The latter do not have to comply with state policy in order to successfully bid for funds. Indeed, they may find that they achieve financial advantage because their overheads are reduced if they do not implement health and safety provisions. Despite attempts by the HSC/E and other organisations to build a `business case' for the implementation of safety procedures, [11] there is little intrinsic financial pressure to adopt safe working practices - indeed, as Dawson et al (1988.253) indicate, the cost of compliance depends on the solvency of the company and the state of the market. Yet the Robens Report assumes that firms basically desire to be compliant, and that `apathy' is the "greatest single contributing factor to accidents at work"(1972.15.28). The system of regulation based on the Report is suffused with this assumption. This is one of the real sources of crisis- this value-judgement is not supported by market reality. Where quasi- markets have been created, the system can be structured to ensure that compliance with policy is beneficial to the providers. Health and safety at work, operating through a real

[11]See CBI.1999 Health and Safety : The Business Case

(labour) market, lacks this artificial structure.

1.15 The focus of change in health care provision has been to import market mechanisms and to minimise direct government intervention. Superficially, the focus of change in the health and safety at work sector appears to differ. As far as the actual delivery of provision is concerned, it has not been deemed necessary to import ideas of a 'quasi market' into this structure, since it already operates in the context of the real market. Employers, themselves operating in a market environment, have control of the actual welfare provision of a safe working environment within their organisation, while their managers are the agents of that control. In these elements, health and safety at work can be seen as a somewhat purer (because it involves a real, rather than a quasi market) form of the model of welfare provision which successive governments have sought to implement. This leads to a deep difference in delivery of the fundamental concept of `public choice'. A quasi-market can be structured to give those using the service at least the illusion of positive choice- for example, the production of school league tables can be used by parents in stating which state school they would prefer their child to attend. But the worker is selling their labour in a real market, where health and safety is subject to the corporate need to maximise profit in order to survive. The only choice available to him is the negative one, of not taking a job with an employer who has a bad record, or of leaving if he believes he is being unreasonably exposed to risk by an existing employer.

1.16 In other welfare providing sectors, the issue was seen to involve more than the mere importation of market mechanisms. The change of organisation culture from a public service (bureaucratic) one to the creation of a 'business culture' through the inclusion of private sector management theories has provided a means of shaping the implementation of policies. The implementation of a new business managerial paradigm has been seen as a necessary corollary to the introduction of the market. Taylor Gooby and Lawson (1993.132-149) have attempted to identify the major facets of this. They point out (1993.132) that this paradigm differs from the initial drive to market reform and privatisation of the 1980s, since it does not necessarily involve spending cuts. They maintain that it is rather a change towards

managerial technique. It is, though, very much more than this. As Hales (1993.216) argues, "the power of organisational culture resides in the fact that it is not just another management technique , which can be applied at will, but is rather an influence upon behaviour which is not recognised as overt 'management'. The beliefs and values which shape employee behaviour are internalised, taken for granted and accepted as unobjectionable; therein lie their force. Culture can therefore exercise the most powerful and insidious form of control because it combines de facto compulsion with perceived freedom from coercion". Within a welfare provider such as the Health Service, organisational culture can exert control over decision making concerning provision of services through direct managerial precept. In examining research question (2), it will be seen that managerial culture has been influential in two ways throughout the societal sector concerned with health and safety at work. Firstly, it operates within the business organisations which are the actual providers of health and safety. Decisions on safety provisions will be taken by people working within such cultures. Secondly, it works within the HSC/E, influencing both the advice given to employers and the enforcement philosophy adopted by the agency. This is particularly powerful when the HSC/E is seen as exercising management control over the whole sector.

1.17 In management theory, one of the key arguments concerns whether organisational cultures are assessable and capable of change, or whether they are intrinsic. Seen in this context, the issue of the extent of managerial control which the HSC/E can exercise in the sector takes on an extra dimension. If organisational cultures are capable of assessment and change, they are also capable of conscious use as control mechanisms and therefore particularly useful in ensuring the implementation of the market in welfare provision. The HSC/E may exert both direct control through its enforcement mechanisms, and may also indirectly shape the organisational cultures which implement Health and Safety provision. In the course of this argument numerous writers have attempted to identify the cultural differences which can be relevant in different types of business organisation. Hofstede (1984), for example, has attempted to assess differences in national cultures in his international survey of IBM employees. He analysed his results on five value dimensions of national

culture: power distance (the degree to which people in a country accept control) amid unequal societal values in institutions and organisations, assertiveness of individuals, materialism, and individualism versus collectivism. He concluded that national cultures were significant in analysing business organisations. Hofstede's work exemplifies two assertions which have gained currency among more recent organisational theorists -in the first place that factors influencing corporate culture are capable of empirical assessment and (by implication) of change; secondly that national and societal influences from outside the organisation are important in the development of corporate culture. This is contrary to the prevailing positivist movement in behavioural management theory, where general principles of organizational behaviour are frequently sought, for example in the work of Maslow (1954, 1971) and Hertzberg (1966). These are concerned to identify general principles based on a view of intrinsic human and cultural qualities. It is the prevalence of the positivist approach which underpins the attempts to translate largely American management theories into a British context, and to introduce 'business' cultures into what were formerly bureaucratic enterprises. The Robens Report contains examples of both sides of this debate. On the one hand, it advocates the creation of an Authority for Safety and Health at Work with ".... A comprehensive responsibility for the promotion of safety and health"(1972.36.116).[12]This was clearly intended to bring societal influences to bear on employers with a view to changing their safety culture and eradicating workforce apathy. On the other hand, it is also implicit that the Robens Committee believed that there were intrinsic qualities in business culture which would lead to the voluntary development of better safety practices - "It will be clear from this discussion that we regard practical safety work undertaken on a voluntary basis at industry level as one of the more fruitful avenues for development in the future. The indications are that such activity will continue to increase spontaneously". (1972.30.94). The Statutory framework and the new Authority were to have the effect of "strengthening and encouraging this spontaneous industry-by-industry activity" (1972.30.96). As a

[12] Later enacted as the Health and Safety Commission and Executive (Health and Safety at Work Act 1974 ss 10-14.

result, the first duty of the Health and Safety Commission outlined in the Health and Safety at Work Act (s11 [2]a) is " to assist and encourage persons concerned with matters relevant to any of the general purposes of this Part to further those purposes". It was clearly expected that the HSC/E should promote the development of aspects of business practice and business cultures which they saw as supportive of health and safety measures. This approach has been fundamental to the development of the values of compliance. It is the natural corollary of the view expressed by Kagan and Scholz (1984. 67-8), that companies are "political citizens", with an inclination towards compliance since they are committed to act in a socially responsible manner.

1.18 Clarke & Newman (1997.34-35) indicated that these managerial ideologies have been legitimated not only through the argument of the New Right that market mechanisms are superior as a means of allocating resources. They have also been legitimated through the idea that they could also inject more discipline into welfare provision, so producing more cost-effective services. As Butler (1993.66), has pointed out, in the health service there has been considerable resistance to this change, and it cannot be said that the process has ever been completed. The societal structure relating to health and safety at work, on the other hand, has only a recent history of an identifiable and cohesive organisational culture. When the HSC/E was created by the Health and Safety at Work Act 1974, it was the first body which was in a position to create an organisational culture for the sector. Its agenda was set both by the Robens structure as implemented in the Act, and by the older legal culture found in the civil law provisions which were adopted in the Robens recommendations. In particular, the obligations of the employer are defined both under the civil law and under **S2 Health and Safety at Work Act 1974**, as existing "so far as is reasonably practicable". This means that risk is to be weighed against cost in assessing the employers obligations. This did not import market orientation and business values into the sector, but it pinpointed and consolidated them. The change which followed in the wake of this, and which is common to both health and safety and to sectors like this health service is, as Clarke and Newman suggest, new emphasis on managerial and business skills. These, they believe, have not just been a technical means

of achieving new political objectives, but have "also played a substantial role in legitimating change and heralding a new order." (1997.36). The development, for example, of risk assessment techniques[13] has lead to the widespread use of management ideologies in deciding whether a safety provision is "reasonably practicable". It will be argued[14] that these are not necessarily consistent with the older legal interpretations which remain at the base of the Statutory provisions. This is one of the key fields of conflict between public service and market values in the development of health and safety policies[15]

1.19 DiMaggio and Powell (1991) have attempted to describe this process of change which has affected many organisations through the concept of isomorphism. In identifying the basis of this idea, they use Hawley's (1968) description that "isomorphism is a constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions". (1991.66). The concept is more complex than this, though. DiMaggio and Powell (1991.64-74) identified two types of isomorphism - competitive and institutional. Institutional isomorphism concerns the way that organisations compete for political power and legitimacy. In considering this type of isomorphism, they have identified three mechanisms through which change occurs: "(1) coercive isomorphism that stems from political influence and problems of legitimacy; (2) mimetic isomorphism resulting from standard responses to uncertainty; and (3) normative isomorphism, associated with professionalisation". These three mechanisms are not always distinct. It may be impossible to strand them into separate threads, yet they arise from different conditions and may lead to different outcomes. Clarke & Newman (1997. 90) maintain that it is possible to see government agencies such as the Audit Commission and Inspectorates as lying between the coercive and the mimetic, since they have linked evaluative and advisory roles through the establishment of organisational templates. This is particularly true of the Health and Safety

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[13] As described in "Reducing Risks, Protecting People " HSE 1999

[14] See Chapters 7 and 8

[15] See research question (1).

Executive which has adopted a strategy to encourage self-regulation in enterprises by focussing on good management of health and safety issues [16]. The risk assessment provisions of the Management of Health and Safety at Work Regulations 1992 again provide an excellent example, where a mix of legal regulation and HSCE advice place enormous pressure on organisations to adopt a homogeneous approach. A failure to carry out risk assessment, or the performance of risk assessment in a way which the HSC/E deems to be inadequate, may result in the use of the direct coercive power of the criminal law. Mimetic processes can be seen in the dissemination of advice on systems and procedures, which the HSC/E sees as an important part of its work.[17] Both coercive and mimetic isomorphism are important in terms of legitimacy.

1.20 As Scott (1991.169-170) has pointed out, Parsons (1960) emphasised that the values pursued by the organisation must be congruent with wider social values if it is to have a claim on societal resources. So in order to achieve legitimacy, provisions must reflect contemporary value judgements. Scott emphasises the development of this view through an appreciation of the complex nature of the institutional environment, and believes that organisational legitimacy refers to the degree of cultural support for an organisation given by wider society .Importantly, though, he stresses that organisations "are not passive actors being imprinted with cultural templates" (191. 170). The organisation itself exercises strategic choices, which may be limited or wide, depending upon the circumstances. The HSC/E has demonstrated such characteristics in relation to the deregulation pressures of the late 1980s and the 1990s.[18] On the one hand, it agreed to a "Review of Health and Safety Regulation" where the HSC/E was asked "to advise the Government whether it was still relevant to the risks faced by workers and the

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[16]see Review of Health and Safety Regulation, HMSO 1994, and the HSE Annual Reports

[17]This may be given individually, to particular: organisations, or through publications, such as "Successful Health and Safety Management " HSE, 1991, or by inclusion in commercially available software packages, such as 'Target', produced by CE Heath PLC, insurance brokers, which has the added incentive of discounts from insurance premiums for firms with good analyses.

[18] See Chapter 7

public, whether it all remained necessary in its current form, and whether it was possible for the administrative burdens which arose for business to be reduced"[19]. The Report did recommend the repeal of seven pieces of primary regulation, which was a substantial reduction, and consistent with the debates of the time. It is certainly arguable that the HSC/E needed to do this in order, not only to maintain its credibility, but also to continue in existence, since there was a concurrent debate on market testing the HSEs regulatory functions [20] with a view to breaking them up. However, the recommendations for repeal which the HSC/E actually made were concentrated on areas where there was overlap in the legal provision, and which would remain covered by the general duties in the **Health and Safety at Work Act 1974,** or which were redundant. In particular they refused to capitulate to pressure to repeal s1(2) of that Act, which was designed to maintain and improve safety standards. Furthermore, the Report contained a section on "Myths and Realities" where the authors examined and exploded, some of the ideological myths which were endemic in criticism of the contemporary system.[21] At this time, the HSC/E could very easily have lost credibility. It is clear though, that it was far from being a 'passive actor', and, by using a combination of compliance with contemporary thinking and resistance, defended itself effectively.

1.20 Both DiMaggio and Powell (1991) and Scott and Meyer(1983.15) argue that organisations are involved in a network of relations which are both created by their own activities and also shape and constrain their possibilities of action within an increasingly structured environment. Both also emphasise that the relationships included are both inter- organisational (horizontally) and power and authority (vertically) based. The difference in view, as Scott (1991.I71) indicates, is that while damage and Powell believe that the environment, showing a strong centralised structure, leads to greater homogeneity; Scott and Meyer believe that it sometimes leads to greater diversity. Scott suggests that where environments lack centralised authority, there may be greater similarity

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[19]Review of Health and Safety Regulation: Main report, Ministers' Forword.

[20] HSIB No. 212, August 1993

[21]Section 4.

of organisational form because of competitive and mimetic processes, but where authority is strongly centralised, there may be greater diversity of form since a variety of more specialised organisational forms may be created, coercively increasing diversity. This debate gives rise to a number of questions when considering how pro-active the role of the state should be in health and safety provision. In the first place, since the main interface of provision is through individual employers, how desirable and achievable is homogeneity? Secondly, how centralised is state authority in this sector? Thirdly, how far is authority invested in the agency, the HSC/E, and how far does it rest with central government ?

1.21 Despite having a distributive structure which is organic, the health and safety sector, superficially at least, appears to have a regulatory structure which is highly centralised. There is a comprehensive legislative framework, centred on the ultimate coercive authority of the criminal law .There is a central government agency involved in regulation (the Health and Safety Commission and the Health and Safety Executive). Business organisations are subject to inspection, and the Inspectors can prosecute. However, beneath the surface, a position which appears to be contradictory is revealed. The Robens Committee.(1972 .255) clearly stated that "any idea that standards generally should be rigorously enforced through the extensive use of legal sanction is one which runs counter to our general philosophy". The strength of the law was to be mitigated through the system of enforcement. The basis of regulation was to be the provision of advice and assistance. This does not appear to be the hallmark of a strong centralised authority[22]. However, in the years since the Robens Report, the Health and Safety Executive, in particular, has developed exactly such a strong centralised position. In doing this, political and ideological action has been as important as its direct activity in inspecting, prosecuting, and in creating Regulations. Clark & Newman (1997.90-91) have stressed the importance of ideology, and the particular aspect of myth making in the process of legitimation. ln the context of

[22].This situation has exacerbated over the years, so that in 1996- 7 for example, Health and Safety Executive staff spent only 3% of their time on regulatory activities, and 55% of their time on research and the provision of information (HSE Annual Report 1996-7)

public sector restructuring, the concepts of management and the market have been developed as naturalising principles, conferring a 'natural status' on social relations. "Management has been legitimated by reference to its status in the real world of business. Markets are naturalised as the primary way of conducting human business -partly because they are a widespread phenomenon, and partly because the model of the market and its economic actors has been generalised as a template for describing human conduct".(1997.91). They go on to point out that managerial ism is not just a set of institutions created in response to environmental problems, but also these institutions are carriers of managerial ideologies. This echoes Scotts view that organisations are not simply passive actors. The history of health and safety at work since the Robens Report has in many ways been the history of the evolution of these ideologies and myths. This has lead to a view of continuity in the sector which is deceptive, but which has contributed to its comparative neglect in policy analysis. This has lead some writers to the view expressed by Baldwin (1996 .90) that "Health and Safety at Work is not a sector affected by sweeping policy change".

1.22 In fact, there have been important policy changes, related to ideological and political developments, in addition to the hegemonic shifts in managerial discourse itself. As Maile (1995 .722) has indicated, "the enterprise discourse associated with neo-liberalism has to be seen in relation to the wider social project of the enterprise culture." One of the examples which she examines in terms of change within a local authority, is the use of the term "empowerment." She points out that this is an ambivalent term, referring in its more traditional context to organisations and pressure groups which are underprivileged and require support, but also acquiring a new meaning by reference to the increased responsibility being placed on the individual in the context of structural change. Where bureaucracy tended to stultify, according to rnanagerial tenet, employees will now be 'empowered' as flexible decision makers (see Peters and Waterman 1982 .57). She also (1995.737) writes "Within the discourse of empowerment there is an implicit critique of the power that professionals have traditionally exercised in relation to policy issues affecting the general public." Local Authority inspectors have considerable powers of enforcement within the health and safety sector[23], and have been directly affected by this cultural shift.

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[23]See Robens Report, Chapter 4, and the more recent re-definition of their role in the Health and Safety (Enforcing Authority) Regulations 1989.

However, it is also important in another sense. As Clarke and Newman explain, state restructuring has altered the balance of power between the public and the private realms. " The process of dispersal, resulting in the disempowerment of a collectivist version of the public, has been accompanied by a process of empowerment of the public as individual consumers." (1997.127). This has resulted in a diminishing of `public service values', which Clarke and Newman see as being values of neutrality, impartiality, fairness and equity. The health and safety sector is perhaps one of the most complete examples of such dispersal. " New institutional arrangements are accompanied by discourses and practices through which the public comes to see itself and think of itself in different ways. They create new subject positions in which people may come to think of themselves as consumers (with certain sets of entitlements and expectations) rather than as citizens (with rights and responsibilities)."(1997.127-8). This positioning of people as consumers of safety is intrinsic in the terms used by the HSE in `Reducing Risks, Protecting People' (1999), where the entitlements and expectations are described as follows:- "Though people accept that we should continue to take advantages of advances in science and technology, this is moderated by expectations that:

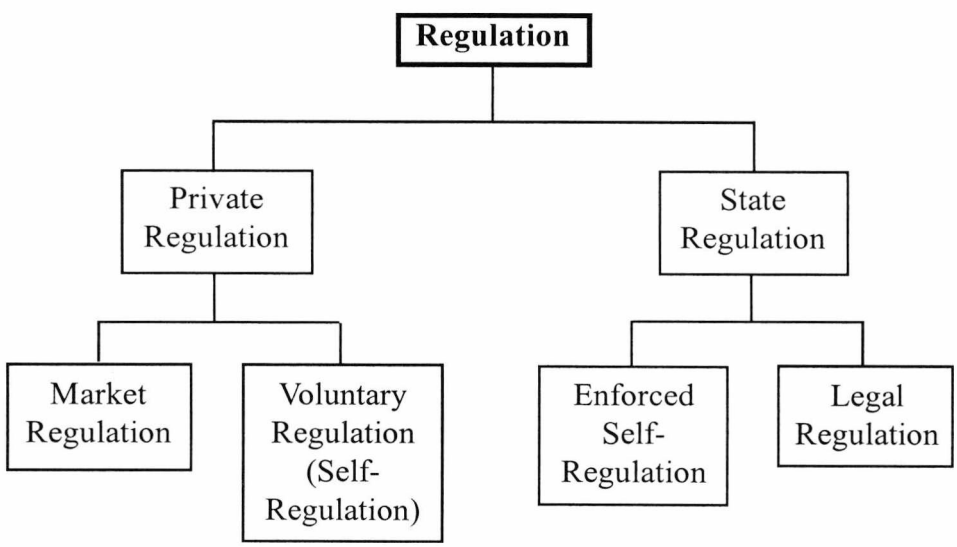
*those who create risks should be made responsible for ensuring that adequate measures are in place to protect people and the things they value from harmful consequences that may arise from such risks;

*the state should be proactive in protecting people from risks as distinct from reacting to events." (1999.5.2) This document pre-supposes that individual `consumers' of safety have an expectation of a safe working environment. Seen in this way, it becomes difficult to articulate what is `public' in health and safety at work. What kind of expectations do these customers have of the ways in which the State should be "proactive in protecting people from risks"? Should the State only be pro-active only where members of the public at large are at risk- such as in relation to railways, or nuclear power stations? Are there broader social concerns, such as the strain placed on the health service in the treatment of people suffering from injuries and diseases caused by their work, the burden placed on other social services by people in need of assistance and unable to work, the human misery caused by such injuries and illnesses? How are these broader interests to be expressed, beyond the interests of individual `customers'? When `public service values' become obscured, and market values are taken for granted, it becomes difficult to focus on issues such as these.

The balance between voluntary and state regulation (Research question 4).

1.23 This lack of focus can be seen in much of the debate concerning the third type of public policy which Lowi sees as shaping the relationship between government and business- that of regulatory policy. It is also crucial to the issue of how governments maintain power over the implementation of policies in an organic redistributive structure. The debate has focussed on the question of the form which regulatory policies should take. In this debate regulation has been analysed by different writers in terms which are not always analogous. For the purposes of this thesis the term 'State regulation' is used generically, relating to legal regulation- the direct implementation of control through a 'policing' function and 'enforced self-regulation' (the creation of a legal structure which imposes duties on private bodies or organisations). This definition has been used in literature relating to company law and financial services policies (see e.g. Clark 1986 Ch.1) However, many writers on deregulation including Ayres and Braithwaite, do not make this distinction and often use the term 'self-regulation' rather loosely, covering both enforced self regulation and aspects of voluntary regulation. It is particularly necessary to make a clear distinction when

Fig. 1.1



examining health and safety at work policies, since the co-existence of legal regulation, enforced self-regulation and voluntary regulation, and the balance between them, lies at the heart of much of the conflict and debate in the sector. Fig 1.1 shows the relationships between the major definitions used in this thesis.

1.24 For Ayres and Braithwaite (1992.1), it is clear that the debate is between those who favour private regulation, and those who favour state regulation. They define private regulation as being " ....by industry associations, by firms, by peers, and by individual consciences". This is very close to what the Robens Report has characterised as the `voluntary' elements of self-regulation (1972.13.42). However, it is clear that Ayres and Braithwaite also encompass the market as a better alternative to allowing politicians to hold responsibility for the welfare outcomes of government. The market is superior to state action, because market outcomes are neither fair nor unfair , but simply the result of the operation of impersonal forces, so that it is pointless for the loser to protest about market regulation within their definition.[24] They do not, though, advocate the philosophy of the `New Right', for example, Hayeks' view that concepts of social justice are not compatible with freedom in a liberal society. He argued that markets form a more effective system of regulation allocations. (von Hayek 1976. 65)[25]. To people who hold this view, market systems offer the policies at arms length. [26] In this thesis, the term `private regulation' refers to non-state regulation, including both market and voluntary regulation.

1.25 `Deregulation' is another term which has been accorded a variety of meanings. For those such as Hayek, who reject any theory of distributive justice, it would involve a retreat by the state from any intervention in the workings of the market. In this view, state regulation is not only unnecessary, but also damaging. However, as Woolfson and Beck (1996 .172) have pointed out, the aim of the British government deregulation task forces of the early 1990s was to make proposals for `reducing the burden of regulation' and to secure a `strong business voice'. In other words, deregulation was about minimising rather than

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[24]See p133, where they advocate "partial industry based regulation" as a half-way measure between laissez-faire and full industry regulation.

[25]See also Offe 1984: 56-8, 267-70

[26] The implications are debated in Plant 1991: 80--107

eradicating state intervention. Ayres and Braithwaite made the point that it is easy to confuse deregulation with privatisation. As they explained, the latter often gives rise to a very great deal of regulation. This was certainly true of the Thatcher governments, and lead Ayres and Braithwaite (1992.7) to propose that "We have not, and are not, experiencing an era of deregulation so much as an era of regulatory flux". Health and safety has been subject to pressures for both privatisation and deregulation. Although already focussed very strongly around the market, the sector was reviewed through `market testing' of the HSE, with a view to the contracting out of regulation in the early 1990s.This did not materialise, but the pressure for `market regulation' was considerable. [27] At the same time, there was deregulatory pressure in terms of minimising regulation, and a definition of `good regulation' which included that it should not be `disproportionate' to potential benefits, and should be `goal-based'- in other words, it should be as non-prescriptive as possible.[28]In the debate about models of state regulation, legal regulation, which involves the development of norm-based regulation, and a `policing' model of enforcement[29] is often juxtaposed with `self-regulation'. Direct legal regulation involves the promulgation of clear legal rules which are enforced by the courts. In health and safety terms, this involves the setting of legal standards. If these are broken, the offender will be prosecuted and punished for the breach. This approach ran through the legislation from the earliest days of the Factory Act (1833) until 1974, when the Health and Safety at Work Act, while retaining the concept of criminal liability, abandoned the idea of implementing standards for the imposition of duties. In this model, the law is directly applied to the corporation by a centralised enforcement agency. Legal regulation has been seen as allied to bureaucratic processes, and characterised as 'regulatory unreasonableness' by Bardach and Kagan (1982.58), in their argument for a self-regulatory approach. This type of regulation was most under attack in the arguments for deregulation, since it is prescriptive, and is generally not merely `goal setting'.

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[27]See HSIB212 August 1993

[28] See "Thinking about regulation" DTI 199

[29]Baldwin & McCrudden 1987.145-6 have outlined the clash of regulatory models concerning the production of the Lifting Gear (Testing and Use) Regulations 1977.

1.26 The Robens Report, and those arguing for deregulation in the Conservative governments of the 1980s and 1990s, argued for `self-regulation'. This term can be confusing, since it is sometimes given different meanings. It may be used in the context of voluntarism, meaning non- governmental regulation. It is more usual, though, for it to designate (see, for example, Braithwaite)[30] a particular form of state intervention. The major characteristic of self regulatory systems, is that the law is not used in the sense of 'policing' the sector, but rather that it acts as a guarantor of the system. Considerable amounts of law may be involved, but their aim is different. Rather, their object is to support compliance and negotiation leading to regulatory consensus. Clark (1986.4), writing about self-regulation in the financial sector, commented that this had resulted in a large quantity of formal, bureaucratic regulation and an increase of formal supervision. It is important to recognise that this approach does not necessarily lead to less regulation- it is simply of a different type. The Robens Report failed to grasp this point. They argued that "The first and perhaps most fundamental defect of the statutory system is that there is too much law"(1972.6.28). In order to rectify the problem, they clearly stated that "any idea that standards should be rigorously enforced through the extensive use of legal sanctions is one that runs counter to our general philosophy"(1972.80. 255). The report advocated the development of self- regulation as being the most appropriate for this field. It meant that the main responsibility for health and safety provision should lie with the employers, and also that mechanisms should be set in place to assist them. (1972.12.41). The Health and Safety at Work Act 1974, which was based on the Robens recommendations, enacted a series of duties which were owed by various duty-holders, rather than a system of direct standards.[31] To assist the duty-holders in complying with the duties, the HSC/E had the role of providing advice and information. At the same time, a system of safety committees and safety representatives were set up within organisations to assist with internal enforcement. In this model, the main force for regulation comes from within the company itself. It is based on a compliance approach, and is often characterised as `goal-setting', since the duty holder has a wide discretion as to how s/he is to actually comply. The view that this is a more appropriate method of dealing with businesses has been put forward by writers such as Kagan and Scholtz (1984 .67-

[30]In numerous works, but particularly Braithwaite and Fisse 1987

[31] See Appendix B

8) and Hutter (1988 .110). In their discussions of criminal liability, they have centred the argument around the question of whether corporations can be seen as " amoral calculators", requiring "strict enforcement of uniform and high standards backed by severe penalties " -Kagan & Stoltz (1984 .72), or whether they are 'political citizens' who, when they break the law, do so out of incompetence, and who merely need support and education to comply with it. They argue that a strict enforcement strategy is counter productive, and leads to "the destruction of co-operation". Hutter (1993) is a protagonist for a compliance approach in relation to health and safety at work, and advocates its extension. The argument here is that although the regulatory agencies do use a compliance approach, there would be further benefit if the Health and Safety at Work Act 1974 were fully implemented. The particular provisions which are not in force are those which increase the involvement of the workforce. One reason for this is the traditional approach of the inspectors, who view employers, managers and inspectors as the main legal actors. Hutter argues that they should extend their view to be more inclusive of employees -"The evidence seems to be that the involvement of the workforce with management and regulatory officials can be effective" (1993.466). These conclusions are certainly true, but they are contrary to the values of the managerial paradigm. As Clarke and Newman have pointed out " The issue of representation is necessarily a source of difficulty for public service bodies in the context of a divided and fractured social realm."(1997.159). It is clear that the major negotiated consensus in day- to- day health and safety regulation lies between employers managers and inspectors, (the providers). It is difficult to include the employees (the consumers) in the decision -making process which determines the provision, both because of their identity as `consumers' and because of the central tenet of managerialism identified by Pollitt (1993 .3) as the "managers right to manage".

1.27 There are, though, additional questions about the fundamental aims of a compliance approach. Hawkins (1984 .9), while dealing with pollution policies, has summed up the real aim of self- regulatory policies as being to " preserve a fragile balance between the interests of economic activity on the one hand and the public welfare on the other". However, it is questionable whether the outcomes of such policies are `balanced'. In terms of Clarke and Newmans 'public service values', a self- regulatory approach is neither neutral nor equitable. As Hopfl (1994 .40) wrote "Self- regulation by apparent consensus is the norm of

professional management". This approach is not only based on managerial values, it also serves to propagate them. Clarke and Newman explain "Regulation and evaluation are elements of the process of managerialised dispersal, linking government, regulatory agencies and `local' organisations in the managerial specification and achievement of performance."(1997.158). Self-regulation is both an outcome of the prevailing ideology, and a means through which it is reproduced. This poses difficulty for writers who attempt to find a `third way' through the regulation debate, where "The empirical foundation for their analysis of what is good regulatory policy is acceptance of the inevitability of some sort of symbiosis between state regulation and self-regulation." (Ayres and Braithwaite (1992.3).[32] They are engaged in developing policy around interrelationships between voluntary and state regulation, "If we accept that sound policy analysis is about understanding private regulation- by industry associations, by firms, by peers and by individual consciences- and how it is interdependent with state regulation, then interesting possibilities open up to steer the mix of private and public regulation."[33] This has lead them to propose a form of "responsive regulation", which involves regulation which responds to different industry structures and the different motivations of `regulated actors', in differing degrees and forms. These responses should be contextual, and relate to regulatory culture and history. They do see a role for state regulation in this, "Public regulation can promote private market governance through enlightened delegations of regulatory function."(1992.4), which they see as including public interest groups, unregulated competitors of regulated firms and regulated firms themselves. This places Ayres and Braithwaite squarely in the self-regulatory fold. They have proposed that the regulatory regime should be based on principles of deterrence (1992.35) with monetary and reputational deterrence as important factors. In this, they reject the view of business organisations as `amoral calculators' and incorporate a view that of corporations as `political citizens'. This is a departure from Hayeks' view that only market values should prevail since it does incorporate a view of social justice, based on the idea that ".... the community, , market, state and the associational order each are important in both challenging

[32]In this quote, `state regulation' denotes `direct regulation'

[33]Ayres and Braithwaite 1992 .3

and constituting the power of each other"(1996. 14). It is this which permits them to see that some businesses may not be so compliant as others. To deal with this, they propose an `enforcement pyramid' with persuasion at its base, being the most frequently required form of enforcement, and criminal penalty, licence suspension and licence revocation being the three phases at the apex. They recognise that there may come a time when compliance runs out, and sanction needs to be used. This pyramid displays many similarities to the Robens Committees' proposals for health and safety regulation[34]. There is, though, an important distinction. The Robens Report said that it was creating a self-regulatory system, but explained that, although the primary legislation should be goal-setting, it did not have confidence that this would lead to an improvement in health and safety provision. It therefore recommended the previous legal regulation, based on the imposition of legal standards, should be kept as part of a `major exercise in unification" (1972.32.98). This is an important characteristic of the modern system for regulating health and safety at work. It goes beyond `responsive regulation', and the values of the compliance culture, and incorporates an element of an oppositional model of legal regulation.

1.28 Despite the fact that this model is ideologically at odds with the policy consensus on health and safety, it has survived. A number of the earlier standards have been repealed, and it might be expected that, as newer regulations are created through the medium of the **Health and Safety at Work Act 1974,** the system would have shifted further and more completely to become a fully self-regulatory one. This has not happened. One of the reasons for this is S1(2) of the Act, which says that new regulations must be designed to `maintain or improve standards'.[35] This means that it is difficult to dispose of previously existing standards, except where they have become redundant- for example due to technological change. Another reason is that European Union legislation frequently embodies an approach where it is necessary to promulgate direct legal

[34] See Robens Report Chapters 7 and 9

[35]See Appendix B

standards .An example is to be found in the so-called "Six-Pack Regulations,"[36] which embody not only general duties, but also standards which are to be met. The HSC, in `Review of Health and Safety Legislation: Main Report', glosses over this . In discussing the Management of Health and Safety at Work Regulations', it says "While the objectives of the Regulations coincide with the existing law, they are generally more detailed on how those objectives are to be achieved., and introduce some formality into meeting the objectives"(1996.172.5). In other words, the regulations are not merely goal-setting, they are normative. This model of legal regulation cannot be given too much prominence, since it runs counter to the prevailing policy of enforcement.[37] However, it does provide both a counter point, and a possibility of developing alternatives to existing regulatory approaches.

Conclusion

1.29 "To ensure that risks to peoples health and safety from work activities are properly controlled".[38] This is the `mission statement' of the HSC. The issue which underpins this statement is the question of what is proper control, and how should it be effected? The societal sector of health and safety at work is characterised by a strong market presence. It is organised around the central concept of the contract of employment, and main health and safety `providers' are the private individuals and corporations who find themselves designated as `duty holders' by the Health and Safety at Work Act 1974. This gives a strong operational base in business cultures, and a central place to strategies which are characteristic of managerialism, and which depend upon concepts of compliance, negotiated consensus and participation. This gives rise to a number of conflicts when considering the needs of public welfare. In the first place, there is a conflict

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[36] The Management of Health and Safety at Work Regulations 1972, the Health and Safety (Display Screen Equipment)Regulations 1972, the (Manual Handling Operators Regulations 1972, the Workplace (Health Safety and Welfare) Regulations 1972, the Personal Protective Equipment Regulations 1972 and the Provision and Use of Work Equipment Regulations 1972.

[37] See Chapter 7

[38] HSC Annual Report 1999-2000 p1.

between the business need of the individual organisation to make a profit, and the public need to expend resources on safety. Secondly, there is a conflict between the organisational culture of the firm, and the welfare need to act for `the public good'.Thirdly, there is a conflict between the various forms of regulation generated originally in the Robens Report, and its subsequent implementation. Finally, there is an unresolved conflict over the role and form of state regulation. The current system of enforcement, based on the recommendations of the Robens Report, embodies managerial assumptions and values to a high degree, and displays many of the characteristics of Ayres and Braithwaites `pyramid of enforcement', with advice and persuasion seen as the main activities of the Regulator, while legal sanction is a last resort. The problem is that it has not been particularly successful- far too many people are suffering death, injury and ill-health due to poor health and safety provision. Despite the problems of under-reporting, it is possible to achieve some insight into the personal misery involved through an examination of injury and fatality statistics.[39] It is more difficult, though, to quantify the social cost and this remains largely invisible. Indeed, as Newman and Clarke have argued, the dispersal of social provision, and the empowerment of the public as `consumers' has lead to an obscuring of `public service values' which make the `public' and `social' aspects of health and safety enforcement even more difficult to analyse. This is important, because there are real grounds for doubting whether the compliance oriented approaches are capable of delivering a substantially safer working environment. The need for companies to maximise their profits, and to survive in markets where "...To demand justice from such a process is clearly absurd, and to single out some people in such a society as entitled to a particular share is evidently unjust"[40] means at the very least that voluntary compliance cannot be counted upon. Ayres and Braithwaite[41] have argued that "If we accept that sound policy analysis is about understanding private regulation- by industry associations, by peers and by individual consciences, and how it is interdependent with state regulation, then interesting possibilities open up to steer the mix of private and public regulation"

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[39]See Chapter 7

[40]Von Hayek 1960 .259

[41]1992 .1

. This is true- but the emphasis needs to be changed. State regulation also needs to be re-assessed, and the question of whether it is time to move the balance of provision back towards stronger legal regulation addressed.

CHAPTER 2 RESEARCH METHODOLOGY

Purpose of the research

2.1 The purpose of this thesis is to examine political social and economic power and explore the way in which such power impacts on policy-making. The method of inquiry is to develop a case study analysis of the policy process concerned with the regulation of health and safety at work. Health and safety at work is not frequently found as the subject of policy analysis, certainly when compared with sectors such as health provision and education. However, it does offer a unique and productive perspective through which policy-making and implementation can be viewed. This is because, unlike in sectors such as health provision and education, the state is not the main provider of outputs. This role is assigned to the employer, and has been throughout the history of health and safety provision. Health and safety at work therefore provides a mature model of decentralised welfare provision.[1] Health and safety at work also differs from most other examples of welfare provision in that, as a sector, it only gained a fully universal structure for provision at a relatively late stage. This stemmed from the Robens Report(1970-72). When the structure eventually arrived, it was ground-breaking for its time.[2] Facets of this approach have been adapted and developed, both in health and safety at work, and in relation to other policy sectors. In particular, regulatory policies have provided a focus for debates concerning the role of the State in welfare provision, as well as those concerning legal regulation, self regulation and voluntarism,[3] which have more recently appeared in connection with other public welfare sectors.

2.2 In order to concentrate on these debates, this thesis is focussed on the regulation of health and safety at work. The includes a study, not only of the

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[1]See Chapter 1

[2] See Chapter 6

[3] Defined in Chapter 1

work and policies of the main regulatory agency, the HSC/E, but also of the broader interactions of policy-makers and actors in a complex web of regulation. The study of health and safety regulation attempted here is wide-ranging, and, for reasons of space, it has been necessary to limit analysis to the implementation of these policies in England and Wales. European Union policy and provision has only been discussed where it has directly impinged upon implementation in England and Wales. This means that there are important and interesting issues of European policy, and its relationship to national policy which it has not been possible to explore, or which have not been fully considered. These could form the basis for a further study.

2.3 The research is concerned with process, rather than with outcomes. Although this is partly an implementation study, issues of policy-making will also be explored. As Ham and Hill (1984.105) have indicated, it is often difficult to disentangle policy-making from implementation- "We are confronted with a process in which concretisation of policy continues way beyond the legislative process. There is something of a seamless web here, though it may be ..... that it is possible to identify some decisions that are more fundamental for determining major (policy?) issues than others". They quote Barrett and Fudge (1981.25), who, in their own research, decided to "consider implementation as a policy/ action continuum in which an interactive and negotiative process is taking place over time between those seeking to put policy into effect and those upon whom action depends". Barrett and Fudge have developed their view as part of an argument against the "top-down" approach to policy analysis of writers such as Hogwood and Gunnn (1984. 11.3). They argue that in a top-down approach, the implementers of policy are seen as the `agents' of those who make policy. Using the `top- down' approach, policy is made, and then translated into a series of consequential actions. Hogwood and Gunn (1984.207-8) agree that this does not reflect reality. They agree that lower-level actors can influence or alter policies. They can also see that implementation involves a process of interaction between organisations. However, they go on to say " Much of this interaction can and should take place before policy formulation (eg in the form of consultation of

local authority associations by central government departments), although there is no guarantee that such prior consultation will produce prior consent."(1884.208). With this approach, problems are seen to revolve around policy `failure', where either the policy is not put into effect as intended, or where it does not produce the intended outcomes (1984.197). This occurs as a result of either non-implementation, or unsuccessful implementation. The view described by Hogwood and Gunn implies a structured process, which does not really take account of the dispersal of state power as analysed by Clarke and (1997.126)[4]. The inadequacy of the `top-down' approach is particularly evident in the societal sector of health and safety at work, where the primary implementers of policy are individual employers. They are, though, connected to the policy-making process in that their representatives are part of the tripartite agency, the HSC/E, a tripartite body which also includes representatives of the subjects of the policy provision (employees) in the form of the TUC. This tripartite body, in turn, not only has implementation responsibilities of its own, but also shares policy-making powers with central government. Policy-making and implementation powers are diffused throughout this system, which can also be defined in terms which include local authorities, police forces and fire authorities, plus the insurance industry. The thesis attempts to unpick this web, as it relates to regulatory policies. The general approach taken in this study was well described by Hamm and Hill (1984.108) - " The reality, therefore, is not one of imperfect control but of action as a continuous process of interaction with a changing and changeable policy, a complex interaction structure, an outside world which must interfere with implementation because government action does, and is designed to, impinge upon it, and implementing actors who are inherently difficult to control. Analysis is best focussed upon the levels at which this is occurring, since it is not so much creating implementation deficiency as recreating policy."

2.4 The following research questions have been developed in an attempt to

[4]See Ch 1.23

systematise the analysis of the levels.

1. What conflicts arise between the interests of public welfare and the interests of the market in the development of health and safety at work policies? Issues connected to this question include the examination of whether the public welfare agenda has been obscured by the articulation of market values; the consideration of the resources base for health and safety at work provision and regulation (and the central role of cost-benefit analysis); the adoption of legal or self-regulatory strategies.

2. How evident are managerial values in the development of regulation and enforcement policies on health and safety at work? Issues here include consideration of whether regulation is, or should be, `goal setting'; the examination of the development and implementation of enforcement policies by the HSC/E.

3. How pro-active a role should the State take in protecting people from hazards at work? Issues related to this question include an examination of whether regulation should be prescriptive or normative; an evaluation of the role of the HSC/E and its relation to local authority enforcement.

4. How has the balance between voluntary and state regulation developed in relation to health and safety at work? Issues related to this include a consideration of how health and safety at work has been defined in its historical context; whether voluntarist and insurance- based solutions have any potential for the improvement of health and safety at work provision.

5. What is the dynamic of influence in the development of policies on health and safety regulation? Issues include the consideration of tripartism in health and safety regulation; the position of interest groups in health and safety policy making and implementation; Parliamentary oversight of the HSC/E and its regulatory policies.

6. Is there any significant non-decision-making in health and safety regulation, where issues remain latent and fail to enter the policy process? Here, issues include an examination of recent policy initiatives, principally "Revitalising Health and Safety", and the Modernising Government initiative.

Procedure

2.5 This study has been constructed using a qualitative paradigm. Merriam (1988.19) has outlines six assumptions of qualitative research: that it is concerned with process; that it is about meaning; that the researcher is the primary instrument of research; that the research involves fieldwork; that the research is descriptive; that qualitative research is inductive. While a great deal has been written about health and safety at work, particularly from the perspectives of legal and criminological study, there has been comparatively little research which approaches the field from the point of view of policy analysis. The intention here is therefore exploratory, aimed at the development of perspectives founded in, and concerning, policy analysis. Methodologically, the regulation of health and safety at work is developed as a case study, through which the distribution of political social and economic power can be analysed. This case study has been designed in the following way : firstly, a historical analysis of the early development of health and safety as a policy field leading up to the Robens Report; secondly, an examination of the civil action in respect of accidents at work and the conceptual base, particularly concerning risk and reasonableness, which has been adopted generally in health and safety regulation; thirdly, an analysis of the major changes recommended by the Robens Report, and its impact; fourthly, an analysis of recent policy proposals concerning health and safety regulation, fifthly, a study, using interviews, to investigate the balance of influence in health and safety policy making, sixthly an exploration of the development of post-Robens health and safety policy, in relation to enforcement policies, concentrating on the HSC/E. negligence and workplace safety representatives

2.6 Bell (1993) states "The great strength of the case study method is that it allows the researcher to concentrate on a specific instance or situation and to identify, or attempt to identify, the various interactive processes at work.". This study will concentrate on the processes at the heart of the development of health and safety regulatory policy. Much of the narrative in this case study is developed chronologically. Penning, Keenan and Kliennijenhuis (1999.51) have pointed out that one of the difficulties of historical analysis is that ".....one is implicitly assuming that the interpretation of time is a result of a few universal factors (for instance, the impact of processes of

`modernisation'). Hence time remains sequentially defined and is potentially an overdetermining factor in relation to the logic of inquiry applied, ...". The use of a case study, rather than a purely historical method, is designed to permit the examination of factors which cross the time-dimension, such as the co-existence of prescriptive and normative approaches to health and safety regulation. Therefore the narrative structure also incorporates unsequenced elements.

2.7 Data was collected by the use of two major methods. Firstly, an analysis of published documents was conducted. This includes, for example, legal source material, such as the **Health and Safety at Work Act 1974**, the **Management of Health and Safety at Work Regulations 1994**, the Approved Codes of Practice, plus other Health and Safety Executive publications, such as the Annual Reports. It also includes a wide range of material published by interested groups - the TUC, CBI, ROSPA and interested professional associations. The materials used are primary source materials. The analysis of these materials forms the basis of most of the case-study narrative. Secondly, interviews were conducted with the representatives of groups which who either gave evidence at, or sent memoranda to, the hearing of the Parliamentary Select Committee for Environment, Transport and Regional Affairs (DETR), at their inquiry into the working of the Health and Safety Executive (1999). These were audiotaped and transcribed. Since only seven organisations gave evidence, it has been possible to interview the whole population. The eighth organisation which gave evidence was the D.E.T.R. itself. Regrettably, it was not possible to obtain interviews within the Department. Additionally, representatives responsible for health and safety policy in a number of organisation which did not give evidence were interviewed.. These were selected from the organisations which sent memoranda to the select Committee, but who were not invited to give evidence. Where possible, the interviewees had either actually given evidence to the Select Committee, or had been involved in drawing up the evidence. This was to ensure that they had an interest in policy -making and regulatory policies, as opposed to particular substantive issues of health and safety.

Where this was not possible, owing, for example, to staff turnover, alternative interviewees were sought from within the organisation who had an interest in this area. The aim of these interviews was not to investigate the Select Committee process itself, though valuable conclusions were drawn concerning this aspect, but rather to make a more general examination of the policy process directed towards the examination of research question 5 "What is the dynamic of influence in the development of policies on the regulation of health and safety at work?" and research question 6 " Is there any significant non-decision-making in health and safety at work?" Marshall and Rossman (1989.114) have advised that the process of analysing data should be based upon its `reduction' and `interpretation'. To achieve this end, the data produced has been organised into categories, and then reviewed.

The major categories used are:

1. The context- the type of organisation represented and its relationship within the regulatory system
2. The individuals and organisations way of thinking about health and safety policy and their view of the dynamic of influence
3. The experience of process evidenced in the interview.

The material was then grouped into three main categories:

The Consultation processes; the Health and Safety Commission; Parliamentary Oversight in the Select Committee. This analysis was then developed as a narrative, which appears in Chapter 9

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2.8 Creswell (1994.158) suggests that the concepts of validity and reliability are crucial to the verification of data. The intention in this study has been to triangulate the evidence by drawing on different sources. In addition to Statutes, Regulations and Codes of Practice, government policy documents such as `Revitalising Health and Safety' have been examined alongside HSC/E policy documents and strategy statements, and policy publications from the other participants in the tripartite system, such as the TUC and CBI, plus statements of judicial policy found in decided cases. Evidence provided to the Parliamentary Select Committee on Environment, Transport and Regional Affairs in its investigation of the HSC/E provides a valuable check on

accuracy of the interview material.

2.9 As a corollary to its analysis, the evidence will be evaluated and synthesised to produce an overall picture of the way in which social, economic and political power has impacted upon health and safety regulatory policies. This will include consideration both of the impact of the restructuring of public welfare described by Clarke and Newman (1997) and also of the impact of ideas of self-regulation and voluntarism examined by writers such as Ayres and Braithwaite (1992). Conclusions will be drawn on the basis of the evidence.

CHAPTER 3 HISTORICAL DEVELOPMENT OF HEALTH AND SAFETY REGULATION BEFORE 1972

3.1 In this chapter, a general historical analysis will be made, giving an overview of the developments in health and safety before the Robens Report 1972. The aim of this is to provide a context for the whole study, but the issues raised have particular relevance to Research Question 1, since the development of health and safety as a policy issue is centred on the conflicting interests of public welfare and of the market. Historically, this is perhaps most clearly seen as a matter of definition. Is health and safety at work to be identified along with other issues of public health; poor housing, poor sanitation, inadequate diet, or is it to be regarded as an employment issue, reflecting the tensions of the labour market? The various groupings of trade unionists, liberal reformers, religious campaigners and legislators who have promoted improvements in health and safety provision have, in effect, operated as alliances which those interested health and safety issues from each perspective. The interplay between them forms the central theme of health and safety policy development.

3.2. Recent literature frequently places the policy developments on health and safety at work firmly into the context of industrial relations issues. Dawson et al.(1988.3-4), for example, identify the doctrines of self regulation and workplace involvement as underpinning the **Health and Safety at Work Act 1974,** and believe that, " these principles ensured that the success of the Act would depend in part on the reactions of employers and employees in individual firms and establishments. It is therefore necessary to consider the Act and the subsequent Safety Representative and Safety Committee Regulations in the context both of industrial organisations ..... and of the developments in labour law..." Today, this is the dominant strand in perceptions of the development of health and safety policy. Davies and Friedland (1983. 49), have characterised this as a temporal shift, from an earlier, more `welfare based' view to one which concentrates on employment. As an example, they use this approach when identifying the sectoral nature of the expansion of regulatory legislation - "For industry we

see the beginnings of relevant legislation in the 1860s and 1870s, but it is only since 1963 that we have had a code of health, welfare and safety for offices and shops". They ascribe this gradual increase in the scope of the legislation through the sectors to the numerical increase in workers in the white collar and retailing sectors during the last fifty years. While this is certainly true, it is important to consider not only who was regulated, but also what was regulated. The earliest legislation was particularly concerned with the reduction of working hours (see 3.4), and this in turn was allied to a broader concern for the welfare of the "deserving poor". - " this extension to white collar workers is a good example of the response of the law to a fundamental social change". Some key questions arise from this.

3.3 Is the regulatory system a mere response to an existing and independently generated social context? To what extent is the regulatory system involved in the development of policy and in engendering social change? These issues can be addressed more effectively when the broader basis of the history of health and safety at work is appreciated. The early development of the field had an equally strong foundation in public welfare policy, and the relationship between this and industrial relations policy is complex one. On the one hand, early Factory legislation criminalised certain health and safety issues - notably concerning working hours and the safety of machinery. This was seen as a natural means of enforcing these provisions, with Inspectors appointed to ensure compliance. It developed in parallel with the same approach to public health. Indeed, it will be argued, that the improvement in living and working conditions of the `deserving poor' (workers) was initially seen holistically. It was in the twentieth century that issues of personal health underwent a process of separation from the public health. In health and safety at work terms, this was seen firstly in moves towards governments schemes for workmans compensation for injuries, and then in the development of the view that the individual could also simply bring a personal action for damages for negligence against the employer, or that a personal action could be brought for breach of the contract of employment.

The Early Legislation- the reduction of working hours.

3.4 In the early and middle part of the nineteenth century, both labour and public health issues were focussed around similar concerns. Wages were low, hours were long and unemployment meant starvation. At the same time, living conditions for workers in the industrial cities were terrible. There was widespread malnourishment, poor sanitation, and disease were rife. One of the focal points for reformers who wanted to improve conditions, and the one of greatest concern in the development of health and safety policy, was the issue of child labour. An initial attempt had been made to control the working hours of children by the Health and Morals of Apprentices Act in 1802. However, as Wedderburn (1995.3) points out, this was poorly enforced, and had little effect. In 1819, a minimum age of nine years was fixed for children working in cotton mills. Again, this was a limited piece of legislation. The growth of the factory system, though, lead to intensified concern among philanthropists.

3.5 On the one hand, this issue was identified with concern about the moral and physical well being of children .[1] Factories were seen as a corrupting influence on young children, where they would learn to adopt licentious morals. They were also at risk from dangerous, unfenced machinery, which, especially when the child felt the effects of fatigue, could cause loss of life and limb. On the other hand, the welfare of the child was not the only issue. Reformers hoped that the conditions of adult workers might be changed as a result of action which apparently concentrated on children. Many of these hopes were tied to the preservation of the Victorian concept of the family. May (1995.62) indicates that in the 1830s "The man's wage of 10s or 13s a week might be less than half what his wife or children might earn as power loom weavers or worsted spinners. The Father's status as breadwinner was thus undermined, which must have had a demoralising effect." More than this, many felt that the extent of child (and female) labour reduced the prospect of a general improvement in wages and conditions of work. In this perception, there was a synergy between the campaigns of middle class philanthropists and the views

[1]see Fraser 1984.12..

of those involved in the labour movement. The labour movement was developing its voice after the repeal of the Combination Acts in 1924 and this certainly included the concept that in an ideal world the `mans wage' would be the main support of the family. However, the defeat of the Grand National Consolidated Trade union in 1834 left radical unionism in disarray, and it was not until the 1840s and 1850s that a new trade unionism developed which the Webbs, for example, characterised as peace loving and conservative. Against these advocates stood the factory owners and the providers of capital.[2]

3.6 In order to achieve real change, though, Parliamentary representation was needed. It was found in the form of Thomas Sadler who proposed a practical solution which, it was believed, would improve the lives of all workers - the idea of a ten hour day . In 1832 he was appointed to chair a Parliamentary Select Committee to take evidence for a ten hour Bill. This was introduced in 1833 and became the first Factory Act. By this time, though, Aldborough in Yorkshire, the constituency which Sadler represented, was disfranchised by the Reform Act and he was unable to find another seat. Leadership of the Parliamentary movement to reform child labour then passed to Lord Ashley (later seventh Earl of Shaftesbury) who agreed to introduce Sadler's Bill in 1833. In the mean time, opponents of the bill proposed another enquiry, by Royal Commission, to counteract Sadlers committee of the previous year. In the Factory Commission Report 1833, it was recommended that the ten hour limit should not be introduced for all workers, as adult workers were 'free agents', who should be able to work the hours they wished. However, they were prepared to recommend regulation for children. Eventually, the **Factory Act 1833** provided that children aged 9 -14 should do only eight hours of actual labour in most textile mills, with two hours at 'school'. Young persons

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[2]It was left to the philanthropists to generate a head of emotive steam. In 1830 Oastler, at the time the principle campaigner for factory reform, wrote to the Leeds Mercury comparing the child workers of the Bradford worsted industry to slaves in the colonies:
"Let truth speak out . . . Thousands of our Fellow creatures and fellow-subjects both male and Female . . . are this very moment existing in a state of slavery, more horrid than are the victims of that hellish system 'colonial slavery'. These innocent creatures drawl out, unpitied, their short but miserable existence, in a place famed for its profession of religious zeal. . ." (Fraser 1984).

under 18 were limited to 12 hours. Night work was prohibited for children and young persons. Four factory inspectors were to be appointed to enforce the Act. The Inspectors, though few in number, had wide powers. They could issue legally enforceable regulations and could sit as magistrates and fine immediately when they discovered an offence, although these powers were repealed in 1844. While the legislation itself was narrow - it only applied to children and it only applied in textile mills, it was significant. In the first place, it established the criminal law as a factor in the regulation of conditions at work, creating offences committed by the employer and punishable by fine. In the second place, it set up a system of state enforcement, separate from the policing of other categories of crime. This was important in that it created the foundations of the factory inspectorate, which developed as a comprehensive enforcement agency. The previous, limited attempts at legislation had relied on Justices of the Peace for enforcement. Secondly, since crimes committed under this Act were not enforced in the same way as other crimes, it was possible to maintain that they were somehow qualitatively different. The factory owner who committed an offence was not regarded, and certainly did not see himself, with the same opprobrium as, for example, the thief .

3.7 Reformers were prepared to support the legislation because they hoped that it would lead to a general reduction in working hours for everyone. The work done by adults in textile mills required the assistance of children throughout the day, and it was thought that if the childrens hours were limited, the adults would find their hours also had to be shortened. Some sponsors of the Act, such as Lord Ashley, hoped that this would reduce adult unemployment without increasing the amount spent on wages since it would be more attractive to employ adults to do all the work. However, a system of relay working for children was permitted, which was open to considerable abuse, and the actual hours worked remained long. Therefore, the hope that the Act would increase adult employment also proved futile. As Bettinson et al (1983) indicated, the ten hour day was not in fact comprehensively enacted for children until the 1847 Act, and even then it was still possible for many millowners to extend the hours so that they could

work a 14 hour day. The Act also extended to women the protection given in 1833 to young persons. However, so strong was the concept of the "free agent" that it was not until the Factory Act 1874, when women and young persons were given the ten hour day, that legislation had the consequential effect of ensuring that adult men also worked only for ten hours.

3.8 It is clear that the details of the legislation reflected the economic arguments of the day, rather than the philanthropic ones. Leonard Horner, one of the initial Inspectors, expressed one of the arguments put forward to persuade the providers of capital to support the Bill in 1837, when he wrote "If the restrictions do cause a reduction in some degree of present profit, by raising wages of children, is there not the most well-grounded reason to expect outlay will, in the end, be returned with interest, by their having a more moral and intelligent set of work-people, who will be more regular in their attendance, will take better care of the machinery, and be less apt to be misled into strikes: and that thus there will be less interruption to the productive powers of the fixed capital, ..." . (in Bettinson et al 1983). Fraser(1975) maintains that, while many believed that free markets should determine the price of labour, there was no free market economy during the 1840s because of such restrictions as the Corn Laws. In this context, legislation which affected the labour market was acceptable. The most persuasive argument supported by middle class philanthropists was that child labour should be tackled by allowing labour to be sold at a rate which would mean that it was unnecessary for children to work to supplement the family income. The hope was that adult wages should rise.

3.9 Against this lay the argument that a reduction in children's hours would lead to a reduction in the working hours of adults as well. Although the rate may rise, actual wages would fall, since no-one could expect twelve hours wages for eight hours work. This was very much in line with Marxs' view, that

"The value of labour was determined, not only by the labour-time necessary to maintain the individual adult worker, but also by that necessary to maintain his family. Machinery, by throwing every member of the family onto the labour market, spreads the value of the mans' labour power over his whole

family". [3]

In this view, it was the market itself which created the evil of child labour and poverty. The only solution to this was a legal one, which involved the criminalisation of certain aspects of the factory system seen as extreme. It was, in fact, a broad coalition which reflected both these viewpoints, but which had come to the conclusion that legislation was the clear solution, which brought about change.

3.10 **The Factory Act of 1833** established the principle of state intervention, even though this was severely limited. It is not surprising that the main thrust of this legislation was the reduction of the working hours of children, since this was the focal point where this coalition could agree. In many ways, it set the scene for future development in health and safety policy, since the will to legislate was marshalled around a particular issue of concern, and was specific to certain industries. The pattern was rapidly confirmed by the **Mines Act 1842,** which made it illegal for women and children under ten to work underground. These provisions were not generated in relation to any co-ordinated health and safety agenda. On the positive side, the Factories Act and the Mines Act created the precedent of criminalising undesired safety implications thrown up by the market, and in both cases an embryonic inspectorate was created to enforce the provisions. It can be argued that the next Act, in 1844, was equally crucial, since this made provision for the compulsory fencing of dangerous machinery. This measure was almost slipped through among a package concerning compulsory day education (which had to be dropped) and a system of half-time working for children. It was, however, an important expansion of regulation. It was in this Act that the State first set standards relating to the physical environment of work. This was still limited to the textile industry, and to particular machinery. However, it laid the foundation for the approach based on the enforcement of standards by the creation of criminal offences, adopted in subsequent factory legislation until the Health and Safety at Work Act 1974. The legislation was limited, but that was not the only problem. Then, as now, enforcement was a

[3]Capital Vol 1 (1976.518)

major difficulty. Marx gives an example from the 1858 Factory Inspectors report " `My attention`, says an English factory inspector, `was drawn to an advertisement in the local paper of one of the most important manufacturing towns of my district, of which the following is a copy: 'Wanted, 12 to 20 young persons, not younger than what can pass for 13 years. Wages, 4 shillings a week. Apply etc'. The phrase `what can pass for 13 years' refers to the fact that, according to the Factory Act, children under 13 years may only work 6 hours a day. An officially appointed surgeon (the `Certifying Surgeon) must certify their age. The manufacturer, therefore, asks for children who look as if they are already 13 years old. The decrease, often by leaps and bounds, in the numbers of children under 13 years employed in factories, a decrease that is shown in an astonishing manner by the English statistics of the last twenty years, was for the most part, according to the evidence of the factory inspectors themselves, the work of the certifying surgeons, who adjusted the childrens age in a manner appropriate to the capitalists greed.".[4] This quotation demonstrates a number of problems which are of relevance today. In the first place, it is clear that any desire on the part of the factory owner to comply with the law is subsumed, in this example, to the pressures of the market. Secondly, there is frequently a collusion in the workplace which obscures health and safety breaches. In this example, it is a collusion between the factory owner, certifying surgeon and the child and its family. The Robes Report identified such collusion as `apathy'[5], which can be overcome by education, advice and support. However, as here, the forces and organisation of the labour marker are frequently crucial factors, and require to be countered by more stringent measures.

3.11 At this point, the groups demanding improved health and safety at work may have had different agendas, but were all operating in a general context of public welfare. The particular strands of welfare were not, though, differentiated in the way that they are today. Safety provisions were linked

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[4] A Redgrave "Reports of the Inspectors of Factories 31 October 1858 p40-41 in Capital Vol 1. 519-520,(1976 edn).

[5]See Robens Report 1972.7.28

with other welfare provision. Marx demonstrates this point, when he discusses the education provisions of the Factory Acts, where the factory owner had an obligation to provide education for those under 14 years old. He quotes Sir John Kincaid, factory inspector for Scotland "It requires no further argument to prove that the education clauses of the Factory Act, being held in such disfavour among mill-owners, tend in great measure to exclude that class of children alike from employment and the benefit of education contemplated by this Act" [6]. The education provisions were an additional factor which made it less attractive for factory owners to employ children who appeared to be younger. Where schools were provided, the provisions were often educationally ineffective because of the poor quality of the teachers and the lack of books and materials (Marx 1976. 523-526). The way in which these provisions were tied together, though, makes it plain that health and safety at work was located within a broad debate on public welfare, alongside education, public health and other problems of poverty, such as poor housing.

Developments from 1870-1914

3.12 During the middle part of the nineteenth century, the Factory legislation was extended. In 1870, the hours of work of women in the textile industry were regulated, and in 1878 employers were given a strict duty to fence machinery. In 1901, through the consolidation of a whole range of previous provisions, the legislation was extended to all factories. This was also important because it included previous enabling legislation from 1891 and 1895 which allowed the relevant Minister to make Regulations concerning particular machines. During this period, the various elements of the broad coalition which had been active in campaigning for change in the earlier part of the century, developed their views separately. The " New Model Unions" (a term created by the Webbs) were intent on demonstrating that they could organise and work within the capitalist system. As Sheldrake (1991.7) indicated, they

[6] Sir J Kincaid "Reports of the Inspectors of Factories 31 October 1856 p 66, in Capital vol1. 525 (1976 edn).

"created a situation where organized labour became characterised at an early stage by the domination of sectional interest over class solidarity"

In this climate, it was unlikely that they would act decisively to promote a general improvement in conditions at work. However, as this view of unionism was gradually superseded by the more militant New Unionism advocated by people such as Tom Mann, one of the organisers of the London Dock strike of 1889 (see Pelling 1976 .94). The issue of health and safety at work became incorporated in the more general demands for an improvement in the conditions of the working class. It was not articulated as a separate set of demands related only to safety at work, but rather formed part of the general pressure for an improvement in conditions which focussed in particular on the "sweated trades".[7] Of enormous importance in drawing attention to this issue was a strike in one of these 'sweated trades' - the match girls strike of 1888. The women who made lucifer matches were poorly paid, worked in appalling conditions, and were liable to develop 'phossy jaw' (phosphorus necrosis) - a gangrene of the bone caused by the fumes of the phosphorus used in the matches. May (1995.271) describes how

" With a fighting fund of £400, of which George Bernard Shaw was treasurer, and with public opinion on the girls' side, the employers were forced to give in after a fortnight."

3.13 It is also clear that health and safety demands formed part of the issue in the London gas workers strike. Here, the final settlement involved a three-shift system of working, which would reduced the basic working day to eight hours. Previously, workers had been on shift for twelve hours, and this could rise to eighteen hours at the weekend change-overs.

3.14 In 1887 Board of Trade report declared that 20,000 workers in East London could be classified as sweated labourers. This report led to the establishment of a Select committee of the House of Lords which examined

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A select committee of the House of Lords, chaired by Lord Dunraven, defined `sweating` as work where there were
"inadequate wages, inordinately long hours, and insanitary conditions of labour" (quoted in Sheldrake, 1991.16)

various sweated trades, including chain making and the clothing trades. Sweating was difficult to define, but the Report did attempt to identify certain characteristics associated with it. These characteristics included:

"1. A rate of wages inadequate to the necessities of the workers or disproportionate to the work done.

2 Excessive hours of labour

3 The insanitary state of-the houses in which work is carried out. These evils can hardly be exaggerated.

The earnings of the lowest classes of workers are barely sufficient to sustain existence. The hours of labour are such as to make the lives of the workers periods of almost ceaseless toil hard and often unhealthy." (quoted in May 1995.333).

3.15 It is clear that at this point, conditions of work were still not separated, in a policy sense, from concern about general conditions of life. As in the earlier period, it was middle-class observers, concerned by this state of affairs, who were able to generate research into the extent of the problem. Charles Booth, for example, between 1889 and 1903 published seventeen volumes of his "Life and Labour of the people in London". This work pioneered empirical methods of social survey, and revealed large pockets of abject poverty in particular in the East End.

3.16 Eventually, pressure mounted for the control of sweating. Little was achieved during the Conservative government of 1895-1905, but when under the new Liberal administration, a Workmans Compensation Act was achieved in 1906, and eventually there was an attempt to control sweating by the **Trade Boards Act of 1909.** Pelling (1.1 et seq) maintains that the working class was generally hostile to the movement which gave rise to the Liberal reforms of the early 1900s. His basis for maintaining this lies in the involvement of middle class intellectuals, such as the Webbs, whose values underpin the movement, and to basic working class hostility to state institutions such as the poor law. Hay (1975.26 -28) argues that the evidence does not support this. By the early 1900s, both the emergent Labour Party and the Trade Union Congress had programmes of social reform which

encompassed education, health and pensions. He argues that certainly the organised working class did demand reform. Analyses of the position and influence of the labour movement lie at the heart of debate about the subsequent development of health and safety at work regulation. There has certainly been a historical ambivalence within the labour movement towards state regulation as a means of controlling labour issues. As Coates (1989 .24) explains, "The national system of multi-employer collective bargaining within which shop stewards operated had been put together at district level towards the end of the nineteenth century, and consolidated at national level between the wars in the very different conditions of large-scale employment." Legal intervention was viewed with suspicion, since it might prejudice this system. On the other hand, modern trade unionism was shaped and nurtured by legal interventions such as the Taff Vale judgement,[8] and the subsequent Trade Disputes Act 1906, which legislated trade union immunities which lasted up to the 1970s and 80s. Many saw legal intervention as supportive of some trade union issues, so that Hays position does reflect a reality which can be traced through the development of health and safety policies - that unions and the TUC have lobbied strongly at various times for aspects of state regulation of health and safety.

3.17 While it would be wrong to characterise the Liberal reforms as simply the work of interfering middle- class liberals, some of the ideas put forward by the interested intellectuals certainly did provide an impetus for change. One consequence of these arguments is the emphasis on personal health and personal compensation for ill health. On the one hand, this was a contributory factor in the perceptual narrowing of the field of `health' into an interest in health provision, while health and safety at work was increasingly seen as an employment issue. On the other hand, these ideas can also be seen in the argument, which has been re- cycled in modern discussion of deregulation, that health and safety matters should be dealt with through individual compensation for the sick or injured worker, rather than through comprehensive legislation to prevent hazards from arising. This was really

[8]Taff Vale Railway Co v Amalgamated Society of Railway Servants1901 AC 426

the beginning of the development of health and safety in its other manifestation - as a private, rather than a public welfare issue. The relationship between these two aspects is a difficult one - since the private developed from the positioning of health and safety as a public welfare provision. One of the influential concepts which provided a basis for the development of the approach was that of ` national efficiency'. Initially the question of health was viewed holistically, including health and safety in the workplace. Concern developed from the revelations of influential reports such as Rowntree (1901 .271) on poverty in York: " For a family of father, mother, and three children, the minimum weekly expenditure upon which physical efficiency can be maintained in York is 21s 8d ..... The number of persons whose earnings are so low that they cannot meet the expenditure for the above standard of living, stringent to severity though it is, and bare of all creature comforts, was shown to be no less than 7230, or almost exactly 10% of the total population of the city." Concepts of `national efficiency' came to the fore in particular when the effects of poverty and ill-health on the condition of recruits to the army for the Boer Wars 1899-1902 was examined. In December 1903, an inter-departmental Committee of Home and Education Departments and the Local Government Board met and examined evidence concerning the low standard of health in many large cities. Their 1904 report did not find that there was a progressive degeneration of the health of the working classes, (Hay 1975.54),but they did find:

"..... a low standard of health prevails among the working classes. It therefore becomes obvious that the widespread existence of poverty in an industrial country like ours must seriously retard its development".

The achievement of imperial and national objectives was being impaired by the poor physical state of the population. As Hay (1975.31) has pointed out, a broad political constituency was again developing. It included Fabian Socialists such as the Webbs who argued that a national minimum standard of life was essential to national efficiency.

3.18 These were the concerns which fuelled the drive towards the **National Insurance Act of 1911.** Debate centred on two major issues - the provision

of medical treatment and ensuring the health and efficiency of employees. In particular, in relation to the second of these, employers were afraid of the Labour Party's proposals to extend Workmans Compensation to all sickness and accidents at work. While the **1911 National Insurance Act** did not go this far, it did firmly establish the concept of a national insurance scheme which included sickness and injury at work. Each employee who earned under £160 per year received medical treatment and free medicine, sickness benefit at 10s a week for 13 weeks and 5s a week for the next 13 weeks. There was also a provision for disability benefit at 5s a week. To achieve these benefits, the worker paid a weekly levy of 4d a week, and the employer paid 3d a week. The state paid 2d a week. In many ways, the national insurance concept was a success for, and possibly the apotheosis of, the public health approach.

The 1871 Report of the Royal Sanitary Commission defined such an approach as: "... the science and art of preventing disease, prolonging life and promoting health through organised efforts of society." (Draper 1991.8) Health problems arising through work were seen as part of the greater issue of health which in itself had two aspects - firstly, that of public provision, and secondly, that of concern to improve personal access to health care. Although only the insured worker was covered in this Act, it provided the basis for the future development of health care by general practitioners (Ham 1992. 10). It was at this point that the seed was sown which has gradually lead many writers (eg Ham) to examine health policy in terms of the provision of health care to the individual, separating this from both questions of public health and issues concerning health and safety at work. As this century progressed, this division became clearer, so that by the end of the Second World War sight of the connection between health policy and health and safety at work had largely been lost. As a result, most modern writers have attempted to contextualise the history of health and safety within the employment relationship as will be seen in subsequent sections. This unfortunate division has important consequences for the present

understanding of health and safety regulation.[9] These provisions were also the beginning of the concept of insurance in health and safety provision. The scheme was public in that it was State - sponsored, and provided some highly necessary relief for the injured workers, who would be unlikely to have the resources to sue in the Courts. However, the unconsidered side effect was that the employer, by making the insurance contribution, was also provided with a safety net. The direct consequences of unsafe practices would not be paid by the employer. Any pressure to improve conditions for fear of compensation claims was mitigated, since possible future expenses were diffused through the insurance provision.

Developments from 1914-1940- increasing importance of individual legal action.

3.19 During the First World War and the inter-war years, new Regulations were made, but there was little major legislative development. However, the ideological shift which moved health and safety away from the concept of "public health", quietly gathered force. The **Factories Act 1937** consolidated the law, and made some new provision, but was not fully implemented. The main legal development occurred in the civil law, since it was during this period that the modern law of negligence emerged. This is really where health and safety can be seen to be specifically located as an employment issue, since the law of negligence was concerned with individual liability between an employer and an employee, and not with broader social concerns. The First World War itself provided an impetus in this direction, since it proved difficult for those campaigning for improved health and safety at work. Trade Unions again were in an ambivalent position, since they were afraid that too much agitation would lead to even more draconian measures than those which were actually taken. The main aim of the government was to maximise production of war goods. Good industrial relations and good conditions at work were seen as making an important contribution. Although normal Trade Union activity was mostly suspended,

[9] A major exception to this is the Gower Report 1949 regarding health and safety in offices and shops.

government resistance was weak where workers did in fact take action - for example, in 1915 a strike of Welsh miners ended in swift agreement to nearly all their demands (May 1995.359). The shortage of labour as more men went to the front gave rising power to those who remained. (Sheldrake 1991.26-27). However, because of growing concern about the rising number of strikes, the Munitions of War Act 1915 withdrew the right to strike in the munitions industry, and also demanded that the unions accept compulsory arbitration. The munitions industry was both a key industry as far as the war effort was concerned, and it was also a highly dangerous one - for example, when a small explosives factory blew up near Teynham in Kent, a hundred people were killed. The powers of the Munitions of War Act could be extended to other industries by Royal Proclamation. Paradoxically, though many trade unionists were clearly unhappy with such measures, trade unionism itself appears to have been enhanced. It was clear that both the Asquith and Lloyd George governments were anxious to do business with firms who employed union labour. Lloyd (1993. 90) explains that this was partly because they needed to be seen to be fair to labour and partly because they believed that union labour would strike less often and would be easier to negotiate with. The unions were to be trusted to deliver a largely acquiescent workforce.

3.20 From May 1915, the Committee on Production became the main arbitration body, and gave official encouragement to the Trade Unions (Sheldrake 1991.27). At the same time, there was a breaking down of traditional work barriers - for example, when conscription was introduced, women were admitted to many areas of work which had previously been closed to them. Much of this work was intrinsically dangerous, such as that in munitions factories, which carried both a danger of explosions and from handling TNT, which caused irritating symptoms, including skin discolouration. Women displaying these symptoms were known as `canaries' (May 1995.360). Safety standards remained those laid down in the 1901 **Factory and Workshop Act,** which did not adequately deal with many of the new technological developments of warfare. There was certainly no rush to legislate in connection with these hazards. They were regarded as

necessary to the war effort.

3.21 Many of the middle-class reformers were drawn in to other measures taken during wartime which did have the effect of improving the general health and conditions of the worker. Rationing, which was introduced as late as 1917, had the effect of improving the health of the population by reducing malnourishment. The Committee on Relations between Employers and Employed (known as the Whitley Committee and forming the basis for the eventual development of the Whitley Councils), which was set up in 1916, included, in addition to employers and trade union representatives, J J Mallon, the secretary of the Anti-sweating League, and Mona Wilson, a social investigator (Sheldrake 1991.30-32). While the main concern of the Committee was to make recommendations for the improvement of industrial relations, conditions of work were included in their terms of reference and many of their reports contained recommendations - for example, those relating to the works committees which had grown up during the war, which were designed to enable proper negotiation over conditions in general.

3.22 When the war ended, many of the fears concerning unemployment and the difficulties of decommissioning did not materialize. This was in part due to the rapid removal of women from the workforce, with more than three quarters of a million dismissed between November 1918 and November 1919. (Sheldrake 1991.43). One of the main factors in the ease of transition, though, was the short economic boom which was experienced at the end of the war, and which lasted until 1920. When this petered out, there began a period of industrial unrest which was unprecedented. This was particularly related to the decline in traditional industries, such as shipbuilding and, from about 1924, coal mining. The depression was fuelled by a loss of export markets, and the development of new technologies - for example, one of the factors in the fall in demand for coal was the conversion of the majority of merchant ships to oil power. Additionally, colonies which had previously supplied raw materials to British factories were increasingly developing their own industries in competition with those of the colonial power - for example,

while Britain's production of cotton goods halved between 1912 and 1938, India's domestic production quadrupled. It was the problems of the coal industry which culminated in the General Strike of 1926, resulting in a complete victory for the government. In the aftermath, miners wages were reduced, and the **Trade Disputes Act of 1927** led to restrictions on the right to strike in sympathy with another group of workers, and on picketing and restricted civil servants from joining unions affiliated to the TUC. (Sheldrake 1991.52). In this climate, it was clearly difficult for the labour movement to exert real pressure for the development of comprehensive legislation. At the same time, pressure from middle- class reformers had become even more concentrated of the provision of personal health care. The Ministry of Labour was likewise unlikely to sponsor new legislation - as Godfrey Ince explained, the policy of the Ministry was

"To encourage industries to set up their own voluntary negotiating arrangements and to settle their own disputes" (Quoted in Sheldrake 1992.56)

3.23 The protective criminal legislation remained rooted in the standards of the 1901 Act. These were narrow , did not cover large numbers of workers and had little regard to the welfare of the workers. Indeed, even after the next major piece of legislation - the **Factories Act 1937**, such basics as washing facilities were not considered necessary for men (Bettinson 1983.52.). Many people in the types of employment which had expanded since 1901 were not covered by legislation - for example, statutory protection was not extended to office workers in general until the **Offices Shops and Railway Premises Act of 1963.** As Jones (1985 .223) indicated, research was undertaken between the wars by organisations such as the Industrial Health Research Board and the Institute of Industrial Psychology, which examined safety and welfare as an aspect of labour management. The implementation of any measures stemming from this research, though, was purely on a voluntary basis. Health and safety at work was being conceptualised more closely as an industrial relations issue, where problems could be resolved within a voluntarist tradition.

3.24 The way in which the standards set out in the criminal legislation were enforced depended on the Factory Inspectors. Carson (1970.383) criticised their unwillingness to prosecute and their preference for formal administrative procedures. Jones (1985 .225-6) maintains that this and other criticisms are based on a misunderstanding of the work of the inspectorate. She argues that the inspectors were concerned with a need to changing peoples attitudes, and to encourage awareness of hazards at work. To this end, she believes that persuasion was a better method of proceeding than prosecution, which was only undertaken as a last resort. Part of the reason for a reluctance to prosecute was a lack of confidence in the courts. Many Factory Act cases were tried by lay magistrates, who sometimes reached strange decisions -

"In fact, nearly half of all magistrates were employers, while only about one sixth were wage earners". (1985.228). As a result, Inspectors placed more emphasis on persuasive and educative work, such as the Industrial Museum which the Inspectorate opened in London in 1927, and which exhibited methods, arrangements and appliances for promoting health and safety at work. Bettinson (1985.26) points out that the 1937 Act had not been implemented by the end of the Second World War- "When the war ended, it was remarkable that so much had been achieved in maintaining and improving standards and even some progress made towards implementing the 1937 Act, but there was great destruction and dilapidation to be repaired and much leeway to make up."

It was during the 1930s and 40s that the pattern was set for the regulatory policies recommended by the Robens Report. Robens relied on representations made by the Factory Inspectorate concerning the efficacy of advice and persuasion as regulatory techniques,[10] as opposed to prosecution. This had clearly been a long-standing development.

3.25 During the inter-war years the civil law, based on the awarding of compensation to workers who were the victims of their employers

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[10]See Robens Report 1972.82 .261

negligence, was refined and many of the principles which underpin the modern law were developed. It was during this period that the employers duty to provide "a safe system of work" was defined, both in the law of tort and through the contract of employment. The key advance was in the acceptance that the employee has not, by implication, agreed to accept the employers negligence. Since **Wilsons and Clyde Coal Co. V English [1938AC 57]** an employer has a personal duty, which cannot be delegated, to take reasonable care to provide a safe workplace, safe equipment; competent and safe fellow workers and a safe system of work [11]. The development of the concept of `reasonableness' in relation to the employers duty is of crucial importance, since it was later refined into the criminal law in the Health and Safety at Work Act 1974, and now forms the bedrock of British regulation.[12] It also underlines the separation of health and safety at work from public health issues. Much of the protective legislation concerned with public health is enforced on the basis of strict liability (for example, the Sale of Food and Drugs Acts). The Factory legislation continued this tradition. Health and safety at work provision has been increasingly, in recent years, drawn towards the relativism of `reasonableness', and the modern managerial tool of the cost - benefit analysis. This trend, it will be argued, has only been stayed by the need to enact European Directives which adopt an approach based on strict liability principles. The prominence given to the civil concept of reasonableness also tends to obscure the `public welfare aspect of health and safety as an issue. As Drake and Wright (1983.8) indicate, a health and safety duty is usually owed by one person to another. The claim for compensation through the Courts is a private action, between the injured worker and the employer, based on such a concept of individual duty. A criminal law, based on the concept of a protective standard, embodies a concept of public opprobrium. When the test of reasonableness was adopted into the criminal law by the **Health and Safety at Work Act 1974**, the criminal law itself was individuated.

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[11] see Munkman 1990 Ch3& 4

[12]See Chapters 7& 8

Developments from 1940-1974- Health and Safety as an employment issue.

3.26 During this period, health and safety became even more firmly located as an employment issue, and the seeds of the modern approach were sown, with pressure to build on concepts of voluntary regulation. The war years, 1940-45 brought little opportunity for further protective legislation. It also became increasingly difficult to ensure enforcement of existing regulations. Order 1305 made it a criminal offence to strike. This was much more severe than the measures which had been taken during the 1914-18 war, where restrictions were limited to key industries. In respect of factory legislation, there were Acts in 1948 and 1959, but these were consolidated in the **Factory Act 1961.** This remains the major legislation on standards in factories. **The Offices Shops and Railway Premises Act 1963** became the first legislation to deal with working conditions in offices and shops. The only previous legislation had been concerned with working hours in shops.[13] The most significant development of all, though, was the publication of `Safety and Health at Work', the Report of the Robens Committee, in 1972, which was eventually substantially enacted in the **Health and Safety at Work Act 1974.** [14]

There were no real attempts to improve conditions during the wartime period. Bettinson, however, felt that there were some advantages in the wartime system as far as enforcement of the existing provision was concerned "Inspectors became the agents for a sort of sub-rationing scheme .... . Permits for wellington boots, industrial wooden clogs, gloves, towels and thermos flasks were among the benefits to be obtained if a suitable case was put up. Small works which had kept themselves well out of sight appeared clamouring at the District Office and sometimes wished they had never done so as enquiries led to all kinds of duties being enforced."(1985.26).

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[13] In 1886.

[14]The Robens reforms are dealt with in detail in Chapter 4, not in this section.

On the other hand, wartime brought a number of problems. Although factory inspection was regarded as a reserved occupation, a number of permanent inspectors were called up, particularly early in the war. They were replaced by temporary Inspectors, who had to be trained. The removal of signposts made inspection in country areas difficult. The Central Office in London was bombed, and a large amount of paperwork was lost. The process of inspection and enforcement, though, did continue.

3.27 As far as policies concerning compensation for industrial injury were concerned, perhaps the most significant milestone of the war period was the Beveridge Report. This was produced in 1942, and recommended that the old workmans compensation scheme should be replaced. Under the existing law, the amounts paid were small, and the employee had to give up their right to sue in the civil courts. The Report proposed that this should be replaced by a national insurance scheme which involved the payment of state benefits at a higher rate for the first six months, and then a `disablement benefit' if necessary. The scheme was finally enacted in 1946.[15]

3.28 At the end of the Second world War there was, again, a period of economic boom, which lasted into the 1950s. Health and safety at work, as a social issue, had an extremely low profile. It became more closely identified as a labour issue. Developments were tied to the growth of voluntarism in industrial relations. The Trade Union movement, where most pressure for improvement was likely to be generated, remained subject to restriction. Order1305, made in 1940, which made it a criminal offence to strike, remained in place until 1950, when it was repealed as the result of agreement between the TUC and the Labour government. It was replaced by Order 1376 in 1951. This provided for a system of compulsory arbitration, which lasted until 1958. Wedderburn (1995.9) maintains that three factors lie at the heart of the development of the voluntarist system of industrial relations in the 1950s. One of these was the revocation of Order 1305, the second was the small number of relevant statutory regulations (though he excludes the

[15]See Wedderburn 1971.439-40

"deep regulatory structures of safety regulation") and the other factor was the disinclination of the courts to intervene. Wedderburn argues that this system was not truly one of voluntarism, bur rather one of `collective laissez faire': "There is no objection whatever in our traditional labour law to compulsory arbitration and legal enforcement, so long as it is balanced against the values of autonomous trade unionism, which are at the core of collective laissez-faire".

Wedderburn sees the 1950s as a period of struggle, where the employers and the unions sought to establish their industrial strength. The repeal of Order 1305 in fact made it more difficult for the unions to gain recognition (1995.14), and it was therefore logical that it should be the employers who demanded further repeal of the system, in the form of the revocation of Order 1376.This happened in 1958. From then on, into the 1960s, the TUC was consistently calling for a return to some form of compulsory arbitration. This is rather different from the influential view of Kahn-Freund who believed that: " the hall mark of the collective bargaining system was its autonomous, self regulatory nature, and the hall-mark of labour law was its abstentionist stance in relation thereto." (Davies and Freedland 1883.5). Dawson et al. (1988 .4-5) appear to follow this view and maintain that governments were increasingly concerned to intervene in such a voluntarist system from the 1960s. They saw intervention as occurring in the context of four phases. The first was the rejection of voluntary solutions to `disorderly industrial action' during the 1960s. The publication of "In Place of Strife" lead to proposed legislation to outlaw unofficial strikes. The second was the attempt of the 1971 Conservative government to impose a new framework, through the medium of the **Industrial Relations Act 1971**. The third was the attempt of the next Labour government to develop the policy known as the Social Contract. The fourth phase involves the attempts by the Conservative governments since 1979 to restrict trade union immunities and reduce individual employment rights. They indicate that discussion of the Health and Safety at Work Act began in the first phase, the Act was formulated in the second phase and passed in the third phase. They place the Robens Report and the Health and Safety at Work Act firmly in the context of a breakdown of voluntarism: "By the time a Labour government was re-

elected in 1966, the primacy of the voluntary solution was under attack. The TUC itself, for so long a staunch supporter of the voluntary principle was demanding statutory support for workplace safety committees. It was in this atmosphere that the government eventually established a Committee of Enquiry chaired by Lord Robens and proposed legislative action in the form of the Employed Persons (Health and Safety) Bill." (1988.10).

3.29 Was the situation quite so clear-cut, though? As Wedderburns (1995) argument indicates, the TUC had never embraced a view of `voluntarism' which included the concept of `abstentionism'. They were quite prepared for arbitration and indirect provision, so long as it meant that they would be free of `direct government influence' (1995.15). As far as health and safety legislation, is concerned, Wedderburn himself believes that: "Of course, legislation on safety is and was an exception to any doctrines about non-intervention of the law, one dictated by history rather than logic."
This would appear to be born out by the fact that the early 1960s (well before the election of the 1966 Labour government) saw another extension of safety regulation in the **Factories Act 1961** and the **Offices Shops and Railway Premises Act 1963.** These remain today as basic indicators of safety standards in the workplace. Of course, this legislative intervention lacks logic when considered purely as an employment issue. In the context of its broader genesis in concern over public health and social welfare, the factory legislation appears in a far more logical light. The concern with standards which are strictly applied, even though there is no negligence on the part of the employer, can be seen as an extension of nineteenth century approaches to public health regulation. This was obscured when, during the twentieth century, there was a decline in concern for public health, and a growth in concern for private health, leading to the formation of the Health Service in 1948. It did not die, though. In 1949, the Gower Report made its recommendation that local authority officers should enforce its proposed health and safety legislation on offices and shops because these inspectors already had responsibility for public health enforcement in the same

premises.[16] Gower felt that there was a logical connection between the public health work of inspectors and health and safety. He rejected the proposal of a central inspectorate for offices and shops because this it would mean duplication of inspection where the similarities of enforcement needs were great. These proposals were not enacted until the **Offices Shops and Railway Premises Act 1963.** The enforcement system which resulted maintained the link with public health. Debate focussed on issues surrounding the competence and training of local authority inspectors. 1963 Act gave the Factory Inspectorate general powers of supervision and control, which they exercised through the appointment of a `Central Advisory Inspectorate'. It was these criticisms which the Robens Committee felt it needed to deal with by recommending that there should be new arrangements for exercising these powers (1972.75.242). There was very little debate, though, about the actual relationship between public health and health and safety. Instead, health and safety at work became even more closely identified as an employment issue. It was identified as anomalous in terms of the more general arguments concerning the employment relationship because the role played by the law in maintaining standards of health and safety were not consistent with contemporary views of voluntarism. Dawson et al (1988.11), saw this as the paradox of the Robens Report. Here, though, Dawson demonstrates a misunderstanding of the Report. The Robens Report was actually an attempt to shift the philosophy which underpinned safety regulation towards voluntarism (using Wedderburns view of this concept): "Our present system encourages rather too much reliance on state regulation and rather too little on responsibility and voluntary self-generating effort."[17] Standards would be improved by a move away from detailed regulation since they would be subject to workplace negotiation. The aim of the subsequent legislation was to move away from legal regulation and the definition of standards, which would quickly become out of date when subject to technological and social change.

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[16]Report of the Committee of Enquiry on Health, Welfare and Safety in non-industrial employment Cmnd 7664 1949.

[17](Robens Report 1972 . 7).

3.30 The new law was concerned with the imposition of duties, which could be interpreted in a flexible way, in the context of their time and place. It was in the definition of these duties that the concepts of `reasonableness' and `a safe system of work' developed in the 1930s in the civil law, were adopted. Their real benefit is that they are capable of interpretation into diverse working situations and that they are capable of further development in the context of technological and social change. Robens was trying to build a flexible and dynamic system, which embraced contemporary concepts of voluntarism. But he was also appreciated that the system needed a legal foundation

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Conclusion

3.31 Dawson et al (1988.85) find that :"given the importance of collective bargaining as the prime mechanism for joint regulation in the UK, its exclusion from the realm of health and safety was curious and always unlikely to be maintained.".

It must be argued that this is to misunderstand the basis of health and safety as a public policy area. It emerged from an initial nineteenth century social welfare agenda which encompassed many issues, including health and education. It developed as both a health issue and an employment issue. The Health and Safety at Work Act does appear anomalous if it is viewed purely in the context of the employment relationship. Regulation of this sector developed principally through the statutory application of standards, which were enforced by criminal sanctions. In this, health and safety at work was much closer to public health regulation than to the voluntarist traditions of employment policy. This is because both health and safety and public health share a root in the more general public welfare agenda of the nineteenth and early twentieth centuries. It was as this agenda fractured, and `welfare' issues became differentiated that health and safety became more closely bracketed as an employment issue. This has contributed to the lack of focus to be found in identifying the `public' aspect of health and safety policy. Seen as an employment issue, health and safety matters may be viewed as part of the 'private' contractual relationship between employer and employee, or as subject to the individual claim for damages of an injured

party. On the other hand, there has been long term recognition that this is not sufficient to deal with industrial injury and fatality. The development of the Industrial Injury Compensation scheme was a recognition that state intervention was needed to ensure a general level of compensation, and an acknowledgement that many individuals did not have the resources to pursue a civil claim. The concept of criminal liability has persisted, even though it has been attacked in recent deregulation debates, and even though there have been arguments and shifting views concerning its form. There has, though, been a real difficulty in defining and articulating this 'public' aspect of health and safety at work. This is the historic legacy which informs the more recent policy debates.

CHAPTER 4

SAFETY AND HEALTH AT WORK - THE ROBENS REPORT AND CHANGE

The Aims of the Robens Approach

4.1 Although it was written in 1970-72, the Robens Report remains the most significant policy document on health and safety at work. If the "top-down" approach to policy analysis described by Hogwood and Gunn (1984.206-9) were adopted, the Robens Report would contain the major expression of policy within this paradigm. That is not, though, the view taken in this thesis. Policy-making and implementation are an ongoing process. Even from this perspective, though, the Robens Report is of seminal importance. It is the only major official review of the field, and as such it, even today, defines the boundaries of the sector and has been the basis of the major policy developments. `Revitalising Health and Safety' (1999), the most recent policy document, does not seek to change the parameters of health and safety defined by the Robens Report. Nor does it make any serious re-examination of the system of delivery developed on the basis of the Robens approach - indeed, it is concerned to build on the system developed from the Robens framework, rather than to create a new one -"The Governments' approach has been to focus on ideas capable of adding value to the current system without threatening its overall balance."[1] For its time, the Robens Report brought new ideas and the potential for a change of direction to health and safety regulation. This analysis of the Robens Report addresses the following research questions:

2. How evident are managerial values in the development of regulation and enforcement policies on health and safety at work?
3. How pro-active a role should the State take in protecting people from hazards at work?
4. How has the balance between voluntary and state regulation developed in relation to health and safety at work policies?

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[1] 1999.8.5

These questions lie at the heart of the changes recommended by the Robens Committee. The aim of this chapter is to examine the thinking of the Committee on these issues, and its consequences.

4.2 The Robens Report was arguably the earliest report to recommend a system for welfare provision which had a core focus on self-regulatory concepts. As Wedderburn (1986.416) explains, this lead to a major rationalisation of the law and its administration. Politically, the Robens Committee was set up in the wake of the major re-examination of employment issues which the Labour governments of 1964-70. The Donovan Commission had reported in 1968[2], and in 1969 the White Paper "In Place of Strife: A Policy for Industrial Relations" [3] was published. As Kessler and Bayliss (1992.60) pointed out, with reference to incomes policy, government policies during the 1960s and 1970s depended on specially close tripartite arrangements. Trade Unions "....entered compacts with governments in which they traded restraints on pay for benefits in other areas of policy ..... the idea that economic policy could be successful only if the unions were closely connected with policy has a powerful hold across the political spectrum." (1992.61). This context affected the Robens Report in several ways. Firstly, the politics of consensus were sufficiently strong that, although the government had changed by the time the Report was produced, the Conservatives under Edward Heath welcomed it. They introduced a Bill to give effect to most of the recommendations (Beck and Woolfson 2000.38). This was lost when there was another change of government, and it was the Labour Party which eventually introduced the Health and Safety at Work Act in 1974. Secondly, by proposing tripartist institutions, the Report was taking a perspective which was in the political mainstream of its time. Thirdly, close trade union involvement, for example in the setting up of safety committee and safety representative systems within firms, was seen as part of the general benefit expected by the trade union movement. As Beck and Woolfson

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[2]Royal Commission on Trade Unions and Employers Associations Report Cmnd 3623 1968.

[3] Cmnd 3888 (1969)

(2000.37) have explained, there was considerable pressure from the unions for the Robens Committee to be set up. The TUC was concerned about the rising number of reported accidents, and a number of major industrial accidents has occurred during the late 1960s, notably the Aberfan disaster. Indeed, the impact of this was instrumental in the setting of broad terms of reference, which included issues of pollution and dangers to members of the public[4].

Main problems perceived in the Report

4.3. Initially, the Report set out, in a logical way, to analyse the main defects in the existing health and safety regime (1972.6-13). The Committee felt that there were three major defects in the regulation. The first was that there was too much law. At the time there were nine major statutes, and more than 500 subsidiary, statutory instruments. The second defect was that the law was also unsatisfactory- "The legislation is badly structured, and in the attempt to cover contingency after contingency has resulted in a degree of elaboration, detail and complexity that deters even the most determined reader"(1972.7 .29). Not only was it difficult to understand, but obsolescence was a problem. As technical advances were made, more detailed standards were needed to deal with them. There was inevitably a time-lag in this, since the procedures of consultation and enactment were slow. Finally, the third major problem was the fragmentation of jurisdiction. In England alone, responsibility for health and safety was divided between five government departments, seven inspectorates and the local authorities.

4.4 In examining these defects, the Report also identified a number of other issues, which were important factors in its final recommendations. Perhaps the most influential of these was the idea that "apathy is the greatest single contributing factor to accidents at work"(1972.7.28). This statement must be considered in the context of the attitude expressed in 1972.1.13- "But safety is mainly a matter of the day-to day attitudes and reactions of the individual". The argument being advanced here is for deliberate efforts to foster safety

[4] (1972.xiv.1)

awareness. In fact, an examination of the Evidence on which the Report was based shows no actual empirical evidence for either of the quoted statements. However, not only was the idea of apathy as a major factor influential in the Report, it has also become an important myth which has shaped the development of regulatory policy in the years since the Robens Report. The actual situation is much more complex. The matter was considered in the consultation process for the recent policy document `Revitalising Health and Safety' (1999.48-52). The evidence gathered revealed that around 50% of those who responded to the worker consultation leaflet thought that management apathy was a factor in poor health and safety practices. Of those who responded to the large employers document, about 66% thought that lack of knowledge and awareness were factors in health and safety problems, though 95% of them said that they knew where to get safety advice themselves. Of those who responded to the small and medium sized business document, only 14% thought apathy was a factor, and 9% thought lack of knowledge was a problem. Superficially, the workers and the large employers responses may lend support to the Robens view of apathy. Certainly, coming almost thirty years after the Robens Report, they provide poor testimony for the efficacy of the measures taken to deal with the issue. However, if apathy is regarded as a symptom, rather than a cause, the situation can be seen to be more complex. Mayhew and Quinlan, (1997), for example, in researching subcontracting in the residential building industry, examined the effects of disorganisation on sites where many jobs may be in hand simultaneously. They found that "Disorganisation also influences perceptions of risk and the attribution of responsibility for OHS (Occupational Health and Safety). ..... many Australian and British builders we interviewed held a strong belief that the residential building industry was `safe'- even though the evidence contradicts this..... Further, `victim blaming' flourishes in this fragmented environment" (1977.199). The effects they noted may be regarded as apathy, but they felt that at the heart of this aspect of the problem lay the economic pressures which lead to cost cutting. This lead to a lack of organisation on sites and multiple work teams where the actions of one worker may injure another. In other words, apathy is a symptom, rather than a cause. The Robens

Committee were certainly aware of the need for "better attitudes and better organisation" (1972. 14.44). Unfortunately, they seriously underestimated the economic and commercial pressures which lie at the heart of much apparent apathy. The need to maintain profitability means that awareness -raising will only achieve limited objectives, and cannot in itself be an answer to the deeper issues of accident causation. An implication of this is that the awareness campaigns of the HSC/E may not achieve the desired amount of success. The Robens Committee, though, went further. In response to the problem of apathy which they perceived, they argued that "..... we regard practical safety work undertaken on a voluntary basis at industry level as one of the most fruitful avenues for development in the future"(1972.30. 94.). The Report recommended a system which prioritised the voluntary and the self-regulatory. Though it advocated that the older system of direct regulation should continue, this was seen as secondary. The prioritisation of voluntary activity has lead to major weaknesses in the way the regulatory system has developed, with an over - reliance on publicity campaigns and on a belief in the willingness and ability of companies to implement safety measures without prescriptive action. At the same time, enforcement activities have lost funding and have functioned at a low level[5]

4.5 A second issue identified in the Robes Report is that preoccupation with the physical environment had dominated health and safety, to the neglect of human factors, such as training and joint consultation. Here, again, the Robes Committee preferred the voluntary approach. In relation to consultation, the Robes Committee stated "We believe that if workpeople are to accept their full share of responsibility (again, we are not speaking of legal responsibilities) they must be able to participate fully in the making and monitoring arrangements for safety and health at their place of work". (1972.19.59) Most of the argument before the Committee concerned the establishment of joint safety committees, with the TUC asking for a legal requirement for employers to establish safety committees and appoint safety representatives, while the

[5]see Chapter 7.

CBI maintained that the success of consultation depended on voluntary arrangements, and that attempts to use the law to enforce this are inappropriate. (1972.20.64). The Committee attempted to take a position between these two arguments, " We are inclined to think that a statutory provision requiring the appointment of safety representatives and safety committees might be rather too rigid and, more importantly, too narrow in concept. Our conclusion is that the best way to meet the real need would be to impose on employers a general duty to consult,....". (1972.22. 69). This was one of the areas of the report which was not implemented. As Eva and Oswald (1981.37) indicated, there had been considerable TUC lobbying concerning the weakness of the old voluntary safety committees. When the Health and Safety at Work Act finally came into force, it contained no general duty, though it did contain a provision that Regulations may be made concerning Safety Committees and Representatives, and the lobbying continued until the Act was eventually accompanied by the **Safety Committee and Safety Representative Regulations 1977,** with an associated Code of Practice and Guidance Notes. As `Revitalising Health and Safety' (1999) concedes " The full potential of Robens' vision for worker participation in health and safety management at individual workplaces is yet to be realised" (1999. 17 .vi.) One of the key problems here is revealed when the Robes Committee discuss the role of management, where statements such as "The job of a director or senior manager is to manage"(1972.14.46) and " The promotion of safety and health is not only a function of good management, but it is, or ought to be, a normal function of management". (1972.15. 47). The evaluation in the Robens Report is founded in a traditional view of the `managers right to manage', whereas the issue of worker consultation and participation demands, if it is to be a reality, a re-alignment of the power relation in the firm, and a re-definition of the role of manager. The Robens Committee was concerned to change the perception of both management and workers, but did not really grasp the nettle of the change in power relations that this perhaps needed to engender[6]. In terms of Research Question 2, this means that an imbalance has

[6] See Chapter 9.10

remained, throughout the development of the system, in favour of a `managerial' definition of management in the workplace itself, and that it has been difficult for Safety Representatives and Committees to seriously challenge managerial hegemony.[7]

4.6 The third issue identified in the Report was that it was difficult to progress any policy- making at governmental level in health and safety because of the number of departments which all had an interest. There was not one body to co-ordinate and move matters forward. This lead the Robens Committee to state two main objectives of reform. One was to create a more unified and integrated system. The other was "The most fundamental conclusion to which our investigations have lead us is this. There are severe practical limits on the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies. We need a more effective self-regulating system".[8] (1972.12.41).

The Recommended Structure

4.7 Robens Committee stated that the system they recommended was `self-regulatory'. However, they did not in fact go so far as to recommend the complete replacement of the old system of direct legal regulation. What they actually did was to create a dual system, where the old, direct regulation acted as a kind of back-stop, to ensure that existing standards were improved, rather than reduced. In terms of Ayres and Braithwaites pyramid of enforcement [9], all elements are present, but the criminal sanction has aspects of both self-regulation and legal regulation. This is sometimes mis-understood. Beck and Woolfson (2000), for example, level the following criticism "In the new self-regulatory system advocated by Robens, prosecution by external regulatory agencies was to be used only as a measure of last resort. Non-judicial

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[7]See Chapter9.11

[8]See Chapter 1.23 for definitions of self regulation.

[9]See Chapter 1 .28

administrative techniques were to play a principle role in ensuring compliance , while legislatively enforced set standards for safety and health at work - representing the so-called prescriptive approach- were to be kept to a minimum. Continuing the enforcement strategy of the Factory Inspectorate, advice and persuasion were seen as the best ways of securing safety improvements and compliance." (2000.39). Although strictly accurate, this does not really give the full meaning of the Report. Robens was not advocating advice and persuasion alone as the optimum means of enforcement - rather, ... "This calls for the acceptance and exercise of appropriate responsibilities at all levels within industry and commerce. It calls for better systems of safety organisation, for more management initiatives, and for more involvement of workpeople themselves. The objectives of future policy must therefore include not only increasing the effectiveness of the states' contribution to safety and health at work, but also, and more importantly, creating the conditions for more effective self- regulation."(1972.12.41). In other words, voluntarism as well as enforced self-regulation was highlighted. The view of the Committee was that internal mechanisms should to be developed within firms, which would involve both managerial arrangements and mechanisms to involve employees (eg safety committees and representatives). Self- regulation was also expected at a sectoral level (through trade associations, and for example the creation of voluntary Codes of Practice). The voluntary **and** self-regulatory elements within the unified system, were seen by the Committee as "more important" than the use of legal sanction. The view of the Committee is more clearly expressed in 1972.80. 255 "In the submissions made to us there was a very considerable body of opinion to the effect that the sanctions of the criminal law have only a very limited role to play in improving standards of safety and health at work. ..... The main need is for better prevention. Technical problems of safety organisation and accident prevention are matters for experts in the industrial field, rather than for the courts." This is a clear statement of priority, but it should not be read as an abandonment of the concept of legal sanction, or as advocating that the law should not be used. The Committees' views should be read in the context of para 254 ".... At the same time it must be recognised that

there will always be some who are indifferent to the demands of safety and to their obligations towards others. Flagrant offences call for the quick and effective application of the law. In what follows we are not arguing for in favour of a generally milder, more tolerant approach, but in favour of a much more discriminating and efficient approach- constructive where appropriate, rigorous where necessary".

4.8 In promoting voluntary aspects of regulation within the firm, the Robens Committee saw two ingredients as being essential for the improvement of management performance in health and safety matters. One was more effective organisation, and the second was the setting of policy objectives. When policy objectives were established, they should be accompanied by a clear allocation of management responsibilities. "Safety and Health should be treated like any other major management function, with a clear line of responsibility and command running up to an accountable individual at the very top". This provision was enacted in **s2 (3) of the Health and Safety at Work Act**, where the employer has a duty to produce a health and safety policy outlining their management arrangements. As Drake and Wright (1983.212-3) have pointed out, it was hoped that the policy would provide the main thrust for the implementation of voluntary standards. The policy should be unique to the employer, and reflect the particular needs of the firm. It should also be regularly updated. In the years following the Health and Safety at Work Act, the HSC/E made a serious enforcement effort to ensure that employers produced and maintained their safety policy[10]. However, since the enactment of the **Management of Health and Safety at Work Regulations 1992**, the focus has changed to the question of whether employers have carried out their obligation to make risk assessments.[11]

Enforcement

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[10] See "Effective Policies on Health and Safety (1980) HSE Books.

[11] See "Reducing Risks, Protecting People " (1999) HSE Books.

4.9 As far as enforcement was concerned, the existing use[12] of the criminal law was to remain, but the Committee also recommended, and the **Health and Safety at Work Act 1974** enacted (s23-26) what the Robens Committee termed `administrative sanctions' as an additional and, indeed, primary regulatory tool. They gave the Inspectors the power to issue `Improvement Notices', without going through the courts. These order the employer to remedy specific faults, or begin a programme of work on hazards, within a time limit. If the employer felt this was unreasonable, they could appeal to the industrial tribunal. The main sanction, though, according to the Robens Report, was to be the Prohibition Notice. This could be used to close down specific machinery, or premises, or a process. There was an appeal procedure for employers to the industrial tribunal. Despite the Robens label of `administrative sanctions', these are prohibitory in their nature. The Robens Committee felt that these procedures would not often need to be used, but ".....when used, should be more effective and constructive than present procedures". (1972.86.278). This would appear to fit very well with the type of self- regulatory enforcement advocated by Ayres and Braithwaite (1992 .102-115), where the punitive regime is designed to ensure that the firms own internal procedures work. The `administrative sanctions' allow for the flexibility of enforcement and for the kind of negotiation which Ayres and Braithwaite see as integral to the system. A key question is whether the use of this type of sanction results in a watering down of standards. On the one hand, the Prohibition Notice in particular, has the potential to be effective since it can be a potent economic sanction. An organisation could potentially be closed down if the hazard were sufficiently great. Secondly, Notices can be speedier , and so may have greater potential in hazard prevention than prosecution, which inevitably takes some time. On the other hand, there is the possibility that employers may be able to negotiate over the decision about whether to give a Notice, and what type it should be. The employer has an opportunity to discuss the requirements, and to make representations, and ultimately to appeal. Nowhere in this process is the employee involved.

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[12]See Chapter 3.29

Although Safety Representatives have a right to receive information from Inspectors, and to make representations to them (Reg 4 of the Safety Representative and Safety Committee Regulations 1977), this is a general right, and not tied to the process of making an Improvement or Prohibition Notice. They do not have the right to be informed of the employers representations, or to comment on them. There might be greater confidence in the process if they did.

4.10 A further issue is the question of whether these powers are used sufficiently. The Robens Committee considered that this might initially be a problem, stating "The issue of notices would call for judgement and initiative, and there could well be some initial hesitance about using these procedures" (1972.86.279).Unfortunately, the reluctance seems not to have been overcome. It is difficult to gauge how frequently Notices should be issued - if a hazard is averted by the threat of a notice, it is not recorded anywhere, so it is difficult to find an accurate measure of prevention. However, it is possible to examine injury rates, and then to make a general assessment of whether the level of enforcement activity is proportionate to the risks. Injury rates represent accidents which were not averted, ones which have actually occurred. The HSC/E statistics covering the decade from 1990-2000[13] show that the number of enforcement notices issued by all inspectors reached a peak of around 40,000 in 1992-3, and a trough of around 15,000 in 1996-7. From 1998-9 onwards, where there has been an increase, but figures are only expected to reach their 1992-3 level again in 2000-2001. When set against the level of industrial injury, these figures are extremely low. The problem is best illustrated by taking 1998-9 as an example. In that year, the HSC/E issued 11,304 enforcement notices [14], and 6470 were issued by local authorities, a total of 17,774. Figures from the Labour Force Survey indicate that in 1998-9 there were 1.03 million people who suffered work-related injury in Great

[13] See Appendix A

[14] See Appendix A

Britain [15]. Of these, there were 380,000 injuries which should have been reported to the HSC/E because they lead to the worker being absent from work for more than three days [16] .The HSC/E figures on work-related injury for the same period are marred by a significant level of under reporting. In 1998-9, the Labour Force Survey showed a 46% level in reporting of injuries by employers, but only a rate of less than 5% for injuries to the self-employed. Over the whole decade the level of reporting by employers has improved from 34% to 46%.[17] . The main duty of HSC/E and local authority Inspectors is to prevent hazards. It is clear from the number of injuries revealed by the Labour Force Survey, that the level of actual injury is hugely greater than the number of enforcement notices issued . The level of risk of injury must be even higher. This is one of the problems of enforcement which are discussed further in Chapter 7. One of the real problems both of research into health and safety, and for the enforcement authorities, is the acknowledged inaccuracy of health and safety statistics. The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (1995) [RIDDOR], came into force for the year 1996-7, and their implementation was `settled' by 1998-9. These regulations changed the basis of reporting and classification. The Health and Safety Statistics Bulletin 1999-2000 (HSE 2000) clearly states the problem: "Statistics for major injuries from 1996-7 cannot be compared with those for earlier years due to the introduction of revised injury reporting requirements (RIDDOR) in 1996." There is, in fact, a second body which collects statistical information on health and safety. The Labour Force Survey has consistently found higher injury and fatality rates than the HSE. They employ a method of house to house survey, rather than using the HSE method of waiting for employers and self-employed people to send in the report. Labour Force Survey figures given here are from "Levels and Trends in Workplace Injury: Reported Injuries and the Labour Force Survey" (HSC & Office of National Statistics 2000), which incorporates both the Labour Force Survey results, and

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[15] See Appendix A

[16] See Appendix A

[17] 1998-9 is an appropriate year, because it is one where accurate comparisons can be made.

the results of research by the Institute of Employment Research on the Labour Force Survey findings. It is clear that there is significant under reporting. The HSE has placed questions in the Labour Force Survey since 1993-4. Eurostat placed a one- off set of questions in 1999-2000. The Eurostat figures indicated that 1.10 million people suffered workplace injury in 1999-2000, and there were 4000,000 reportable injuries. It should be noted, though, that this included road traffic injuries, which are not normally included by the HSE at the moment.[18] Although there were differences of detail, the overall rates of injury revealed by the HSE questions in the Labour Force Survey and the Eurostat questions, were broadly similar. The HSE currently publishes statistics from both sources (see Appendix A)

4.11 The Robens Committee was not only concerned with how the law should be enforced. They also paid attention to the question of what kind of law should be enforced. At the centre of their conceptual framework was the view that there should be a single unifying statute. Their aim in proposing the statute was partly administrative- to unify the seven different inspectorates, and to concentrate expertise on health and safety (1972.31.97). It was also to ensure that the gaps and anomalies in the legislation were covered. Because the existing standards had been legislated in a piecemeal fashion [19] , many workers who were not employed in either factories, or in offices, shops or railway premises, were not covered by any legislation at all. At the same time, standards might vary according to the technical designation of the premises. For example, under **s3 of the Factories Act 1961**, a person whose work does not involve substantial physical effort and who can do a substantial proportion of their work sitting down, is entitled to a minimum temperature of 60 degrees Fahrenheit after the first hour at work. This would apply to a person working in an office in a factory, or to a person sitting at their machine, but not to a person who had to stand to operate their machine. At the same time, an office worker employed in offices covered by the **Offices Shops and Railway**

[18] Legislation to include road traffic injuries to people at work within the HSE remit is projected for 2003.

[19]See Chapter 3.

Premises Act 1963 would be entitled to the slightly higher temperature of 13 degrees centigrade after the first hour, provided that they worked in a room to which members of the public were not admitted. The temperature provision would not, therefore apply to a person working in a shop with the public, or in, for example, social security offices, where members of the public were being interviewed. The differences in temperature are not great, but they do illustrate the technical nature of the older regulations In accordance with the Robens recommendations, the older provisions were not repealed when the **Health and Safety at Work Act 1974** came into force. They remained in place to provide a `bedrock' of standards, to ensure that the new legislation was used for improvement of health and safety conditions. The new Act, taking on board the Robens recommendations, adopted a different approach. It applied to all workplaces, and, rather than set out standards, it enacted a series of general duties. Unlike the older Acts, these duties were owed not only by employers to employees(s2), but also by employers to persons not in their employment (s3), persons who control premises where people work(s4), persons controlling premises where there may be noxious emissions into the atmosphere (s5), designers, manufacturers and importers of articles used at work (s6) and employees (s7). This approach therefore applies to many more actors in the health and safety arena. One of the true strengths of this legislation is that it is inclusive. The other, highly controversial, feature of the Act is that it is based on the principle of rights and duties, rather than on set standards. The Robens Committee felt that this would be of benefit since "A positive declaration of over-riding duties, carrying the stamp of Parliamentary approval would establish clearly in the minds of all concerned that the preservation of safety and health at work is a continuous legal and social responsibility of all those who have control over the conditions and circumstances in which work is performed. It would make it clear that this is an all-embracing responsibility, covering all workpeople and working circumstances unless specifically excluded and applying whether or not a particular detail is covered by a specific regulation." (1972.41.130). This was the aspiration. Ayres and Braithwaite have argued that this form of regulation is `goal -setting' since it sets out the substantive regulatory goal, but lets the

industry decide on the best way of achieving it, and is ...."the best chance of an optimal strategy that trades off maximum goal attainment to least cost productive efficiency." In terms of the **Health and Safety at Work Act,** the goal which is set in each major duty is that the duty holder must do what is `reasonably practicable'.(1992.38). But rights and duties do not have to be seen as `goal setting'.They can equally be viewed as prescriptive. There is some evidence of this thinking in the Robens Report where one of the main recommendations is that there should be an enabling act which "....should begin by enunciating the basic and over-riding responsibilities of employers and employees." (1972.41.129). Here, the duties are not a statement of regulatory goal, but a statement of obligation. This interpretation permits the **Management of Health and Safety at Work Regulations 1992**, which contain detailed standards, to be made as delegated legislation under the Act, and run in partnership the major duties. This point is important, since it demonstrates the ambiguity in the Robens proposals. The Robens Committee was clearly advocating self-regulation as the way forward for health and safety regulation. But there were no real precedents for implementation. They did not, as Woolfson and Beck (2000.39) maintain, reject prescriptivity. Rather, they were either unable or unwilling to completely detach their proposals from the older, prescriptive system, where specific standards apply. This lead to a clear recommendation "There should be a new, comprehensive Act dealing with safety and health at work. The Act should contain a clear statement of the general principles of responsibility for safety and health, but otherwise should be mainly enabling in character. The Act should be supported by a combination of regulations and non-statutory codes and standards" (1972.49.161).This also does not reflect the Ayres and Braithwaite model of self-regulation, since the standards and regulations are set by government, running in tandem with the Codes of Practise, which the Robens Report envisages would be created by voluntarist action. When the **Health and Safety at Work Act 1974** was finally passed, the role of producing these was largely given to the HSC/E, with supervision by the appropriate minister. In

terms of research question 3,[20] it would appear that the Robens Committee saw a vital role for the state (or its agencies) in terms of the setting and maintenance of standards in safety and health at work.

The Statutory Framework

4.12 **The Health and Safety at Work Act 1974** was the enabling Act which eventually ensued as a result of the Robens Committee enquiry. It is not an exact enactment of the Robens recommendations, but does, in general, mirror them closely. Some of the ambiguity about the regulatory nature of the system created through the Act stems from the fact that the Robens Report uses the language of the civil law of negligence[21] in detailing the proposed criminal duties.[22]. Though the words `reasonably practicable' are not used in Robens, it is clear that the Report has this conceptual framework in mind. In para 132, where when the author responds to the criticism put forward by some lawyers that such a statement of duty is unnecessary because it would be merely "..... a statement of the existing common law on this subject, that it would simply mean `writing down a duty which we all know'", the reply is "Our answer to this is that few laymen are familiar with the common law on this subject, however clear it may be to members of the legal profession". In other words, the common law is not inappropriate, but rather, it needs further definition. Details of obligations under the **Health and Safety at Work Act 1974** can be seen in Appendix B and follow this recommendation closely. Briefly, employers have a statutory duty to keep work the place safe for employees so far as is reasonably practicable (**Factories Act 1961, s.29** and **Health and Safety at Work Act 1974, s.2**).There are, though, some differences between this duty and the law of negligence. Firstly, negligence demands that , in order for an injury to be actionable, it must be reasonably forseeable. The criminal

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[20]How pro-active a role should the state take in protecting people from hazards at work?

[21]See Chapter 8 for a discussion of the civil law in its own right

[22] Discussed in Chapter 7 in relation to current enforcement policies

duty, though, applies regardless of the forseeability of danger .A recent decision confirming this was ***Mains v Uniroyal Engelbert Tyres Ltd 1995, 4 AER 102,*** where the employee caught his finger in a machine which he was adjusting. The Scottish Court of Session decided that if the employee was expected to show that the injury was reasonably forseeable, he would be in the same position as a person claiming negligence- and that Parliament could not have intended that, regardless of whether head office personnel or senior management were responsible for a failure to maintain safety standards as in ***R v Gateway Foodmarkets Ltd 1997 ICR 382*** .This is logical, since the aim of the criminal legislation is the prevention of hazard, rather than the compensation of an injured person. Secondly, The **Health and Safety at Work Act 1974, s.3** imposes a further duty, so far as is reasonably practicable, on "every employer to conduct his undertaking in such a way as to ensure . . . that persons not in his employment are not thereby exposed to risks to their health or safety." This can apply to an independent contractor, or, indeed, anyone lawfully on the property. It can also apply to members of the public affected by an employees work as in ***R v Nelson Group Services (Maintenance) Ltd, [1999] IRLR 646.*** All the major duties are dependant on the concept that the duty holder must do what is `reasonably practicable'. In deciding what this means, the criminal courts apply the much older principles described in the civil case of ***Edwards v National Coal Board 1949 1AER743***, where Asquith L. said that `reasonably practicable' is narrower than `physically possible' and implies that "a computation must be made in which the quantum of risk is placed in one scale and the sacrifice involved (whether in money, time or trouble) is placed in the other, and that, if it is shown that there is a gross disproportion between the risk being insignificant in relation to the sacrifice the defendants discharge the onus upon them". This is really where the older concepts of negligence have a potent effect. This decision has enshrined a notion of cost- benefit analysis in both the civil and criminal law. Additionally, it and it has also made an important point about the burden of proof. The employer, to escape liability, must prove that the measures required to alleviate the hazard were not `reasonably practicable' in every circumstance. This is important for the criminal law, since the normal

burden of proving that the defendant committed the offence `beyond reasonable doubt' lies, in criminal cases, with the prosecution. It means that in most health and safety cases, the situation is slightly different. The Inspector simply has to prove that the hazard arose from the state of the workplace- it is then for the employer to try to demonstrate that the necessary precautions were not `reasonably practicable'. Despite these differences, one of the major points of unification in the wake of the Robens Report was that the civil approach was brought into the criminal duties, including the concept that risk should be assessed, and that costs and benefits should be evaluated. HSE, in `Reducing Risks, Protecting People' (1999) makes the point that "The resources devoted to establishing sound information and intelligence on risk account for around 25% of HSE's total resources."(1999.72). It is clear that what appears to be a simple and flexible formula makes complex enforcement demands, since a wide range of factors need to be considered in each instance.

4.13 Since there is considerable doubt as to how general and certain a `test' the concept of reasonableness poses,[23] it is perhaps misleading to portray the Robens recommendations as a move from one type of rule -making to another, as Baldwin and McCrudden (1987 .142-148) do when they describe the Act as providing rule-makers with a hierarchy of rule-types. [24] . Hart (1970.97-107) has discussed the concept of `rules' within the legal system. He defined `primary rules' as ones which impose obligations. They require people to behave in a certain way. They normally have sanctions attached to them. Standards, which give detailed requirements for conduct, such as the Construction (Design Management) Regulations, clearly qualify as `primary rules'. So, too, do the major duties under the Health and Safety at Work Act , where the required behaviour is that the duty holder should act `reasonably'.

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[23]see Chapter 8

[24] " The Act provided the HSC/E policy- makers with a hierarchy of rule-types. This was headed by the general statutory duties set down in sections 2 - 9 of the Act. Regulations provide the next layer of rules. Section 15 of the Act gave the Secretary of State powers to make regulations for any of the general purposes of the Act.... The `Approved Code of Practise (ACOP) was the next device introduced by the Act and attempted to achieve the benefits of responsiveness whilst st the same time operating with some legal force."(p142-3).

As Drake and Wright (1983) have pointed out "`Reasonably practicable' is also a standard" (1983.5) What varies here is not the type of rule, but the way in which the conduct is specified. The change is from the concept of law as a command to the concept of a normative legal structure. The point about `delegated legislation' is that the Regulations made under an enabling Act are, formally, legislation. Baldwin and McCrudden, though, seem to distinguish between the duties in the Act, the Regulations made under it, the Codes of Practice and the guidance issued by the HSE. The hierarchy which they propose gives the impression that some rules are to be taken more seriously than others(1987.144). In fact the difference, is better described by Kelsens `hierarchy of norms'[25], where the relationship between the normative types is complex. The provisions of all the Acts and the Regulations made under them all have the same statutory force, and are typical of enabling and delegated legislation. The Codes of Practice, of which Baldwin & McCrudden vaguely say "They did have some legislative force, but were not made by Parliament or by a person immediately responsible to Parliament", are not legislation- they in fact achieve their legal status as prima facie evidence of reasonable conduct. Their legal importance lies in the context of the main legal duties in the Health and Safety at Work Act which require that the duty holder should do what is reasonably practicable to ensure health and safety (see Appendix B). The Codes of Practice, too, are based on a model found in other fields - Robens gives the example of the Industrial Relations Code of Practice, and its admission in proceedings under the (then in force) Industrial Relations Act (1972.48.153). There was nothing new in the form of regulation which the Robens Committee proposed. What is unusual is its extent. The HSC `Review of Health and Safety Regulation (1994) found that (as at 31 March 1993) there were 28 sets of primary legislation and 367 sets of regulations in force. Of this "three quarters pre-dates the landmark **Health and Safety at Work Act 1974**".(1994.Annex 11.148).It is certain that a lot of regulations have passed into law without Parliamentary debate- but this is not new. The Robens Committee quoted nine major groups of statutes, and nearly 500 subsidiary

[25]See Drake and Wright 1982. 11-12

statutory instruments. (1972.7.28) as being in force while they were deliberating. These were made under the then existing enabling legislation, mainly the **Factories Act 1961** and the **Offices Shops and Railway Premises Act 1963**. It would appear that there has been rationalisation of the law, in that the number of provisions has been reduced. It is also clear that the piecemeal development of health and safety legislation (see Chapter3), had resulted in a need for rationalisation.

4.14 The third element in Baldwin and McCruddens hierarchy is the Code of Practice. The view which Robens took was that Codes would be drawn up by industry organisations and other interested bodies, like, for example, the Institute of Petroleum, which had produced the Code of Practice for the Maintenance of Fixed LPG Vessels (1972.46. 145). The HSE would give formal approval to those which it considered worthy, legitimating them as descriptions of good practice. Robens was well aware that in advocating increased use of Codes of Practice, he was recommending the use of something not subject to Parliamentary scrutiny and approval. He felt, though, that the advantages of increased flexibility, ease of introduction and revision, and ability to reflect new developments, outweighed this (1972.45 .143). It is clear, though, that he did not see the use of Codes as a substitute for the use of regulations. He appreciated, though, that "The question of the desirable balance between the use of statutory regulation and the use of non-statutory codes of practice is a controversial one." (1972.45.143). It was, in fact, not only controversial at the time, but it also provided an opportunity for the proponents of deregulation to place limits on regulatory activity. As Dawson et al (1988 .267) indicated, the Secretary of State for Employment told the HSE in 1979 that they must consider the overall economic implications before they put forward new regulations, and any proposals were subject to careful scrutiny. The HSE itself admitted in its Review of Health and Safety Legislation (1994), ".... most UK health and safety regulations introduced since 1980 were brought in to meet EC and international obligations, primarily EC. They cannot now simply be removed". (1994.102.17).On the other hand, the ` Review' also explains that "Approved Codes of Practice, which acquired

legal standing through their approval by the Health and Safety Commission, have developed quite differently from the Robens model. They are now almost always produced by the Commission itself, and not by industry; they are often applicable across the board, and not just to a specific sector; and they tend to combine practical guidance with legal commentary and interpretation." (1994.22 .24). In other words, by 1994, what was once envisaged as a key self-regulatory activity to be performed by industry had instead been taken over by the Regulator. The `voluntary Codes of Practice' which Robens advocated had gained some of the characteristics of regulations, but lacked the most important aspect- that of direct legal enforceability. Robens' hope for the idea of increased reliance on voluntary Codes of Practice was that "The means used should encourage industry to deal with more of its own problems, thereby enabling official regulation to be more effectively concentrated on serious problems where strict official regulation is appropriate and necessary."(1972.46.148). Hawkins (1984. 3-5) explains that the aim of a compliance approach to regulation is to prevent harm by the negotiation of future conformity to standards which are administratively determined. Robens recommendations went further than this by expecting the regulated industries to also set the standards (albeit with some supervision from the HSC/E). This is not how the matter has developed, and demonstrates a real failure in the concept of compliance. Industry has not in fact taken on the mantle expected of them in producing the detail of safety provision, though, it will be seen, various organisations have been pro-active in consultation processes when the HSC/E decide to produce both regulations and Codes. This, in turn, has resource implications - the Robens Committee did not really consider the matter, but it is clear from their recommendations that industry itself was expected to donate the resources needed to create the voluntary Codes , with the HSC/E as the `expert advisor', available to give technical advice. The **Health and Safety at Work Act 1974s16** contains a provision which allowed the Health and Safety Commission to approve Codes of Practice which it considers suitable. This provision applies both to Codes generated by the Executive and to those "issued or proposed to be issued otherwise than by the Commission"(S16 [b]). This specifically allows for industry created Codes to

be given formal approval. However, the level of voluntary activity envisaged by the Robens Committee did not materialise. It is difficult to tell whether this is causally related to the power given to the Commissions under s16, or whether the resource implications were not lost on commercial enterprises, or whether other factors are at work. The reality is that the HSC/E uses its own resources to the production of new Codes of Practice. Its work has gone far beyond that which the Committee expected, of simply monitoring and advising industry bodies in this respect. This, in turn has given the Codes of Practice the appearance of direct regulation. Therefore, it is not surprising that the `Review of Health and Safety Regulation' found that employers were confused and frequently misinterpreted Codes of Practice and Guidance as setting out direct, mandatory standards (1994.22.26). The recent policy document `Revitalising Health and Safety'(1999), does not review the working of Codes of Practice. However, perhaps it should consider the question of whether it would be worth re-issuing some or all these Codes as direct regulation. This would remove the complex issue of reasonableness from some situations, and help the HSC/E to fulfill its commitment in `Revitalising Health and Safety' to remedy the complaint that many small firms find little clear advice available "through a range of information products including clear, straightforward sector-specific guidance supported by case studies" (1999.Action Point 25). In terms of Research Question 3, the State agency has, it fact taken a more pro-active role than the Robens Committee envisaged. Voluntary Codes of Practice did not emerge from industry in the way expected in the Report. It was left to the HSC/E to create those which it felt were necessary, and in doing this, developed a monopoly of the process. This is surely of benefit. One of the criticisms of voluntary codes mentioned in the Robens Report is that there might be " ...a falling off in the degree to which adequate standards are actually achieved in the workplace." (1972.46.148). Commercial enterprises may well be reluctant to grasp difficult, and expensive issues, or may `water down' provisions which they see as not being in their commercial interest. Standards are surely more likely to be maintained where

an independent state agency, with a public welfare base, generates the Codes.[26]

The Enforcement Agencies

4.15 A key aspect of the Robens Report was that a new Authority for Safety and Health at Work should be created. This would rationalise an existing system where seven different inspectorates were spread over five different government departments[27]. In fact, the remit of the new Authority was much wider than this . It was to advise government, employers, trade unions and other interested parties; manage the inspectors; administer and review the law; do research and provide information and training; and collaborate with the TUC and CBI and other employer organisations and trade unions. The Authority would be under the responsibility of one government Minister, who would be responsible to Parliament. In the **Health and Safety at Work Act 1974**, this emerged as a two tier organisation, the Health and Safety Commission, and the Health and Safety Executive. **S10 of the Health and Safety at Work Act 1974** sets the Commission up as a tripartite organisation, with representatives of government, employers and employees. As Kessler and Bayliss (1992 .168) indicate, this was recognition that independent trade unions have certain statutory rights in the workplace. On the other hand, one of the arguments against this model of tripartism is that it consolidates the roles of certain large organisations (eg the TUC, the CBI,) which each have their own agendas, to the exclusion of broader viewpoints. The Health and Safety Commission currently consists of a chairman and nine members, reflecting this tripartist representation. The Health and Safety Executive was created "to

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[26]The issue of how much of a public welfare stance is taken by the HSC/E is considered in Chapter 7

[27]These were: Factory Inspectorate (Dept of Employment)
Mines and Quarries Inspectorate (Dept of Trade and Labour)
Agriculture Safety Inspectorate (Debts of Agriculture)
Explosives Inspectorate (Home Office)
Nuclear Installations Inspectorate (Dept of Trade and Labour)
Radio chemical Inspectors (Dept of Environment)
Alkali and Clean Air Inspectorate (Dept of Environment)
(1972.59.193)

exercise on behalf of the Commission such of the Commissions' functions as the Commission directs it to exercise (S11[4]a), and to "give effect to any directions given to it by the Commission"(S11[4]b). At present, part of its role is to give the Commission advice on policy, technological and professional issues, though the Commission also has a network of 25 advisory committees which deal with particular hazards and industries. The Executive is also responsible for advising employers and enforcing the law, researching gathering and providing information on health and safety matters, and liaison with local authorities.

4.16 The role of the local authorities is one which tends to be overlooked by commentators. The Gower Committee (1949) recommended that local authorities should be responsible for health and safety in offices and shops (see Chapter 7). By the time of the Robens Report, they had acquired broader responsibilities, covering a range of areas, including some aspects of factory regulation. The Robens Report recommended that they should retain responsibility, though with some rationalisation. This was for two reasons. The pragmatic view, base on the resource implications, was that ".... any idea that a central inspectorate should be responsible for visiting innumerable small shops, offices and petroleum filling stations throughout the country is quite impracticable."(1972.73.237). The second reason was that "....the considerations which lead the Gower Committee to recommend that local authorities should be responsible for offices and shops, as a logical extension of their traditional role in public health, remain valid."(1972.73. 238). The Committee was, though, concerned that the local authority inspections were of uneven quality. They recommended that the Authority for Safety and Health should have a supervisory role, though they did not want to set out too rigid a structure for this.(1972.75.243) The Committee felt that this supervision could be achieved if the Authority was organised through regional offices, which would supervise the local authorities in their area. At the present, the Health and Safety Executive has this responsibility. The responsibilities of the local authority inspectors were revised in 1977, and again in the Health and Safety (Enforcing Authority) Regulations 1989. The 1989 Regulations had the effect

of increasing the field of responsibility of the local authorities. The HSE supervision is not currently organised through regional offices, but works via the Health and Safety Executive/ Local Authority Enforcement Liaison Committee (HELA). The membership of the HELA [28]consists of senior officers and managers from local authorities. These are nominated by the Local Government Association and the Convention of Scottish Local Authorities. It is jointly chaired by a Deputy Director of the HSE and by a senior manager from a local authority. It has two sub-committees, the HELA Technical sub-committee, and the HELA Petroleum Enforcement Liaison Group. It is answerable to the Local Authority Unit in the HSE, and attempts to ensure an even standard of inspection through co-ordinated training with the HSE, and by the use of an `Audit Protocol' for use by local authorities , where they can audit the extent of their compliance with the HSEs' `mandatory guidance' on enforcement. It is clear from the HELA `mission statement' that the directing mind on enforcement policy comes from the HSE. This states "Through support to local authorities, to ensure that the Health and Safety Commissions' objectives are achieved in the local authority enforced sector." (HELA Annual Report 1999-2000.84.) HELA has some appearance of autonomy, but in reality it is the administrative organ for ensuring that HSE policies are applied throughout the local authorities. Wiseman (1996), revealed the extent of compliance. Her research was concerned with the introduction of a new procedure, concerning enforcement notices. Employers were to be given an extra `Notice of Intention' before an improvement notice was issued. She examined the extent of compliance with the new procedure, and the impact of it. One of the most outstanding results was the lack of divergence in practise between the local authority and HSE Inspectors- including the fact that 94% of all local authority officers and 90% of all HSE Inspectors gave the leaflet explaining the procedure at every inspection, regardless of whether they intended to issue an enforcement notice. This procedure had been issued to the local authority Inspectors as `statutory guidance'. This lack of discretion is symptomatic of an imbalance of power which seems to contradict the

[28]See Chapter 7

reasoning which was used both by Gower and by Robens to justify local authority involvement. The experience of the local authority inspectors in dealing with `public health' issues can only be of limited value, when operating in the context of `mandatory guidance'.

4.17 The most crucial integrating proposal of all in the Robens Report, though, was the creation the Health and Safety Inspectorate within the HSE.. The old arrangement of seven separate inspectorates was seen as uncoordinated and inefficient. In particular, it was hoped that a unified inspectorate would give rise to improved research base and better use of technical resources. The Robens Committee emphasised that they saw the role of the inspectorate as being "the improvement of health and safety at work," (1972.63.206). This, the Committee felt, meant that giving advice and information would be prioritised over prosecution. The Committee did not see any conflict in these roles. They saw the sanctions as remaining in the background, to influence the relationship between the employer and the inspector. There was an element of pragmatism in this view. The Robens Committee quoted the point made by the Chief Inspector of Factories in his Annual Report for 1969 (Cmnd 4461) - " It is no more thinkable that there should be so many Inspectors that one could be permanently stationed in every works than that, say, every fifth motor car should be a police car to enforce the Road Traffic Acts....". (1972.64. 208). Baldwin and McCrudden state that "Inspectors are inclined to argue that Robens overstated the extent to which the mandatory model of enforcement applied before 1972" (1987.150). Though this may have been the perception of some in the Inspectorate, it is not a true comment on the Report, which very clearly supports a position based on the evidence of the Factory Inspectorate itself. In fact, as Baldwin and McCrudden indicate, the Factory Inspectorate continued to apply their policies after Robens very much as before. In 1970, there were 300,000 factory visits, and the prosecution of under 3,000 offences. By 1985, the number of visits had halved, but the rate of prosecution remained about the same - there were 1,431 prosecutions (1987.150). Baldwin and McCrudden make the point that these were responsive rather than anticipatory actions. Where the Robens Committee said "there are severe practical limits on

the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies", (1972.12.41), they had in mind one of the key arguments since made against a more proactive enforcement policy - that the resources needed would be too great. Too many Inspectors would be needed. Superficially, this argument has some merit. Between September and November 2000, there were 27.96 million people in employment, and 28.03 jobs in the economy ((Labour Market Statistics Jan 2001, Office of National Statistics). To deal adequately with this would need a huge increase in the number of inspectors. The question is whether more resource should be applied to this sector. Woolfson and Beck (1996.181), writing of the deregulatory policies of the 1980s and 1990s, pointed out that "The actual assault on the HSE as a regulatory institution has been preceded by imposed budgetary cuts, reduced inspections and a staff recruitment freeze. Now, even the `reluctant enforcement' strategy of the HSE is under direct attack." This gives rise to two questions : how much, in terms of resources, should be given to health and safety at work? Where does the proper balance lie between advisory and enforcement policies? This second question is important, since it is clear that there has been a shift in policy within the HSE, in order to deal with reduced resources. More emphasis has been placed of the provision of advice and information. By the mid-1980s, the HSE had begun to suffer from the reduction in overall resources (see Chapter7), and the number of inspections began to drop. This also affected the efficacy of other enforcement notices, since inspection is a pre-requisite of their issue. It will be argued (see Chapter7), that the levels of inspection and enforcement have dipped far too low, and the overriding need is for a strong enforcement policy, with a large increase in the number of inspectors. This is an instance where the state agency needs to be more proactive , and further resources are needed to achieve this.

Conclusion

4.18 The Robens Report was a major departure from previous models of regulation, and set the pattern for much of the subsequent debate concerning self-regulation. However, it does contain a number of major failures which have

been compounded by the way it was implemented. One of these lies in the proposals for worker consultation and participation. As Woolfson and Beck (1996 .177) said, in relation to a discussion on the duty of care "The fundamental flaw with Roben's self-regulation approach was that it presupposed a natural consensus between management and workforce. The Committee, in essence, dramatically overestimated what Robens claimed to be a `natural identity' of interests on the part of the `two sides' of industry'." This is certainly true of the recommendations on worker participation. Here, the issue of the power and values of management embedded in the phrase "managements right to manage" were not considered. This has been compounded by the way the subsequent enactment handled this issue, opting for a system of safety representatives and committees, but not for a general duty to consult. In terms of Research Question 2, therefore, the dominance of managerial interpretations in this field has not been seriously challenged.

A second area of failure comes from the way the Robens recommendations changed the relationship between the state and the health and safety sector by recommending a move away from a `command' concept of regulation to one which is `normative'. It also signalled a move towards a system which shared some characteristics with the one advocated by Ayres and Braithwaite (1992), where regulation is mainly through attempts to "secure compliance by persuasion" (1992.35). This has been heavily criticised. The criticisms began from the moment the report was published. For example, Woolf (1973 .93) argued for a command model- that the role of criminal law was to set legal standards, and ensure that they were obeyed by making it unworthwhile to break them. The point here, though, is that although the role of the `command model' of regulation was reduced, it was never wholly rejected. When the **Health and Safety at Work Act 1974** was passed, the older legislation[29] remained in force, so guaranteeing the older standards. At the same time, the duties in the **Health and Safety at Work Act 1974** can be seen as part of a command structure. What Robens was really recommending was a multiple system, which involved

[29]Primarily **The Factories Act 1960** and the **Offices Shops and Railway Premises Act 1963**

legal regulation, self regulation and voluntary action by employers. The voluntary side of this has not worked well, since industry has not been proactive in creating Codes of Practise. Rather, this has been an activity of the HSC/E, as an agency of the state. In connection with Research Question 4[30], voluntary regulation has failed in this respect. However, as has been argued in 4.14, in connection with Research Question 3, there has been benefit in the more proactive role taken by the HSC/E as agents of the state, since they do not face commercial pressures which may water down standards.

The real problem is not that a `command' framework has been rejected, but rather the dominance attained by the self-regulatory concepts. As Woolfson and Beck (2000 .48) have indicated, the result of this has been `business- friendly and consensual'. In terms of Research Questions 2, it is clear that this consensual approach has permitted to values and ideologies of management to be firmly embedded in the system. In terms of Research question 3, the role of the State is mediated by the need to maintain this consensus. Finally, in relation to Research Question 4, the voluntary sector is really the area where the vision of the Robens Report failed to achieve fruition. The Robens view of industry-wide safety committees (1972.26.81-86), has not been developed. This does not mean that there is no voluntary action. Rather, it is located through organisations like the Confederation of British Industry, which plays a full part in the tripartite system which has developed, and the Institute of Directors, which participates in relation to issues which concern its members. The nature of this participation is through the consultation processes which have been developed and implemented by the HSC/E. This is participation within the context of self-regulation, rather than through purely voluntary activity. The system finally enacted under the **Health and Safety at Work Act 1974** gave far grater impetus to the development of self-regulation, rather than through purely voluntary activity. It is, in fact, self-regulation which was enhanced by the Act. A key issue to be examined in subsequent chapters is the question of how this has affected the development of health and safety policy.

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[30]How has the balance between voluntary and state regulation developed in relation to health and safety at work?

CHAPTER 5 CONTEMPORARY POLICY MAKING AND HEALTH AND SAFETY

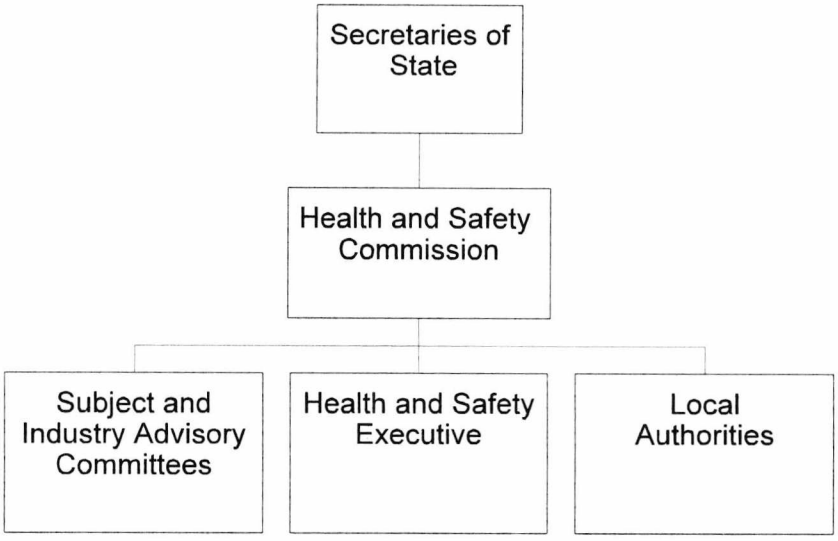

Fig 5.1 The Main Institutions

The present system

5.1 The aim of this Chapter is to examine health and safety policy- making in the context of recent, more general, government policy initiatives. This will be done with reference to policies on regulation . It is therefore important to summarise the system as it stands today. For the sake of clarity, it will be examined here in a top-down sequence, though that does not reflect the reality of the policy-making relationships. Since the **Health and Safety at Work Act 1974** first set up the institutional structure of health and safety regulation, there has been a refinement and development of the system. There has not been radical change- the Health and Safety Executive and Commission still remain at the heart of the system. But there has been an expansion and bureaucratisation to reflect the range of activities which they engaged in, and to support the self-regulatory

philosophy which underpins most of them. **Fig 5.1**[1] gives a basic outline of the system..

5.2 At the head of the system illustrated in **Fig 5.1** are the "Secretaries of State"- the ministers with departmental responsibility for aspects of health and safety. The most recent outline of these responsibilities available from the HSC/E appears in Appendix C. Even this is not in fact complete, since in June 2002, responsibility for the main body of the HSC/Es work passed from the Department of Environment, Transport and the Regions to the Department of Work and Pensions. As can be seen from Appendix C, several ministries have particular responsibilities, and, since these sometimes overlap, and can change with the re-organisation of the Ministries themselves, it is sometimes difficult to determine the parameters of responsibility.[2] Any lack of clarity can be resolved on a working basis by the application of the final Note, which states that any Secretary of State can, with the consent of the 'lead' Ministry[3] " ....direct or ask the Commission to do work on particular matters with respect to its functions". This also exemplifies the relationship between the Secretaries of State and the HSC/E, namely that ministers have the first call on HSC/E resources and time for policy development.[4] This means that the HSC/E is not a fully independent agency. However, the situation is more complex than this implies. The HSC has the right to do research, give advice and to propose new laws under **S11(2) of the Health and Safety at Work Act 1974** . This does give it a considerable level of autonomy, subject to the overriding right of government to its time and resources. It also places the Commission in a strong position to shape and otherwise influence government policy on Health and Safety at Work. Where this has not been possible, it has shown tenacity in resisting policies of which it

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[1]Based on the more detailed diagram "Health and Safety in Great Britain: the main institutions" in Health and Safety Systems in Great Britain - HSE 1999

[2]For example, since the transfer to the Department of Work and Pensions, the responsibilities for genetically modified crops.

[3]Now the Department of Work and Pensions

[4]See **Health and Safety at Work Act 1974 ss11 (3) and (4)** and see also the interviews in Chapter 6

disapproves, for example, the market testing and deregulatory policies of the mid-1990s[5].

5.3 The Health and Safety Executive consists (formally), of a Director- General and two Deputy Director- Generals, who both assist the Commission and provide such advice as Ministers may require of them, under the **Health and Safety at Work Act 1974 s11 (4) and (5).** Under these three officials are the large professional staff, who actually perform the executive functions. A number of formerly independent directorates, notably the Railway Directorate and the Nuclear Safety Directorate have been amalgamated into the HSE. The work of the HSE in respect of enforcement policies is analysed in Chapter 7. An important extension of the HSE is the Local Authority Unit, which liaises with HELA, the Health and Safety Executive/Local Authority Enforcement Liaison Committee, which is responsible for harmonising the work of the Local Authorities with that of the HSE. One of the main areas of consideration is to provide consistency in enforcement.[6] The Local Authorities have a wide range of responsibility. They include the fire authorities, and the environmental health, consumer protection and trading standards departments of local councils. Their position has been discussed in more detail in Chapter 7.

5.4 Finally, the Advisory Committees play an increasingly important role in giving technical and expert advice to the HSC/E, and in identifying sectoral needs which they then may translate into policy proposals. The range of Committees has recently come under review. The number of Committees has increased in recent years, and changed, to reflect contemporary needs. As this process happens, so the relevance and influence of the committees has risen[7]

The policy process

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[5] See Chapter 1

[6] See Chapters 4 and 7

[7] See interviews Chapter 6.

Research question 1: What conflicts arise between matters of public welfare and the interests of the market in the development of health and safety at work policies?

5.5 When the of the Conservative governments of the 1980s and 1990s took office, they asserted the role of the market as a regulatory organism against that of government regulation. They took the view that social justice was not an attainable aim, and ideologically followed the view expressed by Hayek(1976) that the market is the superior regulating force, since, in terms of a person seeking redress, "there is no individual and no cooperating group of people against which the sufferer would have a just complaint, and there are no conceivable rules of just individual conduct which would at the same time secure a functioning order and prevent such disappointment ." As a result of this there were moves to reduce state activity to minimum, and steps were taken towards the privatisation of formerly 'public' activities, especially the operation of public utilities. However, these moves in themselves spawned a welter of regulatory bodies and new government regulations- partly to give effect to the changes, and partly to create or shape markets in circumstances where they had not previously existed. When the Labour Party took office in 1997, they did not revise the structural changes of their predecessors. Rather, they sought to overlay their own agenda. As Pierre and Stoker(2000) have explained, a system of governance emerged, which ".... refers to the development of governing styles in which boundaries between and within public and private sectors have become blurred. The essence of governance is its focus on governing mechanisms which do not rest on recourse to the authority and sanctions of government...." The implications of this for policy development include, on the one hand, a greater interest in non-governmental implementation strategies, and on the other, the likelihood of increased influence being exerted by interest groups. The first of these implications can be exemplified in terms of health and safety policy by the interest in the possible involvement of the insurance industry in ensuring compliance with safety requirements, (see Chapter 8). In terms of the second, health and safety regulation was set up on a tripartite basis as a result of the Robens Report (see Chapter 4.). Organisations like the CBI and the TUC have

long exerted influence, particularly through their membership of the Health and Safety Commission. However, it will be argued in this chapter that the range of influence has changed - for example, through the increased emphasis in recent policy making on small businesses, and through the increased emphasis on occupational health interest groups in what Jordan and Richardson 1987 .16, have identified as the `policy community', which appear to have enhanced their ability to be heard .

Research question 2: How evident are managerial values in the development of enforcement policies on health and safety at work?

5.6 Regulation and enforcement policies on health and safety at work must be positioned within the general structure of policy-making . The policy context needs to be analysed, with an emphasis on the links between the underpinning philosophy of government policy making and the practical issues of health and safety at work.

Pierre and Stoker (2000.42) have outlined the main tasks of governance in this system as follows:

"The first task involves defining a situation, identifying key stakeholders and then developing effective linkages between the relevant parties. .... The second is concerned with influencing and steering relationships in order to achieve desired outcomes. .... The third is about what others call `systems management' ... It involves thinking and acting beyond the individual subsystems, avoiding unwanted side effects and establishing mechanisms for effective co-ordination."

As Pierre and Stoker go on to point out, this involves a departure from older hierarchical forms, and it is by no means certain how far this can be achieved. This statement identifies three key planks of current policy-making, namely the identification of 'stakeholders', the emphasis on 'outcomes' and the attempts at 'systems management'. Attempts have been made to shape civil service policy-making along these lines in the present governments' `Modernising Government' initiative. This was initiated with the publication of the White Paper "Modernising Government" , which sets out both the philosophy and the methodology to be followed by policy-makers in all departments.

5.7 Although the H.S.C/E in some ways makes its own interpretation of this methodology, as a government agency which exercises statutory powers, it is required to adopt the same values and operate broadly the same system[8]. This was confirmed in the interviews conducted at the HSE [9]. The particular importance of the White Paper is that it reveals the underpinning values of the system more clearly than most of the H.S.E. documentation. The White Paper explains the political basis of policy making as follows:. " Policy making is the process by which governments translate their political vision into programmes and actions to deliver `outcomes'"(Ch 2 .1.) The aim of the modernisation agenda ,as expressed in (Ch 2.6) reinforces this "Our challenge, building on existing good practice, is to get different parts of government to work together, where that is necessary, to deliver the government's overall strategic objectives- without losing sight of the need to achieve value for money." This re-iterates the emphasis on outcomes, and the development of systems management which involves cross-department and cross-agency co-operation, and adds to these priorities the need to have close regard to cost. The White Paper goes on (Ch2 .12) to enumerate a series of action points which, it is hoped by the authors, will lead to the achievement of 'modernisation'. In terms of policy development, perhaps the key proposal is that an integrated system of impact assessment and appraisal tools should be developed., along with systems (eg peer reviews) designed to ensure that the other principles of modernisation are implemented. The approach is essentially managerial. Indeed, it provides an example of the kind of isomorphic pressure conceived by De Maggio and Powell[10]. Legitimation of a policy proposal depends on the application of the procedures for policy development and appraisal which are set out in detail in the many documents attached to the initiative.[11] The details of the system, though, are subject to a number of interpretations- as Clarke & Newman point out, "individuals and

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[8]See, for example Cabinet Office: "Better Policy Making and Regulatory Impact Assessment (2002 1.3)

[9]See Chapter 6

[10] As discussed in Ch1.

[11] "Better Policy Making and Regulatory Assessment (2002), being an important current example, produced by the Regulatory Impact Unit.

groups actively construct the meanings of the changes they experience, and create new institutional norms and patterns, new logics of appropriateness, within a nexus of social relationships." (1997.99). It is not certain as to how these interpretation will develop.[12] However, "Modernising Government" does attempt to incorporate a managerial system of values in the policy process, based on a concept of the 'market' in public provision which emphasises cost/ benefit relationships and the assessment of risk. At the heart of this procedure is the precept that government interventions should be targeted at cost effective outcomes which can then be measured. This has huge implications, since as Hogwood and Gunn (1984.113) maintain,".... what policy-makers define as problems and how they define them will be deeply influenced by the values they bring to the policymaking process". These are the same underpinning values which have been adopted by the H.S.C/E. This methodology does not mean that all consideration of 'public good' has been eradicated. Indeed, it is likely to lie at the heart of the initial idea that government intervention is needed . However, the considerations of "Modernising Government" then act as a filter, which policy makers must apply.

5.8 Central to this process is the Regulatory Impact Assessment (RIA). Since 2001, responsibility for the "Modernising Government " initiative, which rests primarily with the Cabinet Office, has been devolved through a number of Units and Agencies. Responsibility for this important area has been given to the Regulatory Impact Unit (RIU). According to the most recent document produced by the RIU, "Better Policy Making and Regulatory Impact Assessment", the RIA is "....an assessment of the impact of policy options in terms of the costs, benefits and risks of a proposal." (2002.1.1) As this document says, "....large organisations appraise their investment decisions in similar ways, too".[13] In response to the question "when should I do an RIA", the policy maker is told ".... you **must** prepare an RIA for all proposals (legislative and non-legislative) which

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[12]One interviewee (see Chapter 6) particularly commented that, of the various departments which deal with health and safety policy "....they each keep their own culture" (Institute of Directors). He had not noticed any change in this.

[13] 2002.1.1

are likely to have a direct impact (whether benefit or cost) on business , charities and the voluntary sector. This includes proposals which reduce costs on business and others, as well as those that increase them."(2002.1.4). This will include all health and safety at work measures, since employers are the primary providers. In many ways, this simply reflects the long-standing use of risk assessment by both the HSE and the courts[14]. But it also ensures that the HSE conforms to a more centralised normative approach. In Chapter 7, it is argued that the approach of the HSE to risk assessment has branched away from the approach adopted by the courts. This gap could widen if the HSE finds itself following centralised precepts developed without consideration of the specific issues of health and safety at work. For an example of the consistency of approach between the HSC/E and "Modernising Government", particularly regarding the underpinning values on issue definition, one need look no further than an examination of the most recent statement of government policy on health and safety at work, prepared collaboratively , the strategy document, "Revitalising Health and Safety."

Revitalising Health and Safety

5.9 The original consultation document was published in 1999, and the strategy document published the following year. This means that it slightly pre-dates the 'Modernising Government' initiative. However, there is a strong consistency in the approach adopted in Revitalising Health and Safety. The aims of the 'Revitalising Health and Safety' process were expressed as follows :

"to:

* inject new impetus into the health and safety agenda;

*to identify new approaches to reduce further rates of accidents and ill health caused by work, especially to small firms;

*to ensure that our approach to health and safety regulation remains relevant for the changing world of work over the next 25 years; and

*to gain the maximum benefit from the links between occupational health and

[14] Discussed in detail in Chapter6. and Chapter 7.

safety and other Government programmes."(2000.1).
The document states the belief that the framework created by the 1974 Health and Safety at Work Act does not need radical change -"The Government's approach has been to focus on ideas capable of adding value to the current system without threatening its overall balance." However, it will be argued that the prioritisation of certain issues, in compliance with the values of "Modernising Government", will in fact change the overall balance on implementation.

5.10 The relevant values of "Modernising Government" can be gauged through an examination of the work of the Better Regulation Task Force, which was responsible for the initial development of the approach. This was established in September 1997. It was situated in the Cabinet office and its main focus was " To advise the government on action which improves the effectiveness and credibility of governments regulation by ensuring that it is necessary, fair and affordable, and simple to understand and administer, taking particular accounts of the needs of small businesses and ordinary people". The Task force developed a simple expression of the main standards against which proposed regulation should be tested- five Principles of Good Regulation. In order to comply with these, the regulation must be: necessary; fair; simple to understand and easy to administer; affordable; effective and must command public support.

5.11 The task force also reviewed special issues and produced reports on them. All ministers had to respond to task force reports within 60 days of the publication, so it carried authority. The task force was supported by the Regulatory Impact Unit, which was previously known as the Better Regulation Unit. It worked with other Cabinet Office Units, other departments and regulators. It examined regulations which had an impact on business, charities, and the voluntary sector to ensure that they comply with its five Principles of Good Regulation, which were differently defined. In this case the Principles are that regulation must be: transparent (which means that it should have clearly defined objectives and obligations); accountable(regulators are accountable to parliament and appeals procedures are accessible): consistent (with existing UK

and EU regulations): targeted (focussed on the problem); and proportionate to risk (balancing risks and costs). These principles now form part of the Strategic Plan 2000-2004, drawn up by the HSC.

5.12 In 2000, the Task Force published "Good Policy-Making: a guide to regulatory Impact Assessments ".[15] This document laid down fairly detailed procedures, and it was from this document that the values which reflected on the policy process can be discerned in their practical form. The Better Regulation Unit's scrutiny team worked with all the departments to ensure compliance with the systems which have been created.. In his introduction to `Good Policy-Making', Tony Blair set out the agenda of his government- "....our aim of Britain is to create an environment where businesses thrive and enterprise is rewarded. In or alongside this, we must ensure that minimum standards exist to ensure fairness at work, safe products and a safe environment." He went on to say "....in particular, I want to stress that a regulatory impact assessments is not an ad -on to the policy process, it is an integral part of the advice that goes to ministers helping to inform options as the policy develops." This statement of the government's agenda made it explicit, right from the outset, that the concept of fairness could not be determined in a way which overrode the interests of business, and that policy -makers must produce regulatory impact assessments, which attempt to measure the effect of policy on business. The interests of business are, therefore, a key underpinning value in the creation of new regulations. Here is an important point of potential conflict in relation to health and safety at work, where a consideration of public interest may involve regulation which limits the capacity to do business (eg in the production of asbestos based products[16]).

5.13 According to "Good Policy-Making", there are three forms of regulatory impact assessment: initial assessment, partial assessment and full assessment. The initial assessment is "a rough and ready working assessments of the policy

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[15] Now updated in the more recent document 'Better Policy Making and Regulatory Impact Assessment (2002), though the principles remain the same.

[16] See Chapter 8

options using information that you will probably already have" (Part 1 .13). Two matters are emphasised. In the first place, an initial assessment should include an estimate of possible risks, and benefits and costs. Throughout the document, the concepts of risk assessment and cost/benefit analysis hold a central position, underlining the importance placed on private business technique. Secondly, the policymaker is advised to "think small first".In other words, the interests of small businesses should be an initial consideration. Further, Para 1.4 advises "always consider options that limit or do not involve regulation". This holds an echo of the previous Conservative governments desire to reduce state activity. In this instance, it appears that this paragraph contains a preference for a compliance approach, based on the encouragement of various forms of self regulation. Finally, Para 1.5 advises the policymaker to always consider whether the options are likely to have a socially unacceptable effect or impose unfair costs on specific vulnerable groups such as the elderly. This does give some expression to the `public' aspect of policy, though, as witnessed by its position in the list, it is likely to be swamped by the business-based considerations. The values demonstrated here are that policy should be business friendly, and that direct (legal) regulation should be kept to a minimum.

5.14 "Revitalising Health and Safety" is not a Regulatory Impact Assessment. It is actually a strategy document which slightly pre-dates `Good Policy Making'. However, it does embody the approach, and many of the characteristics found in the later document, and is an example of the kind of policy development likely to be spawned by the `Modernising Government' initiative. In accordance with the aims of the White Paper (Para 1.7) , an effort has been made to develop an integrated approach to policy. The Revitalising Health and Safety initiative was co-ordinated by a steering group. The document (200.12) lists the various departments, and gives a brief indication of the area of their involvement, which in some cases is very specific -eg the Lord Chancellors Department worked on penalties. The original consultation document was launched jointly by the Department of Environment Transport and the Regions[17] and the Health and

[17] Then the Ministry with major responsibility for health and safety at work.

Safety Commission, so, in addition to the overall work of the steering group, the consultation was also a joint project between the Department with overall responsibility, and the regulatory authority. Additionally, according to Para11, a group of `stakeholders' was identified, with whom exploratory meetings were held prior to the publication of the consultation document. This is also in accordance with "Good Policy Making" -para2.2, which, concerning the initial, partial assessment, states "You may also want to take some early soundings from those likely to be affected. This is not a formal consultation, but should help to inform your thinking about options and what methodology might be adopted to take account of all those likely to be affected." The practise involves a preliminary sounding out of the opinion of interested parties, so that the policy-maker may form their own conceptual framework. This gives an early opportunity to those interest groups who are asked for their opinions to try to influence the development of the policy.

5.15 The practise also has a further, possibly unintended, effect. It encourages the early identification of what Grant (1985) has characterised as `insider groups' in respect of that particular policy field. While the formal aspects of the consultation process may encourage opinions from a much wider range of respondents, these `insider groups' maintain the `inside track'.[18] They are likely, for example, to have notice of the consultation brought to their attention early, to have already given thought to their response before the formal consultation period, and to have a better opportunity to give a considered response while meeting the deadlines of the formal consultation. Baggot (1996 .126) explained that one of the ways that the Thatcher government imposed its view was by having very short consultation periods, sometimes of only thirty days. Revitalising Health and Safety had a consultation period of 86 days, which obviously allowed for more meaningful response. However, it remains true that the longer the time that respondents have, the greater their capacity to put forward a detailed, reasoned and well-researched submission. Insider groups must still have this advantage. They are also earmarked as groups to be listened

[18] See interviews Chapter 6, in relation to HSC/E consultation processes generally

to. In 'Revitalising Health and Safety', a number of the groups who had `exploratory meetings' with officials were named. Of these, only the TUC and HELA (the HSE and Local Authority Enforcement Liaison Committee) did not represent a sector of business. While it is clear that the list is not comprehensive, it does appear that the interests of employers in the private sector were disproportionately represented. When the formal consultation took place, steps were taken to gather responses from a wide range of sources. In addition to the main document, three summary leaflets were produced- one targeted at employers, one at workers, and one (again reflecting the `Modernising Government' priority) aimed at small businesses. Of the 1478 replies, 14.1% came from private individuals (para14 fig1) - hardly mass participation. It would appear that the views of individuals, therefore, are most likely to be expressed at this stage if insider groups which reflect their interests are involved in the process.

5.16 The actual proposals in Revitalising Health and Safety are grouped around certain key themes. It is clear that the responses to the consultation were considered and analysed in connection with these themes, though it in not clear whether responses were used in actually setting the themes around which the policy is based, or whether they were read against a pre-determined agenda. The document goes on to set targets for the reduction of accidents and ill-health at work, and makes clear the need for "the commitment of stakeholders to share in our aspirations and contribute to their delivery, for example by devising and publishing their own supporting targets" (2000.30). The role of stakeholders is stressed throughout the document. In line with the White paper (para6), 'Revitalising Health and Safety' clearly adopts an approach to policy implementation based on a concept of `partnership' with those identified as 'stakeholders'. The central `partnership' which is advocated is that between employers and employees in the workplace. This is particularly evident in the discussion of Safety Representatives - " We welcome the work of the TUC and the CBI in promoting partnership in health and safety, with the particular aim of ensuring that employers see safety representatives as partners in health and safety management rather than a group of people whom they are formally required to

consult. Developing wider partnerships with other key stakeholders, including government at central, regional and local level, is also crucial." (Para 83).In this particular instance, such an approach, may result in a distinct change to the existing balance of health and safety regulation. The role of the safety representative is set out in Reg 4 of the Safety Committee and Safety Representative Regulations (1997). It involves investigating complaints by employees, and making representations to employers on the basis of those investigations, and also making representations concerning general health and safety matters in the organisation. The responsibility for the management of the situation rests, at the moment, squarely with the employer. While good relations are desirable, the safety representative needs to maintain an independence from safety management in order to represent effectively. The concept of partnership in this particular field may change the relationship to a point where safety representatives are so compromised by involvement in safety policy making that they are no longer able to represent effectively.

Taking business into account

5.17 One of the key facets of the modernisation initiative is the importance of business, and particularly small business, in policy formation. Although " Modernising Government" is couched in terms which can be applied to any policy development, it is clear that business is to be considered specially- eg Para 15 describes the creation of the small business service, and continues " The Department of Trade and Industry will consult small businesses, their representative organisations and other interested parties to make sure that the new body provides high quality services and support to small firms. The new service will have £100 million of new money over the next three years for this purpose. Its role will be to:

*act as a strong voice for small business at the heart of government

*improve the quality and coherence of delivery of government support programmes for small businesses and ensure that they address their needs

*help small firms deal with regulation, working with others such as the Inland Revenue and Customs and Excise to cut the burdens of compliance."

If this paragraph is simply indicating that the needs of small businesses should be considered and weighed alongside other needs, then it would appear to be

perfectly reasonable. However, the Small Business Unit has in practice been given an enhanced voice. In "Good Policy Making" Step 3- Seeking Collective Agreement , para 3.1 says that collective agreement for a proposal may be sought through Ministerial correspondence, or through a Cabinet Paper for discussion by Ministers. The paragraph contains an extract from the "Guide to Cabinet Committee Business", which says "The Cabinet paper or letter to a colleague must explain...The impact on business, charities and voluntary organisations of any proposals involving new or amended regulations. ...taking account of the results of the Regulatory Impact Assessment (RIA) prepared in accordance with the Guide to Regulatory Impact Assessment and any discussions with the Regulatory Impact unit and Small Business Service" Further, para 3.2 - under the heading Additional Requirements states "SBS has a right to have its view explicitly recorded in the Cabinet paper or letter to colleagues" . This ensures that the `strong voice of small business' is directly heard by ministers. It is difficult for the policy maker to simply ignore the SBS- the box next to the paragraph says " RIAs must record whether or not the SBS was consulted. In cases where there is no impact on small firms, the fact should be made explicit in the RIA. The SBS has a right to have its views recorded in the RIA and may offer a form of words if it chooses to do so". No other body of interest is represented in this way. The charities and voluntary organisations mentioned in the "Guide to Cabinet Committee Business" do not have their own unit within government, and are not able to, for example, dictate the form of words by which the Minister is informed of any impact on them. But the full impact of these provisions may be felt in a more subtle way than that of direct representation. As the Cabinet Office Policy Paper on Modernising Government (Ch2 para2.8) states, "For policy making to be fully effective, policy makers not only need all the `traditional' attributes (knowledge of relevant law and practice, understanding of key stakeholders views, ability to design implementation systems), but they must also understand the context within which they (and the policy) have to work. This means understanding not only the way organisational structures, processes and culture can influence policy making, but also understanding ministers priorities (such as the importance of constituency concerns or impending elections or re-shuffles) and the way policies will play in

the `real' world where they will make an impact". The combined impact of the "Modernising Government" provisions is to give small businesses an extra chance, not only to represent their views as stakeholders, but also to influence perceptions of context. This influence may well extend to the perceptions of context both by the policy maker and the Minister. Additionally, it is possible that the culture of government policy making may itself be influenced by a desire to nurture small businesses.

5.18 In the context of Health and Safety at Work, there are comparatively few measures unlikely to have some impact on small businesses. When interviewed concerning the policy process[19], one of the HSE respondents said that he had very little direct dealing with the Small Business Unit. This is one area where HSE policy proposals follow a different path from policy generated by Ministries. However, the HSE policy- makers have felt the pressure to prioritise the needs of small businesses .... "How to do that effectively is the biggest problem" (H.S.E. interview 2001). A step towards this has been taken with the appointment of a member of the Commission to represent the interests of small businesses. A second step is the H.S.Cs Small Firms Strategy, which aims to monitor health and safety implementation and review its sensitivity to the needs of small firms. As part of this scheme, the H.S.E. were given £535,000 to develop electronic tools for small business advisors, in collaboration with the Small Business Service. While it is not unreasonable that the impact of health and safety regulation on small firms should be considered, the question is whether this can be done without damage to the tripartist balance of policy making in this field. The Small Business Service itself (March 2001) estimates that 12 million people work in `small and medium sized businesses'- defined as those with fewer than 250 employees. These constitute 55% of the private sector workforce. According to the Service, "On average 998 of every 1000 UK enterprises are small or medium sized." This means that small businesses, as employers, are major protagonists in the health and safety debate. They are both the object of regulation and major contributors to the development of the

[19] See Chapter 6

regulatory policy. The consequence of this is that a number of sometimes contradictory pressures are exerted on the development of health and safety policy.

5.19 Although "Modernising Government" operates in parallel in relation to HSC/E health and safety policy making in respect of small businesses, it is highly relevant because the HSC/E does follow its basic philosophy. It can therefore help to identify some of the key issues in the way in which policy-makers regard business interests. An example can be seen in " Modernising Government", para 8.4, Fig 17, where the White Paper identifies some of the contradictory pressures involved in the consideration of business interests, in its' discussion of the benefits and pitfalls of consultation. A key area of difficulty arising from such policy considerations may be related to the differences as between small and larger employers,- for example, small businesses may argue that the burden of the cost of safety provision weigh disproportionately on them. Alternatively, there may be factors within the trade itself which make the implementation of safety policy difficult, such as the levels of self-employment in the building trade,[20] or intrinsic danger in the asbestos industry.[21] On the other hand, consultation can "provide a focus for the mobilisation of resistance". In health and safety terms, this can enable interested groups to make more successful challenges to policy proposals. As the White Paper points out, "well organised lobby groups and sectoral interests can dominate a consultation process, giving a distorted view of relevant opinions." The H.S.E does appear to make efforts to consult widely, and the increased use of modern communications media, such as the internet, facilitates this. However, the process does favour organisations which are large enough to have the resources to respond to consultations promptly and to adequately research their responses. Lastly, the position of self-employed individuals is ambiguous. They may well find themselves categorised as 'small businesses' for some purposes,

[20] See Chapter 6.

[21] See Chapter 6.

and employees for other purposes.[22] It is debatable whether, within this system of organisational consultation, they have an adequate voice.

The Construction (Design Management) Regulations) 1994

5.20 The issue raised by an examination of context are not only relevant in relation to consultation. They provide a major theme of the "Modernising Government" initiative in its broader sense. In "Professional Policy Making for the Twenty First Century" (1999 2.8) it is explained that "For Policy to be fully effective, policy makers not only need all the traditional attributes (knowledge of law and practise, understanding of key stakeholders' views, ability to design implementation systems), but they must also understand the context within which they (and the policy) have to work.". The document goes on to identify three area of context which should be considered- the wider public context, the political context and the organisational context. In order to consider some of the issues which may arise in this consideration of context, it is worth examining an example from Revitalising Health and Safety. This example is contained in Action Point 16 (para 75), which states that "The Health and Safety Commission will consider further whether the 1974 Act should be amended, as Parliamentary time allows, in response to the changing world of work, in particular to ensure the same protection is provided to all workers regardless of their status; and will consider how principles of good management promoted by the Construction Design Management Regulations approach should be encouraged in other key sectors. Ministers will be advised accordingly." This will be considered in relation to some of the issues of `public context' identified in the complex model in Fig 3 (para2.8) of "Professional Policy Making for the Twenty First Century". Questions to be considered by the policy- maker include the following :

* what are the desired policy outcomes?
* which are the most effective outputs for achieving these outcomes?
* Who are the key stakeholders and how should they be involved?

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[22] See Chapter 6.

In this instance, the desired policy outcome appears to be twofold- firstly that the same protection should be afforded to workers regardless of their status as either employees or independent contractors[23], and secondly that there should be greater clarity in the identification of who is responsible for safety in contractual chains. The most effective outputs for achieving these outcomes appear to be the amendment of the legislation, and the promotion of the `principles of good management' contained in the Construction (Design Management) Regulations, 1994.

5.21 It was appropriate for the authors of "Revitalising Health and Safety" to look at the construction industry in connection with Action Point 16, since sub-contracting has been rife in this sector long before it developed as a major practise in other industries. It is further characteristic of the construction industry that these sub-contractors may be either smaller companies, or self- employed individuals. The safety problems arise where work is passed through chains of contractors, and it often becomes difficult to identify who is responsible for safety within the chain. Both companies and individual sub- contractors may attempt to deny responsibility on the basis the it belongs to someone else. As a result, crucial safety measures may not be taken or enforced. The **Construction (Design Management) Regulations 1994** -(CDM regulations)- attempt to deal with this and other safety problems found in the management of complex projects. They only apply to the construction industry, and Action Point 16 appears to be asking the Health and Safety Commission to extend them into other fields . If they are to truly consider policy outcomes, though, the authors of "Revitalising Health and Safety" should consider this proposal very carefully. The recent history of the CDM Regulations, has been somewhat chequered. In the case of **R v Paul Worth SA 2000 AC** the Court of Appeal interpreted the Regulations in a way which changed established thinking about the chain of responsibility. It is worth considering the details of this case, since they both illustrate the difficulties of safety implementation which are becoming widespread in many industries where contracting out has spread, and also

[23] For a discussion of this the legal implications of this, see Chapter 8.

resulted in a swift policy decision by the Health and Safety Executive to amend the law to maintain the status quo. In the **Paul Worth SA** case, a man was killed when a conveyor at Port Talbot Steel Works fell and crushed him. The conveyor fell because it had not been secured by a latching device. The dead man was employed in the installation of a plant designed by Paul Worth SA, who had employed another company, Fairport Engineering Ltd., to convert their design into construction drawings. They, in turn, had contracted the actual construction of the conveyor to a third company, Universal Conveyor Co Ltd., and asked them to prepare a drawing of the conveyor, which Fairport would approve. It was this final drawing which did not contain the latching device, and on the basis of this the conveyor was constructed without the latch. The question here was where responsibility for the absence of the latch lay. Regulation 13(2)a states that the person who "prepares the design" is responsible for it. Paul Worth SA were charged as the company with the `headline' contract to design supply and install the conveyor. Their name was on the defective drawing, and they had approved it, as they were contractually bound to do. The Court of Appeal, though, decided that they had not "prepared the design" according to the regulations. They held that the word `prepare' relates to the drawing up of the design, but does not extend to a firm which merely approves a design created by someone else.The company was acquitted of causing this fatal accident - appearing to have no responsibility for the content of a sub-contractors' drawing to which they gave their`approval'.

5.22 The implications of this case were severe- it also meant that where an employee had prepared the design, the company could not be convicted. Because of the widespread and complex nature of contacting out in the construction industry, issues of design responsibility had become impossible to regulate. The HSE acted swiftly, and in March 2000 (Press Release C008:00) announced that they were shortly issuing a consultative document setting out proposals to amend the Regulations. As a result of this, the **Construction (Design and Management) Amendment Regulations 2000,** were issued in October2000, ahead of a further consultation which is to re-examine the whole working of these regulations. The new Regulation 2 makes it clear that responsibility lies

with the person who prepares the design, or who arranges for an employee or other person to prepare it. The problem, though, is that the technical nature of the Regulations means that they can easily be interpreted in ways which can restrict their potential effectiveness.

5.23 In this instance, the HSE responded quickly, taking a clear view that the Regulations were beneficial and appropriate. However, it is ironic that, shortly after the courts had rendered them unworkable, these Regulations were being put forward as a model for the future development of protection in complex contractual chains. In "Revitalising Health and Safety", the CDM Regulations were seen as a foundation for a a policy which would remedy these particular problems of sub-contracting- para 76 says " A large majority of respondents to our consultation saw a need for clear and simple guidance to ensure better understanding of health and safety responsibilities in contractual chains. Only 19% considered themselves to be clear on who held health and safety duties in contractual chains. 81% felt there was a need for clarification or clearer guidance, with about a tenth of these commenting that the law was only clear where the CDM Regulations applied.." .

5.24 Revitalising Health and Safety does not allow the Health and Safety Commission much area of discretion- it "will consider how the principles of good management promoted by the CDM Regulations approach can be promoted in other key sectors." An examination of outcomes, though, should also involve an examination of the adequacy of this approach.. Brabazon, Tipping and Jones (2000.), in a Contract Research Report which was specially commissioned by the Health and Safety Executive , and was based on the HSEs own data, certainly does not confirm the effectiveness of the existing `principles of good management' in the CDM Regulations. They did find that there had been a slight decrease in fatalities in the construction industries after 1994. However, more recent statistics (See Appendix A) show a rise in fatalities in construction reported to the HSE in 1999 and 2000. Brabazon, Tipping and Jones (2000.15) point out that, although the average rate of fatalities for the primary building trades is below the HSE Intolerable Risk Guideline(1 in

10,000), several trades are above it, with scaffolding trades having a 1 in 5,400 rate, roofing having a 1 in 3,800 risk and steel erection having a 1 in 3000 rate. It would therefore appear that some trades retain levels of danger which require urgent improvement. Injury rates are similarly high. Davies and Elias (2000), in calculating variables which affect overall regional industrial injury rates, concluded "Comparison of the size coefficients indicate that employment within construction has the largest effect upon workplace injuries". While certain trades may contain more inherent dangers than others, the rate of injury in the most dangerous trades still appears to be unacceptably high. This leaves the question of whether the CDM Regulations have reduced the rate of fatalities or injury in these and other trades. Brabazon, Tipping and Jones (2000) were not able to do a statistical examination to compare trends in projects covered by the CDM Regulations with projects which were not covered, because of a lack of data. They were also unable to analyse injury trends by size of company for the same reason. However, the rate of injury in scaffolding, roofing and steel erection are also "higher than most other trades within the industry and there has been no perceptible reduction in the rate of major injuries since the introduction of the CDM Regulations" (2000.14) They were also able to conclude that "employed workers appear to have an average annual rate of injury over twice that of self-employed workers (1 in 15,000 compared to 1 in 35,000). However, there is uncertainty in these figures in regard to the estimated ratio of the employed over the self- employed over the five years".
(2000.23). The available evidence clearly indicates that the employment status of workers is significant in assessing the likelihood of their being injured, as is the particular construction trade in which they are engaged. Action Point 16, in Revitalising Health and Safety, relies on a number of assumptions, which are not necessarily true. In the first place, the CDM Regulations themselves, may not ensure effective management throughout a project. Brabazon Tipping and Jones conclude that a worker in the three most dangerous trades has a 1 in 100 probability of having a fatal injury in a 40 year working life (2000.13). The CDM Regulations, also, do not seem to have evened out the risk in relation to other trades. Para 76 of Revitalising Health and Safety associates the CDM Regulations with clarity in the definition of responsibility in contractual chains.

Clarity does not, though, appear to translate itself into any equalisation of risk on the ground. Some trades certainly remain far more dangerous that others, though all are potentially subject to the Regulations. It is therefore doubtful as to how far the Regulations go towards the achievement of the other aim of Action point 16- ensuring that " the same protection is provided to all workers regardless of status". In "Professional Policy Making in the Twenty First Century", one of the `Characteristics of modern policy' is that it should be outcome focussed - in other words, it should aim to deliver changes in the real world (2.4 Fig 1.). This example, in Revitalising Health and Safety, demonstrates the difficulty of such a project.

5.25 Finally, the HSE data is inadequate for a thorough examination of the safety issues concerning sub- contracting and self employment in construction. No-one really knows how many small companies or self-employed contractors are engaged in the construction industry. It is not possible to compare complex contracts where the CDM Regulations apply with those where the Regulations do not. There is evidence that the Regulations have improved safety - Brabazon, Tipping and Jones found, in response to their `consultation' that most of their respondents thought the Regulations had been either very beneficial , or slightly beneficial. This, however, is not a very precise measure. In terms of policy development, the possibility that the data kept by the regulator is inadequate must pose real problems. In `Professional Policy Making in the Twenty First Century', the `Core Competencies' of Professional Policy Making include the statement that policy making should be "forward looking- takes a long term view, based on statistical trends and informed predictions, of the likely impact of policy". In this context, the tools of competency appear inadequate.

5.26 The final issue to be considered is that of risk assessment. " Good Policy Making" Part 2 para 1.1 makes it clear that "If your proposal deals with a risk, then you will need to make a simple assessment of the risk". As seen in Chapter 7, the concept of risk assessment lies at the heart of existing Health and Safety legislation. As a result of the European Directive , enacted into English law in the Management of Health and Safety at Work Regulations 1999. S3 (1) , every

employer must make a risk assessment of the risks to employees and to those not in his employment who might be exposed to risk arising from the employers undertaking. S3(2) gives a duty to the self-employed to make an assessment of risks to themselves and others not in their employment. An employer of more than five people must record the assessment. In both cases, the assessment must be "suitable and sufficient". They must also review the assessment when there have been significant changes. Risk assessment is important in Health and safety provision in two ways- firstly in ensuring that employers identify and analyse hazards and make the information available to employees (s10). In this sense it is part of the managerial process of dealing with Health and Safety issues. Secondly, risk assessment is an integral part of the process of deciding whether the employer has done all that is "reasonably practicable" to deal with the hazard. Here, it is a factor in defining the employers legal duty to act in relation to a substantive hazard. As a result, the concept of risk assessment will affect all proposals for new or amended regulation of hazards in a layered form, represented in fig 1. Initially, risk assessment will be used in determining whether legal standards or other obligations should be imposed in respect of a hazard, secondly it will be used managerially by an employer to define the arrangements he will make for dealing with the hazard, and thirdly it will be used to decide whether these arrangements were adequate to absolve the employer from legal liability. The issues of risk assessment in relation to health and safety at work is discussed in more detail in Chapter 7. The basic point, though, is that risk assessment, with its focus on cost/ benefit analysis, is essentially a managerial technique. It is related to an appraisal of the effects on businesses, and its preponderance does not encourage policy-makers to give due weight to the broader public welfare aspects of policy development.

Conclusion

5.27 The HSE is not a fully independent agency because ministers have first call on its resources. Pierre and Stoker(2000) describe the blurring of boundaries between public and private sector, increased influence of pressure groups, and increased emphasis on small businesses. The underlying tenets of the modernising government initiative are identification of stakeholders, demand for

outcomes and systems management to ensure cross department action. These tenets have been adopted by the HSC/E. Indeed, they are consistent with values of much longer standing which, as will be seen in chapters 6 and 7, have been developed over time. In particular, the cost/benefit analysis has been used by the Courts and HSE in determining when an employer has acted 'reasonably' , and so fulfilled his obligation. The effect of current government tenets of policy making is that they confirm and institutionalise this approach, and legitimate it through its consonance with other fields of policy formation. This means that, in terms of research question 2, managerial values have been consolidated at the heart of policy making, and institutionalised. An examination of the `Revitalising Health and Safety' process reveals that it embodied many of the principles of better policy-making contained in the 'modernising Government' initiative. It included the identification of stakeholders, who were consulted both informally at the initial stages, and later as part of the formal consultation process. The document goes on to set targets for the reduction of accidents and ill health at work, and identifies action to be taken to achieve this[24]. All this is measurable. It also stresses the role of `partnership', particularly between employers and employees in the workplace, but also between different branches of government. The position of employees as 'partners' was mainly discussed through the role of safety representatives, which appears to involve the incorporation of the safety representatives as part of the firms safety management 'team' and which could diminish their ability to represent.

5.28 The `Modernising Government' initiative also creates a system where small businesses must be consulted. The Small Business Service has a right to be involved where new measures which may affect small businesses are proposed. These are generally businesses where there are fewer than 250 employees. One issue is whether this may, alongside the emphasis on business generally, lead to an imbalance in policy making against public welfare considerations. Secondly, there is an issue concerning the question of when an individual may be considered a small business. The HSE makes efforts to consult with small

[24] Largely by the HSE

businesses, but there are large problems, for example, where there are high numbers of individuals working as independent contractors, which make it difficult to ensure that all interests are considered. Measures which sound sensible in the context of organisations often do not address the problems of this growing group. An examination of the Construction (Design Management) Regulations 1994 illustrates this. Here, the lack of accurate statistics produced by the HSE makes it difficult to gage the exact extent of the problem, but available research does indicate that the regulations have not really achieved their end of providing the same protection for all workers regardless of their status.. Further, it is debatable whether the Regulations are capable of delivering the 'real world' outcomes emphasised by current government processes. This is a particularly interesting example, since it is a classic piece of 'enforced self-regulation'[25], where the law is used to create management structures, in this case across employing organisations, rather than to impose standards. In terms of research question 2, this must call into question the appropriateness of 'goal setting' regulation in such complex situations. It is a further recommendation of 'Revitalising Health and Safety' that the approach contained in these regulations should be applied beyond the construction industry, to other situations where there are chains of contractors. This is certainly an area where health and safety provision needs to be improved, but in 'Revitalising Health and Safety', the policy-makers appear to have simply taken the ideas thrown up by the consultation process, including the assumption that the CDM Regulations work well, without seeking empirical confirmation of this. In relation to Research question 3, it is surely incumbent on those making a policy be more than merely responsive in such situations.

[25] See Chapter 1.

CHAPTER 6 INTERVIEWS

Research Question 5. What is the dynamic of influence in the development of policies on health and safety regulation?

6.1 The purpose of this chapter is to investigate the dynamic of influence in developing health and safety at work policies by comparing and contrasting the views and perceptions of representatives of organisations with an interest in the health and safety policy process. In 1999, the Parliamentary Select Committee on Environment, Transport and Regional Affairs conducted hearings into the working of the Health and Safety Executive. They reported in 2000. Interviews were conducted in organisations which submitted memoranda to, and gave evidence to, these hearings. This group was selected since it had shown a desire to participate in a key health and safety policy area. Interviews were conducted in all the organisations which actually gave evidence, except for the Department of Environment, Transport and Regional Affairs itself. The Department was only able to offer an interview with a Press Officer, who was not involved in the policy process. It was decided that this would not be worthwhile. Although the principal aim of the interviews was to examine the policy process generally, rather than to concentrate on the Select Committee hearings, interviewees from four of the seven other organisations called to give evidence before the Committee were among the individuals who actually gave evidence on behalf of their organisation. The interviewee from the Institute of Directors had prepared the Memorandum which was sent to the Select Committee, but was not asked to attend. The other interviewees were either successors in office of the individuals who attended, or had a serious involvement with health and safety policy making for their organisation. The initial intention had been to interview more than one person in each organisation, to ensure validity. However, this was not possible due in the main to the limited numbers of individuals concerned with health and safety policy in most of the organisations, as opposed to substantive issues of health and safety. Two individuals were, though, interviewed at the Health and Safety Executive. It was, unfortunately, not possible to interview

the senior policy advisors at the T.U.C. and the C.B.I., who were unavailable for interview for a thesis. It would have been desirable to have included their perspectives. The list of organisations and interviewees is set out below:

Organisations and Interviewees

6.2 Health and Safety Executive

Mr Ian Greenwood, Leader, Strategic Policy Team, Strategy Division (Policy responsibility for Consultations)

Health and Safety Executive

Ms Nancy Park , Policy Officer.

Royal Society for the Prevention of Accidents

Mr Roger Bibbing Chair of Policy Committee, gave evidence at Select Committee hearing

Centre for Corporate Accountability

Dr. Gary Slapper, gave evidence at Select Committee hearing.[1]

Pesticides Trust

Ms Alison Craig. Gave evidence at Select Committee hearing.

Institution of Occupational Safety and Health

Senior Policy Officer[2]

Union of Construction, Allied Trades and Technicians

Health and Safety Officer

Trades Union Congress

Ms Maureen Rooney. T.U.C. nominated Health and Safety Commissioner and a member of the T.U.C. National Executive Committee.

Confederation of British Industry

Mr. Rex Symons. C.B.I. nominated Health and

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[1]Representatives from some organisations did not have a formal post.

[2]Representatives from other organisations wished to be referred to by post only.

Safety Commissioner until 2002. Member of C.B.I. Health and Safety Committee. Attended Select Committee hearing.

Broadcasting, Entertainment Cinematograph and Allied Trades Union

Health and Safety Officer.

Institute of Directors

Mr. Geraint Day, Policy Advisor for Health and Safety. Drew up memorandum for Select Committee but not asked to give evidence.

6.3 The interviews were recorded on tape, and then transcribed. The main aim of the interviews was to gain insight into the relationships and interactions which inform the dynamic of influence in health and safety policy making. To achieve this, the material was collated in relation to the following issues:

1. The context- the type of organisation represented and its relationship within the regulatory system
2. The individuals and organisations way of thinking about health and safety policy and their view of the dynamic of influence
3. The experience of process evidenced in the interview.

It was then organised around the following headings:

1. HSE Consultations:
    a.. The Informal and Formal Processes
    b. Who is Involved in the processes?
    c. Incorporating the results of consultation
2. The Health and Safety Commission
3. Parliamentary oversight by the Select Committee.

The material in the interviews was then developed into a narrative, which appears below.

HSC/E consultations

The Informal and Formal process

6.4 The HSE/C interviewees see the development of policy in what one described as a layered process, with three identifiable stages. The 'top' layer is the formal statutory consultation process, which is transparent and depends on a standard set of criteria. Behind that layer is a discussion stage, which is engaged before formal consultation, where the Commission has no clear view of the policy issue. This, again is a formal and transparent process, where a discussion document would be issued and opinions formally invited. Thirdly, "underpinning all that is the dynamic of the policy process itself where the vast majority of HSEs business lies. The hidden part of consultation if you like, in other words those informal discussions with stakeholders about the genesis of the idea from the development from proposals. .... It has to be unofficial because at that stage you are probably dealing with some very sensitive issues on both sides - the Commission will not have reached a view so the HSE cannot commit to a line; the stakeholder may actually expose things in confidence which on the public record they may not be prepared to admit to." The interviewee from the T.U.C., who is also a Health and Safety Commissioner, confirmed that ".... this clearly does go on"- it was also apparent from this interview that the main channel for the informal process is through the H.S.E. officers. The C.B.I. interviewee, who was also a Commissioner, confirmed that "there is informal discussion, one does er, give an opinion, and this is important at the stage of formulating policy." In the description of this stage as one which "underpins" the whole process, the H.S.E. interviewee indicated that in his view these discussions were absolutely central in shaping what he called the HSC/E s "line". This was confirmed by the statement that there is "....great emphasis on collaborative working because the commission, for example, does not take notes and never has done, its general approach is one of working through consensus. That doesn't mean to say it won't take tough decisions where it has to, but it has a preference for making sure that people understand the arguments and where possible are capable of accepting those arguments as the basis of upon which its advice to ministers will go ahead." The interviews clearly demonstrated: firstly, that, when compromises are negotiated, a hegemonic view of policy issues and outcomes is generally established; secondly, that a substantial and

crucial element of the process occurs outside of the formal procedures.

Who is involved in the process?

6.5 Both interviewees from the HSE described those involved in the process of consultation as "stakeholders". In terms of the formal process, it was clear that the H.S.E. holds what one interviewee called the "Consultation Directory" and the other the "corporate list". This is a database of people and organisations who are sent consultation documents. This database is historically evolved, and consists of individuals as well as organisations. However, as one interviewee said, this " .... is not the only source so, for example, we hold the corporate list, (the Consultation Directory), and we refresh that on a quarterly basis. But colleagues are at perfect liberty to add to that list." It was clear that the H.S.E. policy officers occupy a power position, since they select names from the database to receive particular consultation documents. The nature of this was elucidated in the following passage:

"The only thing they can't do- they can't-we have a small core of people we must consult because there are a few statutory situations where we must consult. For example, the nuclear industry is one. Now we have devolution, we would always consult Scotlands' Parliament and the Welsh Assembly. Apart from that our list is advisory, it is intended to inform people, so a lot of our colleagues use it wholesale. Others, because it's a specialist area, will have their own list.

Qu.: So not every consultation goes to everyone on the directory?

A: It's a judgemental area [sic]. But that is simply us contributing to them. That does not stop them from contributing to us, because we would always issue a press notice."

This interviewee appeared to be concerned not to leave the impression that the list narrowed the range of people to be consulted, and he indicated that the policy officers ensured that the widest range of groups and individuals were consulted. Membership of the list is clearly important. It means that the individual, or body, is likely to be contacted by the H.S.E., in which case they will not have to actively find out about the consultation and take the initiative themselves. However, it is also clear that the officials of the H.S.E. have

broad discretion both to include a wider range of people and organisations than appear on the Consultation Directory, and also to exclude those who they feel are not appropriate. Indeed, the implication in the interviews is that in specialist fields, the Directory could be ignored altogether, though this was not positively confirmed. It is certain that the Directory is there for reference, rather than there to describe parameters. The role of the H.S.E. policy officer is therefore pivotal, since it is the policy officer who decides who will be sent details of each consultation.

6.6 The H.S.E. interviewees revealed that responses from the press notices on the H.S.E. website, and from the link to the UK Online page on consultations, would be taken into account. The H.S.E. has recently set up its own consultation page, which contains details of both open and closed consultations. [3] This makes the consultation documents easily available, and gives a range of further information. It also gives a summary of 'Responses to consultative documents', though few documents are at present included in this section. An examination of the consultations for which responses appear reveals that substantial numbers of responses are generally received, though the numbers do vary between consultations.[4] The HSE interviewees were also asked, in the context of levels of response to consultations:

"Qu. If the press have picked up the press release, would that significantly affect matters?

A. I don't have any evidence one way or another. The people most likely to pick it up, in general terms, would be the specialist Health and Safety press, where [sic] we get good press from them. Although- I was thinking we did one on smoking some time ago. That hit the news big time- quite a large response on that one."

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[3] www.hse.gov.uk/condocs/

[4] For example, the consultation on "Health and Safety Responsibilities of Directors March 2001" brought 462 responses, with 1500 copies of the consultation document sent out directly, and the website was accessed more than 11,000 times.(CD167, Annex A), whereas "Regulating Higher Hazards, exploring the issues Jan2001" had 70 responses from 61 different organisations and individuals.(HSC/02/51). Responsibilities of Directors has been an issue in the wider press, and this may account for the high level of interest in this consultation.

As is clear from this response, little actual research seems to have been done by the H.S.E. on levels of response to consultation, and further research on this would be appropriate. There was, though, some evidence that other groups perceive that levels of publicity are important in determining the amount of attention that issues receive. For example, the interviewee from the Pesticide Trust said " Pesticide incidents are ranked very high by the HSE because they do receive public attention. The do give priority to pesticides, and they regard us as stakeholders.". Neither of the HSE interviewees, though, appeared interested in giving credence to the role of publicity in determining policy priorities, except where it works through their formal channels in eliciting public participation in consultation. The aspiration which underpins the process was described by one H.S.E. interviewee thus: "The aim is to invite opinions from as many UK citizens as possible."

6.7 As one of the HSE interviewees indicated, the HSE has developed its use of the internet in order to increase the availability of information. This, she indicated, may benefit small businesses, so long as they use the internet. While the H.S.E. website is reasonablely accessible, the UK Online website also mentioned in the interview[5] covers all central government consultations, and anyone attempting to find those concerning Health and Safety at Work needs to be persistent.[6] The recent evolution of the H.S.E. website has certainly improved access for organisations and individuals seeking information about the formal process, and made it easier for them to participate. However, although a wide range of opinion is received, the process of canvassing replies to the consultation is not perfect. The Pesticide Trust pointed out that although pesticides form a clear area of interest within health and safety generally, there are at least 26 websites which they should monitor regularly."We have been discussing how to improve our monitoring of websites generally, and this is something we are trying to improve. But it is really a matter of how much time we have available". Such smaller bodies

[5]www.ukonline.gov.uk/CitizenSpace/CSConsultationList/

[6]On 28/12/02, for example, 157 consultations had to be sifted to find the one open H.S.E. consultation- Cd186- amendments to the Asbestos Regulations.

who may not have the time or resources to monitor the internet are dependant on the H.S.E. officer to ensure they have a copy of the consultation document. Even if they are on the Consultation Directory, the question of whether they are in fact circulated depends on the perception of the H.S.E. officer. As one interviewee said "We are not omniscient and there is bound to be somebody who we miss".

Incorporating the results of consultation

6.8 Once responses have been received, they are then entered into the policy making process. One HSE interviewee made it clear that it does not make any difference whether the view comes from an individual or an organisation, all will be taken into account. The full responses are not forwarded to the Commission for consideration- rather, they are summarised by the H.S.E. officer. Both HSE interviewees believed that the replies needed to be summarised (and, indeed, edited) so that the information would be manageable for the Commission. They said that full texts are available for public scrutiny, which appears to ensure transparency in the process, since any interested party can read the summary and judge whether it is fair. This seems to be a reasonable position. However, the raw responses contain such volumes of information that it is unlikely that there will be frequent or serious scrutiny of the summaries. Considerable reliance is therefore placed on the H.S.E. officer to ensure that the Commission receives a fair picture of the responses. An examination of the summaries of responses on the website reveals that they are analysed according to sector[7]. This reinforces the tripartite nature of the process, but it could also have the effect that the comments of individuals who do not represent organisations, are difficult to classify. Generally, those who reply appear either as representatives of their organisation or sector, or they do not find themselves mentioned in these particular summaries. The R.O.S.P.A interviewee , speaking about the way that the consultation had

[7]"Health and Safety Responsibilities of Directors" provides a typical example, where the views are summarised for each question under the headings "Employers and Trade Associations, Trade Unions, Local Authorities/ Local Authority bodies, Professional and other bodies".

worked in the "Revitalising Health and Safety" initiative, thought the process had shown some benefits - "That is one of the most promising things in 'Revitalising'-- it allows ideas to surface. To be fair to them, quite a lot of things, particularly the stuff on education, ...wasn't [sic] an idea that came from the executive, that came out of the consultation. But a lot of them had to be saying the same thing in order for the executive to say, that is a point we missed. So a single good idea would get lost".

6.9 It is more difficult to address the question of who is involved in the informal process which underpins the development of the consultation, because the process itself is opaque. Both H.S.E. interviewees believed that most people likely to be concerned in any particular policy issue were consulted. As one said "in developing the consultation document, the project officer will have had an enormous range of contacts already and so all of those people are likely to be within the loop". So the knowledge of the H.S.E. officer is expected to repair any deficiencies in the Consultation Directory, and they have discretion to circulate anyone whose opinion is not otherwise solicited. It is clear that considerable reliance is placed on the H.S.E. officer to conduct this informal process effectively." The interview with the Pesticide Trust revealed a possible problem with this system. This organisation has a liaison relationship with one of the HSEs Principle Inspectors, in the Field Directorate. When asked how the Trust is involved in the HSE policy process, the interviewee replied " We find out about them through **** [8] in the operations directorate. He is responsible for letting us know. We have this contact who would generally inform us. I have recently pointed out to him my great difficulty in keeping informed about what is happening in the HSE, and we have gently complained to him. Though there are websites, I don't feel that we are being kept informed." The interviewee went on to say, concerning her organisations' involvement in consultation "They keep us informed and up to date about their initiatives, for example about G. P. monitoring about pesticide ill-health, but I

[8]A named inspector

can't remember a consultation from the HSE".[9] While some gentle consultation may be happening through the Pesticide Trusts' contact at the HSE, it must be pointed out that he is a member of the Inspectorate, not the Policy Division. It is possible that this organisation has missed out in the consultation process through a lack of understanding of the internal organisation of the HSE. Although the HSE interviewees made it clear that anyone who asked would be placed on the consultation directory, the Pesticide Trust representative, (who is her organisations principle liaison with the HSE) was not aware of the process. The Centre for Corporate Accountability was another campaigning organisation. They, it is understood, have recently been added to the consultation directory. R.O.S.P.A. and I.O.S.H both regard themselves as campaigning organisations. They, though, appear to be, as the I.O.S.H interviewee said "inside the loop" of consultation. B.E.C.T.U and U.C.A.T.T. both wanted to be involved directly where there were particular issues of interest to their members, though in both cases, their involvement seemed mostly to be in relation to the formal process. The Institute of Directors was generally satisfied with its level of participation. Again, they wanted to participate where issues were raised which were of particular interest to their members. The other organisations where interviews were conducted were tripartite bodies, with members on the Commission. They were generally satisfied with their level of inclusion. Further research is needed to discover how well the system works, and whether smaller organisations do achieve a satisfactory level of consultation on the issues which concern them. There does, though, appear to be a desire by a number of organisations, and a perceived need, to be "within the loop". This phrase was used by several of the interviewees, including one from the HSE. The focus of further investigation could well be to investigate the whether there are "insider" and "outsider" organisations in respect of health and safety consultation, and, if so, to study the implications of this.

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[9]An examination of HSE 'Closed Consultations' between Jan 2000 and Dec2002 reveals that, although no consultations were specifically about pesticides, at least 12 consultations were published which were about chemical hazards in general, and which might have interested this organisation.

How do respondents exercise influence?

6.10 One of the answers to the question of why some consultations attract large responses , while others have comparatively few, gives a significant indicator to the way the dynamic of influence works in relation to Health and Safety policy[10]- "the pre-consultation has been good, so you only get a few people replying. The other (reason) is, you know, 'apathy rules ok' - we've no way of testing either of those obviously".This implies that the interviewee views the pre-consultation process as likely to be effective both in identifying and in ironing out possible areas of contention., before the formal process of consultation begins. It is also clear that it is the norm for the H.S.E. officer to engage in the informal procedure. The following exchange took place when one of the interviewees was questioned about the way in which the informal process worked:

Qu Presumably the tripartite bodies have a bigger input when you do the unofficial shaping of the issues at the initial stages?

A. Well its quite likely that they will want to- er- involve themselves , but I wouldn't characterise that as a -er- disproportionate interest.

Qu Im not saying that, but as a matter of availability?

A. Yes, indeed, after all its -er- I think almost inevitable, because the Commission will have started the process of saying, " well we want to consult on this" .and therefore the T.U.C./ C.B.I. members will become immediately aware that the work is in hand on this.

Qu. And will also have the opportunity to feed issues in, that they are concerned about?

Yes, yes.

This interviewee was anxious not to give the impression that the T.U.C. and C.B.I. had any advantage over other interested groups in shaping the consultation agenda. When asked about their influence in respect of the formal process , he had already answered, "everybody gets the same dibs [sic], if that's what you mean", and made it clear that the views of these bodies were not

[10]See footnote 2 above, for example

given any greater weight when the formal submissions were made to the consultation documents. However, even though this was agreed with some reluctance, it is apparent that they do occupy a key position in the shaping of the consultation document. These groups are aware of the issue at an earlier stage, have longer to develop their own views, and are in a position to get their own concerns on the agenda before any formal consultation begins. It is also implicit in the answer, that other groups, such as the Institute of Directors and the Association of Small Businesses who have representatives on the Commission, have a similar advantage. This may also extend to other organisations who are frequently consulted. It was clear that all the interviewees also saw the importance of informal discussions both with the H.S.E. and among themselves. The C.B.I. interviewee confirmed this "....naturally, our position evolves through discussion on the broadest possible front." The extent of the actual influence of any particular organisation, though, is difficult to gauge. The interviewees from the H.S.E. were sensitive to allegations of 'capture' of the H.S.E. or the policy process by any organisation, and were careful to deny that this had happened. - "....but that's (the reaching of agreement) not the same as has been implied by some observers about a cosiness of relationship. You know these people do approach things from different sides of a political divide and there are regular and robust exchanges of views." This exchange of views was further described in the inteview with the T.U.C. representative on the H.S.C.,concerning her discussions as a Commissioner, which are sometimes part of the preliminary process, before concrete proposals have been produced, " I would never take a decision at the HSC meetings without taking account of what the T.U.C.s position is ....Once there we act as individuals in the sense that we speak in confidence - things are not attributed to people - there's a freedom to express oneself at the meetings, but if I was not aware of a particular aspect of an issue that was going to come up, I would consult with other colleagues and would take into account what the T.U.Cs position is. But that is not to say I would always run with that, because my own union, for instance, would have differences with the T.U.C. about different aspects. So I have my own opinion, but I try to do it from an informed point of view." So the robust discussion is not simply across a political divide.

This Commissioner clearly acts as a delegate, rather than a representative, and expresses views which sometimes reflect broad perspectives beyond the particular tripartite body for which she was appointed, for example, where this Commissioners' own union disagrees with the T.U.C. opinion.

6.12 All the interviews referred to the need to reach agreement as the main structural outcome of the process. It is clear that all the discussions are designed to arrive at significant hegemony concerning the direction of particular proposals. This may not always be achieved. One of the H.S.C. interviewees pointed out that " ...this is not something designed to reach agreement at all costs. There will be a recognition - and the Commission has from time to time actually said 'no we are not prepared to take a decision now because they cannot reach agreement' "[sic].

It is clear from the interviews that the aim of the HSE is to build hegemony, and to move forward on issues only when this has been achieved. In doing this, HSE policy officers hold a key role. Theirs, though, is not the only influence. There are clearly pluralistic discussions, both at the consultation level, and in the Commission, where a range of opinion is taken into account.

The Health and Safety Commission

6.13 The H.S.C. has the statutory role of initiating and developing policy on Health and Safety at Work. It is a tripartite body, and, as has been seen,[11] the members are influenced both by their own organisations and sometimes by the need to take broader perspectives. The R.O.S.P.A interviewee underlined the need for a broad composition of the Commission so that it would provide a voice for a wider range of interested parties, including the public- " there is a representative of the public in so far as you can do this, but the world of work has changed - there should be representative for professionals involved in health and safety." He acknowledged that this would mean a change in the

[11]See para 6.10

present balance, but believed that this was necessary. The CBI interviewee , on the other hand, said that he believed the existing tripartite system worked very well. He pointed out that there are, at present, nine Commissioners, and felt that they currently represented a broad range of opinions. He believed that this was particularly important- "We have a system where we, and the other tripartite bodies, brief the Commissioners, so that they have a good understanding of the whole range of views on various issues. This is really important in developing their understanding, and because the system works through the reaching of agreement". The range of influences was indicated by the T.U.C. interviewee, who is also a member of the Commission -" Ideas don't come from one avenue. Sometimes we have to react to Europe and sometimes we are pro- active with a European dimension -erm -we react also to government initiatives because different ministers have different priorities ....but the experts that we have in the executive are steeped in the work that they do and- erm - they are terrific. But there's also the Advisory Committees and they discuss topics that they are familiar with and come up with ideas. The Heads of that particular sector will come along to the Commission and say 'we have been working on this and we need to do this that and the other". The R.O.S.P.A interviewee raised two issues, which are relevant here. Firstly, " There is a weakness in that the HSE still considers itself to be the competent intellectual authority when it comes to looking at the way forward". This was said in connection with the consultation process, but the issue which underpinned many of the points which he made was that he would like to see more opportunities for professional advice to be given from outside the HSE. It was clear from the interview with the Commissioner that she regarded the HSE as the competent professionals, whose advice carried particular weight in helping the Commissioners to assess the ideas and proposals received from other sources.[12] Secondly, the R.O.S.P.A. interviewee felt the Advisory Committees were not as effective as they could be - "they tend to be sounding bodies."This is probably true. However, it was also clear from the T.U.C.

[12]The provision of professional advice to Ministers, and when requested by the Commission, is one of the responsibilities of the HSE under the Health and Safety at Work Act 1974 s 11 and 14.

interview that their role has been substantially enhanced recently and that there are real attempts to improve the expertise in these Committees. The argument raised in the R.O.S.P.A. interview is one for a greater role for health and safety professionals in health and safety policy making.[13] This would certainly change the present hegemony.

6.14 One of the particular features of this interview was the respect which the Commissioner had for the H.S.E. officials.

"I take direction from the Secretariat, they are superb. And lots of them have actually been inspectors so they've- they are not just civil servants doing an administration job, they are actually doing something they are really interested in. And I think that thats a bonus if you've got someone doing something that they are committed to." Clearly, a body which has been held in high regard was likely to be regarded as authoritative in most circumstances. It also means that the officers of the executive are in a position to exercise considerable influence in policy decisions made by the Commission. The T.U.C. interviewee explained that a considerable amount of the Commissions time was spent in the consideration of papers presented by the HSE officers. It was clear that in the past, the Commission had been more inclined to respond to an agenda set by the Executive, rather than to take its own policy initiatives. In this respect, there appears to have been some change in recent years " I think that there's been a real change in the emphasis of work and I think that Bill Calahan[14] has been has to be given full credit for this, because he has been honest with everybody and said, 'Look, the Commission needs to be seen to be setting the priorities rather than reacting all the time to the executive. The Executive have to be told what we see as the priorities and they have the expertise the knowledge and know

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[13]There has long been debate about the role of the Commission. The Robens Report, which advocated a Health and Safety Authority which differed in a number of respects from the one created in the Act, saw their equivalents as operating like non-executive directors in a public company (1974.34.118).They would "....bring to the Managing Board 's policy deliberations their experience of a wide variety of walks of life and areas of interest".The current Commission does reflect a wide variety of interests, including representatives from local authorities, a consumer association and a member of a Health Authority.

[14] Chairman of the Commission

how to carry it out. We are becoming less and less reactive to the Executive. Its more and more us saying to the Executive well, we've discussed it, this is where the emphasis should lie' .....I think that that [sic] has strengthened the effectiveness of the Commission."(T.U.C.).

6.15 The HSC also seemed to spend time on issues arising from government policies.

".Qu. Would you say that government policies have a great deal of influence on the way the HSC sets its priorities?

A. Resources are always a problem. Take the railway industry for example. Far too much of our work has been reacting to disasters on the railway. I'm not saying that we shouldn't be doing that but there just seems to have been a preponderance of that in the last few years. Theres whole chunks of - -not just the resources, but the energies, because what has happened has been horrendous." (T.U.C.). This raised the issue of the extent to which political issues may affect the policy process at the H.S.C. The interviewee responded that there was no "cold hand of government". However, there was clearly a degree of influence exercised by ministers. "Well the railways are at the forefront of a lot of the work at the Health and Safety Executive and the Health and Safety Commission as well. .. I think that HSC and HSE are pro-active on their priorities but they are reactive to the government and lots of the things that we want to move along can be shifted or sidelined when - if something like the Cullen report has to be done" (T.U.C.).This was an indication of the dominance of the views of government. It was clear that the H.S.C/Es agenda was subject to the need for government to be seen to be dealing with sensitive issues, and the implication was that there is less pressure for government to take on board the agenda needs of the H.S.C./E. The point was elaborated thus: "There are priorities, but its done on a pragmatic basis as well as common sense. Things have to be justified, why not. But if a minister comes along and says well this is a priority for our department and it has to be done by yesterday and I'll give you some resources to deal with it, then it will be taken on." (T.U.C.) This was corroborated in several interviews , for example "The one whose will is most likely to prevail given any contentious issue- not if there's

any consensus, that usually means where there is no money or politics involved.-, where there is anything contested my understanding is that the locus of power is with the ministry" (Institute for Corporate Accountability)
However, although the government may direct the H.S.C/E to attend to certain policy priorities, that does not necessarily mean that they will achieve the outcome which they desire. This is particularly true when the desired outcome challenges the established hegemony
"Q: Reading the 1994 Review of Health and Safety, it seemed there that the tripartite bodies and the H.S.C had worked closely together to defend its position?
A: I think that that is unquestionably the case".(H.S.C.)

Parliamentary oversight of the HSC/E

6.16 The interviewees from the Centre for Corporate Responsibility, R.O.S.P.A. and the Pesticide Trust all actually gave evidence before the Committee. The interviewee from the Institute of Directors drew up the memorandum which was presented to the Committee, but was not called upon to give evidence. The experience of all these of the process of producing memoranda and the administration before the actual Select Committee hearing appears to have been a positive one. Most groups felt that the procedure was transparent. The Centre for Corporate Accountability interviewee, for example, said "I found it very thorough and conscientious thing . It was quite an inspiring part of the democratic process to be dealing with the secretariat.", and the Pesticide Trust interviewee felt that " The administrative support was very efficient. It was also open and friendly." All of the interviewees felt that they had sufficient time to draw up their evidence, including the representative from the Pesticide Trust who managed to survey her members, and presented the results in a Supplementary Memorandum, " This had not been done previously. We had two to two and a half weeks to do it in. Resources were not a problem." R.O.S.P.A. also had no resource problem, "We can always do with more resources, but we have researchers, so were able to gather people we

needed".

6.17 The actual hearing of the select committee was not comfortable for everyone. The Pesticide Trust interviewee said " It was the first time I had been to a Select Committee, and I found it very intimidating. Not in a bad way- but it was intimidating. .... It was a fair scrutiny, though." The Centre for Corporate Responsibility interviewee, who said that the procedure was "very formal", agreed that there was a real attempt at scrutiny - "The evidence was very probing, and the MPs had prepared the background,". However, this interviewee felt that there was not really a genuine search for knowledge., since some members were asking questions with a particular agenda in mind. He believed that "The HSC/E Select Committee was a genuine attempt at oversight, but I would perhaps query whether the mindset- whether there was too much acquiescence in the status quo." This was particularly the case in relation to the Committees attitude to resources for providing health and safety, "Greater resources could be made available through parliamentary pressure". The precise nature of this disappointment was clearly related to outcome, " When you get the opportunity to speak to 25 of them around the table to say to them that institution needs to be better resource, if the result of that story is that because of the attitude of at least fifteen of the people around the table that is not going to happen, then despite all the good things that I said about the thing, then it leaves one in a depressed state rather than an optimistic one about what's going to happen." (CCA). The Pesticide Trust interviewee was also disappointed about the outcomes because she was ".....disappointed they did not pick up on focussing more on chemical health and safety." She found it difficult to assess the progress that had been made since the Hearing, or whether the select committee Report had made any difference on the ground "The survey results were quite critical of the HSE, but it is difficult to monitor whether things have improved. We have a scattering of contacts with the public. The law is so weak that they are almost always frustrated. I must say, though, that there has been nothing quite as bad as the evidence we quoted in that survey." R.O.S.P.A., was also frustrated that their own issues did not receive sufficient attention, "Right at end we managed to squeeze in a bit about

road risk, ... but as a campaigning organisation what you want is M.Ps to pick up on your areas of concern I am not sure we were able to do this. ....My general impression is that a lot of M.Ps don't really understand what the health and safety at work, or the health and safety system is about, and, while there can be no statutory requirement for competence to be Members of Parliament, there ought to be some er...". This is a rather harsh observation, which may have really reflected the difference of priorities between the interviewee, who was concerned about a list of particular health and safety issues[15], and the members of the Committee, who were conducting oversight of operation of the Health and Safety Executive. This interviewee thought that" The MPs may debate health and safety issues, but they don't really deal with particular hazards or issues of health and safety. That's done by the executive". He went on to say, "The Select Committee is sort of background music as a whole, it serves to underline the importance of health and safety and from that point of view is a good thing- but the opportunity to do a more piercing analysis and develop more precise recommendations (was lost)." He did not seem to perceive any stringent calling to account of the HSE by the Committee. The interviewee from the Centre for Corporate Accountability was also disappointed in the outcome of the hearing, but from a different perspective. One of his concerns about the HSE was that "..... because of chronic underresourcing they have to rely on the reporting of incidents by the institutions that may be offenders. That would be regarded as woefully inadequate by most. The thing is very badly resourced. and Parliament is the social institution that could do something about that." The Select Committee did not make any recommendation about any increase of resources, including for the enhancement of the reporting system.

6.18 It appears, according to the interviewees, that the administration of the Select Committee hearing was well organised, and the members were reasonably well prepared and advised. All the groups interviewed were, though,

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[15] "We have key issues which we focus on, and they are: occupational road risk; accident investigation; director action on safety and health; and performance measurement and targets".RO.S.P.A. interview

disappointed in some way about the results. This may have been because there was a hope that the Select Committee would deal with substantive issues which interested that particular group. But sometimes the disappointment was related to what can reasonably be seen as a failure of oversight, such as the failure to tackle the problem of resources for enforcement. It was evident from the interviews that the Committee had focussed on issues such as the way in which the HSE prioritised its work. In doing so, it examined some detail of how the HSE works within the present system. But it did fail to ask relevant questions about the system itself. Its recommendation did not, therefore, look for radical change.

CHAPTER 7

ENFORCEMENT POLICY SINCE 1974

Research question 3 How pro-active a role should the State take in protecting people from hazards at work?

The Health and Safety Executive and the Legal Framework

7.1 As explained in Chapter 4, the Robens Committee recommended [1] that an `Authority for Safety and Health at Work' should be created with "comprehensive responsibility for the promotion of safety and health at work". The Report maintained (1972.12. 41) that: "One main objective of reform of the statutory arrangements should be the creation of a more unified and integrated system to increase the effectiveness of the states' contribution to health and safety at work.". This was because the Committee believed that the best way of ensuring the co-operation of the different bodies which it sought to involve was to ensure a unified administration. This was enacted in the Health and Safety at Work Act as the establishment of the two linked bodies- the Health and Safety Commission and Executive[2]. Current government policy expresses considerable satisfaction with the framework set up after the Robens Report. **The Health and Safety at Work Act 1974**, itself, was given explicit approval in the recent policy document `Revitalising Health and Safety', which said " The Government considers that the basic framework set up by the 1974 Act has stood the test of time. This provides for goal setting law, taking account of levels of risk and what is `reasonably practicable', with the overriding aim of delivering good regulation that secures decent standards and protection for everyone". (1999.2). A key aim of the new legislation was that current standards should be maintained and improved via a dual approach, which kept the existing regulation and then overlaid it with the principles and

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[1] 1972.36.115-6

[2] See Chapter 5.1

duties.

7.2 The new Act was, like the previous Acts, an enabling one. As Baldwin and McCrudden (1987) pointed out "It was acknowledged that increased reliance would be placed on rules that were subject to little parliamentary control, but Robens thought this was necessary". This is an important criticism of the outcome of the legislation. It meant that the Health and Safety Commission and Executive (HSC/E) were set up with considerable powers to draw up and approve Codes of Practise and Guidance [3], although the relevant minister must agree and may himself make Statutory Regulations without reference to Parliament. This means that many standards are currently set without Parliamentary debate.[4] It is true that delegated legislation has been in use systematically since the **Factories Act 1901**[5]. However, in recent years there has been no major Statute, and Parliament has not had the opportunity to discuss the plethora of regulation which has accrued.[6] Many of these regulations have a `goal seeking' element, as the HSE explained in `Reducing Risks, Protecting People' 1999, "The general approach is to set out the objectives to be achieved and to give considerable freedom to dutyholders as to the regime they should put in place to meet these objectives. However, this is not universal. As explained later in this document, there are circumstances where the enabling powers of the HSW Act have been used to enshrine

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[3]Health and Safety Act Work Act s16

[4]Though the House of Commons Select Committee on Environment, Transport and the Regions examined the working of the Health and Safety Executive and Commission in 1999-2000. This is the only recent Parliamentary scrutiny, and was not related to substantive standards.

[5]See Chapter 3

[6] Some of these Regulations have made major changes -eg the 1992 Management of Health and Safety at Work Regulations which came into effect on 1st January 1993 and 1st January 1996 (made pursuant to the EC Health and Safety Framework Directive 89/391/EEC . These include the Workplace (Health Safety and Welfare) Regulations 1992, SI 1992/3004; other important Regulations include the Reporting of Injuries Diseases and Dangerous Occurrences Regulations 1995 SI 1995/3163and the Fire Precautions (Workplace) Regulations 1997 SI 1997/ 1840

regulations on specific measures for ensuring that the risks[7] from certain hazards are properly controlled - extending in certain circumstances to proscriptions or to the establishment of a licensing or permissioning regime for certain activities"(1999.6-7 .8). As the HSE itself admits, it has not been possible to dispense with standard -setting regulation and it is simplistic for the authors of `Revitalising Health and Safety' to describe and treat the law as purely goal- setting. In fact, the law is complex, taking in not only the duties and standards enacted by Parliament, the Regulations and Codes of Practise published by the HSC, but also the interpretation given by the courts, and the structures of legal precedent. It is clear from this that both legal[8] and self-regulatory approaches are in use. The HSE would give formal approval to the Codes and Guidance which it considered worthy, legitimating them as descriptions of good practice. Robens was well aware that in advocating increased use of delegated legislation, he was recommending the use of something not subject to Parliamentary scrutiny and approval. He felt, though, that the advantages of increased flexibility, ease of introduction and revision, and ability to reflect new developments, outweighed this[9]. Codes of Practise, were seen by the Robens Committee as part of the voluntary system, to be made by industry itself[10] .The Act, though, gave greater power to the HSE than was envisaged in the Report. It is clear that the Committee did not see the use of Codes as a substitute for the use of regulations. They were firmly placed as a regulatory tool of the voluntary sector. The Report showed appreciation, though, that "The question of the desirable balance between the use of statutory regulation and the use of non-statutory codes of practice is a controversial one." (para 143). This balance was, in fact, not only controversial at the time, but it later provided an opportunity for the proponents of deregulation to use existing concepts to justify the limitation of state regulation of health and safety. As Dawson (1988 .267) indicated, the

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[7] 1999.36.115-6

[8] See Chapter 1

[9] 1972.45.143

[10] 1972.30.96

Secretary of State for Employment told the HSE in 1979 that they must consider the overall economic implications before they put forward new regulations, and any proposals were subject to careful scrutiny. The HSC/E itself admitted in its' Review of Health and Safety Legislation (1994), "....most UK health and safety regulations introduced since 1980 were brought in to meet EC and international obligations, primarily EC. They cannot now simply be removed". (1998.102 .7). Here, they clearly accept that new Regulations were only generated through national mechanisms in the most exceptional circumstances. On the other hand, the ` Review' also explains that "Approved Codes of Practice, which acquired legal standing through their approval by the Health and Safety Commission, have developed quite differently from the Robens model. "They are now almost always produced by the Commission itself, and not by industry; they are often applicable across the board, and not just to a specific sector; and they tend to combine practical guidance with legal commentary and interpretation." (1972.22. 24). In other words, by 1994, what was once envisaged as a key self-regulatory activity to be performed by industry had instead been taken over by the Regulator. The `voluntary Codes of Practice' which the Robens Committee advocated had gained some of the characteristics of regulations, but lacked the most important aspect- that of direct legal enforceability . Robens' hope for the idea of increased reliance on voluntary Codes of Practice was that "The means used should encourage industry to deal with more of its own problems, thereby enabling official regulation to be more effectively concentrated on serious problems where strict official regulation is appropriate and necessary."(1972.148).

7.3 Hawkins (1984. 3-5) outlines the aim of a compliance approach to regulation as being to prevent harm by the negotiation of future conformity to standards which are administratively determined. Robens recommendations went further than this by expecting the regulated industries to also set the standards (albeit with some supervision from the HSC/E)in drawing up the Codes of Practise. This does not appear to have worked. The involvement of industry is now limited to and dependent upon consultation procedures

introduced by the HSC/E. [11] Further, it is the HSC/E which must now devote its' own resources to the production of new Codes of Practice, rather than simply monitoring the activity of industry bodies in this respect. Given the fact that Codes of Practice have taken on so much of the appearance of direct regulation, it is not surprising that the `Review of Health and Safety Regulation' found that employers were confused and frequently misinterpreted Codes of Practice and Guidance as setting out mandatory standards(1994.22.26). The recent policy document 'Revitalising Health and Safety'(1999), does not review the working of Codes of Practice. However, perhaps it should consider the question of whether it would be worth making some or all these Codes into direct regulation. Although the issue of reasonableness is a thread running through a number of these Codes, many involve the straightforward setting of standards. If these were published as Regulations, the complex issue of reasonableness and the need for cost/ benefit analysis would be removed from some situations. This would help the HSC/E to fulfill its commitment in `Revitalising Health and Safety' to remedy the complaint that many small firms find little clear advice available "through a range of information products including clear, straightforward sector-specific guidance supported by case studies" (Action Point 25). Indeed, one of the major points of unification in the wake of the Robens Report was that the civil approach was brought into the criminal duties, including the concept that risk should be assessed, and that costs and benefits should be evaluated. The HSE, in `Reducing Risks, Protecting People' (1999) makes the point that "The resources devoted to establishing sound information and intelligence on risk account for around 25% of HSE's total resources."(1999.72). It is clear that the duties are to be interpreted taking into account a wide range of factors in each case. It is very clear that this review of policy is not intended to reconsider the fundamental duties of Health and Safety . The stated aims are:

"* to inject new impetus into the Health and Safety agenda;

* to identify new approaches to reduce further rates of accidents and ill health caused by work, especially approaches relevant to small firms;

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[11] See Chapter 6

* to ensure that our approach to health and safety regulation remains relevant for the changing world of work over the next 25 years; and

* to gain maximum benefit from links between occupational health and safety and other government programmes." (1999.8).

None of this involves any review of the nature or extent of the standards, nor any comprehensive independent assessment of how they have worked.

7.4 There are two approaches at the heart of the legislation, one based on standards, and one based on duties. Robens did not see any dichotomy or any problem in this - indeed, he saw the two approaches as a source of strengthening enforcement -" The limited nature of some of the present work of the safety inspectors derives from their pre-occupation with- and indeed to some extent their dependence upon- a large number of detailed statutory regulations unrelated to any over-riding general requirement. ..... When an inspector visits a workplace, he should be concerned with the total picture as much as with those particular details which happen to have been made the subject of specific regulation; and for this he needs a broad statutory mandate."(1972.41.131). At the time when this was written, the Factory Inspector was a person appointed by the Crown, holding an independent commission giving the power to act. In this context, a general duty would enable an independent professional to take a broad view of each employer and each situation, and the role of the Inspector would be enhanced. However, **the Health and Safety at Work Act s.19 and s.20** changed this, making the inspectors subject to the enforcing authority. This means that inspectors are controlled either by the HSE, or one of its constituent bodies (eg the Nuclear Installations Inspectorate), or by a local authority, operating within the context of HELA [12].As a result, and with the increased development of managerial practice throughout state agencies, it is clear that the inspectors have far less discretion than Robens envisaged. Agenda setting power[13] can be seen as

[12] Health and Safety Executive and Local Authority Liaison Authority

[13] See Clarke and Newman 1997.64

resting very strongly with the HSE, and, increasingly, with central government, rather than with the inspectors themselves. This is emphasised by the Better Regulation Task Force in their paper `Enforcement'(1999), where, in discussing "Key recommendation 2: Performance indicators should be linked to outcomes and reflect nationally (and Locally) agreed policy objectives", the Task Force makes the point "HSE and LA (local authority) inspectors take decisions in line with the HSCs' enforcement policy statement, published as a leaflet. The HSE has also produced for its' inspectors, and distributed to all Local Authorities, an enforcement handbook which is designed to promote consistent practice within the HSE, and between the HSE and Las. The HSE was also the first central government enforcement body to adopt the `Enforcement Concordat' setting out principles of good enforcement." (1999.12). The inspectors may make decisions based on their view of the whole situation, but this view is formed within the context of a normative framework which , as Clarke & Newman (1997.64) suggest, is concerned with the setting of rationing criteria and the establishment of priorities between different services. A lack of prioritisation within restricted resources accounts for the fact that in 1998-9 only 5.7% of accidents or incidents reported to the HSE were investigated, a fall from the total of 6.9% in 1997-8. In her evidence to the Parliamentary Select Committee on Environment, Transport and Regional Affairs,(1999), in its investigation of the HSE, Jenny Bacon, then the HSE Chief Executive, having set out the criteria inspectors used in deciding whether to investigate an accident, said " We do not set out to investigate all accidents, because there is a law of diminishing returns, and because we are in the business of prevention, so we want to make sure our resources are being used to inspect and prevent things happening rather than spending all the time on investigation of accidents that have happened". (Examination of Witnesses qu 255). She obviously does not consider that the investigation of accidents can have much of a role in prevention. This surely, demonstrates overconfidence in the compliance approach to regulation. Even Acres and Braithwaite (1992), who were committed advocates of self-

regulation and a compliance approach [14], argued that ".... the greater the heights of punitiveness to which an agency can escalate, the greater its capacity to push regulation down to the cooperative base of the pyramid "(1992.40). It is clear from Jenny Bacons' evidence that whatever the individual inspectors' view of the deterrent effect of investigation, it is not a factor that they can take into account in deciding how to prioritise their time. While Baldwin and McCrudden (1984), are correct in suggesting that the influence of Parliament was reduced under the enabling provisions of the Health and Safety at Work Act, a real part of the professional function of the inspectors has also been eroded by recent managerial reform. This means that the HSE holds enormous power, both in relation to the determination of the content of legal regulations and in relation to the interpretation of the duties under the Health and Safety at Work Act 1974. It is not, though, all powerful. Both central government, and the courts also hold important power positions in relation to the enforcement of health and safety at work.

Deregulation

7.5 Although the general duties of the Health and Safety at Work Act appear to be currently synchronised with government policy, this has not always been the case. Perhaps the greatest challenge to the Health and Safety legislation came under the Conservative governments' deregulation initiative of the 1990s.. Although the older legislation based on the setting of standards, and on the European legislation (whose approach also was strongly based in the application of standards [15]), were the major areas which were seen as being in need of review, the Health and Safety at Work Act itself came under attack.. The section which was perhaps came closest to repeal was s1.(2), which states that existing regulations will ".... be progressively replaced by a system of

[14]See self-regulation Chapter 1.23

[15] See Chapter 4

regulations and approved codes of practice ..... designed to maintain or improve the standards of health, safety and welfare established by or under those enactments". In other words, the commitment that any new provisions should maintain or improve safety was a source of concern. Ultimately the view of the HSE in its' 'Review of Regulation: Main Report' 1994, prevailed, and the provision remained. The attack, though, exemplifies the view of deregulators taken by Bain (1997.180) who states, "In the USA and in Britain, deregulation supporters have followed similar strategies. Firstly, they want to curtail the role of the state as much as possible in formulating and extending health and safety legislation. Secondly, they aim to reduce or abolish the role of state agencies in developing, overseeing and enforcing existing health and safety policies." In fact, it would have been difficult to repeal this S 1(2), since the Treaty of Rome states that "Member states shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers."(ART 118a). This point was appreciated by the exponents of deregulation, who saw European regulation of health and safety as a barrier to successful deregulation in Britain. As Bain describes, this suspicion of European regulation became clear when a group of Deregulation Task Force members, CBI representatives and German business people was created by John Major and the German Chancellor Helmut Kohl to identify and monitor European Union proposals for regulation which they regarded as burdensome. They reported on a number of measures, including the Working Time Directive proposals [16].

7.7 While government representation and negotiation was able to water down some of the European proposals, the main component of the deregulatory attack within Britain took the form of procedural barriers, as Beck and Woolfson (2000) have indicated. They give the example of the Construction (Design Management) Regulations 1994[17], where the HSE was faced with both a six month delay, and an independent consultants' report before the

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[16] See IRS Health and Safety Information Bulletin 244 1996

[17] See Chapter 5

Regulations could become law (2000.44).

Risk Assessment

7.8 The other facet of the deregulators' approach was an attempt to change the concept of risk. This strikes at the heart of the legislation, since risk assessment is an integral part of the concept of 'reasonable practicability' which lies at the core of the major duties. The movement for change can be detected in the HSC Annual Report, 1996-7, which says " Underlying our approach to all activity is the concept of tolerability of risk. Risk assessment is an increasingly important part of decision-making processes within government and it is important that the approach to risk assessment is consistent".The reference in the Annual Report to consistency indicates the strong pressure for centralisation, as the concept of risk assessment permeated through government. It would appear that this is an example of coercive isomorphism,[18] where the HSE is responding to both formal and informal pressures from central government. This pressure is currently exerted through bodies such as the Cabinet Office, and the procedures described in, for example "Better Policy Making and Regulatory Impact Assessment (2002)[19] They posited certain predictors of the extent and the rate at which organisations change to become more like others in their field, and one predictor which appear to have great relevance here is predictor a-2 "The greater the centralisation of organisation A's resource supply, the greater the extent to which organisation A will change isomorphically to resemble the organisations on which it depends for resources."[20]. As Bain (1997) points out, after a series of budget cuts in the 1980s, the HSEs enforcement division was subject to 'market testing' from 1993, and a cut of 105 in the number of inspectors plus a 2.5% budget cut (over all divisions) in 1993-4, and a further 5% cut in 1995-6. There was considerable pressure to adopt a view of risk

[18] see DiMaggio & Powell 1991.67

[19] See Chapter 5.

[20] DiMaggio and Powell 1997.74

which was consistent with general government policy, to fend off further cuts. As far as `tolerability of risk' in concerned, the concept of `reasonable practicability' has always allowed that there are some risks which must be tolerated - but the deregulation myth demanded that health and safety duties should be seen as absolute, as Beck and Woolfson (2000 . 44) pointed out. They go on to describe how the deregulatory changes involved an attempt to shift the concept of risk assessment towards a `balanced view', which emphasised cost, particularly in relation to small businesses (p44-5). The HSC, in its Enforcement Policy Statement (1996) certainly steps towards this thinking, particularly by adopting the idea of `proportionality', which means "relating enforcement action to the risks" (para7). The Report goes on to state - "When the law requires that risks should be controlled so far as is reasonably practicable, enforcing authorities considering protective measures by duty holders should always take account of costs as well as the degree of risk...."(para9). Until this time, the concept of cost benefit analysis had demanded that benefits should be given at least an equal weighting- and the HSC was careful about the way in which it abandoned this- "... In general, risk -reducing measures would be weighed against associated costs. If there is a significant risk, the duty holder must take measures unless the cost of taking particular actions is clearly excessive compared with the benefit of risk reduction." (Para9). It is, though, clear that cost is emphasised, and the judgement involved in the equation is tipped towards ensuring that employers are not expected to carry too high a burden of expenditure for safety matters. This is the current HSC policy statement on enforcement.[21] Interestingly, though, there appears to be some dissonance in the way that the Executive, which has to apply the policy, approaches the issue. The way it is interpreted is evidenced by the discussion document `Reducing Risks, Protecting People' 1999, where the HSE describes its policy on risk assessment in detail., " Thus we use risk assessment essentially as a tool for extrapolating, from available data, on our experience of harm or for compressing a large amount of scientific information and judgement into an estimate of the risks. The policy

[21] A new policy is in the process of production.

process then couples the scientifically- based judgements about risks with policy considerations about the approach to their control."[22] . This gives an appearance of neutrality, based on `scientifically based judgements'.The problem is that there are different ways of assessing risk , which may arrive at different conclusions about the same hazard. A number of these are discussed in `Reducing Risk, Protecting People'. Perhaps the most significant views, though, are contained in Annex3, where it is made clear that the legal position on risk remains the one described in the (civil) case of ***Edwards V National Coal Board 1949 1AER 743***[23] where the test is whether there is a `gross disproportion' between the risk and the `sacrifice' in money, time or trouble, needed to avert the risk. The view taken by the HSE is stated in 1999.17.23 " The test of `gross disproportion' when weighing risks against costs implies that, at least, there is a need to err on the side of safety in the comparison of safety costs and benefits. In short, case law requires that there should be a transparent bias on the side of health and safety". Clearly, there is a disparity between the view of the Commission and the view of the Executive. The shift which Beck and Woolfson analysed does not appear to have translated into the practice of the regulators. The main reason for this appears in the reference in para17 to the case law. The HSE , as a prosecuting authority, encounters judicial policy regularly. This is well established, and does not seem to have changed substantially on this issue since the Act was passed. The courts have interpreted the concepts of `reasonable practicability' and `risk' in the criminal cases brought under the Act in a parallel way to the interpretation in the law of negligence. For example, in ***R. v Swann Hunter Shipbuilders Ltd 1981 1AER264*** , the company was convicted of offences under S2 of the Health and Safety at Work Act, following a fire on board HMS Glasgow in which eight workmen were killed. The fire was caused by leaking oxygen equipment, which had probably been used by the employee of a sub-contractor. Swann Hunter argued that it was not reasonably practicable for them to give information or instruction to the employees of a sub-contractor on the grounds

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[22] 1999.27.75

[23] See Chapter 8

that it was reasonably practicable for them to have given information to sub-contractors employees even when considering the safety of their own employees. The Court of Appeal confirmed their conviction, on the basis of the test in ***Edwards v National Coal Board***. Dunn LJ said that it was reasonably practicable for then to have given the information, since their own employees were at risk. Even more recent cases appear to confirm this approach - for example in ***R v Nelson Group Services (Maintenance) Ltd [1999] IRLR 646***, Where a company was prosecuted for contravention of Health and Safety at Work etc, Act 1974 s.3(1) on the basis that an employee's negligence exposed a third party risk . Section 3 of the Health and Safety at Work Act 1974states: "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as it reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

In this case, a gas fitter employed by the company One of its fitters, Mr Brennan, removed a gas fire from a customer's house in Swindon but failed to seal the outlet, leaving a hazard to which the occupiers of the house were exposed. The company argued that it had done everything that was reasonably practicable to ensure that the fitter did his their job properly. In particular it had set out a safe system for doing the work he was employed to do, ensured that he had the appropriate skill and training and had provided him with safe plant and equipment for proper performance of the work. The company was convicted after the judge told the jury that if householders were exposed to risk, the defence that they had done what was reasonably practicable was not open to the company. The Court of Appeal reversed this, saying that because an employer still has the right to argue that he has done everything `reasonably practicable', even though an employee was in fact negligent. The judicial interpretation of the concept of reasonableness has been remarkably resistant to change, and the HSE as a prosecuting authority, has to pay due regard to it.

7.9 The problem appears to be that there are two concepts of risk assessment which are current. One concept it based on what can be termed a `managerial' approach, where there is strong pressure to express the valuation numerically,

and where, although there may be some attempt to address more distant social considerations, these are often based on unproven assumptions, and where there is a strong emphasis on actual outcomes. The alternative appears to be the more legalistic approach, which does not require pseudo- scientific analysis, is more concerned with the evaluation of a broad range of factors, and emphasises the potential rather than the actual. The first approach is exemplified in the HSCs `Review of Health and Safety Regulation'(1994. Annex 12), where it describes its' approach to cost benefit analysis " CBAs aim to make a numerical comparison of costs and benefits. In order to do this, the aim is to measure all costs and benefits on a monetary basis. One principal benefit envisaged for most HSE regulation is a reduction in injuries or incidences of ill health. In valuing this we use an accepted methodology used by the Department of Transport in analysing road traffic accidents." (1994.155 .5). The practical application of this was discussed in Uff and Cullen (2001) in their analysis of train protection systems. They describe how the value of a prevented fatality (VPF) is computed -"The numbers of `equivalent fatalities' in any accident are estimated by counting numbers of major and minor injuries which are then aggregated into an equivalent fatality by counting ten major injuries or two hundred minor injuries as equivalent to one fatality. The figures have little basis other than convention....".[24]. The VPF is used to assess the potential of a system to prevent fatalities. This figure is the one which the Department of Environment Transport and the Regions (DETR) uses for road projects, and the is increased to take account of other benefits of preventing an accident. As Uff and Cullen describe, the HSE has broadly adopted the approach and it has been a part of Railtracks' `safety case' since 1994, although with an additional factor of 2.8 added to reflect a n assumed differential between road and rail safety, "the current VPF figure for fatalities arising from rail accidents, accepted by both Railtrack and the HSE, is £3.22 million.[25]-"This approach was first adopted in the reappraisal of ATP in 1993/4 and has been justified by DoT (now DETR) and HSE on the basis of

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[24] 2001.43. 4.23

[25]" 2001.44 . 4.25

societal concerns about the consequences of major train accidents". The HSE is certainly clear that societal factors must be considered. In `Reducing Risks, Protecting People', the HSE brings this factor into the equation,- "The framing of the issue may point to its being one where a decision on proportionality of action requires information on the risks. In such cases, we need to characterise the risk quantitatively and qualitatively, to describe how it arises and how it impacts on those affected and society at large" (para71). This is, at least, an acknowledgement of the public aspect of health and safety policy, and of the role of the HSE as regulator on behalf of the State. The question raised by the Uff and Cullen report is of how effective this kind of approach has been. The immediate issue which is evident from the Report is of the notional nature of the figures. They give the appearance of scientific legitimacy to what are basically estimates. Secondly, the figures seem to contradict the acknowledgement in `Reducing Risks, Protecting People' that quantitative analysis may also be necessary. There are some risks which are not susceptible to reduction to a numerical figure, and one wonders whether the addition of a factor of 2.8 can accurately represent public concern over major rail accidents. It is the managerial view of cost benefit analysis which demands reduction to numerical figures, not, as the HSE acknowledges, the need to satisfy the legal test of reasonable practicability. This points to a serious problem with the test of reasonableness- it was formulated in the mid 20th century, at a time before the cost benefit analysis gained such overwhelming currency as a management and governmental technique, and, although there are many surface similarities, it is not identical in its legal sense and in its managerial sense.

7.10 Allied to this problem is the central dilemma of the cost-benefit approach. The analysis of a hazard will be done by individual employers. Many of them will be in the private sector, and the directors making the decision will be accountable to shareholders. How far can they be expected to expend resources on hazard prevention to benefit society at large, when this

will reduce the resources available to pay dividend? [26]. How many companies will voluntarily add a societal dimension to their risk assessment, rather than concentrate only on the interests of their own shareholders and their own employees? Again, there is a problem with the concept of reasonableness which makes it difficult for employers to really address the issue. When employers do their risk assessment, what exactly are they assessing? This is identified by the HSE in 'Reducing Risks, Protecting People' (1999), when it makes a distinction between a hazard and a risk. It identifies the conceptual distinction by saying that a hazard is an intrinsic property causing harm, while a risk is the chance that someone or something will be adversely affected- "HSE frequently makes use of the above conceptual distinction in its' guidance by requiring that hazards be identified, the risks they give rise to are assessed and appropriate control measures introduced to address the risks." (1999.16.38). The HSE go on to quote ***R v Board of Trustees of the Science Museum 1993 1WLR 1171*** which decided that as far as the use of the term 'risk' in connection with the Health and Safety at Work Act 1974 is concerned, the word should be interpreted as conveying the possibility of danger, or what is conceptually regarded as a 'hazard'. In considering whether an offence had been committed under S3(1) of the Act, the court of Appeal said "In the context the word 'risk' conveys the idea of the possibility of danger. Indeed, a degree of verbal manipulation is needed to introduce the idea of actual danger which the defendants put forward." The HSE states that it makes use of the distinction as a means of clarifying the issues to be covered in their guidance to employers. The problem, though is that the courts, when they adjudicate on 'risk', are considering the possibility of danger, while the employers, when they assess risk , are likely to be focussed on actual danger. Under S3 of the management of Health and Safety at Work Regulations 1999, an employer has a duty to make a risk assessment of the risks to which employees are actually exposed.[27]. As guidance on this, the HSE produced the leaflet 'Five Steps to Risk Assessment', which fudges the issue by not emphasising that the

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[26] See Chapter 1

[27] Regulation 3

employer should assess the potential for danger, rather than an actual danger. This is compounded by the CBI brief `Health and Safety: the business case', which says "While underpinning the law in health and safety, risk assessment is a fundamental process in business decision making. Businesses do it instinctively, in investment appraisal, equipment choice, customer credit, supplier liability and recruitment. Management of operational risks for health, safety, fire and security is no different. Risk assessment is the process of looking at your workplace to identify areas of risk and minimise them". The emphasis is on the concrete, and the extant. It is very easy for an employer to feel that they have done enough when they have identified to dangerous parts of machinery which need to be guarded, or made a risk assessment of objects falling on a pathway. But risk assessment in its legal health and safety context is more demanding than it is in a business context. It demands both an assessment of the potential for danger and a view of the societal context of the danger. The question, though, is whether even this is always sufficient. Uff and Cullen (2000), in their review of train protection systems, examine the problem in an extreme form. Having quoted the ***Edwards v National Coal Board 1949*** approach to the test of `reasonable practicability', they go on to ask "Given that Railtrack cannot impose safety requirements beyond those which satisfy the test of reasonable practicability and cost benefit, how are safety systems to be imposed where these criteria are not clearly satisfied?"(2000.41.14.17). They examined differing approaches to cost-benefit analysis. One (para 4.21) involved the assessment of future benefits and their reduction to money values, including the prevention of injury and death. The second (para 4.27) involved looking at a range of possible future events involving different types of figures, rather than average figures, and where it is claimed that the provision of an Advanced Train Protection System is supported by the analysis. Both systems are mathematically based, and demonstrate how divergent outcomes can be when based on differing methods of analysis. Uff and Cullen conclude " Any future ATP system will entail expenditure at levels many times higher than that indicated by any approach based on CBA (cost benefit analysis). Despite its cost, there appears to be a general consensus in favour of ATP. The expenditure of massive sums of

public money on ATP rather than on other rail or road safety schemes, or any other causes, is a matter for government, including the European Commission." (2000.45.4.49).Although they write that "It follows that cost benefit analysis, unless so mandated, should not be taken as the only criterion for making a decision on safety issues"[28], Uff and Cullen clearly believe that the situation goes beyond the test of `reasonable practicability', but this is open to debate. It can equally be maintained that the managerial models of cost-benefit analysis which are applied in making the test are wanting, and that Railtrack did in fact have a legal duty to install the system- the argument that the system is too expensive for a private company to afford being an argument in favour of public ownership. Whichever view of reasonableness is correct, the heart of the problem is that Uff and Cullen, the HSE and the Rail Regulator have seen the question of reasonable practicability as bound by its commercial context. The argument for the provision of ATP is a public one, with important implications for both the safety of the public and for transport policy in general. Despite the fact that the test of reasonableness developed in the cases in the 1940s and 1950s is broad and flexible, it is increasingly interpreted in the light of modern management technique. This leads to a narrower view, tied with increasing closeness to notional numerical analysis. In connection with Railtracks' safety case, the HSE, despite its' policy statement, appears to collude in this interpretation. The very flexibility of the concept allows this shift to proceed without serious debate. It is surely time that the concept was reviewed. It demonstrates a major failure in `Revitalising Health and Safety' that there is no consideration of the meanings of reasonableness.

7.11 The problems highlighted in the Review of Rail Protection Systems, though, may not simply be related to the opacity of the concept of reasonableness. There is also the issue of whether sufficiently stringent enforcement measures have been taken. As Uff and Cullen state "It needs to be emphasised, however, that public subsidy substantially distorts the attitude of the operators, including Railtrack, to the fitment of safety systems. The costs

[28]2000.42. 4.20

and benefits to them are quite different to the costs and benefits to the public at large. The interests of the public are represented most closely by HMRI (Her Majesties Railway Inspectorate) and the Regulatory bodies and, in this Joint Inquiry, by the Passengers' Group." (200.39 . 4.10). The Railways Inspectorate is a division of the HSE, and if this body is not acting with sufficient forcefulness, then it is unlikely that the public interest will be adequately reflected in safety provision. It is important to see this issue in the context of the budget cuts and deregulation initiatives of the 1980s and 1990s. Bain (1997) describes the result of this "By March 1995, 85 of the most senior inspectors and medical advisors had left.... . The agency struggled to train new staff, meet inspection targets and to undertake new work. Many workplaces, it was stated , were being visited only once every ten years, and the number of planned inspections fell by one-third between 1995 and 1996."(1997.183). In fact, this is not quite accurate. Planned inspections fell from 165,198 in 1990-91 to 120,080 in 1995-6.[29]. As IRS HSB argues, an increasing amount of staff time was transferred from proactive to reactive workplace visits. Over the same period, the total number of inspections and investigations fell from 191,000 to 149,000. Perhaps more revealing is that the number of `staff years' spent on investigations has reduced from 280 to 180 in the same period. Not only were there fewer investigations, but they were performed more quickly at well. Recent figures are difficult to compare. In 1998-9, there were 183,292 `regulatory contacts', and in 1999-2000 there were 185,000.[30]. This appears to be a real increase. However, this figure is described in the 1999-2000 Annual Report as "Making regulatory contacts including inspections, and investigations with employers and duty holders". The implication is that the figure may include other types of visits in addition to inspections and investigations. This is certainly evident from the Notes, which appear in the Summary of the Report, published in the HSE website. This is states that the figure "Includes all operational site visits, office meetings etc with `clients'". In other words, a substantial investigation may be counted many times, as each

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[29] IRS HSB 261 September 1997, and HSC Annual Reports 1995-6 and 1990-91

[30] HSC Annual Report 1999-2000

visit, meeting and telephone call is added. Further, the production of its statistics in the form of `Key outputs and quality measures' has allowed the HSE to change its system of expressing the number of staff hours spent on investigations. The only `quality measure' now available indicates the percentage of inspector time spent on site contact and related activities. In 1998-9, this stood at 78%, in 1999-2000, it was 75%. The 1999-2000 performance target was 80%. This means that there is no comparable information as to how long is spent on investigations. On the other hand, when Inspectors are not having `regulatory contact', they are likely to be in court prosecuting cases. The publication of a `performance target' for to non-court related activity must place pressure on inspectors to limit the number of prosecutions, which may be time -consuming. A further issue which may have produced pressure to only prosecute in limited circumstances is the practise of measuring prosecutions by the percentage resulting in conviction. This is exacerbated by the fact that the cases are criminal prosecutions, and subject to a criminal burden of proof. Guilt must be established `beyond reasonable doubt', not `on a balance of probability'. In 1998-9, this too was stated as a performance target. In 1999-2000, no target was set, and the percentage number fell from 78% to 75%. In her evidence to the Parliamentary Select Committee [31], Jenny Bacon said "We prosecute where we have the evidence to do so, and where it is in the public interest to do so, and that is standard guidance for any public prosecutor." (Qu265, 23/11/1999). However, when asked whether the decision to prosecute was based on whether the case would take up too much time, she replied "It is not based solely on the use of our time. That is one of the considerations." (Qu 262, 23/11/99). It is clear that resource allocation is an important factor in the decision to prosecute. There is a further implication of this problem. In 1998-9, 83% of prosecutions resulted in conviction (HSE Annual Report 2000.45). In her evidence to the Select Committee, Jenny Bacon enlarged on this by saying "We certainly do not prosecute only where we are certain we will achieve a success. I think it is obvious from the fact we only achieve a conviction in something like 35% of

[31] 1999-2000

defended cases. Overall, it is more like 83%., but in defended cases it is only 35%." (Qu263, 23/11/99). What is obvious from this is that the overwhelming number of prosecutions brought by HSE inspectors are so clear- cut that they are not defended.. This also means that in only approximately 8% of overall cases there both a defended case and a conviction. Apart from giving a strong message to employers that they should hire a good lawyer, it also means that very few cases ever go to appeal. As a result, the opportunity for judicial analysis and review of the criminal law is limited. The opportunity for judges, for example, to develop and update the concept of reasonableness in its criminal context, is reduced.. The low prosecution rate also means that a low proportion of cases where employees suffer major injuries are investigated and prosecuted. In their memorandum to the Parliamentary Select Committee, the Centre for Corporate Accountability criticised the failure of the HSE to investigate major injuries which have been reported.

1996-8	***Injuries Reported***	***Injuries Investigated***	***% of Injuries Investigated***
Agriculture	1,501	378	25.2
Manufacturing	16,842	2,735	16.2
Construction	8,724	1,184	13.6
Extraction	10,146	545	5.4
Service	10,590	523	4.9
Total	**47,803**	**5,365**	**11.2**

Fig 5.1 Reported and Investigated Major Injuries (1996-1998) to Workers by Industry.

(From: Memorandum by Centre for Corporate Accountability to Select Committee on Environment, Transport and Regional Affairs [HSE20]).[32]

7.12 As can be seen from Fig 5.1, the investigation rate is not only low - it varies quite sharply according to industry. The Centre for Corporate

Accountability also point out that actual prosecution rates also vary according to region, with a prosecution rate in Scotland of 6.4%, being less than half that in the Home Counties, which was 13.3%. As they point out, "One of the HSEs 'five principles of enforcement' is 'consistency'. The huge disparities of investigation rate in one part of the country to another, and in one industry to another, appears to be in clear breach of this principle". (para15). The Select Committees recommendations and the response by the government and HSC/HSE includes Conclusion 2, where they highlight the urgent need to improve both investigation and prosecution rates. In its' reply to the recommendations, the HOSED refer to the Enforcement Management model, developed to cover proportionate and targeted enforcement action. The HOSED believe that this will help inspectors to make consistent decisions. This may be true if there are differing practices in different areas, but, with so many standardising policies, it is unlikely that there is any wide divergence. The problem is as likely to concern a differing view of how scarce resources are allocated, and perhaps some regional differences in the priority given to the 'performance targets' for inspectors time.

Key risk areas	***Improvement notices***	***Prohibition notices***	***Information Laid (Prosecution)***
Asbestos	37*		4
Millennium bug	0	0	0
Gas Safety (35 fatalities)	227	37	261
Working Well together Campaign	0	0	0

Agriculture (4 child fatalities, 7 deaths from falling from heights)	6 (Children) 5 (Heights)	6 (Children) 5 (Heights)	6 (Children) 0 (Heights).

* Figure for both Improvement and Prohibition Notices

Fig 5.2 . Compiled from figures in HSC Annual Report 1999-2000

7.13 Fig 5.2 identifies the targeted risk areas for 1999-2000, where the HSE is most likely to apply its' resources. It can be seen that the most significant area of enforcement activity is in Gas Safety, which is in many ways a part of the HSEs' environmental responsibility, and not merely concerned with safety at work. The statistics include, for example, actions against landlords. Two areas had no enforcement actions at all- the publicity campaign concerning the Millennium Bug, and the Working Well Together campaign. The latter, though, involved 1500 contacts by Inspectors. Apart from gas safety, where members of the public are at risk, the policy of targeting, shows little prioritisation of enforcement, both in terms of the selection of targets, and in its' implementation.

In 1999-2000, the percentage of reported accidents investigated rose, from 5.7% in 1998-9, to 6.8%. The Select Committee (reporting in 1999-2000) asked for a 3% increase in investigations over the next three years (Recommendation 2). They also asked for the HSE to consider a change in the weighting given to the factors taken into account in deciding whether to prosecute, and to consider whether some categories of very serious injury should automatically trigger investigation in the way that fatalities do.(Recommendation 4).

7.14 As Bain also pointed out, when the HSC/E was transferred to the Department of Environment (in the wake of `market testing'), in 1995, this was in preparation for privatisation. In `Review of Health and safety Regulation (Main Report),1994, the HSC made its' own view clear. In discussing `Myths and Realities' of safety regulation, it makes it clear that

"The whole philosophy and structure of British health and safety legislation are designed to ensure that the costs which are imposed on business are proportionate to the benefits which can be obtained.". (1994.51. 143).

Prosecution of Offences

7.15 One of the most frequent criticisms of the enforcement system is that the penalties on conviction are too low. Most Health and safety at work offences are punished by a fine, and there is general acceptance that the level of fines has been too low (see for example HSE Press Release C49/98 of 17th November 1998). Changes do seem to be made in response to these criticisms. The maximum penalty which can be imposed by Magistrates Courts was increased for more serious offences from £2,000 to £20,000 in 1992 (see Health and Safety at Work etc Act 1974, ss.1A and 2A, inserted under The Offshore Safety Act 1992, subject to any lower limit specified by regulations (see Health and Safety at Work etc Act 1974, s.15(6)(d)) or by s.33(2). The maximum fine for less serious offences was increased from £2,000 to £5,000. Crown Courts can impose unlimited fines and can impose imprisonment for up to two years for failing to comply with Notices, or for contravening licensing requirements or provisions relating to explosives .The problem, though, is not so much to do with the power of the courts, as with the extent to which they use them. The average fine in 1991/92 (ie BEFORE the 1992 increase in maximum limits noted above) was only £1,134 (see Health & Safety Commission Annual Report for 1991/92, pp 135/136). Tougher sentencing is now normal. The average Magistrates Courts fine or breaches of HSWA ss.2 to 6 in 1997/98 was £6,223[33]

7.16 The same trend to heavily increased levels of fine is also apparent in the Crown Courts. Thus on 27th July 1999 at the Old Bailey a record fine of £1.5m was imposed on Great Western Trains for the accident at Southall on 19th September 1997 when a High Speed Train went through a red signal and

[33] HSE Press Release C49/98 of 17th November 1998

collided with an empty freight train, killing 7 passengers[34] Previously the highest recorded fine had been £500,000 imposed in March 1999 on Balfour Beatty Rail Maintenance Ltd for contravention of Health and Safety at Work Act 1974 s.3(1). Balfour Beatty had pleaded guilty at Chelmsford Crown Court (which imposed the fine) to a charge arising out of the September 1997 derailment of a freight train between Witham and Kelvedon in Essex where Balfour Beatty were repairing the line. Before that the highest Health and Safety fine had been £250,000, imposed on the British Railways Board in 1991 by a judge at the Old Bailey after the December 1988 Clapham Junction crash in which 35 people died.

In ***R v F Howe & Son (Engineers) Ltd. 1999, 2AER 1998***, the Court of Appeal (Criminal Division) set out factors which should be borne in mind by all courts when considering health and safety fines and specifically identified the following as aggravating features: A young man of 20 was killed while cleaning the factory when the vacuum cleaner he was using became live as the result of an electrical fault. The Inspector found a number of serious faults, including that a circuit breaker had been tampered with, and that there had been no risk assessment. The company was a small one, with an annual turnover of £350,000 to £400,000, and a net profit of £30,000.On conviction at Bristol Crown Court, the company was fined a total of £48,000, and ordered to contribute £7,5000 towards prosecution costs. The company appealed, and the fines were reduced to £15,000, mainly because of the resources of the company. The court, though, did believe that the levels of fines were too low, and set out guidelines to be followed in future. The main issues to be considered in deciding the level of fine are :

- how great was the employers' failure in meeting the `reasonably practicable' test;
- the death of a person is an aggravating feature of the offence and the penalty should reflect public unease at unnecessary loss of life;
- the size of a company and its financial strength or weakness cannot affect the degree of care that is required in matters of safety; but the financial resources

[34]see HSE Press Release E144:99 of 27th July 1999

can affect the size of the fine;

- the degree of risk and extent of the danger created by the offence;
- the extent of the wrongdoing- for example whether it was an isolated incident or continued over a period;
- a fine in health and safety cases needs to be large enough to bring the message home where the defendant is a company not only to those who manage it but also to its shareholders.
- the fine should not be so large as to put the company out of business or cause redundancies except where the case is so serious that the firm should not be in business.

The fine may be aggravated where there has been a failure to heed warnings and where the defendant has deliberately profited financially from a failure to take necessary health and safety steps or specifically run a risk to save money. The fine may be mitigated where there has been a prompt admission of responsibility and a timely plea of guilty, steps taken to remedy deficiencies after they are drawn to the defendants attention and where the firm has a good safety record.. These factors were "given unqualified support" by the Lord Chief Justice in ***R v Rollco Screw and Rivet Co. Ltd & ors TLR 29th April 1999.***

7.17 While the level of fines is the area where greatest concern has been expressed, there have also been questions concerning the variety of sentence. The Health and Safety at Work Act gives the courts the power to impose a custodial sentence for breach of the main duties. [35] This is only done in very rare cases. The major penalty used is the fine. This is to be expected where companies are involved. However, there are cases where the employer is not incorporated, or where an individual director or executive is prosecuted for a breach. In some of these cases, it may be reasonable to expect that a custodial sentence may be appropriate. Yet this almost never occurs. The balance of penalty can be seen by an examination of the HSE Register of Convictions. An examination of the convictions relating to the construction industry from 1April

[35] See Appendix B

1999 to 1Sept 2001 provide a sample[36]. During this period, there were 1213 convictions recorded. Of these, all but fifteen defendants were punished by a fine. Four Scottish defendants were `admonished', and one was admonished for two offences, and given a Community Service order for the third. Three English defendants were given community service orders, and seven were given conditional discharges. None were given a custodial sentence, or a suspended sentence. It is difficult to make an absolute comparison, because the statistical dates differ, but during the year 200-2001[37] fatal accident rates in the construction industry are expected to rise by 28% over the figures for 1999-2000, and reach a rate of 6.0 per 1000,000. (See Appendix A).In the context of this rise, it is difficult to believe that all these offences were so minor that custodial sentences were never warranted. This is a matter of judicial policy.

Conclusion

7.18 The view of the former Chief Executive of the HSE , that prosecution does not have a large role in the prevention of accidents, appears to be one which permeates the system. Both from the number of cases prosecuted, and in the penalties incurred, it would appear that there is little incentive for organisations to improve their compliance with the law. The Robens Committee felt that prosecution was a matter of last resort, and that the "provision of skilled, impartial advice and assistance should be the leading edge of the activities of the unified inspectorate."[38] HSE policy since the Health and Safety at Work Act came into force has certainly reflected this, as evidenced by the low rate of inspection where fatalities occur. The Robens Report is not, though, the only factor in the development of this approach. Government deregulatory policies, where State intervention was to be minimised , and where the HSE itself, as a state regulator, came under threat from market testing , created a political environment where a strong use of

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[36] The Register carries convictions from 1April 1999 and is updated weekly.

[37] October-October

[38] 1972.65. 211.

direct enforcement powers would probably have further jeopardised the agencies' position. Likewise, the HSE limited its recommendation and publication of further Regulations and Codes of Practise to those which were necessary to fulfill the British obligation to implement EU directives. In this, the HSE was defending its' position,[39] and complying with its remit. As a result, it has colluded in a hegemonic view of policy, still evident in the recent document "Revitalising Health and Safety".

7.19 While it seems clear that stronger direct regulation is necessary, it would be simplistic to view that as a complete answer to the problems raised by current regulatory policies. As the Robens Report states "There are severe practical limits on the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies".[40] One of the most severe limits is the question of how much resource governments are prepared to give to such regulation. A further limitation is the policy of the HSC/E itself, which places an emphasis on the provision of advice and information in its' internal allocation of the resources which it does receive. An immediate question which therefore arises is whether it is realistic for one agency to provide information and advice to employers and to be the main prosecuting authority? There are arguments which support the current structure, in the concentration of expertise and the development of an overview of the field. However, Inspectors are the interface with the employer. It is surely not realistic to expect them to be both advisory friend and possible prosecutor. There is a strong argument for a greater separation between the advisory function and the prosecutory one. There is surely a need for an independent investigation and prosecution inspectorate, where decisions can be taken without functional confusion.

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[39]The HSEs' `Review of Health and Safety Regulation 1994 is really a very effective defence of the regulatory position.

[40]1972.12. 41

CHAPTER 8 THE CIVIL ACTION FOR DAMAGES

The relationship between civil action and the regulatory system.

8.1 The civil liability of an employer towards an injured worker is decided through two major legal concepts - the tort of negligence and the contract of employment. Actions for negligence and breach of contract developed historically with the aim of providing an avenue for the compensation of individuals for personal injury which they have already suffered. The issues raised by an analysis of these concepts are of particular importance in any consideration of Research Questions 3 and 4- how pro-active should the state be in protecting people from hazards, and how has the balance between voluntary and state regulation developed? This is because the relationship between the individual and the employer lies at the heart of the civil action. The essence of the action is that an injured employee should be compensated where the employer is at fault. This can be regarded as a purely private matter between the two parties, where the State has little or no role. However, this is not an accurate view. In the first place, the State, through the courts, provides a legal structure for the resolution of these civil disputes. This structure, and the legal principles to which it gives effect, were in place long before the Robens Committee reported. It was these principles which Robens used to develop his concept of self-regulation, and which were eventually enacted in the Health and Safety at Work Act. Of particular relevance here is the concept of `reasonableness' and the test developed for it, based on cost-benefit analysis. These were adopted to form the basis of the major criminal duties contained in the Act. Superficially, at least, this change appears to signal a shift from a legal regulatory approach by the State, to a self-regulatory model of state [1]control. In documents such as the government policy paper "Revitalising Health and Safety", for example, the duties are characterised as `goal setting', which contrasts with the `policing' approach of traditional legal regulation. It cannot be disputed that the principles of the civil law have been adopted throughout the regulatory system for health and safety at work. The second set of

[1]See Chapter 1

arguments about the civil action focus on its deregulatory potential to permit the withdrawal of the State from active participation in health and safety provision. Is the potential for a civil claim for damages sufficient to ensure that employers take all reasonable safety precautions? Will such actions result in increased insurance premiums, resulting in the overly-negligent employer ultimately being put out of business through their inability to ensure? In this chapter, the basic concepts and arguments developed in the context of the civil action will be analysed and evaluated.

Some of the core issues

8.2 The essence of the tort of negligence is the breach of a duty of care. It was described by Lord Wright in ***Lochgelly Iron and Coal Co. Ltd v McMullen 1934 AC 149*** as follows " ... negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing". This means that the legal debates concerning negligence normally revolve around three issues - whether a duty of care exists; whether it has been broken and whether damage or injury has resulted from the breach.

8.3 The claim for breach of contract involves an allegation that the employer has broken a duty found in the contract of employment. Some of these duties will be imposed by statute, such as the Working Time Regulations 1998. There is also an implied term in every contract that the employer will provide safe working conditions. In ***Wilsons and Clyde Coal Co. v English, 1938 AC57*** the duty was described as including the provision of a safe system of work, safe fellow employees, safe equipment and safe premises. In general, the principles applied in deciding liability are so close to the principles used in negligence cases that it does not make a great difference which branch of the law is used. Generally, the action for breach of contract will be used for technical reasons- for example in ***Matthews v Kuwait Bechtel Corporation 1959 2WLR702***, the issue was one of jurisdiction - law of contract was used so that a person working overseas could bring his action in England. In ***Johnstone v***

Bloomsbury Health Authority 1991 I.R.L.R 118 the issue was about the contracts of junior hospital doctors. In this case, the contract provided for a forty hour working week. The doctor also had to be available for up to an extra 48 hours on call. This lead to Johnstone becoming ill as a result of working very long hours. He asked for a declaration that he should not have to work more than a 72 hour week, and for damages for injury and loss as a result of the Health Authority breaking their duty of care. The hearing was concerned with technical aspects concerning the selection of issues which could be heard in the case. The court decided, though, that the Health Authority was not entitled to expect the doctor to work for so many extra hours that his health was damaged, and they had to exercise their duty of care in deciding how many extra hours to demand. However there are limits to an employer's duty . For example he does not have a legal duty to warn a qualified senior secretary that she should intersperse other work with her typing to avoid risk of RSI (Repetitive Strain Injury) ***Pickford v ICI Plc 1998 IRLR 435***

In this case, Ms Pickford, who had been a full-time secretary at ICI since 1983, saw her GP in 1989. She was sent to the company doctor about pain in her hands and then saw a consultant orthopaedic surgeon. The conclusion was that the symptoms were work related but non-treatable and that she could either carry on typing and put up with the condition or find different work. After periods of sick leave, ICI terminated her employment in 1989. She claimed compensation for Repetitive Strain injury, later amended to a claim for PD4, which is the official designation for writers cramp as an industrial disease. The House of Lords eventually decided that ICI had no duty to tell an experienced employee like Ms. Pickford how to organise her work ,or to advise her to take breaks. The employer therefore had not broken their duty of care. This appears to contrast with the criminal duty under **s2(2)c Health and Safety at Work Act 1974,** where the employer must provide "such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees" , since it does not appear to give due weight to the need for even experienced employees to be re-trained periodically and have their knowledge updated. Judicial policy is very similar in both tort and contract cases, and they will be

considered together in relation to health and safety at work in this chapter.

8.4 Wedderburn (1986.425) claims " It is not at all clear that we should include, within the `enforcement' of safety, the civil action in tort for compensation that an injured workman may have against his employer". However, an analysis of the civil action shows that it is very much a part of the regulatory process, despite the fact that the aim of this branch of the law is to allow an injured person to claim compensation rather than to directly prevent of accidents. The lack of clarity which Wedderburn refers to is the direct result of the blurring of the `public' aspects of health and safety policy. On the one hand, this is where the issue is most individuated, in a private action between the injured worker and the employer. On the other hand, these civil claims have a strong influence on hazard prevention and the overall regulation of the sector. The TUC, have argued that compensation claims can have a direct effect, and that this could be enhanced.

" There are about 100,000 successful compensation cases every year, but in 1998/99, the HSE prosecuted only 1,797 cases (and local authorities will probably have done similarly"- (`Paying the Right Price' (2000)[2]. In this document, the TUC argues that claims for compensation form an important aspect of the regulation of Health and Safety, and that they could play an even greater part if the recommendations of the Law Commission which would encourage the courts to award punitive damages[3] were to be adopted. This Report (No247, 1997) recommends that punitive damages should be awarded for any tort or equitable wrong (Part vi,19a) , but not for breach of contract (Part vi,19b). The report goes on to recommend:

"20. punitive damages may be awarded in addition to any other remedy which the court may decide to award, but may only be awarded if the judge considers that the other remedies available to the court will be inadequate to punish the defendant for his conduct.".

The government has indicated that it does not intend to implement the Law

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[2] A TUC policy document on compensation for workplace injuries

[3] The main aim of damages is to compensate. Punitive damages are to penalise and are awarded rarely.

Commission proposals, but the TUC has argued strongly that it should reconsider " At a stroke, however, the civil compensation system could begin taking employers to task, by imposing `punitive damages' on top of compensation awards, where a clear warning was ignored" (TUC2000). This appears to be an argument that the civil compensation system could operate as a substitute for the criminal regulatory system. But can the fear of individual action by employees, and the possibility of a resulting punitive award ever be a sufficient constraint to exercise real regulatory power in hazard prevention?

8.5 The Robens Report (1970-72) certainly did not see the civil system as a substitute for criminal legislation. The Report (para 433) concluded that the system of civil compensation had, at that time, a deleterious effect on the effort to prevent accidents. Robens asserts (para438) that ".... the system is costly, and the money spent on litigation would be better devoted to accident prevention." The report was written against a background of criticism, where the ability of the law of negligence to provide an efficient and effective remedy for the injured had been called into question.[4] The Robens Committee called for a major review of the civil compensation system, with a particular view to the examination of its effects on accident prevention. However, although the Law Commission has produced a number of reports on particular aspects of the issue, the kind of review which the Robens Report envisaged has not yet been held. Since Robens, key concepts of negligence and breach of statutory duty have largely been developed through case law. The Robens Committee were well aware that this could cause problems. They described the process as succinct : "In both civil and criminal proceedings, the legal provisions will be tested as to their application to particular circumstances; as to their meaning and exact scope and as to their appropriateness to new, unanticipated situations. They will be subject to arguments based on general principles and to arguments about the interpretation of detail. The courts do not approach individual cases with a view to supporting or strengthening the contribution of the legal rules to safety. They conceive it to be their duty to interpret the law as laid down, and to

[4] See Atiyah (1970)

apply it logically to the particular facts of each case. Such principles as do apply are those which have been developed by the courts to further this process.(1972.185.3). [5] The Report examines how this can have an adverse effect on safety- for example where terms such as `factory' are given a technical legal definition which excludes many premises from the operation of the law.[6] The two particular problem areas which the Robens Committee highlighted were instances where the interpretation of the law diverged from practical safety considerations, and where the law is uncertain. It can be argued, though, that, particularly in relation to the modern development of cost benefit analysis, judicial policies have had a positive effect on health and safety, since they have retained a broader interpretation of the employers' duty.[7] Whether beneficial to a health and safety agenda or not, judicial policy is the primary developmental force in civil claims, and in this respect is an important contributor to health and safety regulation.

8.6 Judicial policy has manifested itself in a number of ways. Perhaps the most crucial of these has been in the concept of reasonableness. In the wake of the Robens Report, which criticised the differences between civil and criminal standards of liability, the test of reasonableness was adopted into the criminal regulation, in S2 of the Health and Safety at Work Act, where the employers duty is to ensure "as far as is reasonably practicable " the employees health, safety and welfare at work. This key regulatory concept is now fundamental to all legal aspects of regulation. A second aspect of judicial policy, as Robens pointed out (para435), is that statutory regulation is subject to intense scrutiny and argument in civil proceedings. Legislation whose primary context may be the imposition of criminal liabilities (eg the Factory Act 1961) may well be the subject of argument in the context of whether the employer had fulfilled their civil duties. There is sometimes conflict in applying a body of legislation to two purposes, and in this context, the aims of accident prevention may

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[5]Safety and Health at Work vol 2

[6]See s175 Factories Act 1961 and cases such as **Stone Lighting and Radio Ltd v Haygarth 1968 AC 157**

[7]See Chapter 7

sometimes conflict with the issues perceived as important in the context of compensation (p185.3) .The consequence of this intense scrutiny is that there is "... constant pressure for extremely precise and detailed statutory regulations which..... has serious limitations when viewed as a contribution to its primary purpose of accident prevention". Statutory regulation rarely addresses both of these conflicting aims well. The danger is that in attempting to do so, statutory measures are framed in an over- complex manner, which may make them fail both as preventative and compensatory measures. In this respect, judicial needs in assessing compensation may adversely affect the framing of criminal legislation, and may also lead to a complex network of statutory regulations which unnecessarily complicate accident prevention measures. This is a different argument from the deregulatory debates of the 1990s, which were ideologically concerned with a reduction in the role of the state in regulation (see Bain 1997.180) Robens attempted to remedy the conflicting aims by recommending (para469) that "The existing statutory provision should be replaced by a comprehensive and orderly set of revised provisions under a new enabling Act. The new Act should contain a clear statement of the basic principles of safety responsibility. It should be supported by regulations and by non-statutory codes of practise, with emphasis on the latter." This was translated, in 1974, into the Health and Safety at Work Act, where, instead of detailed standards, the safety obligations were expressed as a range of duties. On one level, this did simplify the enabling Act. The obligation to do what is `reasonable practicable' was applied both in compensation cases and in determining criminal liability. Detailed regulation, and the development of Codes of Practice and Guidance, which would give a more detailed indication of the standards and actions to be considered reasonable, became the province of the Health and Safety Executive. Unfortunately, this does not mean that the accumulation of detailed provision has slowed since the Robens recommendations, it simply takes a different form. In 1998-9, for example, the HSE produced 66 "formal policy products" - regulations, codes of practice, consultative documents and guidance documents. (HSE Annual Report, 1989-90 34.).

Legal issues - the duty of care

8.7 In addition to these more general matters, there are problems with the substantive law which would make it difficult to view civil compensation claims as an adequate substitute for an inadequately enforced system of direct regulation, in the way implied in `Paying the Right Price'. These can best be considered by an examination of some of the difficulties faced by a plaintiff in establishing an employers' liability for negligence, since this is the dominant form of action, and since other actions, for example, those for breach of contract, tend to face the same issues. In `Paying the Right Price,' it is asserted that "Barely a tenth of those victims with a valid claim actually make one, indeed some estimates suggest it is less than one in twenty. Most of those who do claim do so reluctantly, put off by all the barriers to success, even where the victim is blameless and in need". Even though it is not possible to verify such figures, it is certain that there are considerable barriers which must make many worthy claimants feel that such an action is not worthwhile.
In "Paying the Right price" the TUC admit that "barely a tenth of those with a valid claim actually makes one" (ibid , Foreword). The reasons for this are complex. On the most practical level, the expense and difficulty encountered in bringing a claim deter many potential applicants - and these problems are only partially mitigated by legal aid and `no win no fee' arrangements.

8.8 A second, important factor which may deter a claim, and which, as the Robens Committee pointed out, is unhelpful in ensuring a safer working environment, is the uncertainty of the law- it is by no means certain that the claimant will be able to establish that the employer is liable. The so-called `modern' approach to negligence has attempted to remedy this by the formulation of systematic, general tests. This approach was most clearly formulated in the decision of Lord Atkin in ***Donoghue v Stevenson 1932 AC562***, where the judge sought to clarify the law by describing a general principle which could be applied to all cases where negligence was alleged. In this case he accepted that negligence occurred when a duty of care was broken, and damage or injury resulted. Lord Atkin proposed that a duty of care is owed to ones neighbour, and asked "Who then, in law, is my neighbour? The answer

seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." (p580). Ever since this case argument has raged over whether it is possible to propound a general test in this way, and, if so, whether this was an adequate framing of it. Attempts to articulate and apply a general principle reached their peak in ***Anns v London Borough of Merton 1978 1AC728***. However, about a decade after Anns, judges began to re-assess the concept. In ***Caparo Industries v Dickman 1990 2AC605*** , Lord Bridge expressed the change of view succinctly. He indicated that the law should also draw on concepts of proximity and fairness which "....are not susceptible of any such precise definition as would be necessary to give them utility as practical tests..." (P618). Judicial policy appears to prioritise the need to retain flexibility, so that each case can be decided fairly. While unfair decisions benefit no-one, this change of approach does mean that negligence cases have become far more of a lottery over the last twenty years. This is likely to have a twofold effect on accident prevention. In the first place, many are likely to feel that the effort and resource needed to sustain a civil claim are not worth marshalling in the face of an uncertain outcome; secondly, accident prevention often requires clear guidance and the technicalities often argued to distinguish cases may act to obfuscate the issues which are important to accident prevention.

8.9 Even the most basic issues are open to technical argument. The most basic question in negligence, for example, is that of who owes a duty of care, and to whom? In employment terms, the issue is whether an employer owes a duty of care to employees, to people classified as independent contractors, and to employees of someone else who may be visiting their premises in the course of their work (eg a fireman fighting a fire). This is crucial, since an injured worker can only obtain compensation through the courts if duty of care is broken by someone who owed it to them. There are numerous legal authorities for the proposition that employers owes a duty of care to their employees- a principle clearly stated in ***Wilsons and Clyde Coal Co v English, 1937 AC 57***, where Lord Wright said that the employer must "....take reasonable care for the

safety of his workmen, whether or not the employer be an individual, a firm or a company, and whether or not the employer takes any share in the conduct of the operation" (p84). As Wedderburn (1986 .427) points out, the duty is a personal one. It took a number of cases in the 1930s and 1940s to overcome the view that the worker had not consented, by implication, to run the risk of the employers' negligence simply by virtue of taking the job. The consequence of this is that negligent employers remain liable to compensate their own employees, despite the fact that dangers may have been present from the first day of employment. However, liability depends on there being a finding of fault in respect of the employer. Here can be seen one of the greatest problems of the law of negligence. The individual worker must prove the employers' negligence. They have to find the evidence- and this often means that they must rely on the employer to release it to them. Clearly, this can be impossible if the employer evades demands for the production of evidence, or merely gives no explanation of the events. The courts have mitigated the rule, by developing the concept of `res ipsa loquitur' [8]. In ***Scott v London and St. Katherine Dock Co. 1865 3H&C 596***, Erle CJ said that this doctrine applied where ".... the accident is such that, in the ordinary course of things does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care". (p601). As this case indicates, the doctrine does not dispose of the need to prove that the duty of care is broken - but only gives a means of proving that it has been broken in the limited circumstances where there is no explanation for the events giving rise to the injury- either because the employer chose not to give one, or because the cause of the events cannot be fully determined.

8.10 The employers' duty of care also extends to the situation where a negligent employee injures another - provided that the negligent act was authorised by the employer or where it was so closely connected with an authorised act that it might be viewed as a reasonable method of doing the

[8] "Let the thing speak for itself"

work. However, a self- employed person is in a different position, and so is a prospective employee who is not yet under contract. The employer will not be liable for their actions. A recent example, with broad implications, is the case of: ***Kapfunde v Abbey National PLC and another [1999] ICR 1, CA*** . In this case, the plaintiff worked part-time for Abbey National, and applied for a permanent post. She completed the standard confidential medical questionnaire and indicated that she suffered from sickle cell anaemia and chest infections. This was referred to a general practitioner, who was given an annual retainer to act as occupational health adviser to Abby National. He assessed the questionnaire and advised that Kapfunde's medical history showed that she was likely to have a higher than average absence level. The advice was accepted and Kapfunde was not given the permanent post. The court decided that the doctor was under a contract for services when assessing medical questionnaires completed by prospective employees and was not an employee - in other words, he was an independent contractor. Abbey National was therefore not responsible for his actions. It was also said that the doctor did owe a duty of care to Abby National, but did not owe one to Kapfunde . Finally, the Court of Appeal, to make the verdict absolutely certain, decided that even if he had owed a duty of care to Kapfunde, the doctor had exercised the required degree of skill and care to be expected of an ordinary competent occupational health adviser.

8.11 The Kapfunde case illustrates a number of issues which are important to the regulation of health and safety at work. Perhaps most obviously, it demonstrates that the duty of a doctor asked, as an occupational health adviser, to examine a worker or a workers' records, is to the employer, rather than to the person who is subject to the examination. This clarifies the position of the occupational health adviser who cannot, for example, be expected to give the employee advice about the hazards of their work. Secondly, it illustrates the point made above, that the employer is not responsible for the negligent acts of their independent contractors. This an increasingly important issue, as employers embrace the concept of contracting out, and the terms of contracts sometimes change so that former employees are re-defined as independent

contractors. Far form ensuring certainty in the law, this change in employment practise has pushed it further into the minefield of technicality, since the court must frequently also decide whether a person is to be legally classified as an employee or not. One of the leading cases on this is ***Mersey Docks and Harbours Board v Coggins & Griffiths [1947] 2 AER 345 HL.*** Here, a crane operator was loaned out by the Docks and Harbour Board to a company owning a mobile crane. The House of Lords decided that the Board remained his employer, because they retained the right to control his method of work. More recent cases have embodied a broader test , where the general economic relationship between the employer and employee is examined and a decision reached on the realities of the relationship (see ***Ready Mix Concrete v Min of Pensions 1968 2QB497.***) This had become the usual approach. However, in a recent case it has been decided that the `control test' is the dominant one where the issue is one of `temporary deemed employment'. In ***Interlink Express Parcels Ltd v Night Trunkers Ltd & another Times Law Reports, 22 March 2001,*** drivers supplied by Night Trunkers were loaned to Interlink to drive Interlink lorries. Interlink had a Goods Vehicle operating Licence, but Night Trunkers did not. It was decided that although the drivers were paid by Night Trunkers, Interlink directed the routes, supervised timesheets, specified the qualifications and instructed the drivers on servicing and cleaning the vehicles. Interlink had a right to control how the drivers operated the vehicles, and were therefore the temporary deemed employer. The drivers were covered by their licence. This case demonstrates one of the key uncertainties of the law- that principles may be re-interpreted in the light of particular circumstances.[9] On the one hand, this may be seen as embodying the strengths of flexibility and pragmatism; on the other, the return to an older test has thrown a mantle of uncertainty over other, existing contracts. What is `temporary deemed employment', and when may a person be a "temporary deemed employer" rather than an " actual employer"? May "temporary deemed employment" extend to cover all aspects of the working relationship, or is it limited to certain issues, like the applicability of an operators licence? There will be no answers

[9] See Robens Report 1972.187.9

until future cases either elucidate these issues, or overrule this case.

Flexibility or uncertainty- breaking the duty of care.

8.12 The dichotomy between flexibility and uncertainty extends to decisions concerning the nature and extent of that liability. In general, employers will only be liable for actions which were authorised by them unless the negligent action so closely connected as to rank as a method of doing the authorised act (see eg ***Racz v Home Office [1994] 2 WLR 23*** and ***Cobham v Forest Healthcare NHS Trust EAT case 916/93***). The fluid nature of judicial policy in connection with the operation of the duty of care can be illustrated by an examination of cases concerning stress at work. In general, employees suffering from stress may be compensated for two types of damage: firstly they main claim for injury to their mental health; secondly, they may claim for physical injury, such as repetitive strain injury. Judges have been cautious and reluctant in allowing claims in both respects. Their approach was characterised by Lord Wilberforce in ***McLoughlin v O' Brian 1983 AC 410***, where he identified three factors which limited the duty of care- " the class of person whose claim should be recognised; the proximity of such person to the accident; and the means by which the shock was caused (p422). In practise, the view taken by judges of what constitutes "proximity" to the accident has had the effect of seriously limiting the number of people who can succeed in a claim for purely psychological injury. In ***Frost v Chief Constable of the South Yorkshire Police 1997 1AER 540,*** a number of police officers claimed damages for post traumatic stress disorder suffered as a result of the Hillsborough football disaster. The Court of Appeal decided that employees and rescuers are owed a special duty of care if they are exposed to "exceptionally horrific events" (p552.). As a result of this approach, officers who had been on duty in the stadium, (even those not directly involved in the incident) were able to collect damages.[10]

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[10]However, an officer who was not at the stadium, but who was asked to strip bodies in the mortuary failed to get damages, since the court decided that she merely carried out the kind of duties expected of a police officer after a serious incident.

8.13 There has been a reluctance to allow claims where there is no `horrific event', but where the illness stems from ongoing daily stress. The first case where an employee succeeded in obtaining compensation in these circumstances was ***Walker v Northumberland County Council 1995 1 AER 737***. Walker was employed by the council as an area social services officer. He was responsible for four teams dealing with children at risk. During the relevant period, his workload increased dramatically owing to numerous cases where there were allegations of child abuse. During November 1986, he had a nervous breakdown. He returned to work in March 1987, on the understanding that he would have special assistance and not go back to the same level of responsibility. The support was withdrawn within a month, though the workload continued to increase. By September 1987, He was suffering from stress- related illness again, and had another breakdown. This resulted in his being dismissed in February 1988 The Court decided that the employers duty was to provide a reasonably safe system of work for employees, and to take steps to protect him from risks which were reasonably forseeable. There was no reason to exclude the risk of psychiatric damage from this. The main issue which faced the court was whether there was a relationship of proximity between the employer and the employee, the magnitude of the risk, the seriousness of the consequences to the employee and the practicability of preventing the risk. The Court decided that by 1987, it was clear that Walker was at greater risk of psychiatric damage through stress than other managers, and the Council should have realised that, when support was withdrawn, there was a significantly greater risk of injury to his health unless the workload could be reduced. The Council had acted unreasonably and had broken its duty of care. The Council was ordered to pay damages on the basis that, as employers, they had a duty not to cause him psychiatric damage by giving him too much work and/or insufficient back up support.[11]

It was reported subsequently that Northumberland County Council had decided

[11]The Council had actually dismissed Walker on grounds of ill-health.

not to appeal and agreed damages at £175,000 [12].This was a landmark decision, since it made it clear that Walker could succeed even though he was at greater risk than other managers. The important point was that the employer was, or should have been, aware of this. The HSE has attempted to translate this into simple guidance for employers.[13] The problem, though, remains complex. Walker had already been diagnosed as suffering from stress-related illness, which fixed the Council with knowledge of his condition. Where there is no prior illness, it is difficult to pinpoint the moment when the employer should be sufficiently aware of the employees' vulnerability so that they should act to minimise the stress.

8.14 Central to the issue of whether the duty of care has been broken is the concept of reasonableness. This concept is crucial, because it defines the standard of care which an employer is expected to apply. The test is an objective one, where each employer is expected to act as a reasonable employer should. In both civil actions, and in many statutes, this has been translated as an obligation on the employer to provide safety measures which are `reasonably practicable'. It is in the development of this concept that the civil law has perhaps had the greatest effect on enforcement, since the adoption of a parallel principle in the Health and Safety at Work Act. In ***Edwards v National Coal Board 1949 1AER743***, Lord Asquith said "reasonably practicable is a narrower term than physically possible, and implies that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them- the risk being insignificant in relation to the

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[12]The Times 26th April 1996

[13] A discussion document was issued on the 8th April 1999 "managing Stress at Work", DDE 10 (HSE BOOKS), and there were proposals for a Code of Practise - see HSE press Release C009/99, "Opening the big debate on stress at work" (8/4/99). A further study was commissioned by the HSE was published in December 2000 "The scale of occupational stress: further analysis of the impact of demographic factors and type of job"

sacrifice- the defendants discharge the onus upon them" This approach has been developed over many years . An example of the operation of this can be found in ***Latimer v AEC 1953 AC 643***, where water flooded a factory floor, and, when it drained away, left a slippery residue where it had mixed with oil. The employer tried to remedy the situation by laying sawdust, but they did not have enough to cover the whole floor. Latimer slipped, and was injured on an untreated area. The court decided that the alternative course of action was to close the factory until the floor had been cleaned. This, they decided, was a costly option, and the risk of injury was too low to justify it. Latimers' action for negligence failed.

8.15 This approach has become fundamental to modern safety regulation[14]. It has, though, had a number of baleful consequences for both individuals attempting to gain compensation, and for those attempting to prevent hazards. Firstly, it is an approach which favours cheaper options. For example, where there is a noise hazard, it is much cheaper to provide ear defenders than to provide noise absorbent surfaces, and to buffer noisy machinery. Despite the Noise at Work Regulations 1989, and the HSEs' interpretation in its' advisory leaflet "Ear Protection: employers duties explained", available research shows that there is still an overwhelming use of ear protectors to deal with noisy situations. Honey, Hiller, Jagger and Morris (1996.40) conclude that over 80% of the noisy establishments in manufacturing, and over 90% in other sectors provide hearing protection. On the other hand, only between 19 and 36% of their `weighted respondents' had ticked that they had taken some other measure. The most popular of these other measures was the purchase of less noisy new equipment- something which could be done as part of a structured replacement programme. As they conclude " Altering the building or workplace to dampen noise, requiring suppliers to provide quieter equipment or adapting existing equipment were less common"[15] While there may be

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[14]See Chapter 7

[15] Also "Ear protection should be considered only as a last resort to control noise exposure. Use it as a short term measure until controls to reduce noise levels have been introduced".

technical or other good reasons why some firms have not taken the more expensive options, the judicial approach to `reasonableness' does not provide any regulatory pressure on those who could be more pro-active in looking for solutions. This was realised by the Robens Committee, which recommended that in respect of noise hazards " Cost and competition factors make this a special case where the influence of an authoritative code of practise is unlikely to have a sufficiently rapid effect unless underpinned by legislation".(1972.111.354).

8.16 A second problem arises when deciding what factors to include in the cost/benefit analysis. It is natural for a commercial organisation to consider the effect of safety measures on its profitability, and to examine the benefits in accident prevention to its employees. But how far can it be expected to take account of public policy aspects of safety? The increased privatisation of previously publicly services has brought this consideration to the fore. Uff and Cullen (2001) have pinpointed this issue in their examination of train protection systems in the wake of the Southall and Ladbroke Grove train crashes. Basing their discussion of the test of reasonableness in safety cases on Lord Asquiths' judgement in ***Edwards v National Coal Board (1949 1AER 743*** , they maintain " It is well recognised by decision makers, particularly ministers and their advisers, that the approach to risk must also take into account public reaction to the consequences. Some consequences are regarded ad so abhorrent and intolerable, that the risk of such occurrence must be reduced whatever the cost. Examples are the possibility of nuclear contamination or the spread of CJD. " (2001.40. 4.16) They go on to ask that, since Railtrack ".... cannot impose safety requirements beyond those which satisfy the test of reasonable practicability and cost benefit, how are safety systems to be imposed where these criteria are not clearly satisfied?"(2001.41. 4.17). The short answer is that in this respect the cost/benefit approach is inadequate. Railtrack, and other companies are unlikely to applying more stringent measures than those which are `reasonably practicable' because, of the need of the Board of Directors to account to the shareholders. Their duty is to ensure profitability, a duty which will almost always be perceived to be in

conflict with extra spending on safety measures. One answer might be to adapt or change the approach to give the directors a duty to prioritise safety in these circumstances.[16] Para 69 of the governments' policy document "Revitalising Health and Safety" recommends a reconsideration of directors duties in taking safety decisions, and the publication of a code of practise. However stronger measures than this , including legislation, are probably necessary to effect real change. Meanwhile, in the context of train protection measures, Uff and Cullen state " In the UK rail industry as presently constituted, safety measures going beyond the conventional yardstick might be adopted in response to commercial pressure, particularly if they involve material benefits. However, for the new safety systems currently under consideration, the only means of ensuring fitment is through regulation coupled with the assured provision of adequate funding" (2001.41.4.18).

8.17 The civil system depends heavily on the idea that a balance can be struck between the commercial pressure to maximise profit and the safety needs of workers. As Wedderburn (1986.428) indicates, ".... the employers' duty is one to `take reasonable care for the safety of his employees, not a guarantee of their safety". Some commercial operations are both highly profitable and highly dangerous to workers. Where the precautions to ensure the safety of workers are technically difficult or even impossible to implement, the risk- benefit approach to reasonableness has not , in itself, been strong enough to eradicate dangerous practices . Perhaps the clearest example of this issue is illustrated by the history of the production and use of asbestos. The HSE, in their advisory document "Toxic Substances: Asbestos" HSC/99/91, estimates that up to 3,000 people each year die from asbestos related diseases, and believe that this figure is likely to increase until 2010. Yet, despite many thousands of negligence claims against employers who either manufactured asbestos or used it in their products, it has taken statutory regulation to prohibit the use of asbestos. Although the understanding of the exact nature of the diseases caused by asbestos inhalation has developed over time, there has been an awareness of the

[16]See Chapter 7

hazardous nature of the substance since 1898. This awareness was boosted when Merewether and Price (1930) produced a report which collated the existing information. This report had such impact that the first statutory regulations, ***Asbestos Industry Regulations 1931*** were the eventual result. Indeed, as Steele and Wikeley (1997) have pointed out, this report was still found to be useful in two important recent asbestos cases, ***Margerson v J.W. Roberts Ltd*** and ***Hancock v J.W. Roberts Ltd.***

They were heard together in 1996, and the Merewether and Price report was used to fix the date at which the factory owners had sufficient knowledge that asbestosis was a reasonably forseeable consequence of inhaling asbestos dust and to identify the point where they should have taken measures to control emissions of the dust. These two cases were brought by people whose only connection with the industry was that they had lived close to an asbestos factory in childhood, and had played in the dust around its' loading bay. The major issues were whether the factory owners owed them a duty of care, and whether their illnesses were reasonably forseeable by the owners at the time when they inhaled the dust, between 1934 and 1939. However, Steele and Wikeley (1997)have identified two further factors which have a bearing on the ability of compensation claims to have a direct influence in the prevention of hazards. They conclude - " First, the judge appears to attach no culpability to the former practice, as he outlined it, of preferring to offer high wages and compensatory measures to employees, rather than to spend money on safety features." (1997.275) The company had made no attempt to comply with the regulations, and in fact extracted dust from the factory straight into the atmosphere outside. They found it cheaper simply to pay compensation to those who contracted illness. Secondly, " The judge expressed his displeasure and irritation at the defendants' conduct of the litigation in no uncertain terms, characterising it as `reflecting a wish to contest these claims by any means possible, legitimate or otherwise, so as to wear them down by attrition'." It would appear to be the general policy of the company, and of other companies who were also members of the Turner and Newell Group, to slow down the process of litigation as much as possible, so that it became difficult and expensive for litigants to take their claims through to the final conclusion.

Many would die or give up on the way. The technical nature of the law of negligence is likely to have assisted them in this attempt to evade liability.

8.18 As scientific knowledge of the dangers has progressed, it has become apparent that the only way to really prevent the incidence of asbestosis and mesothelioma is to ban the use of asbestos. It has taken a significant period of time, and further legislative regulation to achieve this. Crocidolite (blue asbestos) and amosite (brown) asbestos were banned from supply or use within Great Britain in 1992, but it was as late as 1999 that a new set of Asbestos (Prohibitions) Amendment Regulations came into force, prohibiting the use of chrysolite (white asbestos), [17]and a separate regulation banned the use of this substance in brake linings.[18] This latest directive was prompted by an amendment to the EU Directive 76/769 EEC, which will prohibit the importation and use of white asbestos in the EU from 01/01/2005.[19] Over the years, it has become clear that the fear of compensation payment has not been strong enough to discourage firms from importing or using asbestos. Indeed, it must be pointed out that it has taken the impending deadline in the EU legislation for asbestos to be banned completely.. While the product remains profitable, some companies will merely place their desire for profit above the risk to their employees and to others. In this respect, the weakness of concept of reasonableness comes from the same source as its' strength. It is a flexible concept, which can be applied in many different working situations. It is also never absolute- courts can take account of the particularities of any situation in deciding the extent of the employers duty. This is the strength of the concept, and one of the reasons for its' survival. However, the weakness arises from the difficulty in deciding how high the standard of care should be. It is difficult,

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[17]Control of Asbestos at Work Regulations 1987 (SI1987No2115) as amended by the Control of Asbestos at Work (Amendment Regulations 1992 (SI 1992No3068) also the Asbestos (Prohibition) Amendment regulations 1999 (SI1999no2373)

[18]The Road Vehicles (Brake Lining Safety) Regulations 1999(SI1999 No2978).

[19]EU Marketing and Use Directive (76/769/EEC) has been amended in 1998. This banns the marketing and use of chrysolite asbestos in the EU from 01/01/2005

under the law of negligence, to conclude that a business activity is so dangerous that it should be terminated. The nature of the test is that where the cost of safety provision is so high that it outweighs the risk, then the employee must run the risk. This is so even where the risk is also high. Since the Health and Safety at Work Act the concept of reasonableness underpins the whole regulatory system, and this serious flaw in replicated throughout. In "Reducing Risks, Protecting People" 1999, the HSE identified an increased expectation for a society free of involuntary risks, and stated the dilemma inherent in modern applications of the cost- benefit approach - "Any genuine discussion quickly raises ethical, social economic and scientific considerations, for example:

* Whether certain hazards should be entertained at all;

* how to maximise benefits to society through taking account of advances in scientific knowledge and technology while ensuring that undue burdens with adverse economic and social impact or consequences are not imposed on the regulated;

* the need to avoid the imposition of unnecessary restrictions on the freedom of the individual;" (para11)

It is clear from this detailed review that the HSE are, in their policy, trying to strike a balance between complex and often contradictory pressures, and that they do have a theoretical willingness to close very dangerous enterprises.[20] The problem is that the risk assessments which most nearly affect the safety of workers are done by their own employers, where commercial pressures are at their strongest. The attitude of the HSE is influential in compensation cases, despite the fact that their main concern is for regulation under the ***Health and Safety at Work Act***. This is because, firstly, the duty of reasonableness demanded under the ***Health and Safety at Work Act*** in many ways mirrors the standard of reasonableness in negligence[21]. Secondly, breach of statutory provision is a factor frequently argued in negligence claims. Even if the Statute relates to a separate, criminal liability, it is easier to argue that the

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[20] See also Chapter7

[21] see Chapter 7

employer who has broken a statutory provision has been negligent . For example, in ***Margerson v JW Roberts*** and in ***Hancock v JW Roberts,*****(1996)** liability towards employees could not be disputed, because the company had ignored the ***Asbestos Industry Regulations***. This is an example of where the standards enacted in as criminal law as Statutes or Statutory Instruments are often relevant to the civil claim. So too are the Codes of Practise and Guidance notes, and even more informal advice issued by the HSE, which frequently seeks to interpret the conduct expected of a reasonable employer. There is a symbiotic relationship between the civil system and the regulator, where the regulations, codes and advice given in relation to accident prevention, frequently lie at the basis of civil claims, while the needs of the civil system for detailed regulation which clarifies issues of fault and risk, and which narrows to opportunity for semantic argument, often shapes the regulations, codes and advice.

Breach of Statutory Duty

8.19 The relationship between the criminal provisions and civil claims is more easily apparent where a person claiming compensation makes a claim for the separate tort of "Breach of Statutory Duty".Where a specific standard is imposed by a statutory provision, there may be an added advantage in making such a claim over use of the law of negligence, since the court may apply the principle of strict liability. This means that the claimant does not have to prove fault. Here, the standard of care and the concept of reasonableness are irrelevant. In order to be strict, though, the duty must be absolute. An example is the duty to fence dangerous machinery, under the **Factories Act 1961, s 14.** Not all statutory duties are included, though. **S.47 of the Health and Safety at Work Act 1974** states that the breach of any of the major duties will not give rise to any liability in tort, nor will the breach of any statutory regulations made under the Act. The effect of this is that successful claims for breach of statutory duty mostly relate to breaches of the earlier legislation. There have, for some years, been calls to repeal the **Factories Act 1961** and the Offices **Shops and Railway Premises Act 1963**, as part of the government

deregulation initiative[22]. Currently, the Better Regulation and Environment Branch (BREB) of the HSE are conducting an assessment with a view to repeal. One of the effects if any such move were to take place would be to reduce the range of safety related regulations where the employer has strict liability. Given the difficulty of proving fault in negligence, this would significantly reduce, for many, the possibility of making a successful compensation claim. Where a statutory provision might be broken, it is common to sue both for negligence and breach of statutory duty. This happened in ***Young v Charles Church (Southern) Ltd & another 1997.*** In this case, Young saw a work colleague killed by electrocution. As a result he suffered from psychiatric illness and stress. He sued his employers for negligence and breach of statutory duty. The statutory duty in question was Regulation 44(2) of the Construction (General Provisions) Regulations 1961, SI 1961/1580, which provides: "(2) Where any electrically charged overhead cable or apparatus is liable to be a source of danger to persons employed during the course of any operations or works to which these regulations apply . . . all practicable precautions shall be taken to prevent such danger." The Court of Appeal (overruling the High Court) decided that the regulation went beyond the coverage of physical electrocution. Protection was also given to employees from any type of injury which could be foreseen as likely to occur when "electrically charged . . . apparatus is liable to be a source of danger". Young won damages on both counts.

8.21 Although strict liability may make it easier for a complainant to win, there are still real difficulties to such a claim. Wedderburn (1971.431-439) described a number of them. In the first place, he pointed out that the Statute must cover the premises where the worker is employed. If the provision broken is the Factory Act 1961, then the premises must come within the definition of a "factory", a matter which is not very precisely determined in the Act, and is open to judicial interpretation. Secondly, the Statutory Duty must cover the particular worker- for example, some work cannot be done by women or

[22]See also Chapter 7

young people, some provisions apply to an employee, or to someone doing work in a factory (so including an independent contractor). Thirdly, the statutory duty must cover the particular circumstances and the resulting injury. In the Young case, the court interpreted the Statute reasonably broadly, but this is not always the case. Technical limitations may be placed on the duty, which allow the employer to avoid liability. As Wedderburn writes " There are fashions and phases in judicial thinking, as in all other areas of life. Many of these interpretations of the law .....seemed to display a feeling that workers claims had gone far enough; the decisions certainly pay scant attention to any policy of accident prevention" (1986.434) This echoes the view of the Robens Committee (1972.186.7). A further issue raised by Robens was the principle of forseeability. This is a principle which is central to the concept of negligence, but which has been adopted in actions concerning breach of statutory duty.[23] The central concept is that compensation will only be paid for injuries which are `reasonably forseeable'. As the Robens report points out, here the law takes a step back from the concept of absolute liability. Although the complainant does not have to prove fault, he has to prove that the consequences of the breach of duty were reasonable predictable. The Robens Committee find this fair, on the grounds that "It is a practical impossibility to require that a person guards against a danger that is not apparent or discoverable".(1972.186.5) However, it does leave a range of problems. If, for example, a person is injured by a hidden defect in the equipment they are using at work, they will have no remedy against the employer even where he has bought the equipment cheaply from a non-reputable manufacturer. This contrasts with the situation of a consumer purchasing goods where there is an implied duty that the retailer will be liable where goods are not of merchantable quality even where the defect was a hidden one.[24]

Conclusion

8.22 In this chapter it is argued that the civil action is of fundamental

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[23]It was brought into English law in **The Wagon Mound 1961 AC 388** an Australian case which came to the English courts on appeal.

[24] S14 Sale of Goods Act 1979.

importance in the regulation of health and safety at work. Perhaps the most direct influence is in the way in which the principles of negligence have been brought into the criminal law as the result of the Robens recommendations. In particular, the adoption of the test of "reasonable practicability" in deciding the liability of the employer was one of the key changes brought about in the wake of the Robens Report. The Robens Committee saw the Act as a unifying one, which would bring together the varied statutory provisions which then existed. The Report was, though, scathing about the effect of the civil action, which has as its' aim the compensation of the injured person, on the prevention of hazards. One major criticism was of the way in which criminal standards were frequently used as a basis of civil claims, on the grounds that "... another result of utilising the same body of law for two quite different purposes is that the task of those who have to maintain and enforce the statutory provisions for accident prevention is made even more complicated" (1072.145.435).
Ironically, the effect of the **Health and Safety at Work Act**, in adopting the concept of `reasonableness' has been to exacerbate this factor, since the test is now used in criminal and civil cases. While it has imported greater flexibility and fluidity into the system, the effect of this change has been to individualise regulation. Within the civil context, the State acts as a passive guarantor of these individual rights. It is a provider, not of `health and safety at work', but of a system where an injured person can act to claim compensation for their injury. This lies at the heart of the Robens dilemma. The Committee realised that the prevention of hazards held a requirement for the State to be more pro-active.
The traditional approach, where the criminal law imposed direct legal standards, unquestionably involved such a pro-active approach, since prosecuting agencies had an obligation to act to enforce the standards. The importation of the concept of `reasonableness' and the test for this, based on cost-benefit analysis, into the criminal law, did in fact signal a retreat from this position. Although the standards remained, the development of duties based on `reasonableness' encouraged a regulatory approach based on consensual compliance, and the application of what Braithwaite and Ayres (1992.49) have described as the "minimum sufficiency principle: the less salient and powerful

the control technique used to secure compliance, the more likely that internalisation will result". Although Robens was in fact advocating a pluralist system, with a place (albeit rather limited) for legal as well as self-regulation, it will be argued [25] that the self-regulatory ideology has become so dominant as to have distorted both the public welfare arguments for legal regulation, and the perceptions of its potential. Reliance on the test of `reasonableness' has also had the effect of creating greater uncertainty of outcome in the regulatory process. The question of whether duties have been broken contains a relative element, depending on economic and business arguments. It can be argued[26] that the test has enhanced the importance of commercial consideration in health and safety provision, so that it is a dominant position. It is difficult to give due weight to the issues of social impact, which may be accumulative, but which do not necessarily bear heavily in arguments relating to one firm, or one context.

8.23 The question of whether commercial considerations are given undue weight is also relevant in considering the deregulatory argument. Are civil remedies sufficient, on their own, or with very limited direct legal regulation, to ensure a safe and healthy working environment? The arguments against this proposition are evident in an analysis of the defects in the civil law. The technicalities of establishing that a duty of care exists, that it was broken because the employer acted `unreasonably' and that any injury was consequent upon and proximate to the breach of duty, all provide hurdles which make and action difficult and daunting for a plaintiff. The example of the handling of the hazards of asbestos demonstrates the limitations of the civil law, with cases such as ***Margerson v JW Roberts Ltd 1996*** providing evidence of how large asbestos companies, far from attempting to comply with the law, used the technicalities of the law, and delays in the legal process in their attempts to avoid liability. Indeed, the sheer length of time which it has taken to ban the use of asbestos in Britain clearly demonstrates the inadequacy of the civil law in preventing this hazard. It is only the use of direct legal regulation, resulting

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[25]See Chapter 7

[26] See Chapter7

from European legislation, which has finally terminated the use of this substance. It may appear that the use of insurance would provide an answer to some of these problems. This has a superficial attraction for advocates of self-regulatory and voluntarist solutions, since it would appear to minimise State involvement in the regulatory process. However, insurance companies have consistently pointed out that the current system of adjusting premiums is not easily adapted to penalise employers who persistently abuse health and safety requirements. Additionally, the system is not as voluntarist as it might appear, since Employers Liability Insurance is required by direct legislation.

8.24 It is clear from the analysis of the civil action that in this, as in other aspects of health and safety, direct, prescriptive regulation does play a part. At the same time, the principles of 'reasonableness' and the use of the cost-benefit analysis have been applied more generally, throughout the system, as the criteria which underpin the 'goal setting' requirements of a self-regulatory system. These are of dominant and pervasive influence, since they are both interpreted by judges when cases come to court, and also form the basis of the HSC/E enforcement policy and of the advice given to employers by Inspectors. These two contradictory approaches co-exist uneasily, and the tensions between them lies at the heart of many of the arguments concerning health and safety provision.

CHAPTER 9 WORKER PARTICIPATION IN HEALTH AND SAFETY REGULATION

Research Question 4. How has the balance between voluntary and state regulation developed in relation to health and safety at work policies?

9.1 Among the most crucial developments recommended by the Robens Committee are the proposals for the involvement of workers in health and safety regulation. These proposals can be seen as important in two ways. Firstly, the recommendations mark a change of approach within the English system. At the time when the Committee met, Britain had no institutionalised methods of worker consultation such as those found in other European countries. Until the Robens Report, worker involvement was based largely on voluntary joint consultation mechanisms.[1] The nature of these was explained in the Report thus: "In manufacturing industry in this country, the typical method of involving workpeople is through the voluntary establishment of joint safety committees in which representatives of management and employees meet periodically to discuss safety and health problems and measures."(1972.19.61). The Committee examined both the creation of safety committees, and a further, parallel, system of safety representatives with a distinct role. The concept of the Safety Representatives was not new. There were some areas where they already operated with statutory backing. The provisions were on an industry basis - for example, "safety supervisors" were appointed in the construction industry under the Construction Regulations 1961 , (Wedderburn 1986.422). The most long-standing and direct experience, though, was in the coal mining industry. Since 1892, coalminers had been able to select safety representatives to inspect coal mines, and this had been extended to all workers in mines by the **Mines and Quarries Act 1954**.(Robens 1972.19.60). As Woolfson and Beck (2000.38) have pointed out, Lord Robens was an ex-Chairman of the National Coal Board, and had

[1] Attempts at participation were not limited to the worker/employer relationship. In 1893, there was an experiment in appointing workers as `assistants' to factory inspectors (Wedderburn1986.423)

direct experience of this system in operation. It was therefore quite natural that he should consider this model when examining worker participation.

9.2 While the Robens Report seemed to find the creation of safety committees and safety representatives relatively unproblematic as a method of permitting employee participation, the issue which did cause controversy was the question of whether legislation should be used to ensure that the system worked. This has to be seen in the context of the debates about `voluntarism' in industrial relations rife in the 1950s and 1960s, and the level of consensus which appeared to exist, at least on the surface. Ian McLeod, Minister of Labour (1958), explained the position thus " The whole basis of our industrial relations system is voluntary negotiation and agreement between the sides. Where we differ is.....whether there should be the prop of compulsion behind it in certain events".[2]

9.3 By the time of the Robens Committee, the TUC was a strong advocate of legislation. This may seem to be a step away from the `voluntarist' approach, which had characterised post -war industrial relations generally. However, in the post-war years, the TUC had not been completely antithetical to government intervention. As Wedderburn (1995.15) described the debate, the position of the TUC during the 1950s and 1960s was not to advocate `abstention of the law', but rather to argue for what Wedderburn characterises as "collective laissez-faire". This meant that voluntary negotiation between employers and employees would be backed up by arbitration which would be " independent of direct government influence"(1995.15). Although the terminology had not been developed at the time, the concept of "collective laissez-faire"reflects an essentially self-regulatory view of the role of government, where a legislatory framework would guarantee the system. This is conceptually close to the idea of `responsive regulation' proposed by Ayres and Braithwaite, which provides a model of self-regulation based on the belief that "Public regulation can promote private market governance through

[2]Parliamentary Debate 19th Nov 1958 quoted in Wedderburn (1995.14)

enlightened delegations of regulatory functions." (1992.4). Ayres and Braithwaite go on to maintain that regulation could be delegated to interest groups, to unregulated competitors of regulated firms and to the regulated firms themselves. They explain the aims of responsive regulation thus: " By credibly asserting a willingness to regulate more intrusively, responsive regulation can channel marketplace transactions to less intrusive and less centralised forms of government intervention. Escalating forms of responsive regulation can thereby retain many of the benefits of laissez-faire governance without abdicating governments' responsibility to correct market failure". (1992.4-5). The model of, "collective laissez- faire", for which the TUC argued in the post-war years, did not simply mean that the market mechanism was focussed into labour market negotiation, but also that arbitration was involved to provide an independent body, capable of correcting market failure in specific instances. This mechanism stood outside the firm and its immediate market situation.[3] Here, there is no concept of `escalating regulation' or of a plurality of interventions. The role of government, though, is seen as providing a mechanism for the correction of market failure and , importantly, one which can deal with individual failures in their own particular context.

9.4 The general stance on industrial relations based on `collective laissez-faire' carried over into the deliberations of the Robens Committee. Here, the TUC advocated more than mere arbitration, and did in fact argue for a legal duty on employers to appoint safety representatives and safety committees where a trade union requests it. It is clear that the TUC was concerned that the trade unions should maintain control of the situation, by controlling the ability to initiate the system in each firm. At the same time, they were requesting a direct form of legal intervention, where the law would be necessary to enforce the newly-created duty on employers. Such a system would be self-regulatory,

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[3]Though Ayres and Braithwaite view their work in a post-corporatist context, this is very close to corporatism, as described by Jessop (1982.238-9)," Liberal capitalism is characterised by a clear-cut institutional differentiation between the economic and political spheres so that the economy operates within the limits of market rationality and the state ideally adopts a laissez-faire stance apart from its role in formal facilitation".

since the safety representatives and safety committees would give organisation- based regulation of health and safety at work, but it would not be voluntarist. The CBI, on the other hand, argued against any legal intervention at all on the grounds that joint consultative machinery can only work by agreement, and this cannot be compelled by law (Robens Report 1972.29.64).This must be seen in the context of their general argument against detailed statutory provisions on health and safety at work, and in favour of a reliance on common-law principles (Robens Report, Evidence, 1972 .2.2.1).This would preserve the right of the individual to sue for negligence, but was essentially voluntarist in relation to issues relating to worker involvement. The Robens Committee eventually failed to recommend a legal duty to create a safety representative and safety committee system. This was largely because a Private Members Bill, the Employed Persons (Safety) Bill, was already before Parliament. But the Committee also wished to emphasise their view of self- regulation , saying "...we have stressed the concept of self-regulation in this Report. In this we do not distinguish between the `two sides' of industry; if progress is to be made there must be adequate arrangements for both management and workpeople to play their full part." (Robens Report 1972.21.66.). Feeling unable to make any recommendation for a duty concerning safety representatives and safety committees, the Committee decided that some legal provision was needed to ensure proper arrangements for worker consultation and participation. They therefore recommended "...that there should be a statutory duty on every employer to consult with his employees or their workplace representatives at the workplace on measures for promoting safety and health at work, and to provide arrangements for the participation of employees in the development of such measures. The form and manner of such consultation would not be specified in detail, so as to provide the flexibility needed .....". (1972.22.70). This duty was not tied to trade union recognition or other negotiating procedures. This is the provision whose implementation has been delayed for considerably longer than has that of most of the Robens recommendations. Provisions for ensuring consultation with all employees eventually came into force with the **Health and Safety (Consultation of Employees) Regulations 1996.** Although this

recommendation was considerably more vague than the TUC would have liked, it did mean that the Committee took an essentially non-voluntarist stance. It is also important to note that the duty to consult all workers, recommended by the Robens Committee , was considerably broader in scope than the safety representative and committee proposals, which were tied to trade union recognition.

The provisions of the Health and Safety at Work Act 1974.

9.5 The Employed Persons (Safety) Bill, which was under consideration at the time of the Robens Report foundered, and legislation on Safety Committees and Safety Representatives did not reach the Statute book until 1974. As Woolfson and Beck (1996.199) have indicated, the provisions of the Act permitted the trade unions to achieve their aim of gaining a pivotal role in health and safety in the workplace. The main legislation in contained in **s2(4) Health and Safety at Work Act 1974** which states that every employer must consult with appointed safety representatives in order to make arrangements which will enable effective co-operation in promoting and developing health and safety at work measures, and in checking their effectiveness. In 1997, the **Safety Committee and Safety Representative Regulations** (SRSC Regulations) were produced, and published alongside the Code of Practice and HSE Guidance Notes. These set out the details of the system. In line with the TUCs original representations to the Robens Committee, the trade unions managed to achieve some control over the initiation of the system. Of particular importance was Regulation 3, which states that safety representatives shall be appointed by recognised trade unions. This Regulation lies at the heart of the contention by Woolfson and Beck ((1996 .199) that the Act and Regulations " became bound up with the legitimation of trade unions as a means of employee representation at the workplace on safety issues." Politically, this provided a crucial focal point of influence for the unions through the Thatcher years. However, this has also meant that the safety representative and safety committee system has been tied to the fortunes of

trade unionism. At the time of the legislation, this was simply an attempt to place the system within what Woolfson and Beck (1996.199) have described as "an orderly collective bargaining framework".

9.6 However, the tie with trade union recognition meant that the statutory system of safety committees and safety representatives did not become universal. The rules governing union recognition at that time were set out in **s11-16 Employment Protection Act 1975**. Recognition meant that the union was recognised for collective bargaining purposes. When recognition was requested by the union, but withheld by the employer, the procedure allowed for the matter to be decided by A.C.A.S. [4] A procedure was in place whereby A.C.A.S. had to ballot the workers employed in the firm in question, and , if there were a sufficient majority, would then make a `statutory recommendation' that the employer must recognise the union. This procedure was effectively rendered nugatory by the courts, particularly after the decision in ***Grunwick Processing Laboratories v A.C.A.S. 1978 AC655*** .In this case a substantial number of employees were dismissed while they were on strike. They joined a trade union, and, when the employers refused recognition, asked A.C.A.S. to conduct a ballot. The employer refused access to those still at work, so A.C.A.S. could only ballot the striking workers. As a result of the ballot, A.C.A.S. made a statutory recommendation favouring recognition. The House of Lords declared this to be void. The case made it effectively impossible for the procedure to be legitimately conducted where the employer refused to co-operate with the ballot. The result was that employer who did not wish to recognise the union could not be made to do so .Shortly afterwards, the Thatcher government of 1979 repealed **s11-16 Employment Protection Act 1975** , leaving no compulsory recognition procedure at all. This situation was not remedied until **Schedule A1 of the Employment Relations Act 1999** detailed a new recognition procedure. However, even when this is used, recognition is by no means certain. The consequence has been that, over the years, the Safety Representative and Safety Committee procedure under the

[4]Advisory, Conciliation and Arbitration Service

Act has been effectively limited to those employers who voluntarily recognise trade unions.

9.7 The effect of the withdrawal of any legal means of enforcing recognition was soon visible. There was a steady decline in trade union density throughout the Thatcher administration. In her first decade the decline was from 54.5% to 46.3% of the population[5], and there was a commensurate reduction in recognition by employers. This meant a reduction in the number of establishments where the Safety Representatives and Safety Committee had the rights and protections given by the legislation. Walters and Gourlay (1990.11.3ii) found that trade union recognition was strongly associated with the size of the work unit, with the proportion of units with recognised trade unions increasing with size. In their survey, just over 50% of workplaces with recognised trade unions had safety representatives. Again, this proportion increased in larger workplaces, especially in the public sector, where 78% of organisations with recognised trade unions had appointed safety representatives (1990.18.2[5]i) Even in eligible units, therefore, the system of safety representatives and safety committees was far from universal. Indeed, in comparison with the Health and Safety Executive survey of 1979[6], Walters and Gourlay found that the overall percentage of workplaces where safety representatives had been appointed seemed to have halved. There was a large decline in smaller units, but an increase in the number of larger units with safety representatives (1990.32.3[i]). The explanation that they gave for this was that union organisation had been more resilient in larger workplaces, and the spread there was due simply to the continued practise of appointing representatives. Walters and Gourlay were at pains to point out that their sample was comparable to the 1979 HSE Survey sample in terms of size and the preponderance of small units.(1990.113). In this, they distinguished their results from the more general survey of industrial relations by Millward and

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[5] See J Waddington "Trade Union Membership in Great Britain 1980-1987 British Journal of Industrial Relations 1992.

[6] Managing Safety, Health and Safety Executive (1981)

Stevens (1986)[7] which found much higher levels of health and safety representation - in particular, that overall representation had increased from 70% to 80% between 1980 and 1984. Walters and Gourlay explain this discrepancy by suggesting that the Millward and Stevens work examined a lower proportion of small units. This may be so, but a part of the explanation may also lie in the nature of the surveys. Millward and Stevens were interested in all types of representation, and found increasing instances in firms where unions were not recognised. Walters and Gourlay undertook their study " to examine the implementation of the SRSC Regulations"(1990.1.4). They were therefore focussed on representation in units where there were recognised trade unions, since this is a pre-requisite for the operation of the SRSC Regulations. Their analysis of data was not designed to elicit the same kind of detail about what will be termed "voluntary representation".[8]

9.8 It is clear that many safety representatives exist outside of the structures created by the implementation procedures in the 1974 Act. Hillage, Kersley, Bates and Rick (2000)[9], who have conducted the most comprehensive recent survey of workplace consultation on health and safety , found that "In nine out of ten workplaces where the employer consults with a safety representative, that person is not appointed through trade union procedures. In only a small proportion (three per cent) of all workplaces do employers consult only with trade union representatives, and in a further two per cent they consult with both trade union and non-trade union representatives" (2000.7.[2.1]). [10] Until

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[7]British Workplace Industrial Relations 1980-1984 (1986).

[8] There is a sense in which all safety representatives work voluntarily. However, here the term "voluntary" is meant to designate safety representatives appointed under voluntary arrangements made with management, as opposed to "statutory representatives" who have the powers and protection of the SRSC Regulations.

[9] Referred to subsequently as Hilage et al

[10] Hillage et al point out that this does not mean that trade union representatives are not important. 77% of the workers covered in their sample worked in establishments which were covered by a safety representative, and 52% worked on a site where there was no trade union appointed representative.(2000.8). This is still a large number, but does mean that considerably more people work on

recently, these "voluntary representatives" existed without legal support . On the surface, this seems like a vindication of the Robens Committees view that safety representatives and committees should be subject to voluntary development (1972.22.70). However, there are important distinctions between "voluntary representatives" and those who are protected by the SRSC Regulations, which , it will be argued , have a real impact on their role, and on their ability to function.

The formal, legal structure now enshrines the distinction. Only those appointed by recognised trade unions under **s2(4) of the Health and Safety at Work Act** have the rights and duties contained in the **SRSC Regulations** and its associated Code of Practice and Guidance Notes. This includes important rights, such as the right to investigate hazards and make inspections, and to attend safety committee meetings, which do not apply to other representatives. (1977.Regulation 4). **The Health and Safety (Consultation of Employees) Regulations 1996**[11] (HSCE Regulations) apply where employees are not in groups covered by trade union appointed representatives. They set up a different system, where employers may arrange elections for non-union representatives, or they may choose to consult employees directly. Hillage et al (2000.2.2.) Found that only around 14% of "voluntary" safety representatives were elected., while 43% were appointed by management and 59% volunteered. At the same time, at 93% of workplaces where there was some form of consultation on health and safety issues, employers said it took place directly, alongside consultation through safety representatives.(2000.3.4). Only 10% of the overall sample said they did not consult at all. This shows high levels of consultation, though the figures must be viewed with caution, since only 53% of employees thought that they were ever consulted with directly. This distinction is indicative of the weakness of the HSCE Regulations on this point. Direct consultation, which may take many forms, is difficult to define, monitor and enforce.

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sites where safety representatives have had the rights and duties outlined in the SRSC Regulations than is implied by the nine out of ten figure.

[11]SI 1996/1513, implementing EC Directive 89/391/EEC (the Framework Dirctive).

The Functions of Safety Representatives

9.9 One of the key differences between union and non-union appointed representatives is to be found in the descriptions of their functions. Those of union appointed representatives are set out in **Regulation 4 of the Safety Committee and Safety Representative Regulations.** The major functions are:

1. To investigate hazards and dangerous occurrences, and consider the causes of accidents
2. To represent employees and investigate complaints
3. To make general representations on health and safety matters on behalf of employees.
4. To carry out inspections
5. To represent employees in consultations with HSE inspectors and representatives of any other enforcing authority
6. To receive information from inspectors
7. To attend meetings of the Safety Committee as Safety Representatives.

They are allowed reasonable time off, with pay, to perform these functions and undergo training. Safety Representatives are not, though, liable in negligence if an accident occurs.

The functions of non-union representatives under the **Health and Safety (Consultation of Employees) Regulations 1996** are:

1.To take up with employers concerns about risks and dangerous occurrences,
2.To take up general issues which affect health and safety with employers and
3.To represent employees in consultations with health and safety inspectors.

9.10 Hillage et al (2000) tested perceptions of the safety representatives role. They asked employers and both union and "voluntary" representatives what they thought were the functions of safety representatives. They found that the employers saw the most common role as reporting hazards (84%) followed by inspecting the workplace (78%), though the hazards identified tended to be

minor (2000.11-12). Interestingly, the incidence of inspection appeared to be as high among non-union representatives as among union- appointed ones, even though the 1996 Regulations do not give them a specific right in this respect. However, the difference appeared when the question of whether representatives actually represented employees, rather than merely identifying hazards. Employers with only union-appointed safety representatives were more likely to say that they did.(2000.12-13). Similar results were found when the representatives were surveyed., leading to the conclusion " looking at the responses according to the type of representative, non-union safety representatives appear far less likely to keep a log of hazards in the workplace, or to represent employees in discussions with the Health and Safety Inspectors or other outside agents, compared with union representatives. They are also less likely to have stated that they represent employees on health and safety issues to management, compared with union- appointed representatives."(2000.14).This makes it clear that there is a disparity in the way in which the two groups function, with voluntary representatives limiting their activities to the identification and reporting of hazards, and being much less likely to play a part in either policy formation or in interaction with outside bodies. It would appear, therefore, that the duty to consult has not achieved the aspiration of the Robens Committee, namely, that the duty should compel the employer to "consult with his employees or their representatives at the workplace on measures for promoting health and safety at work, and to provide arrangements for the participation of employees in the development of such measures." (1974.22.70)

9.11 It is debatable, though, whether the differences between the roles of the two types of representatives are closely related to the differences in the regulations. Hillage et al (2000.70) found that many employers were either unaware of either set of Regulations, or had little knowledge of them.[12] At the

[12]41% of employers were unaware of the HSCE Regulations 1996, with 42% saying that they were aware of them, and 17% did not know whether anyone in their organisation had heard of them, although 90% of employers with more than 2000 employees were aware of them. Only a third of employers were aware of the SRSC Regulations 1977.(Hillage et al 2000.69)

same time, most employers and employees felt that the regulations had made little difference to consultation(2000.83).The ineffective nature of the Regulations appears to be confirmed by another disturbing development, identified by the TUC Biennial survey of safety representatives[13]. Here, although the number of representatives who are always automatically consulted on health and safety issues by their employers has risen from 24% in 1998 to 27% in 2000, the number who are never automatically consulted has risen also, from 17% in 1998 to 22% in 2000. Additionally, the number who are never consulted, even when they ask, has risen from 4% in 1998 to 6% in 2000. In construction, 34% of safety representatives are never consulted, highlighting the further problem that consultation is not evenly distributed among employers. James and Walters (1999.91) commented that "Existing research[14] evidence on the factors which contribute to representative effectiveness adds weight to a pessimistic view of the likely impact of representatives elected under the HSCE Regulations." This appears to be confirmed by the slightly later survey of Hillage et al (2000). However, the TUC survey indicates that the position is also deteriorating in some respects for union-appointed representatives. Several major arguments can be made as to why both sets of Regulations seem to be of limited effect. One is that it is a problem of awareness. Numbers of employers, particularly small ones do not know of the existence of the Regulations. Hillage (2000.71.4.1) links lack of awareness to lack of training.[15]. Clearly, employers who are not aware of the regulations are not in a position to implement them. A second argument is that employers do not consider the Regulations because they are difficult to understand, and that further simplification and guidance is needed. This is not confirmed by Hillage et al (2000.83), who concluded "Employers who were aware of the Regulations felt they had a reasonable understanding of them,

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[13]Trade Union Trends Survey 00/5 (Dec 2000). This was a survey of 8,861 union appointed safety representatives.

[14]Citing Walters and Gourlay 1990.

[15]Hillage et al also found that there was far higher awareness in workplaces with trade union representatives than where there were " voluntary " representatives (200.41.4.1)

although there were some suggestions in the follow -up interviews that their knowledge may be limited." Finally, there is the argument that the Regulations are not effective because they are not enforced effectively. Generally, both sets of Regulations are enforced by Health and Safety Inspectors. However, enforcement action is only likely when all efforts to reach an agreement have failed. The HSE guidance leaflet "Consulting Employees on Health and Safety: a guide to the law (1999.7) makes this clear "If there is a disagreement between employers and employees or their representatives about the consultation arrangements, an agreement should first be attempted through the normal procedures of the organisation. The Advisory Conciliation and Arbitration Service (ACAS) can become involved if necessary". It is, in practice, very unlikely that an inspector will become involved. Hillage et al (2000.82.4.4) found that 68% of safety representatives thought that both sets of regulations should be more strongly enforced, while 30% of employers agreed. The Hillage study did not ask the respondent whether they felt that the procedure was adequate, or whether they considered that there should be stronger action taken under the procedure, but it would appear that there is room for greater stringency in both respects.

Research question 2. How evident are managerial values in the development of regulation and enforcement policies on health and safety at work?

Training for participation.

9.12Some of the reasons for the differences in the way the two groups of representatives operate may be related to the question of training. The TUC has run a comprehensive programme of training which was for many years, supported by government grant. This was phased out in 1995. Woolfson and Beck remark that "This is particularly alarming at a time when modern safety management requires that workforce representatives have more extensive and sophisticated training if they are to make a worthwhile contribution in the form of independent audit of increasingly complex safety assessments."(1996.200).

There is little evidence, though, that training has reduced. The TUC Survey of Safety Representatives 2000 shows the following comparison of the percentages of Representatives receiving training between the years 1998 and 2000:

Fig 7.1

health and safety training received	percentage in 2000	percentage in 1998
TUC/union stage1 course	73%	56%
TUC/union stage 2 course	33%	25%
own union introductory/basic course	33%	30%
other TUC/union course	20%	19%
course provided by employer	21%	19%
joint union-employer course	10%	8%
TUC certificate OH&S	6%	not available

(From Report of TUC Survey of Safety Representatives 2000, Table 13:Training Received).

This shows a general increase in training. Walters, Kirby and Daly (2001.13) have found that the overall trend between the early 1980s and 1998 was for a steady decrease in numbers of safety representatives undergoing training on Stage 1 and Stage 2 courses. These are the core courses around which Safety Representative training is based However, as they point out, a significant number of representatives attend short courses. While Walters, Kirby and Daly suggest that numbers undergoing Safety Representative training have held up better than numbers undergoing other forms of Trade Union training (2000.14), they suggest that substantial numbers are not receiving "mainstream Stage 1 and Stage 2 training in health and safety".However, the TUC Survey of Safety Representatives appears to indicate that the situation has improved between 1998 and 2000.

9.13 The real impact of the loss of funding for Safety Representative training has been on the nature of the courses. Until this time, those undergoing the training received no formal qualification. However, when funding was withdrawn, the TUC discovered that the courses were eligible for funding, under the **Further and Higher Education Act 1992** , through the Further Education Funding Council (FEFC). As Walters, Kirby and Daly (2000.18)[16] explain, this meant that the TUC training had to meet FEFC quality standards. The choice made by the TUC was to apply for accreditation through the National Open College Network. Today, TUC courses are formally accredited. Stage 1 and Stage 2 courses are accredited for National Vocational Qualifications. Additionally, the TUC has most recently, moved to give professional qualification to Safety Representatives, through the Institute of Occupational Safety and Health. They have instigated a Certificate in Occupational Safety and Health (IOSH), and a number of Safety Representatives have already qualified as full members of IOSH.[17]

9.14 As Walters, Kirby and Daly (2001.18) have pointed out, the context in which these changes occurred was one of increased managerialism, and particularly, there was an emphasis on concepts of `empowerment' - "..... one of the main ways in which the trade unions responded to their rapidly changing positions in employment relations was by embracing the new human resource management strategies and attempting to modify their approaches to ensure a continued trade union role. Another response was to encourage the development of links with bodies outside the trade union which could be supportive to the maintenance and further development of the traditional social aspirations of trade unions.(2000.18-19). The change in the education programme should be viewed in this context. The disappearance of the government grant was a practical issue which needed to be dealt with. But in the pursuit of FEFC funding, the training changed conceptually. It embraces the concept of `empowerment' in that the achievement of formal qualification

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[16] See Walters,Kirby and Dalys' more detailed discussion of these changes at p18-21.

[17] See `Risk' Issue No31 (TUC 8/12/001)

may `empower' the Safety Representative to go on to further academic attainment. In its alliance with organisations such as the National Open College Network and IOSH, the TUC has sought to legitimatise its training, and to secure a continued government contribution towards funding. These can be seen as pragmatic responses to the political situation. However, the direction taken by the education programme has assisted in a wider change in the way Safety Representatives, and their role, are regarded. The Robens Report conceptualised the role thus "In our view, it is as much or even more important for employees to have representatives to act as a channel of communication with management on safety and health matters as on any other subject of joint consultation..... "There is no legitimate scope for `bargaining' on safety and health issues, but much scope for constructive discussion, joint inspection, and participation in working out solutions. To this the employees safety representative can contribute expertise of a special kind- the intimate knowledge of working habits and attitudes on the shop floor." (1972.21.66) .

The most recent development in the concept of the safety representative appears to step away from the Robens view of the value of this special expertise. `Revitalising Health and Safety'(1999.29.81),took up an earlier idea promoted by the HSE and the TUC, which was designed to improve consultation and participation in which did not have union safety representatives. This was the idea of the worker safety advisor, a volunteer experienced safety representative who would go organisations where they were not employed, and work with employees and the employer. This scheme is currently being piloted by the TUC and a management consultant, and a report is due in 2003. It is not possible, at this stage, to gage how it may work, or the possible implications for the future of the safety representative system. However, while it must be stressed that the pilot scheme is voluntary, t it could increase the trend towards professionalisation.

Conclusion

9.15 In respect of Research Question 4, policy concerning safety

representatives has shown development from its original voluntary concept towards one firmly based in legislation, despite the Robens Committees view that safety representatives and committees should be subject to voluntary development (1972.22.70 . The initial implementation by **s2(4) of the Health and Safety at Work Act** and the **SRSC Regulations** was limited because the rights contained in the law only applied in the context of Trade Union recognition. This meant that safety representatives in many organisations only existed on a voluntary basis, with no legal protection or definition of responsibilities. This situation prevailed until recently, when the **Health and Safety (Consultation of Employees) Regulations 1996** gave a general right to consultation or representation. There are, though, important distinctions between the two types of representatives which have a real impact on their role. Union-based safety representatives have greater rights than their colleagues, including rights to investigate, inspect and receive information. Hillage et al (2000) have concluded that union safety representatives are more likely to actually represent employees, rather than merely identifying hazards. However, they cast doubt on whether the differences in the law caused this, since many employers seemed to be unaware of the detail of the legal provisions. There may, though, be a more subtle reason. Union safety representatives, better trained and themselves aware of their position, may be more likely to approach the job as citizens exercising their rights. Representatives operating under the 1996 regulations are clearly working within a context where they are managerially 'empowered' to act, within parameters set by the employer. In terms of research question 2, although both are working within a context set by managerial values, whereas the former have some ability, both as negotiators, and because of the union/ management relationships within their organisation, may at least be able to push these parameters further, if not step outside of them occasionally. Clearly, this is a hypothesis which requires further research, but the distinctions between the provisions are certainly capable of giving rise to this interpretation.

9.16 The training itself, which union safety representatives receive, has changed, to embrace managerial values. This can be seen in the changes made

in the training after the loss of state funding for the existing courses in 1995. This may have been a necessary response to circumstances, but it has lead to the development of a structure of formal qualification and, more recently, to the development of a full professional qualification. The current trial of proposals for 'worker safety advisors' possibly signals a move to further professionalisation. The Robens Report saw workplace safety representation as a means to end employee apathy on health and safety matters. The union safety representatives have, in fact, been more than this, playing a real role in ensuring that health and safety is delivered in the workplace. The move towards 'workplace safety advisors' signals a greater recognition of this role than has been evident in the past. The real problem, though, for them and for all safety representatives, is that they are operating within the culture of compliance. Their role in any organisation is heavily dependant on the employers view of industrial relations. This goes beyond the question of whether the employer recognises trade unions. Union safety representatives have the backing of the **Health and Safety at Work Act 1974** and the Regulations, and have greater potential than their colleagues to represent, as opposed to simply identifying hazards. However, their real ability to do this depends on the willingness of the employer to negotiate. As James et al (1997.99) have indicated, the HSE inspectors have a policy of non-involvement in enforcing the rights of safety representatives. Enforcement is, therefore, very much a question of the strength of trade unions in the workplace, and the attitude of the employer. Proposals to create a system such as the one in some Australian states, where safety representatives have the power to issue 'provisional improvement notices' (see James et al 1997.94, and TUC 2001), and to stop dangerous operations, have not become law. Safety representatives, as constituted at the moment, can form an important part of the system, but they have little real backing should the employer choose not to work with them. The power relation gives a stronger hand to management, and they generally have to work within a culture of compliance and partnership.

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CHAPTER 10 CONCLUSIONS

10.1 The general aim of this thesis has been to examine political and economic power relationships and their impact upon policy- making. This has been done in the context of a case study examination of the field of health and safety at work, which posed the following research questions:

1.What conflicts arise between the interests of public welfare and the interests of the market in the development of health and safety at work policies?

2. How evident are managerial values in the development of regulation and enforcement policies on health and safety at work?

3. How pro-active a role should the State take in protecting people from hazards at work?

4. How has the balance between voluntary and state regulation developed in relation to health and safety at work policies ?

5. What is the dynamic of influence in the development of policies on health and safety regulation?

6.Is there any significant non-decision-making in health and safety regulation, where issues remain latent and fail to enter the policy process?

10.2 Prior to an examination of these research questions, two general contextual points need to be made. The first is that the study examines and develops the view put forward by Clarke and Newman that there has been a restructuring of the state, which has changed the balance of power between the public and the private sectors., " The processes of dispersal, resulting in the disempowerment of a collectivist version of the public, have been accompanied by a process of empowerment of the public as individual consumers." (1997.127). They see this as the diminishing of `public service values'. In such a system, the public is constituted as a consumer of services, rather than as a citizen who has a set of rights and responsibilities. This is really where the crisis of values, indicated in the title, arises. Clarke and Newman (1997) describe "public service values " as being those of neutrality, impartiality, fairness and equity." In the field of health and safety at work, the

question of values is particularly acute, since, unlike many forms of social provision, the main provider is not the state, or a privatised former state organisation , but rather the individual employer. The issue of whether the worker is to be regarded as a consumer or as a citizen has real consequences for policy development.

10.3 The second contextual issue is that there is some confusion about the nature of the present system. This has been compounded by the Robens Committee, which believed that it was setting up a self-regulatory system, writing that "any idea that standards should be rigorously enforced through the extensive use of legal sanctions is one that runs counter to our general philosophy"(1972.80. 255).The committee had failed to consider that self - regulation does not mean that the system requires less legal intervention than one based on direct regulation. The real difference lies in the aims of the law. In a direct system, the State is involved in directly 'policing' the sector, while legal self-regulation involves law which directed to support compliance and negotiation. The voluntary sector is where there is a lack of legal backing. An example of the difference between legal self-regulation in the health and safety sector was discussed in Chapter 9.8, where safety representatives who were truly voluntary, since they operated outside of the existing legislation in firms with no Trade Union recognition, were brought within the legal self-regulatory system by the **Health and Safety (Consultation of Employees) Regulations 1996** . Even though these provisions are weak, they do serve to legitimate these safety representatives, giving them a role in supporting their employers' compliance with the law. Although the Robens Committee thought they were recommending 'self-regulation', the system which they did, in fact recommend was a multiple one. The older system of legal regulation was retained. This was based on standards with which the employer must comply, and found in a variety of legislation, such as the **Factory Act 1961** . This approach has been continued in, for example, the **Management of Health and Safety at Work Regulations ,** which were developed from European Union legislation. The

self-regulatory element of the system was based on the duties contained in the **Health and Safety at Work Act 1974** , which are based on the concept of doing what is 'reasonably practicable' to ensure health and safety. This idea is essentially self-regulatory, since its corollary is that the HSC/E supports the employer in defining what is reasonably practicable, and gives advice about how risk should be assessed, particularly concerning how costs and benefits should be evaluated. This leads to the situation identified in Chapter7.8, where, in Reducing Risks, Protecting People 1999, the HSE says that 25% of its entire resource is devoted to "establishing sound information and intelligence on risk" (1999.72). One of the problems evident from the analysis in Chapter 7 is the question of whether one agency can reasonably be both the prosecuting authority in applying the law, and the bureaucracy which is charged with supporting compliance. This point was commented upon in the course of interview by the R.O.S.P.A. representative, who concluded "I am sure they are capable of building Chinese walls". While this may be true in the policy context, it is more difficult when considering enforcement on the ground, since the same individual Inspector is involved in both capacities. The problem is really one of balance. Unfortunately, the whole debate on this issue is shaped by the chronic lack of resources available to the HSE. Prosecution is expensive, while the development of advice, and publicity initiatives , can expose numbers of people to information about good practice at comparatively little expense.

1.What conflicts arise between the interests of public welfare and the interests of the market in the development of health and safety at work policies?

10.4 The development of the concept of reasonableness as a basis for both civil and criminal regulation demonstrates how deeply embedded the interests of the market are in health and safety regulation.

In Chapter 3.25, it was explained that the basis of the civil claim lies in a personal duty which the employer owes to the employee. This legal concept

received considerable development during the years between the First World War and the Second World War. At this time, the criminal law was stagnating, and, although there were some new Regulations, there was little major legislative development. At the same time, thinking about health was moving from a public health perspective to grapple with the problems of health care provision. While it is difficult to make firm statements about any causal relationship between these factors, it is clear that , at this time, health and safety issues became positioned, from a policy perspective, as employment matters. The net result was that the aspect of health and safety concerned with the relationship between the employer and the employee was stressed, and the public health aspect became obscured. The development of the law of negligence to give a remedy to persons injured in accidents at work emphasised the individual nature of the relationship between employer and employee, which is contractually defined[1]. In Chapter 8.15, the commercial nature of this relationship was considered. This arises because the test of 'reasonableness' within this relationship is dependent upon a cost/benefit analysis. Uff and Cullen (2001) considered, in their work on train protection systems, how far an employer can be expected to take account of public policy aspects of safety within a cost/benefit analysis. They believe that although there may be situations where there is a very clear criteria which mean that the employer must take into account the public aspect of safety provision, for example, in relation to a nuclear spillage, there are, many instances which are not so clear-cut. If the regulator "..... cannot impose safety requirements beyond those which satisfy the test of reasonable practicability and cost benefit, how are safety systems to be imposed where these criteria are not clearly satisfied?"(2000.41 . 4.17) The conclusion to be drawn from the discussion in Chapter 8 is that the cost/benefit analysis is inadequate. In Chapter 7. 8-9, is was seen that cost/benefit analysis is not limited to civil actions, but is a key plank of the whole system of enforcement In Chapter 5.26, it is revealed as an important plank of government policy-making in general.

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[1]Though legal liability for negligence itself is not dependent on contract.

The elevation, into policy-making centrality, of what is basically a management tool, is certain to bring the same question into the fore in other policy fields. There is no easy answer to Uff and Cullens question, but, it must be suggested, the most viable approach is through legal regulation, resulting from democratic debate.

2. How evident are managerial values in the development of regulation and enforcement policies on health and safety at work?

10.5 It is clear, from the discussion above, that managerial values are suffused through health and safety at work. It could not be otherwise, since the main provider of health and safety is the employer. Managerial values are endemic in the concept of cost/benefit analysis. But they have permeated beyond this. The tripartite partners in health and safety have clearly embraced them. For example, in the face of deregulatory pressure in the middle 1990s, both the TUC and the CBI have showed serious interest in insurance-based regulation, discussed in Chapter 8.25. Since the form of these proposals was, broadly, for private insurance companies to regulate by setting higher premiums for dangerous employers in their Employers Liability Insurance, this would further increase the penetration of commercial risk-assessment techniques and values.[2] Perhaps the clearest example of the penetration of managerial values was discussed in relation to the TUC in Chapter 9.14, where Walters, Kirby and Daly (2000.18) in their discussion of safety representative training, pointed out that "One of the main ways in which the trade unions responded to their rapidly changing positions in employment relations was by embracing the new human resource management strategies". In this particular example, they embraced the concept of 'empowerment'. Safety representatives would be 'empowered' by the receipt of formal qualification at the end of their training courses. It is unsurprising that managerial vales are endemic within health and

[2]This does already happen, but not in a systematic way, as a possible alternative to legal regulation.

safety provision. The problem really is that the structures of health and safety give no clear place where an alternative view can reside. The only step in towards institutionalising a voice for the public policy perspective is that the HSC now has a member who is to 'represent the public' (HSE 2001)[3]. This is scarcely sufficient. One of the reasons why a fundamental review of the health and safety system is needed is that attention should be paid to ensuring adequate institutional consideration of public policy in health and safety policy-making.

3. How pro-active a role should the State take in protecting people from hazards at work?

10.6 The approach to regulation based on goal setting and compliance, examined in Chapter 1.27 and 1.28, and advocated by, for example, Hutter (1993), forms the basis of the duties under the **Health and Safety at Work Act 1974.** The HSE, which, as discussed in Chapter 5, has emerged as the dominant force in setting and implementing enforcement policies, has developed its strategies largely along these lines. At the same time, the HSC, created on the recommendation of the Robens Committee as a tripartite body, has attempted to ensure that policy- making proceeds on a consensual basis. It was very clear from the interviews, discussed in Chapter 9, that it has largely succeeded in developing a policy-making system which proceeds on the basis of consensus. In many ways, this is laudable. Provision is likely to be far more effective where there is broad agreement about its aims and outcomes. Consensus is largely negotiated among pressure groups, each with their own agenda, including the TUC and the CBI. The stakeholders in the health and safety policy process are many and diverse. Where, though, is the public nature

[3] The Health and Safety System 2001. HSE

of health and safety discussed and articulated? The State must be the primary guarantor that the public interest occupies a sufficient place in health and safety policies. This means strong and effective oversight of the system. The Parliamentary Select Committee on Environment, Transport and Regional Affairs hearings, and report on the workings of the HSE, can be seen as an attempt at such oversight. The HSE has taken steps to implement its findings. However, this did not really go far enough. In Chapter 9, the R.O.S.P.A. interviewee described the hearings as "Sort of background music".None of the interviewees seemed to regard the hearings as an exercise in effective oversight. Part of the problem may be related to their decision to look at the workings of the HSE, rather than the system as a whole. This meant that they failed to consider some of the wider issues, such as the levels of resources within the system and the way in which the consensual approach actually operates. Likewise, the governments policy document, Revitalising Health and Safety appears to be a missed opportunity. It was based on a process of consultation, and, as can be seen in Chapter 5, embodied many of the tenets of the governments' Modernising Government initiative. It raised many important issues. But these were considered from a perspective firmly within the compliance-based ideology currently applied to the system. Again, the larger questions were not asked. It is now thirty years since the Robens Committee completed its Report, and a review of the whole system created on the basis of that Report in long overdue. This is an area where the State, and government , should clearly be more pro-active.

10.7 A review of health and safety should also examine enforcement mechanisms. While it is palpably not possible to guarantee everyone a completely safe working environment, there are distinct problems with the market-based approach based on risk assessment. In Chapter7.8, the concept of risk assessment was discussed, and the possible differences of emphasis between the HSCs view of risk assessment in policy development, which appears to have tipped towards giving a heavier emphasis to costs than that of

the courts, and the way the HSE views cost/benefit analysis in enforcement, on a commercial basis. The HSE has maintained the position found in case law, that there should be a bias towards safety in making such an analysis. In this situation, it appears to be the Courts, taking a view based on precedent, which have slowed the full commercialisation of the test, and left some space for the public aspect of welfare provision to be taken into account. Credit must also be given to the HSE, who appear to have maintained this space in their own advice and policies. The question remains, though, whether this gives a sufficient expression to health and safety as a social welfare provision. In Chapter8.17 and 8.18, the example of asbestos gives an insight into the difficulty which the English system has had in dealing with a highly toxic, but commercially useful substance, where European Union intervention was required before the continued use of asbestos was banned.

10.8 Current views of "reasonableness", based on risk assessment, need to be reviewed. This should also take into account the legal regulatory policies of the HSE. At the Parliamentary Select Committee hearing, there was much criticism of the low level of investigation where there had been serious incidents. The reasons for this appear to be resource based, since the cost of investigation is high. The ideology of compliance, too, means that legal enforcement is perhaps not given the priority which it deserves. There appears to be general agreement that legal enforcement should not be any less. Here it is maintained that it should be increased substantially. The increase from 6.8% of reported serious accidents investigated in 1999-2000 to 10% by 2004, which the select Committee demanded, is simply not enough. Educational and advisory campaigns are insufficient to deliver reasonable health and safety standards in the workplace, and there really is a need for employers to know that they will face investigation and possible prosecution should a serious incident occur. This means stronger legal regulation, and, again, a far more pro-active approach by the State.

4. How has the balance between voluntary and state regulation developed in relation to health and safety at work policies ?

10.9 The vision of voluntary action by employers envisaged by the Robens Report, and discussed in Chapter 1.16, which involved a spontaneous increase in voluntary safety work at industry level, (1972.30.94), has largely failed to materialise. Rather, employers have largely been represented through the legal self-regulatory measures taken by the HSE. This includes participation in public consultation processes, and representation through business organisations such as the CBI and the Institute of Directors, in the 'informal process'. Through the CBI, and the representation for small businesses, employers are also part of the tripartite HSC. The main area where voluntary activity has worked on a fairly large scale has been in respect of worker participation. Here many employees were excluded from the legal provision until recently, when the **Health and Safety (Consultation of Employees) Regulations 1996** were enacted, and gave , as described in Chapter 9.4, legal authority for a level of representation or consultation where employers do not recognise independent trade unions. Up to this point, many employers had appointed representatives on an essentially voluntarist basis. However, since the Regulations came into force, they have really become a part of the legal self-regulatory system. The main conclusion is that levels of truly voluntary activity remains low.

5. What is the dynamic of influence in the development of policies on health and safety regulation?

10.10 **S 11 Health and Safety at Work Act 1974** gives the HSC the power to make policy proposals to the relevant Minister, who may then bring them into legal effect either through delegated legislation, or by taking them to Parliament. This briefly summarises the formal policy process. It is, though, susceptible to a variety of influences. In the first place, there is clearly a strong

political influence from the government of the day. Ministers are not tied to taking policy proposals only from the HSC, and policies with health and safety content may be generated elsewhere in the government agenda. This may result in direct influence on the health and safety agenda. The T.U.C. interviewee in Chapter 9, for example, said that railways are at the forefront of a lot of the work of the HSC/E. This was supported by the HSE interviewees. There has been a need for a stringent re-examination of health and safety on the railways, but, at the same time, pressure from government reflecting political concern has clearly played a part in this prioritisation. However, the interviewee also said that there was no "cold hand of government", so it appears that the pressure, though targeted , is not direct.

10.11 Government policies are not only important in relation to particular issues. The present government has produced its current policy document, Revitalising Health and Safety, discussed in Chapter 5, which has been adopted by the HSC/E and which has generated many of the targets and measurable outcomes of current policy.[4] Revitalising Health and Safety was produced in conjunction with the HSC/E, and based on a consultation process which was consistent with the more general policy-making agenda of this government outlined in the Modernising Government initiative examined in Chapter 5.6. This involves a process explained by Pierre and Stoker (2000.42) as one where stakeholders are identified, relationships are influenced in order to achieve desired outcomes, and where there is 'systems management' to achieve effective co-ordination. The aim here is to achieve hegemony, which means that the final policy is a negotiated one. In this instance, government has set the policy agenda, by its determination of the methodology to be used, and setting the terms of reference. The officials[5] organise the consultation, which is public, and analyse the results, producing proposals, which , with government

[4]See the Health and Safety Executive website; www.hse.gov.uk/revitalising.

[5]in this case, officials from the Department of Trade and Industry , which at that time was the government Department with responsibility for the HSC/E, worked with the HSE on this proposal.

agreement, are eventually included in the document. This system clearly gives some influence to stakeholders, who are able to make proposals and representations, which may be included. In creating Revitalising Health and Safety, it was clear that proposals from stakeholders did make their way into the final document, though the R.O.S.P.A interviewee (Chapter 9) felt that many people had to be saying the same thing in order for their view to be included. It would appear that, although stakeholders are listened to, the major influence comes from government, and from the officials, who hold a pivotal position, since they sift and analyse the product of the consultation. This is the formal process. In health and safety policy -making, it is clear that there is an informal process of consultation, which is possibly even more important. This is where stakeholders may influence the process before policy issues are even formulated for formal consideration. Officials from the HSE conduct this informal consultation among stakeholders who they believe have an interest. This places the HSE policy officer in a key position, since he or she decides who to consult and analyses the results. While it does appear that the HSE makes an effort to engage as widely as possible, it is clear from Chapter 8 that interested parties may not, in fact, be included. The consultation process is pluralist in its approach. This allows varied interest groups to put forward their views. The HSE interviewee (Chapter9) was at pains to state that the tripartite partners have no greater interest in this than any other group. However, it is clear that their representatives are "within the loop"[6] and are unlikely to be excluded from any informal consultations.

10.12 The seeds of the dominance of the HSE were laid by **Health and Safety at Work Act 1974 s 11,** which gives it the power to engage in health and safety activities on behalf of the Commission, and to advise Ministers when required. This places the HSE officers in the position of being the health and safety professionals at the heart of the system. As a result, the Commission has frequently adopted an agenda set by the Executive. There are, though, signs

[6] A phrase used in several of the interviews

that this is changing. It was clear from the interviews in Chapter 9 that the commission is making an effort to take the policy initiative more frequently, and not simply be responsive to the Executive. The composition of the Commission has broadened beyond the original tripartite partners, but it is still the case that they exert a strong influence. It is also clear that the present Chairman has worked hard, both to extend representation on the Commission, and to change the way it works, so as to exercise greater control over the HSE. This is a process, though which is still under way. The HSE, although clearly subject to government priorities, and although now prepared to take account of a wide range of interests, remains a key force in detailed health and safety policy-making. The remaining problem is that the HSE is still working within a culture of compliance. It uses the language of compliance, and its process of building hegemony is dependant on the relationships within a compliance-oriented system. This means that, when it does take legal action, this goes 'against the grain' of the system, and so legal regulation has become a last resort. Employers are therefore placed in a strong position also, since they are not only the providers of health and safety, but also primary self-regulators. At the same time, the T.U.C., having come under serious pressure, particularly during the 1980s and early 1990s, found itself in a weakened position. As seen in Chapter 9, it adopted the culture of compliance, as a means of preserving its own position, for example in relation to safety representative training.

6.Is there any significant non-decision-making in health and safety regulation, where issues remain latent and fail to enter the policy process?

10.13 Decision-making on health and safety has produced a huge range of advice, information and regulation. A key area of non-decision making revealed by this analysis has been in relation to resources. During the 1980s and early 1990s, the HSE suffered a considerable reduction in its budgets. This lead to a reduction in the number of inspectors, and an increased emphasis on information campaigns and initiatives to inform employers and persuade them

to comply with regulations. In the three years up to 2002, the HSE, with annual budgets of around £200 million a year[7], was allocated an extra £63 million. resulting in 100 more inspectors. This, though welcome, is completely inadequate. Davies and Teasdale (1994) estimated the social cost of work-related injuries at around £16 billion a year. This cost is unlikely to have decreased. The scarcity of resources has seriously limited the HSEs efforts at legal enforcement. Although 100 new inspectors have been recruited, and it is clear that the HSE is paying greater attention to enforcement, this really does not give sufficient resources to make a serious difference. There has been a failure, at government level, to review the resourcing needs of the whole health and safety system, with the public welfare nature of health and safety firmly in mind. Until this occurs, it will be difficult to effect more than minor changes within the system.

Further issues for consideration

10.14 This thesis has concentrated on health and safety policy-making, and on enforcement policies. In doing this, there have been a number of major issues which have either not been discussed, or which have not been considered in the depth which they deserve. Major areas which should be subject to further research include:

1. The influence of European Union policies and law on health and safety in England
2. Corporate liability, including liability for corporate manslaughter, and health and safety regulation.

3. The health and safety issues raised by changing work patterns, and contracting out.

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[7]See HSE Annual Reports 1999-2000,2000-2001,2001-2002.

4. The Health and Safety Commission- its operation, and relationships with the HSE and government.

5. Interest group involvement in health and safety.

6. Relationship between health and safety and environmental and public health policies.

10.15 Health and safety at work has a dual aspect. It can be seen located firmly in the workplace, where the prime relationship is between the employer and the employee, and where, in the English voluntarist tradition, the State has only a limited role. It can also be seen as a social welfare provision, where the employer is the primary provider, where the State has an important role in ensuring the public aspect of provision is given due prominence. The central dilemma of health and safety is the question of how to ensure that this public aspect is not lost among the commercial considerations of the employer. At the moment, this focus tends to be lost. Part of the problem has been the restructuring of the State, pointed out by Clarke an Newman (1992.127), and part of it lies with the method of delivery of health and safety, by the employer. A government review of the health and safety system is urgently needed, to examine the changes necessary to guarantee a proper consideration of the public aspect of health and safety in the policy-making process.

APPENDIX A

EXTRACT FROM HEALTH AND SAFETY STATISTICAL HIGHLIGHTS (HSE)

ɔn-fatal injuries – Labour Force Survey and reporting rates

ee supplementary tables 2, 3 and 5)

Figure 7: Rate of reported non-fatal injury to employees and the self-employed, and the averaged LFS rate of reportable non-fatal injury to workers 1994/95 - 2002/03p

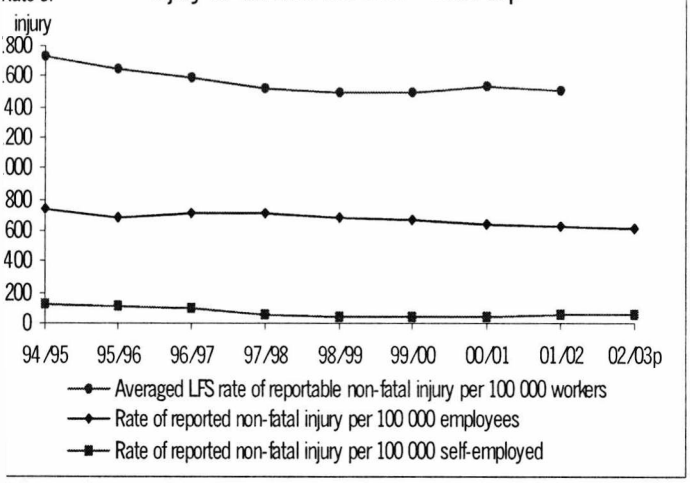
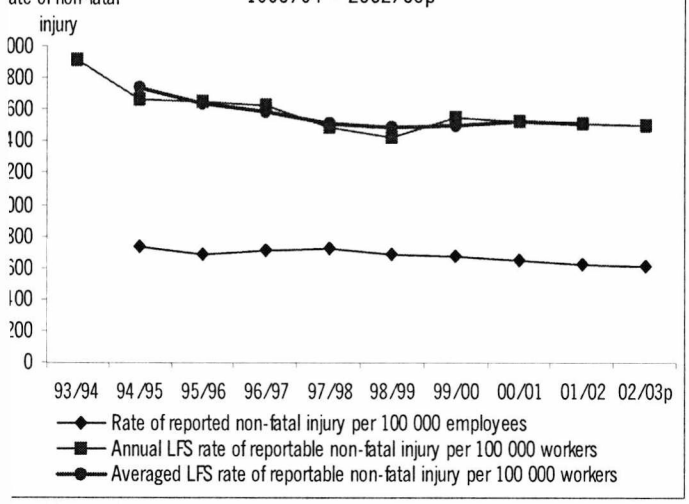


Figure 8: Rate of reported non-fatal injury to employees and the averaged and annual LFS rate of reportable non-fatal injury to workers 1993/94 - 2002/03p



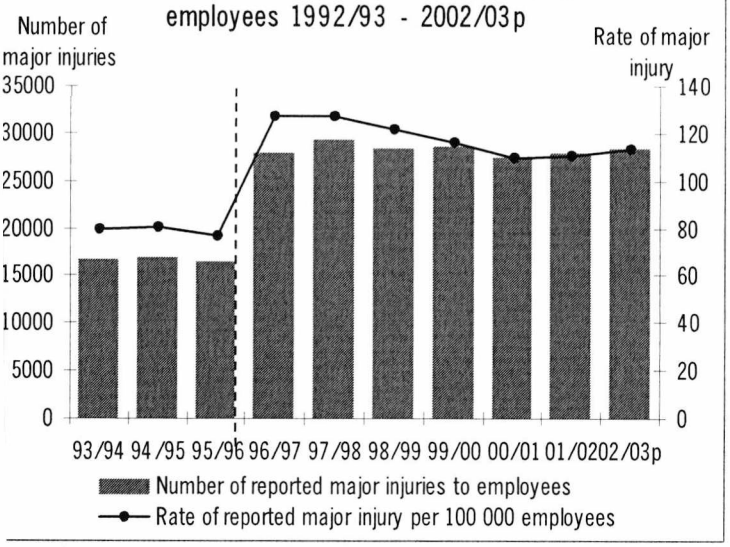
igure 9: Reporting percentage of reportable non-fatal injuries to employees from the annual and averaged LFS 1994/95 - 2002/03p

- Rates of reportable injury from the Labour Force Survey (LFS) are presented mostly as three-year averages, smoothing sampling error fluctuations in the annual series, particularly for specific industries (further details on the LFS can be found in the technical note on page 35). The averaged LFS rate is available for 1994/95 to 2001/02 and the annual series for 1993/94 to 2002/03.
- The averaged LFS rates for reportable injury are higher than rates of reported non-fatal injury, confirming suspected under-reporting of non-fatal injuries. The averaged LFS rate for 2001/02 is estimated to be 1510 while the rate of reported non-fatal injury is 624. The estimated level of reporting of employee injuries based on the averaged LFS rate is 41.3% in 2001/02.
- Rates of reported non-fatal injury for the self-employed are substantially lower. The rate of reported non-fatal injury in 2001/02 is 55.3. This marks an improvement in reporting levels in 2001/02 to 3.7% from 2.7% in 2000/01.
- The LFS and RIDDOR sources jointly provide a picture on trends in non-fatal injury rates. The averaged LFS rate fell by 14% between 1994/95 and 1998/99 and has fluctuated since. As promised last year, this section gives a fuller assessment of reporting levels for 2001/02 and 2002/03.
- The rate of reported non-fatal injury to employees fell by 7% between 1994/95 and 1998/99 and also fell in 2000/01, 2001/02 and 2002/03. This recent downward trend in rates of reported non-fatal injury coupled with a levelling-off of averaged LFS rates suggests that reporting levels have fallen from 1999/2000 to 2001/02. This stems mainly from a reduction in reported over-3-day injury.
- Estimation of reporting levels is based on the averaged LFS as outlined in the statistical note. A full judgement on reporting levels for 2002/03 will only be possible when the average rate of LFS reportable injury for 2002/03 is available in summer 2004.
- In the interim, the annual rate of reportable injury from the LFS can give us some information about reporting in 2002/03, though the annual rate varies considerably year on year. In 2002/03 the LFS rate fell by 1.7% to 1490 from 1517 in 2001/02. Coupled with a similar decrease in the rate of reported non-fatal injury to employees (1.6%), this suggests that the estimate of reporting based on the annual LFS is broadly unchanged in 2002/03.
- The global estimate of the reporting level based on the annual LFS rate has fallen from 43.2% in 1999/2000 to 41.0% in 2002/03. Modelling this downward trend gives a figure of 41.5% for the reporting level of employee injuries in 2001/02 and 40.8% in 2002/03.
- The final estimated reporting level for 2002/03 will be derived from the averaged LFS rate for 2002/03 when the annual LFS rate for 2003/04 is available. Since the LFS does not distinguish between major and over-3-day injuries, there is an implicit assumption that employers report both major and over-3-day injuries to the same extent.

on-fatal injuries reported under RIDDOR

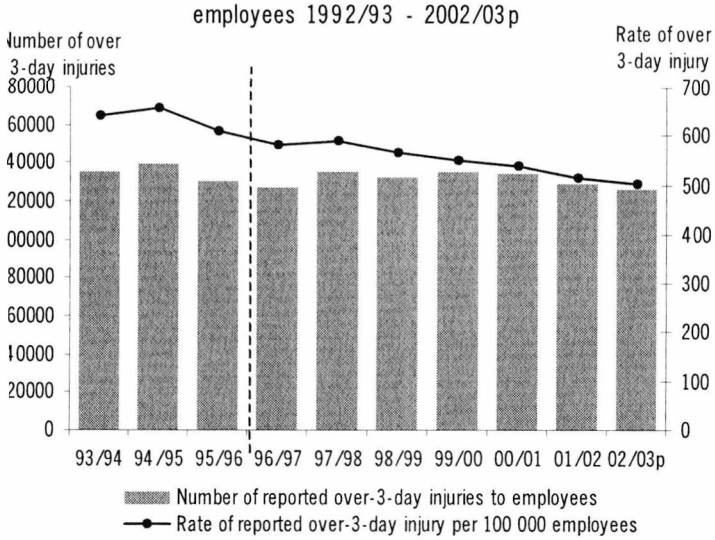
ee supplementary tables 2, 3 and 4)

Figure 4: Number and rate of major injury to employees 1992/93 - 2002/03p



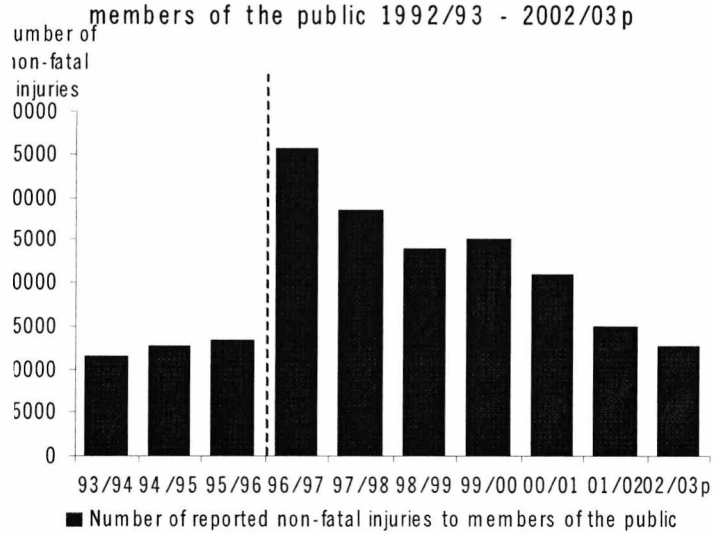
- The number of reported major injuries to employees rose by 1.5% to 28426 in 2002/03 from 28011. The figure for 2002/03 is provisional; a finalised figure will be reported in next year's report. The figure will be expected to rise slightly as a result of late reports.
- The rate of reported major injuries increased by 1.9% in 2002/03 to 113.0 from 110.9 in 2001/02.
- In the longer term the number of reported major injuries has changed little since the new reporting regulations were introduced in 1996/97. The rate of reported major injury fell steadily from 1996/97 until 2000/01 largely as a result of increasing employment. However, in the two years since 2000/01 the rate and number have increased steadily.
- The rate of major injury increased in agriculture (26%), manufacturing (0.7%) and some of the service sectors most notably land transport (10.2%), retail (9.4%) and public administration (9.1)

Figure 5: Number and rate of over-3-day injury to employees 1992/93 - 2002/03p



- The number of reported over-3-day injuries to employees decreased by 2.8% in 2002/03 to 126004 compared to 129655 in 2001/02.
- In 2002/03 the rate of over-3-day injury decreased by 2.4% to 501.1 from the 2001/02 rate of 513.5.
- The number of over-3-day injuries has fallen over the last three years. The rate of over-3-day injury has steadily decreased since 1997/98 and is now the lowest for the period 1992/93 to 2002/03.
- Injuries sustained to employees when handling, lifting and carrying accounted for 39% of over-3-day injuries in 2002/03.
- Injuries resulting from slipping or tripping accounted for 24% of reported over-3-day injuries.
- The services sector accounted for 65% of all over-3-day injuries.

Figure 6: Number of non-fatal injuries to members of the public 1992/93 - 2002/03p



- The number of non-fatal injuries to members of the public decreased by 15% to 12646 in 2002/03 from 14834 in 2001/02. This continues the general downward trend seen since 1996/97 and is the lowest reported figure since the introduction of new regulations in 1996/97.
- 96% (12187) of non-fatal accidents to members of the public were in the services sector in 2002/03. This proportion is consistent with the 2001/02 proportions when 14187 of 14834 non-fatal injuries to members of the public were in the services sector.
- Of the 12646 non-fatal accidents to members of the public 23% occurred in education, 23% occurred in land transport industries and 15% occurred in retail industries.
- The number of non-fatal injuries to members of the public occurring in the construction injury fell from 381 in 2002/03 to 259 in 2001/02, a reduction of 32%.

Supplementary tables – injuries

Table 1: Number and rate of fatal injury to workers as reported to all enforcing authorities

	Employees		Self-employed		Workers	
Year	Number	Rate (a)	Number	Rate (b)	Number	Rate (c)
1992/93	276	1.3	63	2.0	339	1.4
1993/94	245	1.2	51	1.6	296	1.2
1994/95	191	0.9	81	2.5	272	1.1
1995/96	209	1.0	49	1.5	258	1.0
1996/97	207	0.9	80	2.3	287	1.1
1997/98	212	0.9	62	1.8	274	1.0
1998/99	188	0.8	65	1.9	253	0.9
1999/2000	162	0.7	58	1.7	220	0.8
2000/01	213	0.9	79	2.4	292	1.0
2001/02	206	0.8	45	1.3	251	0.9
2002/03p	182	0.7	44	1.3	226	0.8

Table 2: Number and rate of major* injury to workers as reported to all enforcing authorities

	Employees		Self-employed		Workers	
Year	Number	Rate (a)	Number	Rate (b)	Number	Rate (c)
1992/93	16938	80.3	1115	35.8	18053	74.6
1993/94	16705	79.3	1274	40.6	17979	74.2
1994/95	17041	80.4	1313	40.4	18354	75.1
1995/96	16568	77.1	1166	36.0	17734	71.7
1996/97	27964	127.5	1356	38.4	29320	115.1
1997/98	29187	127.6	815	23.3	30002	113.8
1998/99	28368	121.7	685	20.3	29053	108.8
1999/2000	28652	116.6	663	19.7	29315	104.9
2000/01	27524	110.2	630	19.2	28154	99.6
2001/02	28011	110.9	929	27.8	28940	101.2
2002/03p	28426	113.0	1065	31.9	29491	103.5

Table 3: Number and rate of over-3-day injury* to workers as reported to all enforcing authorities

	Employees		Self-employed		Workers	
Year	Number	Rate (a)	Number	Rate (b)	Number	Rate (c)
1992/93	141147	669.0	2136	68.5	143283	591.8
1993/94	134928	640.2	2531	80.7	137459	567.7
1994/95	139349	657.2	2869	88.4	142218	581.6
1995/96	130582	607.4	2394	73.8	132976	537.5
1996/97	127286	580.1	2282	64.6	129568	508.7
1997/98	134789	589.2	984	28.1	135773	514.8
1998/99	132295	567.3	849	25.2	133144	498.8
1999/2000	135381	550.9	732	21.8	136113	487.3
2000/01	134105	536.9	715	21.8	134820	477.1
2001/02	129655	513.5	917	27.5	130572	456.7
2002/03p	126004	501.0	928	27.7	126932	445.6

Table 4: Number of reported fatal and non-fatal injuries to members of the public

	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99	1999/2000	2000/01	2001/02	2002/03p
Fatal	113	107	104	86	367	393	369	436	444	393	392
Non-Fatal (d)	10669	11552	12642	13234	35694	28613	23800	25059	20836	14834	12646

(a) per 100 000 employees
(b) per 100 000 self-employed
(c) per 100 000 workers
(d) The definition of a non-fatal injury to members of the public is different to that of workers (see technical note)
* Non-fatal (major and over-3-day) injury statistics from 1996/97 cannot be directly compared with earlier years (see technical note)

Supplementary tables – injuries

Table 5: Rate of reported non-fatal injuries and averaged LFS rate of reportable non-fatal injury to workers

	89/90	94/95	95/96	96/97	97/98	98/99	99/00	00/01	01/02	02/03p
RIDDOR reported injury rate to employees (a)	835	738	684	708	717	689	667	647	624	614
LFS reportable injury rate to workers (b)	2480	1740	1640	1590	1510	1490	1500	1530	1510	n/a
Percentage of injuries reported	33.6	42.5	41.6	44.6	47.4	46.2	44.4	42.3	41.3	n/a

Table 6: Revitalising indicator (†)- Rates of reported fatal and major injury

	96/97	97/98	98/99	1999/2000	00/01	01/02	02/03p
Rate of reported fatal and major injury (a)	128.6	128.6	122.6	117.4	111.2	111.8	113.8
Uprated rate of fatal and major injury (b)	286.9	270.4	264.1	263.2	261.6	256.5	253.1

Rates of reported fatal injury to; workers (b), employees (a) and averaged LFS rates of reportable injury to workers (b) by industry

Table 7: Agriculture, hunting, forestry and fishing.

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	1999/2000	00/01	01/02	02/03p
Fatal (b)	7.5	7.3	8.5	8.0	10.8	7.5	9.3	7.7	10.3	9.2	9.5
Major (a)*	144.2	147.1	142.6	158.6	256.9	223.3	205.6	224.4	213.9	238.5	269.7
Over 3 day (a)*	483.0	436.1	441.8	497.3	552.0	443.9	427.5	487.0	493.3	618.7	587.5
LFS reportable (b)	n/a	n/a	2290	2180	2020	1830	2270	2520	2760	2670	n/a

Table 8: Extractive and utility supply industries

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	1999/2000	00/01	01/02	02/03p
Fatal (b)	n/a	n/a	n/a	7.7	4.0	8.0	5.0	3.5	4.4	6.9	1.5
Major (a)*	255.6	235.5	194.6	225.9	315.1	282.7	246.8	244.1	267.0	222.9	211.7
Over 3 day (a)*	2066.9	1767.7	1587.0	1411.5	1402.8	1482.6	1347.9	1254.9	1354.7	1326.3	1138.1
LFS reportable (b)	n/a	n/a	2200	1920	2160	1860	1520	1390	1500	1770	n/a

Table 9: Manufacturing

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	1999/2000	00/01	01/02	02/03p
Fatal (b)	1.3	1.5	1.3	1.0	1.4	1.4	1.6	1.0	1.2	1.2	1.1
Major (a)*	136.2	138.6	138.9	130.5	206.4	216.1	201.5	204.1	194.2	194.9	195.5
Over 3 day (a)*	1219.0	1162.1	1193.7	1067.4	1002.8	1026.1	969.8	1007.9	998.8	962.6	934.7
LFS reportable (b)	n/a	n/a	2230	2130	1960	1980	1960	2110	2080	2070	n/a

Table 10: Construction

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	1999/2000	00/01	01/02	02/03p
Fatal (b)	5.9	5.7	5.1	5.0	5.6	4.6	3.8	4.7	5.9	4.4	4.0
Major (a)*	230.4	214.4	221.2	224.0	403.0	382.3	402.7	395.9	380.9	356.1	374.8
Over 3 day (a)*	1277.6	1127.4	1139.4	1030.3	1078.6	966.3	863.4	917.0	829.2	799.1	791.9
LFS reportable (b)	n/a	n/a	2970	2550	2700	2430	2590	2530	2580	2510	n/a

Table 11: Health services

	96/97	97/98	98/99	1999/2000	00/01	01/02	02/03p
Fatal (a)	0.1	-	-	-	0.1	0.1	-
Major (a)*	94.2	94.3	93.1	84.1	78.3	73.2	70.4
Over 3 day (a)*	766.2	737.5	745.5	671.2	618.7	582.2	543.2
LFS reportable (a)	1860	1710	1550	1400	1370	1420	n/a

Table 12: Service industries

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	99/2000	00/01	01/02	02/03p
Fatal (b)	0.7	0.5	0.5	0.4	0.4	0.4	0.3	0.3	0.4	0.3	0.3
Major (a)*	51.2	51.3	53.5	50.1	90.8	88.4	83.7	79.5	75.3	79.0	81.9
Over 3 day (a)*	462.3	459.9	479.4	447.5	444.9	456.1	450.8	430.0	423.4	408.5	405.2
LFS reportable (b)	n/a	n/a	1460	1410	1360	1290	1250	1240	1280	1270	n/a

(a) per 100 000 employees

(b) per 100 000 workers

* Non-fatal (major and over-3-day) injury statistics from 1996/97 cannot be directly compared with earlier years (see technical note)

n/a Not available

† The indicator is based on the modified estimate of major injury reporting.

Supplementary tables – injuries

Table 13: Number of fatal injuries to workers by kind of accident

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	1999/00	00/01	01/02	02/03p
Falls from a height (a)	90	81	79	64	88	92	80	68	74	69	49
Struck by a moving vehicle	51	46	45	42	43	45	48	34	64	39	39
Struck by moving/ falling object	45	33	39	32	57	41	41	35	51	46	30
Trapped by something overturning/ collapsing	36	52	33	41	16	25	15	16	40	8	11
Total accidents (b)	339	296	272	258	287	274	253	220	292	251	226

Table 14: Number of major injuries to employees by kind of accident

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	1999/00	00/01	01/02	02/03p
Falls from a height (a)	3741	3503	3552	3530	5023	5382	5454	5500	5286	4066	3880
Slips, trips or falls on the same level	5513	5962	5941	5800	5862	8671	9007	9087	9054	10268	10458
Struck by moving/ falling object	2013	2010	2046	1978	4606	4739	4287	4370	3988	4016	3892
Injured whilst handling, lifting or carrying	1092	1087	1235	1134	2745	3002	2894	2862	2695	2948	3551
Struck by a moving vehicle	565	524	574	572	903	915	928	959	823	733	653
Total accidents (b)	16938	16705	17041	16568	27964	29187	28368	28652	27524	28011	28426

Table 15: Number of over-3-day injuries to employees by kind of accident

	92/93	93/94	94/95	95/96	96/97	97/98	98/99	1999/00	00/01	01/02	02/03p
Slips, trips or falls on the same level	28501	28441	28537	26790	24537	25883	26687	27615	28552	30106	29848
Struck by moving/ falling object	19716	18809	20082	18663	18283	18772	18029	18293	16892	16288	14466
Injured whilst handling, lifting or carrying	49664	46885	48563	45015	46366	50640	49044	48729	48327	48963	49097
Struck by a moving vehicle	3427	3217	3460	3327	2810	3071	2934	3172	3128	2116	1957
Total accidents (b)	141147	134928	139349	130582	127286	134789	132295	135381	134105	129655	126004

Table 16: Number of dangerous occurrences reported to HSE

	96/97	97/98	98/99	1999/00	00/01	01/02	02/03p
Part 1 (Notifiable in relation to any place of work)	3829	4273	4333	4479	4333	4315	4062
Part 2 (Notifiable in relation to mines)	70	96	114	79	77	82	66
Part 3 (Notifiable in relation to quarries)	114	105	122	92	63	100	82
Part 4 (Notifiable in relation to railways)	5197	5218	5625	5309	4825	5388	4548
Part 5 (Notifiable in relation to offshore workplaces)	347	403	446	453	544	464	443
Total dangerous occurrences	9557	10095	10640	10412	9842	10349	9201

Table 17: Number of incidents relating to the supply and use of flammable gas (c)

		96/97	97/98	98/99	1999/00	00/01	01/02	02/03p
Number of incidents (d)	Explosion/ fire	40	45	37	56	38	43	30
	Carbon monoxide poisoning	103	119	114	118	136	110	86
	Total	143	164	151	174	174	153	116
Number of fatal injuries	Explosion/ fire	9	8	11	10	8	4	4
	Carbon monoxide poisoning	31	28	37	26	25	22	21
	Total	40	36	48	36	33	26	25
Number of non-fatal injuries	Explosion/ fire	35	43	30	61	36	47	36
	Carbon monoxide poisoning	156	189	194	228	265	169	146
	Total	191	232	224	289	301	216	182

(a) Falls from a height include falls from; up to and including 2 metres, over 2 metres and height not known.
(b) The total number of injuries, including other kinds of accident not shown in this table.
(c) Mainly piped gas but also includes bottled liquid petroleum gas (LPG)
(d) An incident can cause more than one fatality or injury

Supplementary tables – enforcement

Table 18: Number of enforcement notices (a) issued by all enforcing authorities

		Improvement notice	Deferred prohibition	Immediate prohibition	Total
97/98 (b)	HSE	4411	181	4319	8911
	Local authorities	3320	110	1070	4500
	Total	7731	291	5389	13411
98/99	HSE	6353	199	4348	10900
	Local authorities	5140	130	1200	6470
	Total	11493	329	5548	17370
1999/00	HSE	6972	196	4172	11340
	Local authorities	4850	80	1170	6100
	Total	11822	276	5342	17440
00/01	HSE	6671	147	4238	11056
	Local authorities	4720	60	1030	5810
	Total	11391	207	5268	16866
01/02	HSE	6712	116	4254	11082
	Local authorities	4820	50	1090	5960
	Total	11532	166	5344	17042
02/03p	HSE	8104	110	5049	13263
	Local authorities	n/a	n/a	n/a	n/a

Table 19: Number of proceedings instituted by all enforcing authorities

		Informations laid	Convictions
97/98 (b)	HSE	1627	1284
	Local authorities	506	440
98/99	HSE	1759	1512
	Local authorities	424	337
1999/2000	HSE	2115	1616
	Local authorities	412	322
000/01	HSE	1973	1490
	Local authorities	401	352
001/02	HSE	1986	1522
	Local authorities	325	307
02/03p	HSE	1688	1260
	Local authorities	n/a	n/a

Table 20: Number of enforcement notices issue by HSE by industry

	Type of notice	Agriculture, hunting, forestry & fishing	Extractive & utility supply industries	Manufacturing industries	Construction	Service Industries
98/99	Improvement	933	156	3087	582	1595
	Deferred prohibition	33	-	67	55	44
	Immediate prohibition	799	117	1055	2017	360
	Total	1765	273	4209	2654	1999
1999/00	Improvement	976	148	3493	681	1674
	Deferred prohibition	21	5	30	112	28
	Immediate prohibition	644	85	1090	1975	378
	Total	1641	238	4613	2768	2080
00/01	Improvement	694	195	3851	539	1392
	Deferred prohibition	21	1	64	55	24
	Immediate prohibition	590	55	1203	2036	354
	Total	1305	251	5100	2630	1770
01/02	Improvement	429	127	3953	588	1615
	Deferred prohibition	16	1	49	28	22
	Immediate prohibition	254	89	1308	2191	412
	Total	699	217	5310	2807	2049
02/03p	Improvement	1503	161	4088	779	1573
	Deferred prohibition	23	1	31	32	23
	Immediate prohibition	579	58	1207	2756	449
	Total	2105	220	5326	3567	2045

(a) Enforcement notice figures include estimates for local authorities that did not provide data. No such estimates are made for proceedings instituted

(b) In 1997/98 approximately 630 Notices of Intent led to work being completed within two weeks. Therefore, improvement notices were not issued. In the absence of the Notice of Intent Procedure, 1997/98 enforcement notice numbers would have been about 630 higher.

APPENDIX B

EXTRACT FROM THE HEALTH AND SAFETY AT WORK ACT 1974

ELIZABETH II

Health and Safety at Work etc. Act 1974

1974 CHAPTER 37

An Act to make further provision for securing the health, safety and welfare of persons at work, for protecting others against risks to health or safety in connection with the activities of persons at work, for controlling the keeping and use and preventing the unlawful acquisition, possession and use of dangerous substances, and for controlling certain emissions into the atmosphere; to make further provision with respect to the employment medical advisory service; to amend the law relating to building regulations, and the Building (Scotland) Act 1959; and for connected purposes. [31st July 1974]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

HEALTH, SAFETY AND WELFARE IN CONNECTION WITH WORK, AND CONTROL OF DANGEROUS SUBSTANCES AND CERTAIN EMISSIONS INTO THE ATMOSPHERE

Preliminary

Preliminary.

1.—(1) The provisions of this Part shall have effect with a view to—

(*a*) securing the health, safety and welfare of persons at work;

(*b*) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work;

(2) It shall be the duty of the Commission, except as aforesaid—

(*a*) to assist and encourage persons concerned with matters relevant to any of the general purposes of this Part to further those purposes;

(*b*) to make such arrangements as it considers appropriate for the carrying out of research, the publication of the results of research and the provision of training and information in connection with those purposes, and to encourage research and the provision of training and information in that connection by others;

(*c*) to make such arrangements as it considers appropriate for securing that government departments, employers, employees, organisations representing employers and employees respectively, and other persons concerned with matters relevant to any of those purposes are provided with an information and advisory service and are kept informed of, and adequately advised on, such matters;

(*d*) to submit from time to time to the authority having power to make regulations under any of the relevant statutory provisions such proposals as the Commission considers appropriate for the making of regulations under that power.

(3) It shall be the duty of the Commission—

(*a*) to submit to the Secretary of State from time to time particulars of what it proposes to do for the purpose of performing its functions; and

(*b*) subject to the following paragraph, to ensure that its activities are in accordance with proposals approved by the Secretary of State; and

(*c*) to give effect to any directions given to it by the Secretary of State.

(4) In addition to any other functions conferred on the Executive by virtue of this Part, it shall be the duty of the Executive—

(*a*) to exercise on behalf of the Commission such of the Commission's functions as the Commission directs it to exercise; and

(*b*) to give effect to any directions given to it by the Commission otherwise than in pursuance of paragraph (*a*) above;

but, except for the purpose of giving effect to directions given to the Commission by the Secretary of State, the Commission shall not give to the Executive any directions as to the enforcement of any of the relevant statutory provisions in a particular case.

PART I *The Health and Safety Commission and the Health and Safety Executive*

Establishment of the Commission and the Executive.

10.—(1) There shall be two bodies corporate to be called the Health and Safety Commission and the Health and Safety Executive which shall be constituted in accordance with the following provisions of this section.

(2) The Health and Safety Commission (hereafter in this Act referred to as "the Commission") shall consist of a chairman appointed by the Secretary of State and not less than six nor more than nine other members appointed by the Secretary of State in accordance with subsection (3) below.

(3) Before appointing the members of the Commission (other than the chairman) the Secretary of State shall—

(*a*) as to three of them, consult such organisations representing employers as he considers appropriate;

(*b*) as to three others, consult such organisations representing employees as he considers appropriate; and

(*c*) as to any other members he may appoint, consult such organisations representing local authorities and such other organisations, including professional bodies, the activities of whose members are concerned with matters relating to any of the general purposes of this Part, as he considers appropriate.

(4) The Secretary of State may appoint one of the members to be deputy chairman of the Commission.

(5) The Health and Safety Executive (hereafter in this Act referred to as "the Executive") shall consist of three persons of whom one shall be appointed by the Commission with the approval of the Secretary of State to be the director of the Executive and the others shall be appointed by the Commission with the like approval after consultation with the said director.

(6) The provisions of Schedule 2 shall have effect with respect to the Commission and the Executive.

(7) The functions of the Commission and of the Executive, and of their officers and servants, shall be performed on behalf of the Crown.

General functions of the Commission and the Executive.

11.—(1) In addition to the other functions conferred on the Commission by virtue of this Act, but subject to subsection (3) below, it shall be the general duty of the Commission to do such things and make such arrangements as it considers appropriate for the general purposes of this Part except as regards matters relating exclusively to agricultural operations.

without risks to health when properly used, the undertaking shall have the effect of relieving the first-mentioned person from the duty imposed by subsection (1)(*a*) above to such extent as is reasonable having regard to the terms of the undertaking.

(9) Where a person (" the ostensible supplier ") supplies any article for use at work or substance for use at work to another (" the customer ") under a hire-purchase agreement, conditional sale agreement or credit-sale agreement, and the ostensible supplier—

(*a*) carries on the business of financing the acquisition of goods by others by means of such agreements ; and

(*b*) in the course of that business acquired his interest in the article or substance supplied to the customer as a means of financing its acquisition by the customer from a third person (" the effective supplier "),

the effective supplier and not the ostensible supplier shall be treated for the purposes of this section as supplying the article or substance to the customer, and any duty imposed by the preceding provisions of this section on suppliers shall accordingly fall on the effective supplier and not on the ostensible supplier.

(10) For the purposes of this section an article or substance is not to be regarded as properly used where it is used without regard to any relevant information or advice relating to its use which has been made available by a person by whom it was designed, manufactured, imported or supplied.

General duties of employees at work.

7. It shall be the duty of every employee while at work—

(*a*) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work ; and

(*b*) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.

Duty not to interfere with or misuse things provided pursuant to certain provisions.

8. No person shall intentionally or recklessly interfere with or misuse anything provided in the interests of health, safety or welfare in pursuance of any of the relevant statutory provisions.

Duty not to charge employees for things done or provided pursuant to certain specific requirements.

9. No employer shall levy or permit to be levied on any employee of his any charge in respect of anything done or provided in pursuance of any specific requirement of the relevant statutory provisions.

PART I

or arrange for the carrying out of any necessary research with a view to the discovery and, so far as is reasonably practicable, the elimination or minimisation of any risks to health or safety to which the design or article may give rise.

(3) It shall be the duty of any person who erects or installs any article for use at work in any premises where that article is to be used by persons at work to ensure, so far as is reasonably practicable, that nothing about the way in which it is erected or installed makes it unsafe or a risk to health when properly used.

(4) It shall be the duty of any person who manufactures, imports or supplies any substance for use at work—

(*a*) to ensure, so far as is reasonably practicable, that the substance is safe and without risks to health when properly used ;

(*b*) to carry out or arrange for the carrying out of such testing and examination as may be necessary for the performance of the duty imposed on him by the preceding paragraph ;

(*c*) to take such steps as are necessary to secure that there will be available in connection with the use of the substance at work adequate information about the results of any relevant tests which have been carried out on or in connection with the substance and about any conditions necessary to ensure that it will be safe and without risks to health when properly used.

(5) It shall be the duty of any person who undertakes the manufacture of any substance for use at work to carry out or arrange for the carrying out of any necessary research with a view to the discovery and, so far as is reasonably practicable, the elimination or minimisation of any risks to health or safety to which the substance may give rise.

(6) Nothing in the preceding provisions of this section shall be taken to require a person to repeat any testing, examination or research which has been carried out otherwise than by him or at his instance, in so far as it is reasonable for him to rely on the results thereof for the purposes of those provisions.

(7) Any duty imposed on any person by any of the preceding provisions of this section shall extend only to things done in the course of a trade, business or other undertaking carried on by him (whether for profit or not) and to matters within his control.

(8) Where a person designs, manufactures, imports or supplies an article for or to another on the basis of a written undertaking by that other to take specified steps sufficient to ensure, so far as is reasonably practicable, that the article will be safe and

(4) Any reference in this section to a person having control of any premises or matter is a reference to a person having control of the premises or matter in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not).

General duty of persons in control of certain premises in relation to harmful emissions into atmosphere.

5.—(1) It shall be the duty of the person having control of any premises of a class prescribed for the purposes of section 1(1)(*d*) to use the best practicable means for preventing the emission into the atmosphere from the premises of noxious or offensive substances and for rendering harmless and inoffensive such substances as may be so emitted.

(2) The reference in subsection (1) above to the means to be used for the purposes there mentioned includes a reference to the manner in which the plant provided for those purposes is used and to the supervision of any operation involving the emission of the substances to which that subsection applies.

(3) Any substance or a substance of any description prescribed for the purposes of subsection (1) above as noxious or offensive shall be a noxious or, as the case may be, an offensive substance for those purposes whether or not it would be so apart from this subsection.

(4) Any reference in this section to a person having control of any premises is a reference to a person having control of the premises in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not) and any duty imposed on any such person by this section shall extend only to matters within his control.

General duties of manufacturers etc. as regards articles and substances for use at work.

6.—(1) It shall be the duty of any person who designs, manufactures, imports or supplies any article for use at work—

(*a*) to ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risks to health when properly used;

(*b*) to carry out or arrange for the carrying out of such testing and examination as may be necessary for the performance of the duty imposed on him by the preceding paragraph;

(*c*) to take such steps as are necessary to secure that there will be available in connection with the use of the article at work adequate information about the use for which it is designed and has been tested, and about any conditions necessary to ensure that, when put to that use, it will be safe and without risks to health.

(2) It shall be the duty of any person who undertakes the design or manufacture of any article for use at work to carry out

PART I

General duties of employers and self-employed to persons other than their employees.

3.—(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

(2) It shall be the duty of every self-employed person to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.

(3) In such cases as may be prescribed, it shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety.

General duties of persons concerned with premises to persons other than their employees.

4.—(1) This section has effect for imposing on persons duties in relation to those who—

(*a*) are not their employees; but

(*b*) use non-domestic premises made available to them as a place of work or as a place where they may use plant or substances provided for their use there,

and applies to premises so made available and other non-domestic premises used in connection with them.

(2) It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substance in such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises, and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health.

(3) Where a person has, by virtue of any contract or tenancy, an obligation of any extent in relation to—

(*a*) the maintenance or repair of any premises to which this section applies or any means of access thereto or egress therefrom; or

(*b*) the safety of or the absence of risks to health arising from plant or substances in any such premises;

that person shall be treated, for the purposes of subsection (2) above, as being a person who has control of the matters to which his obligation extends.

(*a*) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(*e*) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.

(4) Regulations made by the Secretary of State may provide for the appointment in prescribed cases by recognised trade unions (within the meaning of the regulations) of safety representatives from amongst the employees, and those representatives shall represent the employees in consultations with the employers under subsection (6) below and shall have such other functions as may be prescribed.

(5) Regulations made by the Secretary of State may provide for the election in prescribed cases by employees of safety representatives from amongst the employees, and those representatives shall represent the employees in consultations with the employers under subsection (6) below and may have such other functions as may be prescribed.

(6) It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.

(7) In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives mentioned in subsections (4) and (5) above, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed.

ELIZABETH II

Health and Safety at Work etc. Act 1974

1974 CHAPTER 37

An Act to make further provision for securing the health, safety and welfare of persons at work, for protecting others against risks to health or safety in connection with the activities of persons at work, for controlling the keeping and use and preventing the unlawful acquisition, possession and use of dangerous substances, and for controlling certain emissions into the atmosphere; to make further provision with respect to the employment medical advisory service; to amend the law relating to building regulations, and the Building (Scotland) Act 1959; and for connected purposes. [31st July 1974]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

HEALTH, SAFETY AND WELFARE IN CONNECTION WITH WORK, AND CONTROL OF DANGEROUS SUBSTANCES AND CERTAIN EMISSIONS INTO THE ATMOSPHERE

Preliminary

Preliminary.

1.—(1) The provisions of this Part shall have effect with a view to—

(*a*) securing the health, safety and welfare of persons at work;

(*b*) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work;

PART I

(*c*) controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances ; and

(*d*) controlling the emission into the atmosphere of noxious or offensive substances from premises of any class prescribed for the purposes of this paragraph.

(2) The provisions of this Part relating to the making of health and safety regulations and agricultural health and safety regulations and the preparation and approval of codes of practice shall in particular have effect with a view to enabling the enactments specified in the third column of Schedule 1 and the regulations, orders and other instruments in force under those enactments to be progressively replaced by a system of regulations and approved codes of practice operating in combination with the other provisions of this Part and designed to maintain or improve the standards of health, safety and welfare established by or under those enactments.

(3) For the purposes of this Part risks arising out of or in connection with the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking and the condition of premises so used or any part of them.

(4) References in this Part to the general purposes of this Part are references to the purposes mentioned in subsection (1) above.

General duties

General duties of employers to their employees.

2.—(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—

(*a*) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health ;

(*b*) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances ;

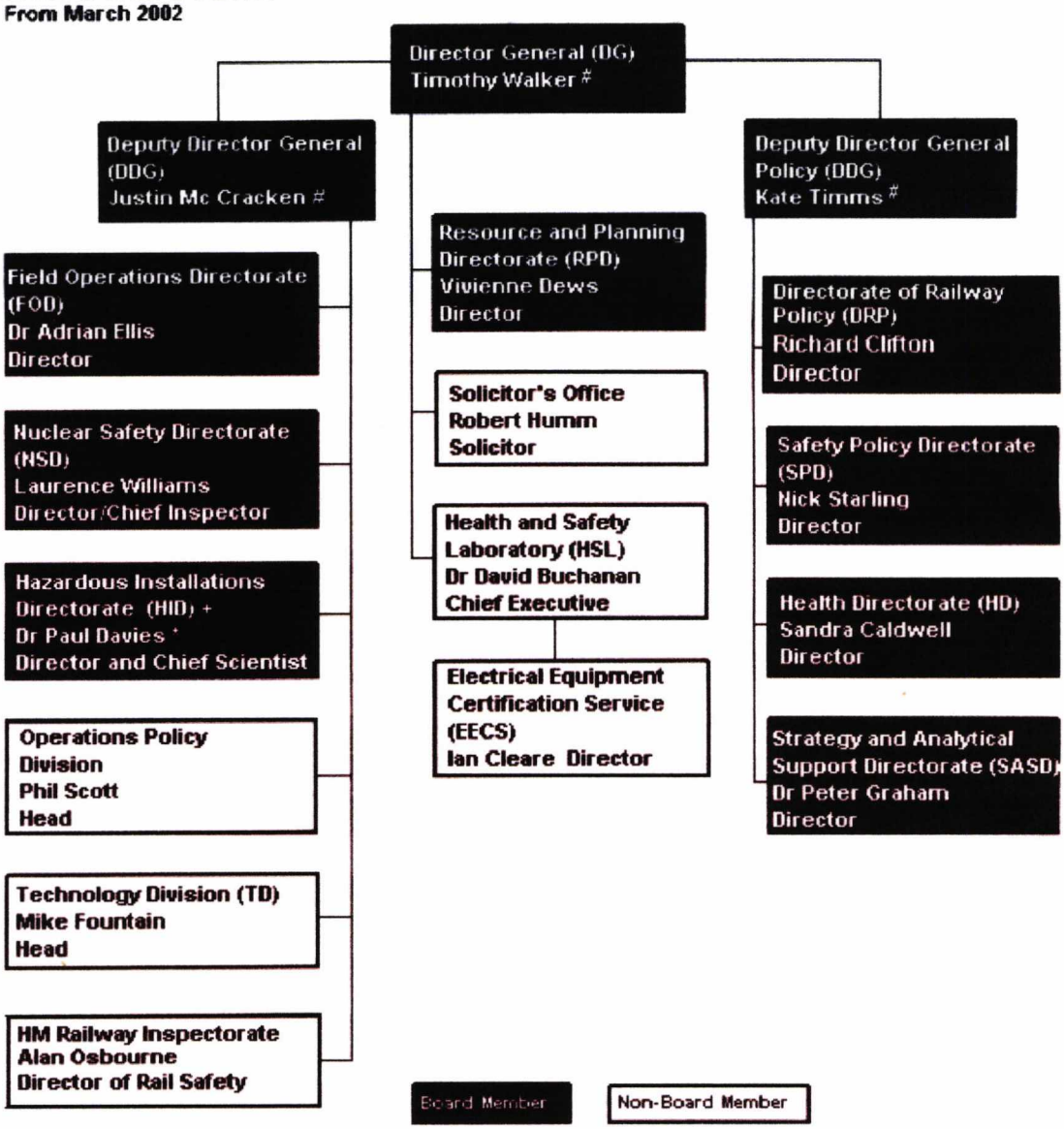
(*c*) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees ;

APPENDIX C

HSE STRUCTURE
(From HSE STRATEGIC PLAN 2001-2004)

HSE STRUCTURE

From March 2002



\# Indicates Members of the Executive

* Dr Paul Davies reports directly to the Director General as Chief Scientist

\+ Hazardous Installations Directorate includes: Central Division; Offshore Division; Land Division and Mines Inspectorate

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