

# **Bill Callaghan's presentation to the Health and Safety Lawyers' Association**

**3 May 2007**

My thanks to Madeleine Abas and your association for the invitation to speak at your event today on the Macrory Regulatory Penalties Review and having the opportunity to hear first hand the views of Professor Richard Macrory, Lord Justice Baker and, shortly, Neil Cameron.

At the risk of teaching this learned audience how to suck eggs, I want first to set the context of our work in HSC/E. Enforcement is a vital weapon in our armoury but it is not the only one. One of our inspectors contrasted those employers who see the light and those that need to feel the heat. Our interventions ranging from advice and persuasion to criminal proceedings reflect that. Secondly our health and safety record is now the best in Europe, if not the world. It was not always so.

## **Robens**

The context of the Robens review was an appalling accident record. At the end of the 1960s around 1,000 employees died each year. Bill Wedderburn, writing in 1971, made plain his belief that the need for reform was clear – “the battle to reduce accidents at work is being lost.”

Robens recognised that rules and laws are essential but they do not by themselves change behaviour. Robens proposed that the statutory

arrangements should be revised and reorganised to increase the efficiency of the state's contribution to safety and health at work. This included the creation of a powerful, independent and unified health and safety inspectorate. But his second main proposal was that the new statutory arrangements should be designed to provide a framework for better self-regulation.

### **HSWA and HSE's regulatory role and responsibilities**

The guiding principle of the Act is well known,

“It shall be the duty of every employer to ensure, as far is reasonably practicable, the health, safety and welfare at work of all his employees.”

Robens' vision was to sweep away previous prescriptive legislation and replace these with simpler regulations under the framework of the Act. Robens anticipated the better regulation agendas of successive governments, and HSC/E can rightly claim to be one of Britain's first risk based regulators. Employers may not always have liked enforcement decisions taken by HSE but they recognise that HSE is a proportionate regulator, one that is firm but fair.

What is reasonably practicable now would not have been practicable 30 years ago and that is why the flexible framework of the 1974 Act has been a spur to safety improvements. In contrast, prescriptive legislation would have ossified the standards of the past. In contrast to the late 1960s, 212 people were killed at work last year.

### **Institutions (HSC/E & Government) and separation of powers; governance reform**

Quite why officials and Ministers in 1973 put forward the quaint structure of a separate Commission and Executive rather than the unitary body recommended by Robens is shrouded in the mists of time.

Your association has submitted its views on the proposed merger of HSC and HSE. I think it is fair to say that you are not convinced. We are clear that the merger of the Commission and Executive into a single body will give us a more robust governance framework, improve our working practices and create stronger voice for health and safety in Great Britain.

Further HSC/E believe that the merger will provide :

- A more accountable structure in line with current best practice
- Better decision making and a clearer public and regulatory presence
- For the continued independence of the health and safety regulator
- A balanced structure, building on strengths of current arrangements, at arms length from Ministers
- A merged unified authority with a membership that reflects the diverse society it serves

Let me address one issue of central concern to HSLA. Individual enforcement decisions will continue to be made by inspectorates. The enforcement policy will continue to be made by the Governing Body.

## **HSC's Enforcement policy**

Macrory rightly points to the need for an enforcement policy. The Commission's enforcement policy statement (EPS) was first published in 1995. It was revised in 2002 and is a public statement setting out the general principles and approach the Commission expects from all health and safety enforcing authorities.

The principles in the EPS are well established :

- Proportionality in applying the law
- Consistency of approach
- Targeting of enforcement action
- Transparency as to how the regulator operates
- Accountability for the regulators' actions

Clearly enforcement needs to be perceived to be fair in order to have a positive influence on duty holders whilst also maintaining trust. Some of you may be aware about plans for a statutory Regulators Compliance Code. We welcome the principle of establishing a code which seeks to bring this clarity to duty holders across a wide range of regulatory areas.

A recently completed evaluation of the EPS concluded :

- Enforcement could prompt health and safety improvement
- Many factors influenced the impact of enforcement
- It was unclear how the amount of enforcement impacted on health and safety
- There was a strong appetite for a wide range of penalties including restorative justice

The Commission accepted that evaluation had shown a need for continued effort to improve communication about enforcement, especially prosecution, in order to better demonstrate proportionality and effectiveness to both duty holders and workers/victims.

The report published last week by the building workers union – UCATT – underlines that need. I put on one side the flimsy numbers and arguments in the report, they do not accord with our figures. The substantive issue is that for some groups, such as the Centre for Corporate Accountability, who provided the so-called research, prosecution is all, and proportionality is nowhere.

That does not mean that HSE is a weak body. Far from it. HSE is a successful prosecutor. Three quarters of the thousand offences prosecuted last year led to a conviction. The numbers of course vary and we have no target for prosecutions, only for health and safety improvements.

However we do agree that penalties are far too low. The average fine per offence is just under £30,000 but stripping out 13 fines in excess of £100,000 the average is just £6,219.

## **Macrory**

That is why the HSC very much value Richard Macrory's work. We replied in detail to the Macrory consultation in August 2006, making the following points :

- We were encouraged that serious consideration was being given to the important role of enforcement and effective penalties in tackling non-compliance
- We asked the Review Team in considering our response to appreciate that health and safety was unique and not always readily comparable with other regulatory regimes

- Before looking objectively at alternative penalties there is a need to ensure that the current level of penalties act as an effective deterrent
- Under HSWA enforcing authorities already have an effective range of enforcement tools which are applied according to the principles set out in the Commission's EPS
- We supported the planned consideration of the effectiveness of the criminal courts in dealing and deterring non-compliance
- On alternative penalties we urged that the options under consideration should ensure that the flexibility and discretion used in the enforcement process should continue and that the system for imposing penalties should operate fairly, clearly and transparently

The Commission by way of conclusion to its response to the Macrory Review stated,

“Obtaining the right enforcement tools, that can be applied in the right manner where they are appropriate, is essential in bringing about the positive changes we all desire to reduce the levels of death, injury and ill-health in the workplace.”

HSC/E in its consideration of what new measures to adopt to plug any gaps in its enforcement armoury concluded that restorative justice was worthy of further investigation. My colleagues have been studying closely the use made of restorative conferencing over the last ten years and its effectiveness including in terms of reducing the incidence of further offending and changing behaviour. We have noted with interest the RJ approach adopted regarding the management of health and safety in the mining industry in Australia. Further work is underway to explore, among a number of issues, the types of offences and situations that might be suitable for an RJ approach including restorative conferencing and the likely costs and benefits in terms of health and safety outcomes.

We are keen to continue to play our part in exploring the potential for using restorative justice to deal with health and safety offences.

Perhaps I could add two personal reflections on the enforcement debate. I shall not rehearse all the purposes of punishment. They are well known to you. My view is that on health and safety matters, restoration, prevention of a recurrence and deterrence should be the principle aims. But we often hear public calls for retribution, coupled with the call for explicit health and safety duties on directors and for corporate manslaughter legislation though I fear that campaigners are more interested in individuals than bodies corporate.

The public perception is that powerful corporate bodies and their senior directors escape unscathed when ordinary workers are harmed or killed.

I do not necessarily agree. But my view is that what is often lacking is the word “sorry”. John Armit’s recent apology stands in stark contrast to previous corporate reactions.

A second observation stems from my experience as a magistrate. I could not of course hear an HSE offence (and statistically they come up once every 14 years per JP) but if I did the sentencing guidelines in my bench book are pretty thin compared with the normal matters I deal with. I know that my bench colleagues would welcome more detailed guidelines.

### **Sensible risk**

My last point is about risk aversion. HSC/E is proud of its record in promoting sensible risk and a proportionate approach to health and safety regulation and enforcement. It is not the picture painted in the press where businesses live in fear of “Elfandsafety”. Health and safety is a frustrating business. In part it’s frustrating because so many of the stories are untrue, or based upon the

misguided actions of a few individuals - in reality the law is flexible and these outright bans just don't exist.

That is why last August I launched our sensible risk campaign. The campaign is based around a simple set of principles that set out what good risk management is – and is not about. In a nutshell: saving lives, not stopping them.

Madeleine will recall the meeting of the All Party Parliamentary Group on Adventure and Recreation in Society we both attended earlier this year. Concerns were expressed that HSE may be changing its policy and approach to the prosecution of individual employees under S 7 of HSWA and this could result in the prosecution of more teachers and adventure leaders. Following that meeting one of my colleagues in HSE wrote to Julian Brazier MP, the co-chair of that All Party Group, concerning this issue and copied my letter to the Association via Madeleine.

HSE's letter confirmed that there had been no change on enforcement under S 7 in recent years and no change was proposed. The numbers remain constant and small under 20 last year – most concern individuals working in construction and manufacturing.

We cannot find a single instance of an individual teacher being sued for failure to protect a child in the last 5 years. Moreover HSE prosecutes only in the most extreme circumstances. Such cases occur where the teacher has ignored clear, direct instructions from their employer or departed from all semblance of common sense, under one case a year.

HSE is most likely to prosecute under S 7 where employees have shown reckless disregard for health and safety and such disregard has resulted in serious risk. And yet the belief abounds amongst many teachers that if anything goes wrong they will almost certainly find themselves in court. Much remains to

be done in communicating facts about the legal responsibilities to teachers and others including the risk they face of being sued in civil law.

## **Conclusion**

So colleagues we in HSC/E are proud of our record in improving health and safety. We aim to be an effective regulator, firm but fair. The Macrory report can help us secure justice and improve health and safety.