



## The Löffstedt report and the Government response

### Corporate simplification

In March 2011, the government asked Professor Ragnar Löffstedt<sup>1</sup> to carry out a review of health and safety regulations. The aim was to identify opportunities to simplify the legislation, thereby reducing the “health and safety” burden on businesses and individuals. Both the report and the government’s response were published on 28 November 2011.

The immediate point to note is that Professor Löffstedt concluded that there was no case for radical overhaul. His recommendations are directed towards better understanding and implementation to avoid over compliance. Of the recommendations in the Report, the Government has immediately supported six key recommendations. A robust (and at first sight, challenging) timetable for action is set out in the Response, which if achieved, could result in a simplification of the legislation starting as early as summer next year.

### The recommendations

#### **Exempting from health and safety law those self employed whose work activities pose no potential risk of harm to others**

Urgent action is required by the HSE to remove H&S burdens from those self employed whose activities represent no risk to other people. Of course, where their activities could potentially pose a risk (either to themselves or to other people), such as in the building trades, the law will still apply. While it is now unlikely that the self-employed who are involved in low risk activities will be visited by the HSE or other regulators, the aim of this recommendation appears to be to remove unnecessary concerns and “red tape” from such people.

The timescale for achieving this is 2013.

#### **HSE should review all its Approved Codes of Practice (ACoPS)**

The initial review should take place by June 2012. As the Government acknowledges, a full review will be a major exercise given that there are 53 ACoPs. Carrying out the initial review over the next 7 months may also prove challenging. Some ACoPs are long and sometimes complex documents: for example, the ACoP to the CDM Regulations<sup>2</sup> is over 70 pages long and given that ACoPs have legal status (i.e. for some situations they describe the scope of what is reasonably practicable), any review and subsequent changes will need to be carefully and clearly communicated.

A review of ACoPS to ensure that they do provide the information which stakeholders require will no doubt be useful as some are very long and are criticised for being too legalistic: the key to this will be balancing simplification with maintaining what some ACoPS do well such as providing examples of good practice.

#### **HSE to undertake a programme of sector specific consolidations to be completed by April 2015**

There remain many old laws and regulations on the statute books which have been identified as areas appropriate for consolidation. However, the Report also identifies other more recent regulations which Professor Löffstedt has concluded simply duplicate other legislation and ones where there is no evidence that they improve health and safety outcomes, for example the Notification of Tower Cranes Regulations 2010.

Professor Löffstedt also highlights other examples where regulations should be amended, clarified or reviewed. These include the Work at Height Regulations 2005 (to ensure that they do not lead to people going beyond what is either proportionate or beyond what the legislation was originally intended to cover) and the requirement for portable appliance testing should be further clarified to stop over-compliance and ensure that these messages reach all appropriate stakeholder groups.

The Report also identifies sector-specific regulations which may benefit from consolidation. The sectors identified include explosives, mining, genetically modified organisms, petroleum and biocides, but other areas may also be included which are governed by a fragmented and potentially difficult to understand body of regulation.

The overall aim is to reduce the number of regulations by more than 50%, without reducing the protection offered to employees and the public and the aim is to do this by 2014. While it may be straight forward to identify older, potentially obsolete legislation, consolidation of other rules may prove more difficult, especially if the legislation originates in the EU.

#### **Legislation is changed to give HSE the authority to direct all local authority H&S inspection and enforcement activity**

The aim here is to improve consistency across all enforcement activity. There is an acknowledgement in the Government’s response that the quality of training of local inspectors needs

<sup>1</sup> Director of the King’s Centre for Risk Management at King’s College London.

<sup>2</sup> Construction (Design and Management) Regulations 2007

to improve, as well as dispelling some of the H&S myths that may cause many councils to be “over-cautious” in their inspections.

It is not clear whether the HSE will be given additional resources to fulfil this role, although the Report emphasises that enforcement activity should not only be consistent, but also targeted at the most risky businesses.

### **The original intention of pre-action standard disclosure lists is clarified and regulatory provisions that impose strict liability should be reviewed by June 2013**

Pre-action standard disclosure lists were originally intended to be a specimen list of documents that might be material in resolving personal injury claims. It appears that employers may in the past have been encouraged to settle such claims in the event that they did not have every single item of paperwork on that list, regardless of their overall level of compliance. The Civil Procedure Rule Committee is to look at how the original intention of the lists can be clarified and restated.

The more significant point is that of “strict liability”. Some health and safety regulations impose strict liability on employers – that is to say that a duty holder cannot rely on a defence of having done all that is reasonably practicable. In terms of criminal prosecutions, the HSE can always decide not to prosecute if it is not in the public interest. However, in relation to civil (personal injury) claims, liability may follow as a result of a breach of duties in health and safety regulations where strict liability applies. Employers may therefore find themselves subject to a higher standard than its usual common law duty of care.

The Government has agreed to look at ways to “redress the balance”, and amending strict liability regulations may be one way of achieving this.

### **The Government works more closely with the European Commission and others to ensure that both new and existing EU H&S legislation is risk-based and evidence-based**

Much is often made of the UK “gold-plating” EU legislation, that is the UK enhancing and going over and above what is actually required by the European Directive. Professor Löfstedt did not look at this issue in any great detail, but found little evidence to significantly challenge the conclusions of previous studies which stated that there is little evidence of gold-plating occurring.

The Government has said that it will work with other like minded EU states to achieve a more proportionate and risk based approach to health and safety including during the EU review in 2013.

## **Conclusion**

There is clearly an appetite within the coalition government for change and a move towards simplifying health and safety legislation. But there is also an acceptance in the Report and Response that while legislation and regulations need to be reviewed and, where appropriate, simplified and consolidated, it is the way in which those rules are implemented that is key to reform.

The Government itself highlights the fact that Britain has an “exemplary” health and safety record with the lowest rate of fatal injury of all the Eurostat countries. Such a record does not come about by chance and it is important that simplifying Britain’s health and safety regime makes it easier to comply rather than eroding the levels of compliance which we currently have.

An understanding of what safety arrangements are required is fundamental, and this applies not only to employers and their employees, investigators and regulators but also to those who provide safety advice. If the approach remains that to comply with health and safety obligations, employers feel they have to take more than proportionate steps, cultural and practical change will be difficult to achieve.

Recent court cases (*Tangerines and Bakers*<sup>3</sup>) have clarified the concept of “gross disproportion”. In short, the argument that “reasonably practicable” requires disproportionate steps has been dismissed. The real test of the efficacy of the Löfstedt report and the Government’s response to it may be whether this approach percolates down to day to day behaviour of not only employers and employees, but those that advise them. The Löfstedt report itself does not go so far as to recommend provision of a definition of “reasonably practicable” but this may still emerge from the ongoing work.



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<sup>3</sup>See our briefing at [http://www.burges-salmon.com/Practices/environment\\_and\\_health\\_and\\_safety/health\\_and\\_safety/Publications/Tangerines\\_and\\_Bakers\\_Judicial\\_clarification\\_of\\_Gross\\_Disproportion.pdf](http://www.burges-salmon.com/Practices/environment_and_health_and_safety/health_and_safety/Publications/Tangerines_and_Bakers_Judicial_clarification_of_Gross_Disproportion.pdf)

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