



UPDATE: The Health and Safety at Work (Offences) Act 2008 Heavier penalties for health and safety offences

January 2009

The Bill is passed

Our previous briefing published in September 2008¹ provided an overview of the Health and Safety at Work (Offences) Bill. The Bill passed its third reading in the Lords on 10 October 2008 and came into force on 16 October 2008.

This briefing provides an update of the likely use of the new powers of imprisonment and the effective date. A synopsis of the implications of the Act is set out in the box below.

Coming into force

The Act comes into force on 16 January 2009 and will apply to all offences committed after that time. It is not retrospective and will not therefore affect offences already under investigation, or incidents which occur before the effective date.

When will it be used?

In a rare step, and apparently as a result of pressure from business and industry bodies, a statement about the intention of the new penalties was issued by a Government Minister just prior to the final reading on 10 October 2008. This statement attempted to answer a range of concerns which had been raised and to justify the approach taken.

Lord McKenzie's² statement addressed two principal points:

- When was the power of imprisonment, which in principle will be available for almost any breach of safety law, intended to be used?

- How was the power consistent with the right to a fair trial under the European Convention on Human Rights?

The statement is of limited value in resisting sentencing for a safety breach (not least due to its vagueness). However, it does offer some reassurance that the powers are intended to be used "*Only where very serious circumstances applied*" and that sentencing guidelines would be amended as a priority to reflect this.

In respect of the compatibility of the new Act with Human Rights legislation, the statement suggests that the new powers represent a "*fair balance between rights of the individual to a fair trial and the protection of life and limb from dangerous work practices.*" It is likely, however, that this will be insufficient to avoid a challenge under the Human Rights Act.

Additionally and curiously, the statement appears to undermine the HSE's position in relation to *R v Chagot*, a current high profile prosecution awaiting a hearing in the House of Lords. In justifying the availability of imprisonment Lord McKenzie suggests that prosecutors "*may refer to the reasonably practicable steps that an individual could have taken*" in bringing their actions. It is precisely HSE's case in *Chagot* that prosecutors need do no such thing.

It remains uncertain when imprisonment will first be sought for one of the offences to which it has been extended. When it is, it remains unclear on what basis imprisonment will be justified and whether it will be challenged on Human Rights grounds.

¹ Located at: http://www.burges-salmon.com/what_we_do/Practices/environment_and_health_and_safety/health_and_safety/Publications/default.aspx

² Parliamentary Under-Secretary of State, Department for Work and Pensions

The Act in overview

The Act will:

- make more offences subject to trial in the Crown Court rather than the 'less serious' Magistrates Court.
- extend imprisonment for breaches of the HSWA to more offences. This will extend the possibility of imprisonment to the following areas:
 - the offences in s37 HSWA by which any director, manager, secretary or officer becomes guilty of a company's offence by neglect, consent or connivance;
 - each employee's obligations under s7 HSWA to co-operate with his employer in relation to safety and to take care of his own safety and that of others; and
 - employers who are sole traders and partnerships for HSWA Section 2 and 3 offences.

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