AN IER BRIEFING

The dangers of 'risk-based policy': Lessons from Löfstedt

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The dangers of 'risk-based policy': Lessons from Löfstedt

January saw the publication of Professor Ragnar Löfstedt's review of progress towards implementing the recommendations put forward in his November 2011 report *Reclaiming Health and Safety for All*.[1] In it, he concludes that substantial progress has been made, noting that all the recommendations have 'either been delivered already or are on track to be completed by the agreed date'.

More generally, however, the review again highlights how an apparently unobjectionable desire to deliver an 'evidence-based and risk-based' legislative framework can conceal a rather more subjectively driven programme of reform. It serves therefore as an important reminder of the need to treat claims of evidence- and risk-based policy-making with due caution.

The Löfstedt report – a reminder

Professor Löfstedt's original report was commissioned by Chris Grayling, then Minister for Employment, to 'identify opportunities to simplify health and safety laws'. In many respects the report was a reassuring one since, in the context of a strongly deregulatory inclined Coalition government, it largely endorsed the current regulatory framework for health and safety and did not embody a concerted attempt to weaken it. Nevertheless, a wide range of recommendations were put forward, some of which were distinctly disturbing.[2] They included the following 'key' ones:

- Exempting from health and safety law those self-employed whose work activities pose no potential risk of harm to others;
- The undertaking by HSE of a review of all ACoPs, with the initial phase of this being completed by June 2012 so businesses have certainty about what is planned and when changes can be anticipated;
- The undertaking by HSE of a programme of sector-specific regulatory consolidations to be completed by April 2015, with it being envisaged that this programme extend to a consideration of regulations relating to mining, genetically modified organisms, biocides and petroleum;
- Legislative reform to give HSE the authority to direct all local authority health and safety inspection and enforcement activity, in order to ensure that it is consistent and targeted towards the most risky workplaces;
- The clarifying and restatement of the original intention of the pre-action protocol standard disclosure list that is used in civil actions for damages;
- A review, to be completed by June 2013, of regulatory provisions that impose strict liability with a view to either qualifying them by 'reasonably practicable' where such

[1] *Reclaiming health and safety for all: A review of progress one year on* http://www.dwp.gov.uk/docs/lofstedt-report-one-year-on.pdf

[2] For a detailed critique of the report see Phil James, Steve Tombs and David Whyte. 2013. 'An independent review of British health and safety regulation: From common sense to non-sense', *Policy Studies*, 34 (1), 36-52.

liability is not absolutely necessary or amending them to prevent civil liability from attaching to a breach of those provisions.

The progress review: the mythology of evidence- and risk-based analysis

In reviewing the progress made in implementing his reform proposals, Professor Löfstedt unsurprisingly does not question the wisdom of any of them - including those relating to the removal of strict liability and the exemption from health and safety law those self-employed whose work activities pose no potential risk of harm. Notwithstanding the failure of the original report to generally demonstrate that they could be defended on evidence- and risk-based grounds.

In fact, the emphasis on evidence- and risk-based policy making continues to seem rather variable. For example, it is noted that government has chosen to go beyond the recommended proposal on strict liability by moving to effectively abolish actions for breach of statutory duty. However, it is left unclear whether this change passes the tests of being evidence and risk-based. Instead, the hope is merely expressed that the government will carefully monitor the impact of the change to ensure that it does not have unforeseen consequences: a hope that would seem to be equally called for in relation to a number of the other reforms currently underway.

This variability, however, comes out most clearly in the section of the progress review where it is noted that consultation is taking place on a National Local Authority Enforcement Code that 'will require LAs to target interventions on those activities that give rise to the most serious risks, and to only otherwise use proactive inspections where intelligence suggests risks are not being properly managed'. Thus, while observing that this code does not go as far as his recommendation that HSE be given the authority to 'direct local authority health and safety inspection', Professor Löfstedt notes that 'it is certainly a step in the right direction and, if adhered to, should ensure a more proportionate, risk-based [that phrase again] approach to LA enforcement'.

One therefore has to assume that the proposed exclusion under this code of a vast array of types and sectors of activities from proactive inspections is seen to accord with this approach, even though it potentially moves from LAs an important source of intelligence regarding where 'risks are not properly managed'. Indeed, given the absence of any critical comment, the same is presumably true of the quoted estimate that in 2012/13 LAs will have reduced their unannounced proactive inspections by 86% since the baseline of 2009/10.

In reality, of course there is simply no firm evidence to support the view that such a reduction in inspection numbers will not adversely impact on levels of safety and health management - particularly when account is taken of the substantial body of evidence suggesting that employer compliance with the law is influenced by the belief that there is a reasonable likelihood of non-compliance being discovered. In fact, there is not even any firm evidence showing that such a reduction can be defended on cost-benefit grounds - bearing in mind that in his original report Professor Löfstedt observed that (a) health and safety regulations have been an 'important contributory factor' in the significant reduction of injury rates since the

introduction of the 1974 Act, and (b) the costs of complying with them are considerably exceeded by those incurred by individuals, employers and the state as a result of work-related injuries and ill health.

Learning from Löfstedt

There is much that was sensible in the original Löfstedt report. However, the claim reiterated in the recent progress review of evidence- and risk-based policy making must be viewed, to say the least, as problematic. An important lesson to be taken away from the document therefore is the need to be very wary of those who advance proposals on the grounds that they are in some way objectively valid. For such claims should simply not be accepted in the absence of clear supporting evidence.

More fundamentally still, it needs to be very much borne in mind that risk-based analysis should not only incorporate relativist comparisons of risk but also be firmly and soundly informed by considerations of desired outcomes or performance. For it can otherwise potentially lead to the 'objective' justification of ultimately harmful reforms. After all, on the basis of what has been said, it would appear logically possible to have a risk-based programme of inspections that only extends to cover just a handful (of very high risk of course) workplaces!