

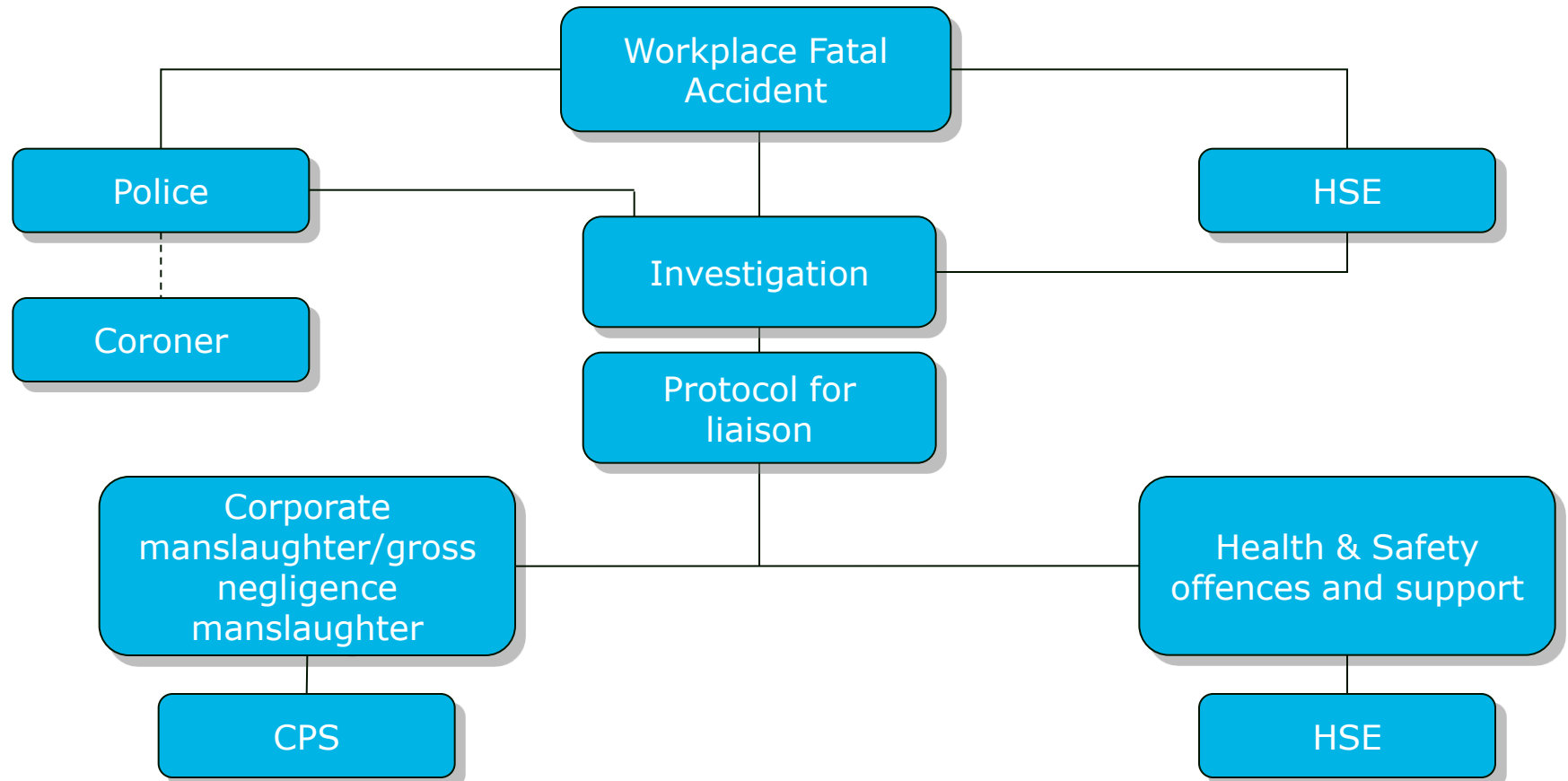
# The Rules of the Game

*HSE's current enforcement strategy  
and proposals for change*

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# The investigation process and practicalities

## Fatal accident investigation protocols





## **The Site Visit**

# The Site Visit

## *Key considerations*

- When will it occur?
- Who will be there?
- Are you/your staff prepared?



# Powers of HSE Inspectors

## Section 20 HSWA powers

- enter premises
- examine and investigate
- Take samples
- Require a person to give answers to such questions as the inspector thinks fit
- Require the production of, inspect and take copies of any entry in any books or documents





# **Working with the HSE/Police**

# Testing your awareness

## *Interviews*



# The internal investigation





# Legal requirement to investigate?

- No specific requirement, but
  - Investigating Accidents and Incidents (HSG245)
  - Management of Health and Safety at Work Regulations 1999 (MHSWR)
  - Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR)
  - Successful health and safety management (HSG65)

# Levels of investigation (HSG 245)

Likelihood of recurrence	Potential worst consequence of adverse event			
	Minor	Serious	Major	Fatal
<b>Certain</b>	Yellow	Orange	Red	Red
<b>Likely</b>	Yellow	Orange	Red	Red
<b>Possible</b>	Yellow	Orange	Red	Red
<b>Unlikely</b>	Cyan	Yellow	Orange	Red
<b>Rare</b>	Cyan	Yellow	Orange	Red

# Levels of investigation (HSG 245)

## *Who?*

- Minimal Level  
(Minor-Unlikely/Rare)
  - relevant Supervisor looks into what happened to see what lessons can be learned to prevent a recurrence
- Low Level  
(Minor-Certain/Likely/Possible)      (Serious-Unlikely/Rare)
  - short investigation by Supervisor or Line Manager into immediate and underlying causes to learn any general lessons

# Levels of investigation (HSG 245)

- Medium Level

(Serious-Certain/Likely/Possible) (Major-Unlikely/Rare)

- more detailed investigation by Supervisor, Line Manager, Health and Safety Officer, Employee Representative to look for immediate, underlying and root causes

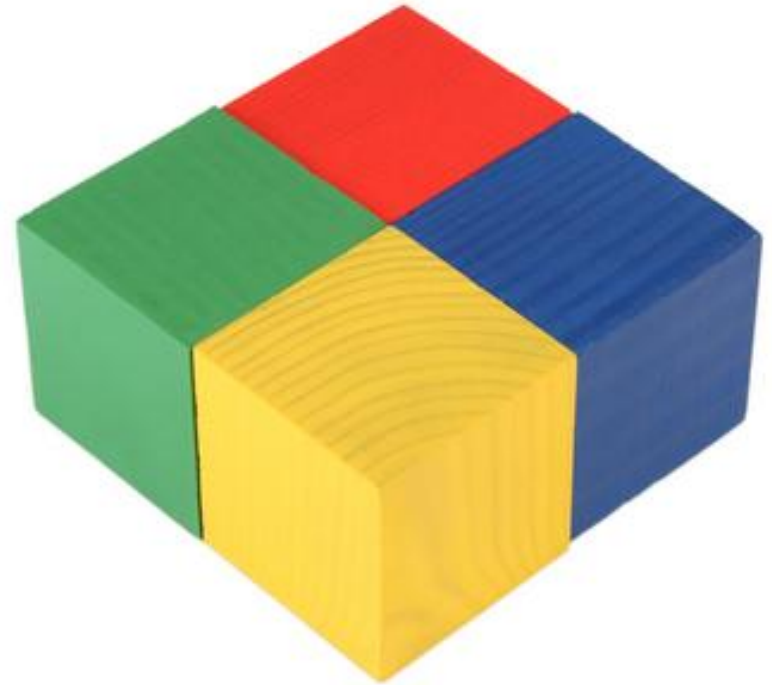
- High Level

(Major-Certain/Likely/Possible) (Fatal)

- team based investigation involving Supervisor, Line Manager, Health and Safety Officer, Employee Representative under the direction of Directors/Senior Managers

# Structure

- Executive Summary
- Introduction / Background
- Body
- Personal factors
- Physical factors
- Management
- Previous history
- Conclusions





# PR and Media

- Spokesperson?
- Press conference?
- Voluntary statement?
- Insurers?





**Buncefield – Disclosure  
and Privilege**

# Legal privilege

- Protects confidentiality
- Dominant purpose?
- Internal investigation reports?
- Who to distribute to – the limited distribution rule
- Partial release?



# Civil vs Criminal

- Civil proceedings commenced before criminal
- Substantial Disclosure
- Accident investigation report- can this be disclosed?





# Lessons to learn

- **S20 HSWA 1974?**
- **Separate reports?**



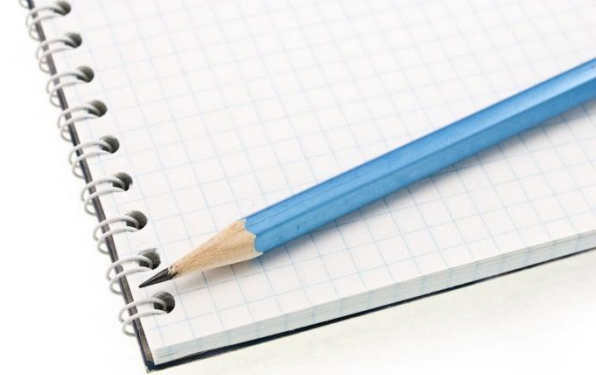
# Investigations and potential claims



Such claims may arise from those subject to investigation



# Enforcement Notices Panic and Pitfalls



# Enforcement Notice Basics

## *A reminder*

- Types of Enforcement Notice:
  - Prohibition Notice
  - Improvement Notice
- Number of Enforcement Notices issued by enforcing authorities in 2009/10:

15,881

# Enforcement Notices

## *Common mistakes*

- Enforcement Notice = No Prosecution
- Assuming compliance is essential
- Viewing Notices as non-negotiable
- A willingness to please
- Failing to appreciate the wider picture



# Threshold for service

## *Inspector's Opinion (1)*



- For an Improvement Notice (Section 21 HSWA 1974):

*“a person:*

- (a) is contravening one or more of the relevant statutory provisions; or*
- (b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated”*

- For a Prohibition Notice (Section 22 HSWA 1974):

*“the activities involve or, as the case may be, will involve a risk of serious personal injury”*



# Threshold for service

## *Inspector's Opinion (2)*

*"the activities involve or, as the case may be, will involve a risk of serious personal injury"*

- Risk = Any possibility of danger
- Multifaceted approach to determining risk
- Is a Notice warranted?



# Threshold for service

## *Inspector's Opinion (3)*

- Does it differ for fire?
- Regulatory Reform (Fire Safety) Order 2005:  
*"a risk to relevant persons so serious that use of the premises ought to be prohibited or restricted"*
- Immediate Prohibition Notice:  
*"the risk of serious personal injury is or, as the case may be, will be imminent"*



# Risk Gap Analysis

Table 5.1 Health and safety initial enforcement expectation			
Risk Gap	Standards	Initial Enforcement Expectation* (to secure compliance with the law)	Prosecution
Extreme	Defined	Improvement Notice	Yes
	Established	Improvement Notice	Yes
	Interpretative	Improvement Notice	
Substantial	Defined	Improvement Notice	
	Established	Improvement Notice	
	Interpretative	Letter/inspection form	
Moderate	Defined	Improvement Notice	
	Established	Letter/inspection form	
	Interpretative	Letter/inspection form	
Nominal	Defined	Letter/inspection form	
	Established	Letter/inspection form/Verbal warning	
	Interpretative	Verbal warning	

\*Immediate risk of serious personal injury has already been considered and dealt with where appropriate

# Responding to a Notice

## *Initial thoughts*

- Jurisdiction of Officer involved
  - Local Authority
  - Fire Authority
  - HSE
- Technical Breaches:
  - Company name/location
  - Offences
  - Time/date
  - Person served



# Responding to a Notice

## *Options*

- Accept and comply
- Appeal
- Extension
- Ignore



# Responding to a Notice

## *Acceptance and compliance*

- Implication for prosecution
- Approval from enforcing authority
- How far to comply
- On record (HSE website and tender process)





# Responding to a Notice

## *Appeal*

- Starting an Appeal – 21 days
- Relevant Body – Employment Tribunal
- Holding position
- Effect of Appeal on the Notice served



# Appealing a Notice

## *Common Grounds*

- Notice fundamentally flawed
- Inspector exceeded powers
- No contravention of statute
- Not 'reasonably practicable' or impossible to comply
- No risk of serious personal injury (for Prohibition Notices)



# Role of the Tribunal

## *Becoming the Inspector*

- NOT a review of the Inspector's decision
- Ask: What would the Tribunal do?
- Considering all information at date and time of service



# Penalties for serious and fatal incidents

- The law has not changed
- The application has



- Corporate Manslaughter
- Health and Safety Offences
- Individual Offences
- Regulatory breaches



# Sentencing Guidelines Council Guidelines

*Corporate Manslaughter and Health and Safety Offences  
Causing Death*

# When does the guidance apply?

- Only relates to organisations - not individuals
- For health and safety offences, only when proved the offence was a significant cause of death





# Key Guidance

- Fine for corporate manslaughter
  - “will seldom be less than £500,000 and may be measured in millions of pounds”
- Fine for health and safety offences causing death
  - “will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more.”

# Financial Information to be Provided by the Court

- Companies - published audited accounts
- Partnerships - annual audited accounts
- Local Authorities, police and fire - the Annual Revenue Budget
- Health Trusts - Monitor (independent regulator of NHS Trusts) reports

# Change in reality?

*Doing fine...*



# Buncefield - Penalties

<b>1. Total</b>	<b>£3,600,000</b>	<b>Costs £2,600,000</b>
<b>2. HOSL</b>	<b>£1,450,000</b>	<b>Costs £1,000,000</b>
<b>3. BPA</b>	<b>£300,000</b>	<b>Costs £480,000</b>
<b>4. Motherwell</b>	<b>£1,000</b>	<b>Costs £500</b>
<b>5. TAV</b>	<b>£1,000</b>	<b>Costs £500</b>



# Recent cases

## *Tesco – April 2010*

- £95,000 fine + £24,321 costs

“Fire safety is a key part of good business management and the general public should feel safe from fire ”

- Breaches of 2005 Order:
  - Fire doors wedged open
  - Obstructing emergency exits
  - Failure to clear emergency routes
  - Storing flammable materials in protected stairway

# Recent cases

## *RWE npower / AMEC -2011*

- Maintenance worker fell 12 metres through unprotected opening (June 2007)
- Confusion and misunderstanding between RWE as client and AMEC as principal contractor
- RWE: £250,000 fine + £30,000 costs (Sec.2)
- AMEC: £200,000 + £30,000 costs (Reg.11)





# First Prison Sentence for Section 7 HSWA



# The case of the errant headmaster

- **Students 'may' have been slightly inebriated**
- **'A serious error in an otherwise unblemished career'**
- **Now retired**
- **Fine PERSONAL not organisational under S7**



# The case of the errant director

- Ernest Jones 4/2/10
- Had no management system in place
- Jones was aware of the risks but did nothing to mitigate them
- Fine £2k
- £1k Costs



# The Young Report



# Cost Consciousness



# Background

- The Young Report
- Tightening of the public purse
- Change in Government policy to recover costs from duty holders
- Environmental Legislation 'Polluter Pays' Principle



# What about Local Authority Enforcement?



What next for HSE?

**ANSWERS**

QUESTIONS?

