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

- Police
- Coroner
- Workplace Fatal Accident
- Investigation
- Protocol for liaison
- Corporate manslaughter/gross negligence manslaughter
- CPS
- Health & Safety offences and support
- HSE
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)

<table>
<thead>
<tr>
<th>Likelihood of recurrence</th>
<th>Potential worst consequence of adverse event</th>
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<tbody>
<tr>
<td></td>
<td>Minor</td>
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<tr>
<td>Certain</td>
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<tr>
<td>Likely</td>
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<td>Possible</td>
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<td>Rare</td>
<td>Light Blue</td>
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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

Discrimination

Beware of potential claims which may arise from poor handling of investigation

Such claims may arise from those subject to investigation

Breach of trust and confidence/constructive dismissal

PI/stress
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

<table>
<thead>
<tr>
<th>Risk Gap</th>
<th>Standards</th>
<th>Initial Enforcement Expectation* (to secure compliance with the law)</th>
<th>Prosecution</th>
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<td>Letter/inspection form</td>
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<td>Verbal warning</td>
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*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

1. Total  £3,600,000  Costs  £2,600,000
2. HOSL   £1,450,000  Costs  £1,000,000
3. BPA    £300,000   Costs  £480,000
4. Motherwell  £1,000  Costs  £500
5. TAV    £1,000   Costs  £500
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?
QUESTIONS?