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Towards a More Effective Health and Safety Regime for UK Workplaces Post COVID-19

A.C.L. DAVIES* AND LISA RODGERS**

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ABSTRACT

In this article, we identify ways in which the Covid-19 pandemic has exposed flaws in the UK's regulatory regime for health and safety at work. The characteristics of Covid-19 presented particular challenges for the risk-based approach to regulation embraced by the Health and Safety Executive (HSE). We offer a critique and suggest four principal areas for reform. First, it is clear that HSE and other enforcement bodies need an injection of funds to support their inspection and enforcement activities. Second, the regulatory regime itself is in need of modernisation to reduce reliance on criminal law. Third, wider labour law problems such as the distinction between worker and employee, which impact health and safety law, need to be resolved. Fourth, and most importantly, there must be much greater recognition that health and safety is an issue for every person in the workforce. Even if Covid-19 ceases to pose such a significant workplace risk, we consider that there are a variety of other common health and safety issues that would be better addressed by a modified and modernised regulatory strategy.

1. INTRODUCTION

Health and safety law in the UK suffers from some well-known weaknesses.[1] For example, Health and Safety Executive (HSE) and other regulators, such as local authorities, have experienced severe budget cuts, which have limited their opportunities for inspection. The mechanisms available to them for enforcement, which rely heavily on the criminal law, are cumbersome and often ineffective. Moreover, the challenge of ensuring that workplaces are

*Faculty of Law, University of Oxford, United Kingdom, email: anne.davies@law.ox.ac.uk;

**Faculty of Law, University of Leicester, United Kingdom, email: lr141@leicester.ac.uk.
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[1]This article considers developments up to November 2022.

safe has been exacerbated by other developments in the labour market. The decline in collective representation at work has reduced opportunities for meaningful dialogue between working people and their employers about safety issues, and the growth of the gig economy has blurred lines of responsibility for safety whilst creating a group of vulnerable workers who are not well-placed to protect themselves.

The Covid-19 pandemic has brought these problems into much sharper focus, as well as creating some new problems of its own. For example, an inspection and enforcement regime focused on (traditionally) high-risk workplaces had to pivot to deal with shops and offices, because workplaces that would typically have been thought of as lower risk were now grappling with a serious contagious disease. The provision of personal protective equipment (PPE), historically the preserve of sectors such as healthcare or construction, suddenly became a requirement for any workplace that remained open, and it became clear that many workers in the gig economy were being expected to make their own arrangements. New problems arose too. For example, the sudden switch to home working for many white-collar workers resulted in a greater risk of physical and mental ill-health due to makeshift desk arrangements and loss of control over the boundary between work and non-work time.

For us, the pandemic has cast new light on what we see as a fundamental flaw in the UK's approach to health and safety at work. For the last couple of decades, most regulatory regimes (including health and safety) have adopted a risk-based approach to regulation, in which regulatory resources are targeted at sectors and firms perceived to be at the highest risk of causing serious or widespread harm. This approach has been particularly useful in the context of a health and safety regime which has suffered a number of crises of legitimacy over the years.[2] The 'common sense' nature of risk-based regulation as means of providing technical, objective responses to (social) problems has served to bolster this legitimacy, whilst at the same time allowing and sanctioning the pursuit of institutional ideals and imperatives around deregulation and enhancing the economic rationalisation of regulation.[3] However, it is our argument that risk-based approaches to regulation have not coped well with the changing landscape of risk brought

[2] P. Almond and M. Esbester, 'The Changing Legitimacy of Health and Safety, 1960-2015: Understanding the Past, Preparing for the Future' (2016) 14 (1) *Policy and Practice in Health and Safety* 81, 91.

[3] P. Almond and M. Esbester, 'Regulatory Inspection and the Changing Legitimacy of Health and Safety' (2018) 12 *Regulation and Governance* 46.

about by Covid-19. In large part, this is due to the nature of the risk (the risks of Covid-19 being not only widespread but also variable and poorly understood), but is also down to failures of the system of risk management more generally.

Our objective in this article is to document what seems to us to be the most important health and safety problems either raised or intensified by the Covid-19 pandemic. Indeed, as we move to an 'endemic' phase of the disease, this analysis is even more vital. Under the government's 'Living With Covid' plan, specific measures heightening employer responsibility for worker safety have been dismantled and the onus is being put back on the 'normal operation' of health and safety (and labour law).[4] Now is the time to assess the functioning of the system of the health and safety system in the UK under Covid-19, review the lessons learnt and suggest reforms to the system which reflect those lessons. We identify four principal areas for reform. First, it is clear that HSE and other enforcement bodies need an injection of funds to support their inspection and enforcement activities. Second, the regulatory regime itself is in need of modernisation to reduce reliance on the criminal law. Third, wider labour law problems such as the distinction between worker and employee, which impact health and safety law, need to be resolved. Fourth, and most importantly, there must be much greater recognition that health and safety is an issue for every person in the workforce. Whilst this is clear as a matter of law, it has been obscured in practice by the predominance of the risk-based approach to regulation. Even if Covid-19 ceases to pose such a significant workplace risk, we consider that there are a variety of other common health and safety issues that would be better addressed by a modified regulatory strategy. It is time to stop neglecting the day-to-day vulnerabilities of ordinary working people and to work towards securing this key element of decent work for all.

For ease of exposition, we break this large topic into the three main functions of any regulatory regime: standard-setting, monitoring and enforcement. Under each of these headings, we identify a mix of known problems with health and safety regulation exacerbated by the pandemic, and new problems that arose during the pandemic. These discussions form the basis

[4]For example, from 1 April 2022 employers will no longer be required to consider Covid as part of their risk assessments. UK Gov, 'COVID-19 Response: Living with COVID-19' (23 February 2022). Available at <https://www.gov.uk/government/publications/covid-19-response-living-with-covid-19/covid-19-response-living-with-covid-19> (last accessed 24 March 2022).

for a series of reform proposals presented in the concluding section. We preface this with a brief overview of risk-based regulation and its problems.

2. RISK-BASED REGULATION

Health and safety law is defined by the 'super-concept' of risk.[5] It is understood that through their activities, employers create risks that could potentially endanger workers and others, and that they should therefore take action to eliminate or control those risks.[6] The main legal framework is set out in the Health and Safety at Work etc. Act 1974 (HSWA). Under section 2 of the Act, an employer must 'ensure, so far as reasonably practicable, the health, safety and welfare at work of all his employees' and under section 3 must 'conduct his undertaking in a way as to ensure so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health and safety'. This duty is supplemented by the provisions of the Management of Health and Safety at Work Regulations 1999 (MHSWA) which require that every employer makes a 'suitable and sufficient' assessment of the health and safety risks to which employees are exposed whilst at work. Employees are implicated too; they should take reasonable care for their own health and safety at work and the health and safety of others.[7]

The starting point of the legislation is workplace activities rather than the employee/employer relationship as such. From this perspective, it makes sense to take a targeted approach to regulation (albeit supplemented by a general duty of care), because some activities undertaken by employers will create more risks to employees than others and these activities should be more tightly controlled. Hence, health and safety law has traditionally had a

[5]E. Ales, L. Miranda and A. Giurini, 'Italy: From Occupational Health and Safety to Well-being at Work' in E. Ales (ed), *Health and Safety at Work: European and Comparative Perspectives* (Zuidpoolsingel, Netherlands: Kluwer Law International, 2013) 195.

[6]C. Sirrs, 'Risk, Responsibility and Robens: The Transformation of the British System of Occupational Health and Safety 1961-74' in T. Crook and M. Esbester (eds), *Governing Risks in Modern Britain* (Basingstoke: Palgrave Macmillan, 2016).

[7]Section 7 HSWA states that: It shall be the duty of every employee while at work—

(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and

(b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.

preference for industry-specific legislation in certain designated 'high-risk' industries, such as manufacturing and mining.[8] There is also a strong political element to these decisions about risk. The injury created by industrial activity is a 'public' issue in a number of ways. First, the visibility of injury and the dramatic consequences for individuals make this issue one of the highest moral and constitutional standing,[9] and this ties in with the preference for regulation of heavy industry where the risk of accidents has been highest. Second, industrial accidents and diseases have an impact beyond the workplace. Members of the public can be directly affected by industrial accidents, and all are indirectly affected by the burden of industrial accidents and diseases on the public insurance, public enforcement and social security system.

In the UK context, the ethos of 'risk-based regulation' represents a wider political philosophy associated initially with the New Labour government which has come to dominate the enforcement regime over the past couple of decades.[10] In a classic 'command and control' regulatory regime, the regulator sets standards for the subjects of regulation, inspects them to determine whether they are complying, and takes enforcement action if they are not. A common problem with this approach is that it may not be possible or justified to give the regulator sufficient resources to inspect compliance with every standard at every firm on a regular basis. If the regulator simply inspects at random, it will inevitably impose unnecessary burdens on compliant firms and miss opportunities to improve the performance of non-compliant firms. Thus, it may fail to achieve its regulatory objectives. A risk-based approach to regulation recommends that the regulator should take steps to identify 'high-risk' sectors or firms, and target its inspection and enforcement activity at those firms.[11] A 'high-risk' sector or firm is typically defined as one where the possible harm is serious (death or serious

[8] Early regulation of heavy industry on the basis of accident risk includes (but is not limited to): The Metalliferous Mines Regulation Act of 1872; Quarries Act of 1894; Explosives Act of 1875; Threshing Machines Act of 1878.

[9] Early Factory legislation was justified on strongly moral grounds. Lord Ashley, who presented the Factories Bill 1933 was clear on the humanitarian motivations of the Bill: that such a Bill was necessitated on the basis of the deep commitment of mankind to prevent the 'unjust sufferings' of innocent children. HC Deb 03 April 1833 vol 17 cc79-115, col 90.

[10] It is particularly associated with the Hampton Review: P. Hampton, *Reduction in Administrative Burdens: Effective Inspection and Enforcement* (UK Government, 2005).

[11] For an overview, see OECD, Risk and Regulatory Policy: Improving the Governance of Risk (2010), and for a more critical account, see R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd edn (Oxford: OUP, 2011), chapter 13.

injury, for example) and there is a high likelihood of it occurring. For example, it might be argued that drilling for oil at sea is 'high risk' because of the possibility of explosions leading to death or injury and because of the conditions in which the work takes place (at sea, in poor weather and so on) increase the likelihood of accidents. The appeal of risk-based regulation is obvious: scarce enforcement resources should be targeted at the sectors or firms most likely to cause the problems the regulatory regime was designed to tackle.

However, risk-based regulation is not without its flaws. One problem is the treatment of what Black calls the 'bulge': the large group of firms engaged in generally non-hazardous activities.[12] Under a risk-based approach, these firms are unlikely to see an inspector, which may make them blasé about their obligations. The regulator may need to use a secondary strategy such as random inspections to ensure that these workplaces do not develop a sense of 'immunity' from regulation.[13] Another similar problem is the potential to neglect lower-level risks or standards. For example, while workplace stress can have severe consequences for the affected individual, it is easy to see why a regulator might opt to focus more strongly on major physical hazards such as falls from height. Third, risk-based approaches are widely acknowledged to be poor at identifying and dealing with novel risks.[14] This is because the regulator is bound to rely largely on existing data in order to identify high-risk firms. In the health and safety context, a firm's or sector's past record in relation to accidents and disease will be the principal source of information used to determine the likelihood of it being a source of hazard in the future. Most regulators face a challenge in spotting situations in which a new risk is emerging or the risk profile of a particular industry is changing. For example, it is not clear whether regulators have gotten to grips with the health and safety issues presented by the exponential rise in food delivery services provided by individuals on bicycles or mopeds. This problem is exacerbated where there is a lack of information about the nature or extent of the novel risk, as in the case of Covid-19.

The pandemic presented a significant challenge to risk-based regulation along all three of these dimensions. First, sectors and firms traditionally thought of as relatively low-risk, such as shops and public transport, became

[12] J. Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom' [2005] *PL* 512, 532.

[13] See OECD (n.11), 201–3; Baldwin (n.11) 284.

[14] Baldwin (n.11) 288–91.

significant sites for transmission of the virus. The Covid-19 risk profile of a particular workplace would often be quite different to its risk profile for other health and safety hazards. Second, the risk of Covid-19 was itself difficult to classify and was, in some instances, low level. While some people infected with the virus died or were seriously ill (either in the short-term or with long-term Covid), many experienced mild illness with few or no symptoms, particularly as the vaccination programme expanded and newer, milder variants emerged. Third, Covid-19 was a new risk, and although much has now been learned about how to manage that risk, it is important to remember the extent of uncertainty in the early days of the pandemic as to how the virus was transmitted and which precautions (face coverings, distancing, sanitising and so on) were likely to prove effective.

Of course, one response to this might be to say that Covid-19 was an exceptional situation—a once-in-a-generation event, for example—and thus it is no surprise that existing regulatory regimes struggled to cope. This is a fair point and we would not wish to underestimate the challenges faced by both firms and regulators during extraordinary times. However, our concern is a different one. The pandemic is just one example of a health and safety issue that is not readily addressed by risk-based regulation. There are many other issues that are potentially devastating to the affected individual but 'low level' from a risk-based regulation perspective: for example, mental health problems, such as those caused by long hours working and stress at work, or bad backs caused by poor manual handling practices or inappropriate seating arrangements. Risk-based regulation needs to be supplemented by other sensible strategies to tackle 'low-level' risks.[15]

Indeed, the targeted approach to risk which underscores health and safety law can be contrasted with the more generalised approach to vulnerability and risk which is at the heart of labour law. Traditional theories of labour law view every employment relationship as imbued with risk for workers, in the sense that they are subject to a bargaining power disadvantage vis-a-vis their employers.[16] The law should therefore step in either to provide workers with the means of increasing their bargaining power or to regulate

[15] There have been attempts historically to try to give more attention to lower-level risks and garner inspection tools to do so: see, for example, the 'Revitalising Health and Safety' strategy of the early 2000s, Department of Environment, Transport and the Regions *Revitalising Health and Safety: Strategy Statement* (London: DETR, 2000). These programmes have been rejected precisely because they cannot be incorporated within the risk regulation regime of health and safety as outlined in the Hampton review (n.10) 26.

[16] P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (Oxford: Stevens, 1983).

work relationships directly. Labour law also moves beyond the general to the particular, for example, by addressing the ways in which workers may experience discrimination at work because of their personal characteristics. While it would clearly be impossible for a regulator with limited resources to address the situation of each individual worker, we argue that it is appropriate to consider how risk-based approaches can be balanced against better recognition of the right of every working person to a safe workplace.

3. HEALTH AND SAFETY STANDARDS

Here we consider two issues: the role of Covid-19 in challenging the way in which health and safety standards are formulated and the problems which emerged concerning their scope of application. In both cases, the pandemic revealed an insufficient focus on setting appropriate standards for *all* working people.

A. Risk and Morality: Protecting the Vulnerable

As has already been intimated, Covid-19 presented a novel risk profile. Sectors which were previously considered 'high risk' did not necessarily present the highest risk to workers in the pandemic.[17] In terms of Covid transmission, traditional high-risk industries, such as agriculture, had a low-risk profile. The outdoor, and often isolated nature of the work meant that there was less risk of passing the virus on. By contrast, areas traditionally considered 'low risk' such as office work had much higher transmission risk. Indeed, some of the most serious concerns about workplace safety during the pandemic were raised by office workers. In April 2021, office workers at the DVLA in Swansea took strike action over health and safety concerns at the site. They pointed to 600 confirmed cases of coronavirus at the site, more than any other workplace in the UK.[18] Furthermore, whilst home working was considered zero risk from the point of view of coronavirus

[17] ONS, 'Which occupations have the highest potential exposure to the coronavirus' (COVID-19) (11 May 2020) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/whichoccupationshavethehighestpotentialexposuretothecoronaviruscovid19/2020-05-11 last accessed 29 March 2021.

[18] BBC News, 'Covid: DVLA staff strike over "fear" at Swansea HQ' https://www.bbc.co.uk/news/uk-wales-56647149 last accessed 5 April 2022.

transmission, and outside the sphere of regulation, subsequent studies have shown that home working has its own particular risk profile and is not risk-free.[19]

It could be argued that this challenge could be met within the current risk-management scheme of health and safety law. There is already the duty under the provisions of the Management of Health and Safety at Work Regulations 1999 (MHSWA) that every employer makes a 'suitable and sufficient' assessment of the health and safety risks to which employees are exposed whilst at work. This is supplemented by the duty on all employers to duty to manage workplace risks caused by biological agents under the Control of Substances Hazardous to Health Regulations 2002 (as amended). It could be argued that it would only be necessary to strengthen the guidance on risk assessments to those sectors with a new elevated risk profile to meet the challenge of Covid-19. Indeed, the UK government did produce both general and sector-level guidance to employers on the management of Covid risks, but that guidance still tended to focus on traditional risk industries such as construction. Indeed, that guidance was ultimately ineffective as the workplace became a major site of coronavirus transmission in practice: between 10 April 2020 and 13 March 2021, 31,380 occupational disease notifications of Covid-19 in workers were reported to enforcing authorities (HSE and local authorities), including 367 death notifications.[20]

The argument pursued here is that in fact, Covid-19 presents a deeper challenge to the methodology of health and safety law and the particular evolution of the risk-management model that this methodology represents. The argument in this section is that the current health and safety model is too focused on the *workplace* as the site of regulation and insufficiently focused on the *worker*. To some extent, this is an inevitable practical response to the operation of health and safety as a risk-based regime. It is at the level of the workplace where the capabilities, expertise and resources for assessing and responding to risk are situated. However, this model has proven itself to be extremely 'sticky' in the face of changing risk profiles and the emergence of new workplaces and spaces post Covid. Moreover, there is a deeper level of challenge provided by the advent of Covid-19. The pandemic has served as a reminder that even in a cost-benefit or risk-management

[19] S. J. Wood, G. Michaelides, I. Inceoglu, E. T. Hurren, K. Daniels, and K. Niven, 'Homeworking, Well-Being and the COVID-19 Pandemic: A Diary Study' (2021) 18 (14) *International Journal of Environmental Research and Public Health* 7575).

[20] HSE, 'Management Information: Coronavirus Disease Reports' (undated) https://www.hse.gov.uk/statistics/coronavirus/index.htm last accessed 30 March 2021.

model, the moral importance of health and safety protection remains an important consideration (even if this is in balance with other factors).[21] The problem with the current model is that the moral accountability and social validity of health and safety law are attached to certain industries, and those industries are disappearing or no longer pose the greatest risk to workers. Without a focus on the worker, there is nothing to fill this vacuum. Under the current model, health and safety law is a weak force in identifying and responding to particular (new) vulnerabilities to which workers are exposed in novel risk situations and this undermines the coverage and effectiveness of the law.

It is worth noting that at its inception, the legitimacy of health and safety regulation was based on the need to modify the social costs of the industrial revolution for certain groups of workers. As such, health and safety had a moral element which relied on the identification of worker vulnerability. Some of the earliest statutory interventions in the workplace in the UK occurred through the auspices of health and safety law targeted to those groups of workers identified as vulnerable, namely, women and children. A series of Factory Acts between 1819 and 1833 dealt with the working conditions of children. These Acts set a maximum 9-hr day and 48-hr week for the under-13s, a 12-hr day and 69-hr week for those between 13 and 18, and mandated the abolition of night work for all under 18 in textile mills.[22] Women were the subject of the subsequent Mines Regulation of 1842, which barred them from underground working, and the Factories Act of 1944 extended the protections of the 18-hr day in the textile industry to women workers.

The targeted nature of early workplace legislation in the UK allowed it to gain political traction at the time. The legislation could be presented as a humanitarian or social welfare response to the unjust sufferings of certain vulnerable groups, rather than legislation which would change the existing bargain between employers and their employees.[23] Indeed at the time of the introduction of the Factories Act 1833, there was significant concern that such legislation should not be extended to adult (male) labourers, as it was felt would be 'in violation of the principle that the adult labourer should be

[21] Almond and Esbester (n.2), 93.

[22] S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: OUP, 2005) 227.

[23] Lord Ashley HC Deb 03 April 1833 vol 17 cc79-115, 79.

left free to make what contracts he thought fit, and to dispose of his labour to the best advantage'.[24] There were also concerns that a more general extension of the Factory Acts would constitute a threat to industry profits and that this should be avoided.[25] Indeed, the introduction of a body of factory inspectors through the 1833 Act was also evidence of a targeted response to workplace exploitation. These inspectors had the power to 'enter at will any factories at work' to expose violations of the Act.[26] The early reports presented surprise and indignation at the treatment of vulnerable workers by itinerant employers:

> My Lord, in the case of Taylor, Ibbotson & Co. I took the evidence from the mouths of the boys themselves. They stated to me that they commenced working on Friday morning, the 27th of May last, at six A.M., and that, with the exception of meal hours and one hour at midnight extra, they did not cease working till four o'clock on Saturday evening, having been two days and a night thus engaged. Believing the case scarcely possible, I asked every boy the same questions, and from each received the same answers. I then went into the house to look at the time book, and in the presence of one of the masters, referred to the cruelty of the case, and stated that I should certainly punish it with all the severity in my power.[27]

At this time, there was a case for arguing that the most risky industries coincided with the greatest worker vulnerability. Early regulation was not only focused on vulnerable workers but was also sectoral. It focused on manufacturing, agriculture and mining, as these generated the most social and political concern and were the source of the greatest number of industrial accidents.[28] However, the landscape of health and safety law started to change towards the turn of the century. Health and safety law was gradually extended to both men and women, and child labour banned altogether.[29] The (moral) consensus around health and safety law thus became much

[24] C. Torrens, HC Deb 18 July 1933 vol 19, 898-913, 901.

[25] Lord Molyneux, HC Deb 03 April 1833 vol 17 cc79-115, 84: 'He hoped, therefore, that the House would not, by acting on a false notion of humanity, proceed to pass an Act which would reduce the profits of the manufacturers one sixth.'

[26] B. L. Hutching and A. Harrison, *A History of Factory Legislation*, 2nd edn (London: P. S. King and Son, 1911) 36. It is worth noting however, that these powers were rarely used in practice: see P. Bartrip, *The Way from Dusty Death: Turner and Newall and the Regulation of the British Asbestos Industry 1890s to 1970* (London: Althlone Press 2001).

[27] Extract from a Factory Inspector's Report, British Parliamentary Papers (1836) No 353.

[28] Metalliferous Mines Regulation Act of 1872; Quarries Act of 1894; Explosives Act of 1875; Threshing Machines Act of 1878.

[29] The Factory Act of 1867 banned child labour for those under 8.

more narrowly defined. It centred on the dangerous actions of a 'high-risk' industry, defined according to the risk of physical injury, and worker protection became an implicit rather than explicit goal of health and safety law. Hence, the decline in the heavy manufacturing industry in terms of both scale and share of the workforce employed over the second half of the twentieth century caused real problems for the orientation of health and safety law. With this decline and the distancing of health and safety law from worker protective goals, this branch of law struggled to find any moral compass at all. These problems of legitimacy have only been reinforced by a longer-term political and ideological shift away from social welfarism and towards deregulatory agendas associated with neoliberalism, declines in union density and the commercialisation of the field.[30]

In the context of the pandemic, this process reduced the effectiveness and relevance of health and safety law. Covid risks have tended to be downplayed, and the particular vulnerabilities of workers ignored. Indeed, the government has been ambiguous about the status of Covid-19 as a workplace risk, despite the devastating impact of this disease on people's lives. For example, the HSE decided to classify Covid-19 as a 'significant' rather than 'serious' health risk according to its risk-management model. As we discuss further below, this position has been criticised on the basis that it tends to downplay the seriousness of the illness and the role of the workplace in its transmission.[31] Furthermore, worker vulnerability and risk stratification did not play a role in the regulation of health and safety during the pandemic.[32] Even where particular vulnerabilities were identified, the guidance distanced itself from providing any specific role for employers in identifying or addressing that vulnerability. During the height of coronavirus restrictions, guidance for employers stated that 'there are currently no expectations of additional controls specifically for [vulnerable] groups'. Instead, the HSE recommended ensuring that existing controls (social distancing, good hygiene and cleaning, ventilation, supervision, etc.) were applied strictly to help vulnerable workers and that those individuals who considered themselves

[30] Almond and Esbester (n.2) 82.

[31] Doctors in Unite, 'For the Sake of the Workers, the Health and Safety Executive must change the Classification of Covid-19 from Significant to Serious'. Available at <https://doctorsinunite.com/health-safety/2799-2/?msclkid=6cccc2f5b4ba11ec948eeaf9414599ed> (last accessed 5 April 2022).

[32] TUC, 'Coronavirus (COVID-19) Guidance to Unions (Updated January 2021) Activist Template (tuc.org.uk)' last accessed 5 April 2022.

vulnerable should 'have individual discussions with their managers around their particular concerns, in which the risk management measures in place at the workplace should be pointed out and emphasised'.[33]

Of course, it could be argued that the issue of particularly vulnerable groups in the pandemic is dealt with through other areas of law. For example, labour law offers the mechanisms of unfair dismissal and anti-discrimination law, which should be able to deal with some of the issues of worker vulnerability thrown up by the Covid-19 pandemic in this regard. In relation to anti-discrimination law, there is an academic analysis which suggests that 'long Covid' is likely to meet the definition of disability for the purposes of the Equality Act 2010, such that employers will need to make reasonable adjustments in those cases.[34] The decision to force people to return to the office as coronavirus restrictions ease is likely to give rise to claims of indirect discrimination where that causes particular difficulties for certain groups.[35] However, generally speaking, the anti-discrimination regime has been a poor mechanism for ensuring equal treatment during the pandemic. The system is unpredictable and individualised and involves very specific qualification criteria, not least in terms of contractual status as well as individual 'protected characteristics'. The recent case of *X v Y* illustrates these difficulties. In this case, the claimant decided not to return to the workplace on the basis of her fear of catching Covid-19 should she do so. She was dismissed and brought a claim for unlawful discrimination on the basis of her belief. However, the judge found that fear of catching Covid was not a 'belief' for the purposes of section 10 of Equality Act 2010 and therefore her claim could not proceed:

[33] HSE, 'Protect vulnerable workers during the coronavirus (COVID-19) pandemic'. Available at <https://www.hse.gov.uk/coronavirus/working-safely/protect-people.htm> (last accessed 11 February 2022).

[34] M. Chance, C. Warwick-Evans and L. Hartley, 'Coronavirus: is long Covid a new form of disability?' (2021) 218 (Mar) *Employment Law Journal* (online).

[35] M. Bell, 'Equality and Diversity in the Post-Lockdown Return to the Workplace' (Regulating for Globalisation Blog). Available at <http://regulatingforglobalization.com/2020/07/03/equality-and-diversity-in-the-post-lockdown-return-to-the-workplace/?doing_wp_cron=1594824736.0129950046539306640625> (last accessed 11 February 2022). Relatedly, Unison has issued specific guidance for their Black members around employment and return-to-work, citing a breach of the Health and Safety Act and unlawful discrimination if employees are put in a vulnerable situation. See Unison, 'Covid 19 Know your Rights: Guidance for Black Members' (June 2020). Available at 26128_Covid-19_guidance-for-Black_members_leaflet.pdf (unison.org.uk) (last accessed 11 February 2022).

> I do not find that the claimant's fear amounts to a belief. Rather, it is a reaction to a threat of physical harm and the need to take steps to avoid or reduce that threat. Most (if not all) people, instinctively react to perceived or real threats of physical harm in one way or another.[36]

The discrimination regime is also not well-placed to deal with new emergent worker vulnerabilities. For example, a number of workers experienced unfavourable treatment as a result of their vaccination status, with firms removing their contractual rights to sick pay and other benefits. Since 'vaccination status' is not a protected characteristic under the Equality Act, those workers would not fall within with auspices of the Act, unless they could show that the unfavourable treatment was also connected to one of the listed protected characteristics, such as disability.[37] Likewise, claimants have found the unfair dismissal regime unable to support the very particular vulnerabilities which emerged during the pandemic. Whilst it has been accepted that the pandemic can give rise to an automatic unfair dismissal claim under section 100 of the Employment Rights Act (circumstances of danger that an employee could reasonably believe to be serious and imminent) these cases have so far failed on the facts.[38]

A well-designed and well-functioning risk-management system which places worker vulnerability at its heart would potentially be better placed than the system of discrimination or unfair dismissal law to deal with these emergent Covid-related vulnerabilities. Absence from work due to fear of catching Covid could be better managed in this way, as long as the risks are in fact recognised by the company and taken seriously, there are proper mechanisms in place to voice concerns and fears, and individuals are provided with support and tailored risk assessments. The next section will develop these arguments further by discussing the scope of health and safety law; specifically who is deemed to be within the scope of health and safety law and what that implies for employer responsibility to workers.

[36] *X v Y* ET Case No. 2413947/2020, para 15.

[37] L. Rodgers, 'Firms are Cutting Sick Pay for the Unvaccinated: What does Employment Law Say?' (*The Conversation* 17 January 2022). Available at Firms are cutting sick pay for the unvaccinated—what does employment law say? (theconversation.com) (last accessed 11 February 2022).

[38] *Rodgers v Leeds Laser Cutting Limited* [2022] EAT 69.

B. The Worker as Risk Agent

A salient feature of the Covid-19 pandemic has been the plight of workers in general, and 'key' workers in particular, in trying to access proper protection from the transmission of the disease whilst at work. Ensuring access to high-quality PPE has been really problematic. Particularly in the early stages of the pandemic, there were shortages of PPE, and this led to a greater transmission risk in some sectors. There have also been recurrent problems with the quality of PPE throughout the pandemic. In the healthcare sector, PPE was supplied which did not meet the required safety standards, and thus workers were not adequately protected or supplies were abandoned. There was also a particular problem in the social care sector where the quality requirements for PPE were not as stringent as for other areas of healthcare.[39]

There is also mounting evidence that employers have not complied consistently with the legal requirements under health and safety law or the government guidance which supplemented it. A survey of union health and safety representatives conducted by the Trades Union Congress in March 2021 found that only 77% of representatives in the food or drink manufacturing sector reported that their employer had conducted an updated risk assessment in light of Covid-19 and only 76% of those in essential retail.[40] Furthermore those representatives reported failures amongst their employers to provide adequate PPE, to implement social distancing, increase cleaning frequency or modify patterns of work to reduce transmission risk. Relatively few representatives reported that their employers had conducted additional risk assessments with respect to workers at heightened risk of severe coronavirus symptoms. The sectoral approach based on risk also tended to focus on certain high-risk areas (such as healthcare) whereas the risks in other areas were downplayed. For example, the narrow sectoral guidance on the need for PPE has been criticised.[41]

[39] Public Accounts Committee, 'Oral evidence: Covid-19: Government procurement and supply of personal protective equipment HC 928 Thursday 10 December 2020' Ordered by the House of Commons to be published on 10 December 2020 https://committees.parliament.uk/oralevidence/1373/default#page=9 (accessed 30 March 2022).

[40] TUC, 'Union Health and Safety Reps Survey' (2020–2021). Available at <https://www.tuc.org.uk/sites/default/files/2021-03/Safety%20reps%20survey%202021.pdf> (last accessed 30 March 2021), p 30.

[41] Fairwork, 'The Gig Economy and Covid-19: Fairwork Report on Platform Policies' (April 2020). Available at <https://fair.work/wp-content/uploads/sites/97/2020/06/COVID19-Report-Final.pdf> (last accessed 29 April 2021).

These problems have been exacerbated by the structure and scope of health and safety law. On the face of it, health and safety law has a wide scope.[42] The HSWA provides that employers have a duty to manage health and safety risks not only in respect of their employees (section 2) but must also ensure that all persons (including those who are 'self-employed'), are protected from exposure to health and safety risks as a result of the conduct of the employer's business.[43] However, the pandemic has exposed problems in the scope of the legislative regime. Statutory instruments which supplement and detail the general duty have been exposed as having a narrow scope in terms of their application. Recent changes to the general health and safety duty have also eroded the coverage of health and safety law, and this has had important implications for workers during the pandemic. At the same time, workers are under ever greater pressure to bear the responsibility for the mitigation of health and safety risks, either implicitly (as employers have not complied with their legal requirements) or explicitly (as the responsibility for compliance is passed to the frontline). Thus workers become not only the primary risk takers but also bear the main responsibilities for these risks as 'rights-holding agents'.[44]

The general health and safety duty under the HSWA is supplemented by a series of statutory instruments which provide more detailed guidance on the application of the duty. Important in this regard are the 'Six-Pack' of Regulations which implement European Directives made under the general 1989 Framework Directive.[45] The scope of these Regulations is often defined narrowly: they tend to apply only to 'employees' rather than the wider categories of 'workers' or the 'self-employed'.[46] In the context of the pandemic, the problems and pitfalls of this narrow application were highlighted

[42] *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493, CA.

[43] Section 3 HSWA provides that an employer must 'conduct his undertaking in a way as to ensure so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health and safety'.

[44] P. Almond and G. C. Gray, 'Frontline Safety: Understanding the Workplace as a Site of Regulatory Engagement' (2017) 39 (1) *Law and Policy* 5, 15.

[45] Directive 89/391. These regulations are: the Provision and Use of Work Equipment Regulations 1992, Manual Handling Operations Regulations 1992, Personal Protective Equipment at Work Regulations 1992, Workplace (Health, Safety and Welfare) Regulations 1992, Health and Safety (Display Screen Equipment) Regulations 1992, Management of Health and Safety at Work Regulations 1993/1999, Control of Substances Hazardous to Health Regulations 1994/1998.

[46] See Provision and Use of Work Equipment Regulations 1998 (as amended) section 3 (2) and the Health and Safety (Display Screen Equipment Regulations 1992 section 1 in which 'user' is defined according to employee status).

in respect of the Personal Protective Equipment at Work Regulations 1992 (PPE) in particular. A detailed study of the experience of platform workers (many of whom would not qualify for 'employee' status due to the nature of their employment) found that these workers had struggled to get consistent access to PPE during the first year of the pandemic, with employers only providing 'one-off' PPE provision or none at all.[47] For these gig economy workers, there was no opportunity to seek recourse for these failures through the law. Indeed, the IWGB, a union representing low-paid migrant workers and other casual labour was so concerned about the lack of access to PPE amongst its members that it brought a legal claim against the government challenging the narrow scope of the Regulations.[48] It argued that the government's implementation of the PPE Regulations failed to meet the requirements of EU law, namely, that those regulations should cover all 'workers'. The Court agreed, and this eventually led to an amendment of the PPE Regulations to include both employees and limb (b) workers within its scope.[49]

However, this legal victory will likely bring only minor and marginal improvements to the experience of 'workers' in accessing health and safety protection during the pandemic and afterwards. The judgement made clear that the provision of PPE, whether to workers or otherwise, is legally framed as a 'last resort' rather than part and parcel of the everyday health and safety duties of employers to their staff.[50] These changes to the scope of the PPE Regulations will not change this position. Furthermore, the other Six Pack Regulations are unchanged by these amendments, and the operation of Brexit will mean EU law has a much lesser impact on the interpretation of UK statutory instruments going forward. Finally, there are counter-trends in the law on health and safety which are serving (indirectly) to erode the protections afforded to casually employed labour. In 2015 an amendment was made to section 3(2) of HSWA, with the effect of removing many 'self-employed' persons from the scope of health and safety law. Only those self-employed persons who conduct undertakings which pose a risk to others now have an obligation to take steps that are reasonably practicable

[47] Fairwork (n.41).

[48] The Independent Workers' Union of Great Britain, *R (on the application of) v The Secretary of State for Work and Pensions & Ors* [2020] EWHC 3050 (Admin) (13 November 2020).

[49] Personal Protective Equipment at Work (Amendment) Regulations 2022.

[50] IWUGB (n.48) para 129.

to ensure that they and other persons who may be affected by their activities are not exposed to risks to their health and safety.

The intention behind the change in the law was to reduce the burden of health and safety compliance from self-employed persons whose work was not high risk.[51] Clearly, this was aimed at the genuinely self-employed. However, it is a reality of current labour markets that many individuals work under contracts in which they are nominally 'self-employed', but the reality of their working relationship is that they are highly dependent on one employer who controls their work. Evidence suggests that (despite recent case-law developments[52]) this kind of 'bogus' or 'false' self-employment is widespread in certain sectors, including construction and many areas of the 'gig economy'.[53] The change to the scope of health and safety law which has been brought in potentially impacts on those workers, and makes them even more vulnerable to health and safety risks.[54] This is particularly the case in an environment where health and safety risk and accountability are shifting more and more to the 'frontline', with employers acting as facilitators of health and safety compliance, rather than taking direct responsibility for compliance at an organisational level.[55]

Indeed, as we move from pandemic to endemic, workers will bear even more of the health and safety risk on the frontline. Specific duties on employers to consider Covid in their risk assessments have disappeared, and Covid self-isolation and coronavirus testing are no longer supported by the government. Any connection between Covid and workplace risk is now downplayed, with the government insisting this is now a 'public health' issue which does not require intervention by way of the regulation of business:

[51] UK Gov, Explanatory Memorandum to the Deregulation Act (Health and Safety at Work) (General Duties of Self-Employed Persons) (Consequential Amendments Order) 2015. Available at <https://www.legislation.gov.uk/uksi/2015/1637/memorandum/contents> (last accessed 11 February 2022).

[52] For example, *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657.

[53] S. Smith, How Bogus Self-employment is Harming Workers'. Available at How bogus self-employment is harming workers (huckmag.com) (last accessed 11 February 2022).

[54] The Hazards Campaign 'Decent Jobs and Decent Lives: A Manifesto for a Health and Safety System Fit for Workers' (IER 2018).

[55] Almond and Gray (n 44) 5.

> Living with and managing the virus will mean maintaining the population's wall of protection and communicating safer behaviours that the public can follow to manage risk. The Government will move away from deploying regulations and requirements in England and replace specific interventions for COVID-19 with public health measures and guidance.[56]

4. MONITORING

In this section, we consider the second key function of a regulator: monitoring compliance. We argue that here too, the risk-management system at work in health and safety focuses too far on workplaces traditionally viewed as 'high risk' and that this no longer represents the real risk profile at work either during or beyond the coronavirus pandemic. As a result, in the absence of an overhaul of the whole system of risk management, there needs to be a way for monitoring and compliance to extend to 'low-risk' workplaces in an effective way. This section will examine the use of 'spot-checks' by HSE and local government to ensure Covid compliance. It is argued that an enhanced regime of random inspections is one way in which to extend the monitoring and compliance function of these organisations. Furthermore, the system is weighted too far towards workplaces rather than workers, meaning that certain risks are underplayed and the enforcement system is extremely inefficient for workers seeking to enforce their health and safety rights.

We saw above that one of the challenges faced by regulators in a system driven by risk is how to deal with the large majority of firms classified as low risk. If these firms are never inspected, there is little opportunity to verify either that they have been classified correctly or that they are complying with the health and safety standards applicable to them. One solution suggested in the literature is to supplement inspection visits targeted at high-risk firms and sectors with random checks on other firms. In this section, we examine the traditional attitude towards random inspections in the health and safety context in the UK, their use during the pandemic, and their potential value in the future. We also comment on the budgetary implications of this proposal.

[56] UK Gov, 'Living with Covid' (n.3) section 3.

Pre-pandemic, HSE did not make use of spot checks.[57] Its inspection policy had two components. First, major hazard industries (such as offshore oil and gas) were subject to regular inspections. Second, in other industries, inspections were targeted either at sectors giving rise to serious risks (such as fatal accidents) or at firms where HSE had intelligence of potential non-compliance. This might come from reports of accidents, complaints from workers or evidence of bad practice from past inspections.

Local authorities' enforcement activities (in England, Scotland and Wales) are governed by a Code promulgated by HSE under section 18(4)(b) of HSWA. This puts in place a regime of risk-based regulation for local authorities and effectively prohibits the use of spot checks or routine inspections:

> Proactive inspection must only be used to target the high risk activities in those sectors specified by HSE or where intelligence suggests risks are not being effectively managed. For this purpose HSE will publish a list of high risk sectors (and the key activities that make them such) that are to be subject to proactive inspections by LAs.[58]

Guidance accompanying the Code identifies some 15 quite specific risks warranting proactive inspection, such as the risk of asthma in bakeries using flour, the risk of fatalities or injuries from being struck by a vehicle in warehouses or distribution premises, and the risk of musculoskeletal problems for care home staff.[59] Local authorities are also reminded that a business which considers that it has been unreasonably subjected to a proactive inspection by a local authority can complain to the Independent Regulatory Challenge Panel, though this was largely a political initiative and HSE's website only identifies two instances of this having occurred.[60]

Covid-19 brought about radical changes in firms' risk profiles. Any workplace that remained open was a possible site of transmission, but particular risk attached to workplaces where staff were in direct contact with customers, such as supermarkets and other 'essential' shops. As the economy began to re-open after lockdowns, the hospitality industry became a significant risk area for

[57] HSE, 'How we inspect'. Available at <https://www.hse.gov.uk/enforce/how-we-inspect.htm> (last accessed 4 April 2022).

[58] HSE, National Local Authority Enforcement Code, para 26. Available at <https://www.hse.gov.uk/lau/national-la-code.pdf> (last accessed 4 April 2022).

[59] HSE, Setting Local Authority Priorities and Targeting Interventions (LAC 67-2 (Revision 10)). Available at <https://www.hse.gov.uk/lau/lacs/67-2-priorities-targeting-interventions.pdf> (last accessed 4 April 2022).

[60] See https://www.hse.gov.uk/contact/challenge-panel-findings.htm (last accessed 4 April 2022).

workers, particularly because some precautions, such as the wearing of face coverings, could not be enforced all the time in these settings. While much attention in hospitals and care homes rightly focused on the Covid risk to patients and residents, workers were also exposed to the virus in these contexts, especially in the early months of the outbreak when PPE was in short supply. Thus, two major changes to risk profiles became apparent. First, previously low-risk workplaces were now high risk for Covid. Second, workplaces with some specific and well-understood health and safety risks in 'normal' times faced a new, general risk across all their operations, the exact nature of which was initially unclear.

Under the Health and Safety (Enforcing Authority) Regulations 1998, local authorities have responsibility for enforcement in relation to shops, cafes and restaurants, and most forms of holiday accommodation such as hotels.[61] Local authorities are also responsible for residential care homes unless they provide nursing care, which brings them within HSE's jurisdiction. Thus, it is apparent that the pandemic brought about an increased risk primarily in the workplaces within local authorities' jurisdictions.

The guidance accompanying the local authority enforcement Code was amended to take account of the pandemic and did encourage local authorities to prioritise Covid risks, whilst at the same time reminding them to continue focusing on other types of hazards.[62] This suggested that authorities should take an intelligence-led approach to Covid risks, using national and local information to identify likely instances of poor performance, rather than using spot checks. While this is a sensible approach in relation to known risks, it is arguably less helpful in relation to a new risk, like Covid, where information about compliance problems might take time to emerge. Of course, like HSE, local authorities also investigate health and safety issues in response to complaints or incidents, but they are expected to adopt the same approach to case selection as HSE does.[63] Again, this prioritises serious cases such as fatalities and injuries or diseases reportable under RIDDOR.[64] Covid infections were only required to be reported in this way in certain limited circumstances.[65]

[61] SI 1998/494.

[62] HSE (n.59), 3.

[63] HSE, *Enforcement Policy Statement* (October 2015).

[64] Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (SI 2013/1471).

[65] See https://www.hse.gov.uk/riddor/coronavirus/index.htm (last accessed 4 April 2022). The reporting obligation applied principally only to laboratory workers working with the virus or to health or care workers treating Coronavirus patients, not to general transmission in the workplace.

However, while the guidance for local authorities remained unenthusiastic about spot checks, HSE itself instituted a broad-brush programme of spot checks across workplaces of all kinds, in collaboration with local authorities.[66] This programme used some of HSE's existing resources, but also drew on an additional £14.2 million made available by the government in May 2020.[67] Some 110,000 such checks had been carried out by November 2020, though it is worth noting that this apparently impressive figure includes telephone and online calls as well as traditional site visits and that some of the activity was carried out by contractors rather than by inspectors directly employed by HSE.[68] HSE's revised business plan for 2020–21 sought to combine this programme of activity with continued work to tackle other non-Covid hazards in workplaces.[69] It is too early to evaluate the effectiveness of the programme, and it is not clear how much can be achieved over the phone in particular, but there is at least one example in which what began as a Covid spot check ended with the prosecution of an employer in the construction industry for multiple violations not confined to Covid precautions.[70] This is significant given the relative rarity of prosecutions in the health and safety context, a point explored further in the next section.

The pandemic has shown that it is not impossible for a programme of spot checks to be set up to tackle widespread but lower-level risk alongside the now well-established risk-based framework. All that was required was a combination of political will and additional budget. We argue that, as the risk from Covid-19 reduces,[71] this programme should be repurposed to fund in-person random inspections by HSE staff aimed at tackling the whole suite of 'low-level' risks which are not given adequate consideration on the current health and safety model. This would offer working people greater protection against problems such as injuries caused by poor manual

[66] See HSE Press Release 18 June 2021, 'COVID spot checks and inspections continue as lifting of restrictions are delayed'. Available at <https://press.hse.gov.uk/2021/06/18/covid-spot-checks-and-inspections-continue-as-lifting-of-restrictions-are-delayed/> (last accessed 4 April 2022).

[67] HSE, *Business Plan 2020/21* (updated November 2020). Available at https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/index.htm (last accessed 4 April 2022).

[68] Ibid.

[69] Ibid.

[70] See HSE Press Release 17 September 2021, 'Contractor prosecuted after spot check reveals multiple breaches'. Available at <https://press.hse.gov.uk/2021/09/17/contractor-prosecuted-after-spot-check-reveals-multiple-breaches/> (last accessed 4 April 2022).

[71] From 1 April 2022, the UK government considers that the workplace risk of Covid-19 has not reduced but disappeared. From this date, there is no longer any requirement for employers to carry out Covid-19 risk assessment.

handling, or periods of ill-health due to stress, which may not be 'serious' in the risk framework, but can be devastating for those they affect. These are currently ignored in the inspection regime in relation to some workplaces. For example, while local authorities are encouraged to inspect proactively for musculoskeletal disorders caused by poor manual handling in care homes, warehouses and distribution centres, this is not an option for other settings in which such injuries might also arise, such as retail.[72] Similarly, the guidance makes clear that local authorities 'are not expected to undertake any proactive interventions focussing on work-related stress', and that a complaint from an individual is not enough to trigger a reactive investigation under HSE's policy on the matter, which local authorities are also expected to follow.[73]

Of course, any extension of the inspection regime would require additional funding. Both HSE and local authorities have experienced very substantial budget cuts over recent years, cuts which have to some extent been masked by the risk-based strategy (which seems objective but may in practice involve regulators adjusting their risk tolerance to fit the resources available). Comparing HSE's budget over time is not a straightforward task, given changes in costs and in the way in which HSE is funded. In 2001–2, HSE's budget—all from public funds—was £203 million.[74] The Bank of England's inflation calculator indicates that the 2020 equivalent would be £338 million, suggesting a significant cut in real terms.[75] HSE's actual expenditure in the 2019–20 financial year (made up of fees and public funding) was around £231 million.[76] The cut is more obvious when we consider other ways of measuring HSE's size and activities. In 2019–20, HSE employed 2399 members of staff,[77] compared to 4050 in 2001–2.[78] Inevitably, this significant reduction in staff numbers corresponds to a marked reduction in activity. In 2019–20, HSE conducted 13,300 inspections, issued over 7000 notices and completed 355 prosecutions.[79]

[72] HSE (n.59).
[73] Ibid, 3.
[74] Health and Safety Commission Annual Report and the Health and Safety Commission/Executive Accounts 2001/02 (HC 1202, October 2002), 166.
[75] Bank of England, 'Inflation calculator'. Available at <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> (last accessed 18 May 2021).
[76] HSE, Annual Report and Accounts 2019/20 (HC 442, July 2020).
[77] HSE (n.76), 13.
[78] HC (n.74), 103.
[79] HSE (n.76), 13.

In 2001–2, HSE conducted 75,237 inspections, issued 11,162 notices and prosecuted in 1930 cases.[80]

General cuts to local authorities' budgets over the past several years are well-documented and have been accompanied by rising demand for some of the services for which they are responsible, notably adult social care. There is no ring-fenced funding for health and safety inspections within local authorities and, inevitably, cuts have been made as councils struggle to fulfil all their obligations. HSE data indicate that there were around 450 full-time equivalent inspectors in local authorities in 2020,[81] whereas in 2010, the number was over 1000.[82]

One apparently obvious solution to this would be to extend the Fee for Intervention (FFI) scheme to local authorities. Under FFI, HSE is expected to recover its costs from firms found to be in 'material breach' of health and safety law.[83] This was an attempt to transfer some of HSE's costs from the taxpayer to non-compliant businesses. Thus, in the 2019–20 financial year (the latest for which information is available), only £136 million of HSE's budget came from public funds because the remainder was made up through cost recovery.[84] Allowing local authorities to adopt this approach would give them another way of funding their health and safety activities. However, this approach has been strongly criticised because of the risk that it undermines important values of objectivity and impartiality and reduces firms' trust in the regulatory regime.[85] Inspectors may appear to be motivated by the need to secure sufficient funding for the organisation when deciding whether or not a firm is in breach, a decision which typically involves a significant exercise of discretion. Although the public finances are undeniably stretched, there are good reasons for preferring public funding for regulation.

In sum, an unexpected effect of the pandemic has been to bring back into focus the value of a system of random inspections to deal with widespread but relatively low-level risks. Of course, the appropriate level of, and thus budget for, random inspections would always be open to debate, but some activity of

[80] HC (n.74), 75.

[81] Calculated from the spreadsheet available on HSE's website at <https://www.hse.gov.uk/lau/enforcement-lae1-returns.htm> (last accessed 4 April 2022).

[82] All Party Parliamentary Group on Occupational Safety and Health, *Local Authorities and Health and Safety* (July 2018). Available at <https://www.tuc.org.uk/sites/default/files/APPG_Local_Authorities_Report_2018_AW.pdf>.

[83] Health and Safety and Nuclear (Fees) Regulations 2021 (SI 2021/33), rr. 23–25.

[84] HSE, Annual Report and Accounts 2019/20 (HC 442, July 2020), 13.

[85] M. Temple, *Triennial Review Report: Health and Safety Executive* (Department for Work and Pensions, 9 January 2014).

this kind would be a significant improvement on a purely risk-based approach, by ensuring that regulators pay *some* attention to all firms and all types of risks.

5. ENFORCEMENT

Our third and final area of regulatory activity is enforcement. The pandemic has highlighted how flawed HSE's enforcement regime is.[86] HSE's approach to its enforcement powers is set out in its Enforcement Management Model (EMM).[87] This sets out a series of issues inspectors must address in order to decide what enforcement action to take. It is expressly intended to ensure that enforcement action is proportionate. The EMM requires the inspector to identify the actual risk in a particular workplace and to compare it with the 'benchmark' risk, the level of risk that would occur if appropriate precautions were taken.[88] In determining both types of risk, the inspector is directed to consider three 'risk elements': consequence, likelihood and extent.[89] These three elements focus, respectively, on what harm will occur, how likely is it to occur and how many people would be affected. Inspectors are offered three options in terms of 'consequences': serious personal injury or health effect, significant personal injury or health effect and minor personal injury or health effect.[90]

In relation to the pandemic, inspectors were directed to treat the risk of contracting Covid as a 'significant' rather than 'serious' consequence.[91] This classification meant that inspectors applying the EMM would not be directed to consider prosecution as an enforcement option for Covid safety breaches.[92] An improvement notice would be the most severe option open to them.[93] Moreover, there would be no basis under the EMM for issuing a prohibition notice (to order the employer to stop a dangerous activity)[94] if

[86] P. James, 'HSE and Covid at Work: a case of regulatory failure' (Liverpool: IER, 2021).

[87] HSE, 'Enforcement Management Model'. Available at <https://www.hse.gov.uk/enforce/emm.pdf> (last accessed 18 May 2021).

[88] Ibid paras 35–65.

[89] Ibid para 43.

[90] Ibid para 50 table 1.

[91] HSE, 'HSE's enforcement of guidelines on coronavirus (COVID-19) in workplaces'. Available at <https://www.hse.gov.uk/coronavirus/regulating-health-and-safety/enforcement-coronavirus.htm> (last accessed 4 May 2021).

[92] HSE (n.87), Tables at para 61.

[93] HSWA 1974, s. 21.

[94] HSWA 1974, s. 22.

an inspector were to find breaches on visiting a workplace.[95] HSE's explanation for this was that coronavirus does not affect all workers equally, and while it can result in death or serious long-term illness, other people experience only a mild illness or no symptoms at all.[96] This led to a very angry reaction among trade unions and others because it appeared to play down the effects of the pandemic on working people, and HSE was forced to issue a clarification emphasising that inspectors still had the discretion to decide how best to tackle infringements in a particular workplace.[97]

This problem is not confined to Covid-19. There are many other examples of widespread but relatively low-level health and safety problems that are unlikely to reach the threshold for prosecution or any other enforcement action by HSE. For example, there are vanishingly few cases of enforcement action taken because of stress at work or breaches of the Display Screen Equipment (DSE) Regulations.[98] While it may be appropriate to retain the possibility of prosecution for the most serious violations, it is clear that HSE also needs access to a wider range of modern enforcement options including a civil orders and penalties regime.

The use of the criminal law in the context of the enforcement of health and safety breach is positive in the sense that it is a sign of how seriously health and safety infringements are taken. Criminalisation implies that the wrongdoing involved is worthy of public condemnation of the employer by the state, not just a requirement to provide a remedy in civil law. It also takes the enforcement of the law out of the hands of individual working people (which is the usual route for enforcing most statutory employment rights in the UK) and puts it into the hands of a public authority.[99] However, the use of the criminal law is also problematic as it means that prosecutions are incredibly rare, and are only available for the most egregious offences.

It is important to start with realistic expectations about the use of the criminal law in regulatory settings. A popular model in the literature, which is well-supported by the empirical evidence, is the 'enforcement pyramid'

[95] HSE (n.87) para 30–34.

[96] HSE (n.91).

[97] Ibid.

[98] These can be checked on the HSE's registers of enforcement notices and convictions. Available at <https://www.hse.gov.uk/enforce/convictions.htm> (last accessed 4 April 2022).

[99] The government is planning to bring other public enforcement bodies (apart from HSE) together into a single agency: Department for Business, Energy and Industrial Strategy, *Good Work Plan: Establishing a New Single Enforcement Body for Employment Rights* (July 2019).

described by Ayres and Braithwaite.[100] On this approach, regulators use informal methods to persuade the vast majority of broadly willing firms to comply and deploy various kinds of intermediate sanctions where this is insufficient. They reserve prosecutions (at the top of the pyramid) for the most serious cases in which a subject of regulation has shown deliberate disregard for the rules, usually with severe consequences. From this perspective, a low number of prosecutions is not necessarily a bad sign, provided that prosecutions are targeted appropriately and taken seriously when they occur. However, even with this caveat in mind, the use of the criminal law to enforce health and safety law in the UK is problematic.

In 2020, there were 5.981 million businesses in the UK, of which 4.568 million had no employees.[101] This leaves 1.413 million businesses which are also employers. HSE's inspection and prosecution figures for 2019–20, discussed above, indicate that there is a vanishingly small chance (well below 1%) of a firm being inspected, let alone prosecuted. Ford has argued very persuasively that the level of prosecution of health and safety offences in the UK is now so low that the area is effectively deregulated.[102]

Even where a prosecution does occur, there is a further problem: health and safety offences tend not to be taken seriously. They are widely regarded by the public as 'regulatory' rather than 'real' crimes.[103] Although the use of the criminal law is intended to imply condemnation by the state, it is difficult to create this effect if the law is out of step with people's worldviews. There are two likely explanations for this. First, the vast majority of cases result in a fine because they are brought against firms rather than individuals.[104] Efforts have been made to increase the level of penalty: unlimited fines can be imposed

[100] I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: OUP, 1992).

[101] M. Ward, *Business Statistics* (House of Commons Library Briefing Paper No 06152, 22 January 2021).

[102] M. Ford, 'The Criminalization of Health and Safety at Work' in A. Bogg et al. (eds), *Criminality at Work* (Oxford: OUP 2020), 430. See also S. Tombs and D. Whyte, 'A Deadly Consensus: Worker Safety and Regulatory Degradation under New Labour', (2010) 50 *The British Journal of Criminology* 46.

[103] See P. Almond and S. Colover, 'Mediating Punitiveness: Understanding Public Attitudes towards Work-Related Fatality Cases' (2010) 7 *European Journal of Criminology* 323. There is a wider debate about 'over-criminalisation' which is beyond the scope of this article. See, for example, A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225; but cf. J. Horder, "Bureaucratic' Criminal Law: Too Much of a Bad Thing?' in R. A. Duff et al. (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford: OUP, 2014).

[104] Imprisonment was introduced as a possible sentence by the Health and Safety (Offences) Act 2008, and it is theoretically possible to prosecute a director or manager of a corporation under s. 37(1) HSWA.

in respect of both fatal and non-fatal health and safety offences even in the Magistrates' Court,[105] and the Sentencing Guidelines suggest substantial sums for large firms in particular.[106] Nevertheless, there will always be a sense that a financial penalty is little more than a tax on doing business. Second, the way in which health and safety offences are constructed may be a factor. The principal offence under section 33 of the 1974 Act is a strict liability offence of failing to comply with various health and safety duties set out in the Act (and related requirements). While many duties in subordinate legislation on health and safety are themselves strict, some of the principal duties under the Act are qualified, for example, by the requirement to do what is 'reasonably practicable', albeit with the burden of proof being on the defendant to show that it did what was 'reasonably practicable'.[107] As Almond argues, while this mitigates the unfairness associated with strict liability offences, it means that the content of the offences is vague and subject to arguments that the cost of taking precautions would have been too great, traits that are not normally associated with 'real' crimes.[108] Moreover, the complex picture that results does not involve a men's rea requirement (for example, of intention or recklessness) and does not, therefore, fit with the idea from the 'enforcement pyramid' that the most serious infringements are those where the employer has shown a deliberate or careless disregard for workers' health and safety.

One response to this has been an attempt to create health and safety offences that are more analogous to 'real' crimes, for example, under section 1(1) Corporate Manslaughter and Corporate Homicide Act 2007. This creates an offence for corporations similar to gross negligence manslaughter but with a focus on the way in which a firm has been managed:

An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised

(a) causes a person's death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

[105] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 85.

[106] Sentencing Council, 'Sentencing Guidelines for Use in Criminal Court'. Available at https://www.sentencingcouncil.org.uk/crown-court?s&collection=health-and-safety-offences (last accessed 18 May 2021).

[107] Health and Safety at Work etc. Act 1974, s. 40. See *R v Davies* [2002] EWCA Crim 2949, [2003] ICR 586.

[108] P. Almond, 'Workplace Safety and Criminalization: A Double-edged Sword' in A. Bogg et al. (eds), *Criminality at Work* (Oxford: OUP, 2020), 393–5.

However, as Almond has argued, the factors which make this offence look much more like a 'real' crime also make it harder to prove, with the result that the number of prosecutions has remained stubbornly low.[109]

All this raises the question of whether it is worth retaining any criminal offences at all in the health and safety context. It is clear that the consequences of health and safety breaches can be very serious, resulting in death or serious injury or illness for some victims, and against that background, it would seem appropriate to retain a possibility of prosecution. However, a balance needs to be struck between creating an offence that is not overly difficult to prosecute (noting, in particular, the experience with corporate manslaughter) but that also fits with people's moral sense of when a crime might have been committed. One option here would be to revisit the current combination of strict liability offences set against reasonably practicable steps, and instead make it a requirement of the offence that the employer has deliberately or wilfully breached its health and safety duties. Arguably, this would be more consistent with the way in which HSE exercises its prosecutorial discretion in practice.[110]

Another issue to consider is whether HSE has enough 'intermediate' options between advice or informal warnings and prosecution, to fill out the middle of the Ayres and Braithwaite enforcement pyramid.[111] Inspectors can issue prohibition notices, to bring a dangerous activity to a halt,[112] and improvement notices, to require an employer to comply with the relevant norms within a fixed period of time.[113] These are useful tools, but the difficulty with them is that the remedy for non-compliance with a notice is prosecution.[114] While this may be appropriate within the logic of the pyramid, because non-compliance with a notice is more likely to be deliberate, bringing a prosecution is expensive and complex for HSE. Some regulatory regimes address this by making greater use of the civil law in combination with the criminal law. For example, the regime of Labour Market Enforcement Undertakings and Orders under the Immigration Act

[109] Ibid, 395–401.

[110] HSE, 'Enforcement Policy Statement'. Available at <https://www.hse.gov.uk/enforce/enforcepolicy.htm> (last accessed 18 May 2021).

[111] Ayres and Braithwaite (n.100).

[112] HSWA 1974, s. 21.

[113] HSWA 1974, s. 22.

[114] HSE, 'Failure to Comply'. Available at <https://www.hse.gov.uk/enforce/enforcementguide/notices/notices-failure.htm> (last accessed 18 May 2021).

2016 enables regulators[115] to seek an undertaking from a non-compliant employer.[116] If the undertaking is not given or is breached, the regulator can apply for an Order on the civil standard of proof. Breach of an Order is a criminal offence. Although this regime is not without its disadvantages, it is arguably more manageable for the regulator.[117]

There are also practical limits on the content of improvement notices. For example, it is not possible to include any ongoing requirements to review or improve safety measures over time because the recipient of the notice is given a fixed period of time within which to comply and it must be practically possible for compliance to take place within that time.[118] Notices must be drafted with precision in order (rightly) to meet the certainty requirements of the criminal law.[119] HSE has tried to address some of these issues, for example, by suggesting that an improvement notice might include a requirement to put new systems in place to review safety measures, but it is likely to be relatively easy for a well-advised employer to demonstrate compliance with this by drafting appropriate documents describing those systems.[120] Of course, the inspector might return at a later date to check that the new systems have been implemented, but the improvement notice would no longer be applicable and the enforcement process would have to be restarted from scratch. A system of improvement notices that allowed the inspector to return at several points in the future to check on compliance, with an ongoing threat of civil penalties, might be more helpful.

6. CONCLUSIONS AND REFORM

Every working person has a right to a safe and healthy workplace.[121] In general terms, the law reflects this position: employers owe broadly-framed duties under the HSWA, which are enforced by a regulator with access to the full force of the criminal law. Working people may also be able to protect their own interests, for

[115] The Gangmasters and Labour Abuse Authority, the National Minimum Wage compliance team and the Employment Agency Standards Inspectorate.

[116] Immigration Act 2016, ss. 14–30.

[117] For discussion see A.C.L. Davies, 'The Immigration Act 2016' (2016) 45 ILJ 431.

[118] HSE, 'Types of Notice'. Available at <https://www.hse.gov.uk/enforce/enforcementguide/notices/notices-types.htm> (last accessed 18 May 2021).

[119] Ibid.

[120] Ibid.

[121] Recognised in the Preamble to the ILO Constitution and Article 7b ICESCR.

example, by bringing a claim in negligence.[122] But the pandemic has exposed a variety of ways in which this basic right is neglected in practice. Although some of these were already well-known to health and safety experts, the desire to 'build back better' offers an opportunity for reform, capitalising on more widespread knowledge of the issues among working people and the public at large.

The fact that the right to a safe and healthy workplace applies to 'every working person' suggests two areas for reform. One is the well-documented problem of employment status. Although the government was forced to extend PPE entitlement to workers after the judicial review challenge discussed above, this has not led to any broader reconsideration of how employees, workers and the self-employed are treated in health and safety legislation. The original intention of the legislation was to apply broadly (leading to a degree of complacency on HSE's part about employment status issues) and this intention should be restored by changing all instances of 'employee' to 'worker' and by reviewing the rights and obligations of the self-employed. Another area in need of reform is the tendency of crucial health and safety activities such as risk assessments to focus on generalities, without being sufficiently attuned to the varying degrees of vulnerability experienced by different workers. While there is an understandable desire not to single workers out for special treatment in ways that might make them feel more vulnerable, HSE's guidance could be updated to encourage employers to work more closely with particular workers to provide personalised risk assessments in appropriate cases.

The pandemic also brought into sharp focus the 'hollowing out' of the concept of a 'safe and healthy workplace' to one in which only major hazards are of real concern. The risk-based framework for inspection, coupled with the use of the criminal law for enforcement, means that whole swathes of serious but not fatal health and safety issues—manual handling injuries, DSE problems, workplace stress—have largely disappeared from view. Employers' compliance with their obligations on these issues is unlikely to be checked or enforced by regulators. We have argued for two significant changes here. First, HSE and local authorities should be resourced to continue with a system of random inspections as a way of ensuring that supposedly low-risk firms are complying with the law, as a supplement to the risk-based inspection regime. Second, the prosecution should be confined to the most serious cases, with greater use of lesser interventions such as civil sanctions to provide an appropriate level of threat to non-compliant businesses.

[122]Though not for breach of statutory duty since this was removed in most cases by the Enterprise and Regulatory Reform Act 2013, s. 69.