

# Scottish House Builders Health & Safety Forum

## 7 May 2014

### Legal Update



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S o l i c i t o r s

G L A S G O W   E D I N B U R G H   L O N D O N



## Health & Safety at Work Etc Act 1974 turns 40

- 85% reduction in the number of fatal injuries to employees
- Reporting of non-fatal injuries decreased by 77% between 1974-2012
- Overall decrease in rate of work-related illnesses, especially musculoskeletal disorders
- Higher number of cases involving stress, depression & anxiety

- Government published progress report on reforms to Health & Safety law on 29 November 2013
- Prime Minister ordered investigation into compensation culture & apathy/indifference surrounding health & safety legislation
- Lord Young of Graffham's Report - '*Common Sense, Common Safety*' published in October 2010
- Professor Ragnar Löfstedt's report - '*Reclaiming health and safety for all: An independent review of health & safety regulation*' - published in November 2011

## Key proposals:-

- Removing HSE approval of first-aid qualifications from Health & Safety Regulations
- Making it easier to distinguish between regulations that impose specific duties on businesses and those that define administrative requirements
- Review of legislation which imposes strict liability
- Introduction of ‘Challenge Panels’ which include a mechanism to challenge incorrect/over-application of health & safety regulations

### Key recommendations:-

- Fire-fighter and police officers to avoid prosecution for “heroic acts”
- Simplified procedure for personal injury claims
- Getting rid of insurance company requirements relating to employment of health & safety consultants
- Ability to challenge official decisions by local authorities concerning health & safety at public events

- Act receives Royal Assent on 30 January 2014 - applies to whole of United Kingdom
- Establishes compensation scheme for individuals diagnosed with the condition and for dependants of those who have died from the disease
- Eligible for award under scheme if:
  - 1) Exposed to asbestos as a result of employer negligence
  - 2) Diagnosed on or after 25 July 2012
  - 3) Have already raised action for damages against employer/employer's insurance provider
  - 4) No longer able to raise action against employer/employer's insurance provider
  - 5) Not received damages/specified payment as a result of contracting disease

- Funded by levy on insurance companies currently active in employers' liability insurance market
- Majority of Act's provisions set to come into force on 31 March 2014
- Rules on insurance company levy effective from 1 September 2014
- Mesothelioma Lump Sum Payments Regulations 2014 currently being considered by Parliament

# The Recovery of Medical Costs for Asbestos Diseases (Scotland) Bill

- Presented to the Scottish Parliament on 21 February 2014 by SNP MSP Stuart McMillan
- Would allow NHS to recover cost of treating patients diagnosed with asbestos-related illnesses
- Estimated that NHS currently spends £20 million per year diagnosing and treating individuals suffering from asbestos exposure - approximately £60,000 per patient
- Treatment costs would be recouped from insurance companies who have previously settled claims with sufferers



- New Reporting of Injuries, Diseases or Dangerous Occurrences Regulations (RIDDOR) came into force on 1 October 2013
- Introduces shorter list of ‘specified injuries’ replacing the classification of ‘major injuries’ to workers
- Previous schedule of 47 types of industrial disease now consolidated into 8 categories of work-related illness

- Fewer types of “dangerous occurrence” require to be reported - number of categories reduced from 40 to 27.
- Examples of incidents still classed as “dangerous occurrences” which require to be reported are:-
  - (1) Collapse, overturning or failure of any load-bearing part of lifting equipment.
  - (2) Explosion or fire attributable to an electric short-circuit
  - (3) Release of biological agent(s) likely to cause human infection/illness
  - (4) Complete or partial collapse of scaffolding more than 5 metres in height
  - (5) Train collisions which would likely have resulted in a fatality

# Changes to CDM Regulations imminent

- Failure to comply with CDM Regulations = breach of HSWA 1974
- Construction industry - one of the biggest sectors in UK, contributes more than £90 billion to UK economy.
- Supports approx 2.93 million jobs - around 10% of total employment in the UK
- Has been subject to major criticisms including:-
  - 1) Inadequate focus on clients
  - 2) Too complex
  - 3) Too much bureaucracy

# Changes to CDM Regulations imminent - Key Proposals

## Simplification of existing CDM regs

- Less duplication
- More succinct expression of duties owed under regs
- Hoped that this will result in greater compliance & improved H&S outcomes

## New role of “principal designer”

- Direct replacement for “CDM Co-ordinator”
- Principal designer shall be responsible for pre-construction phase of project
- HSE estimates that removal of “CDM Co-ordinator” role will save businesses undertaking projects worth 200K+ £30 million per year

# Changes to CDM Regulations imminent - Key Proposals

## Scrapping Approved Codes of Practice (ACoP)

- Replaced with more targeted and direct guidance
- Guidance to include template documents to assist small businesses
- Found that ACoP not working for SME sector - *“largely inaccessible and irrelevant.”*

## Removing Reg 4 of 2007 CDM Regs

- Relates to “explicit competence requirements.”
- Construction industry view - costly and bureaucratic
- New Regulation 8 coming into force in 2015 CDM Regs
- Retains specific requirement that appropriate skills must be made available i.e. instruction, training, supervision etc
- New Reg 8 also mirrors provisions of sections 2&3 of HSWA 1974 regarding health and safety of employees at work

## Company fined after worker falls from summer house roof

- Garden Affairs Ltd fined £5,000 after admitting breach of Work at Height Regs 2005
- No fall prevention/fall mitigation measures in place to protect workers
- Lack of stability as two tower scaffolds not fitted to structure
- No handrails fitted despite equipment being available
- Case demonstrates that Work at Height Regs do not distinguish between low and high falls
- Important to avoid complacency - risk of injury will be minimised if proper safety precautions are in place

# Construction site worker prosecuted after colleague suffers head injury

- Colleague suffered severed injuries after being struck on side of head with digger bucket
- Site worker became distracted as he was using mobile phone whilst operating digger
- Injured colleague hospitalised for 10 days and unable to return to work for 14 months
- HSE drew comparison with mobile phone ban on road users
- Operators of construction site vehicles should devote same amount of attention and concentration as they can be highly dangerous

# Building firm heavily fined after roofer suffers life-changing injuries in ladder fall

- Liverpool-based W Carroll & Sons Ltd fined £105,000
- Roofer carrying 10kg bag of cement sheets on shoulder when he fell from ladder
- Cement sheets could not be fed down chute carrying general rubble as they contained asbestos
- Both arms and legs paralysed, major internal injuries, roofer now wheelchair bound for life
- No risk assessment/method statement provided, also lack of suitable equipment
- Company failed to modify asbestos waste removal procedures following accident
- Not worth compromising worker H&S for quick saving
- Where H&S issue has been identified, remedial action should be taken as soon as possible



- Two companies fined for breaches of health & safety and environmental protection legislation
- Sellafield Ltd fined £700,000 for incorrect disposal of radioactive waste
- Network Rail fined £500,000 following severe injuries to child caused by collision at unmanned level crossing
- Both companies argued that the level of fines disproportionate to gravity of offences

- Both appeals dismissed by Court
- Court stated that structure, turnover and profitability need to be examined where a company's turnover exceeds £1 billion
- Judgment drew distinction between two companies - unlike Sellafield, the fine imposed on Network Rail would not directly punish anyone i.e. shareholders, directors
- Case highlights that gravity of offence may not be decisive factor
- Courts willing to adopt “commercially-minded approach” in deciding on level of fine to be imposed

- Mr Bavaird employed as joiner by East Kilbride Development Corporation (EKDC) in early 1970s
- Alleged that Mr Bavaird was negligently exposed to asbestos during this time- subsequently contracted mesothelioma in 2007 and died in 2008
- Mr Bavaird's executors raised an action against South Lanarkshire Council arguing that when EKDC was wound up, its liabilities were transferred to the Council by virtue of The New Town (East Kilbride) (Transfer of Property, Rights and Liabilities) Order 1996
- Court initially found in favour of the South Lanarkshire Council on the basis that when EKDC was dissolved, there was no "contingent liability" capable of being transferred to the Council

- Decision reversed on appeal
- Court held that definition of “liabilities” could include “potential liabilities”
- Any liability arising from Mr Bavaired’s exposure to asbestos in the 1970s now belonged to South Lanarkshire Council
- Major implications for local authorities - could this significantly extend the scope of their liability?
- Will this ruling affect other public bodies?

# Independence - The Big Question



What would independence mean for health & safety  
in Scotland?

# Independence - The Big Question

- Schedule 5, Scotland Act 1998 - health & safety a “reserved matter”
- This means that the Scottish Parliament cannot implement legislation in this area
- SNP’s post-independence blueprint entitled “Scotland’s Future” published on 26 November 2013 contains following question:

*“Would the people of Scotland still be protected by strong health & safety measures?”*

- The answer provided states that:  
*“Yes. The legal system that is in place immediately before independence will continue on independence. Thereafter, decisions on health & safety law, including corporate homicide, will be made by the parliament and government of an independent Scotland.”*

- Further details awaited on how H&S regulation would be implemented in practice - helpful to look back at Scottish Government's previous position
- *"Choosing Scotland's Future: A National Conversation"* - consultation paper published in August 2007 which discussed further devolved powers for Scottish Parliament.
- Highlighted benefits of H&S regulations becoming devolved matter. These included:-
  1. Improved integration with Scots criminal law
  2. Clearer enforcement of H&S regulations
  3. Removal of barriers to improve operational consistency

# Independence - The Big Question

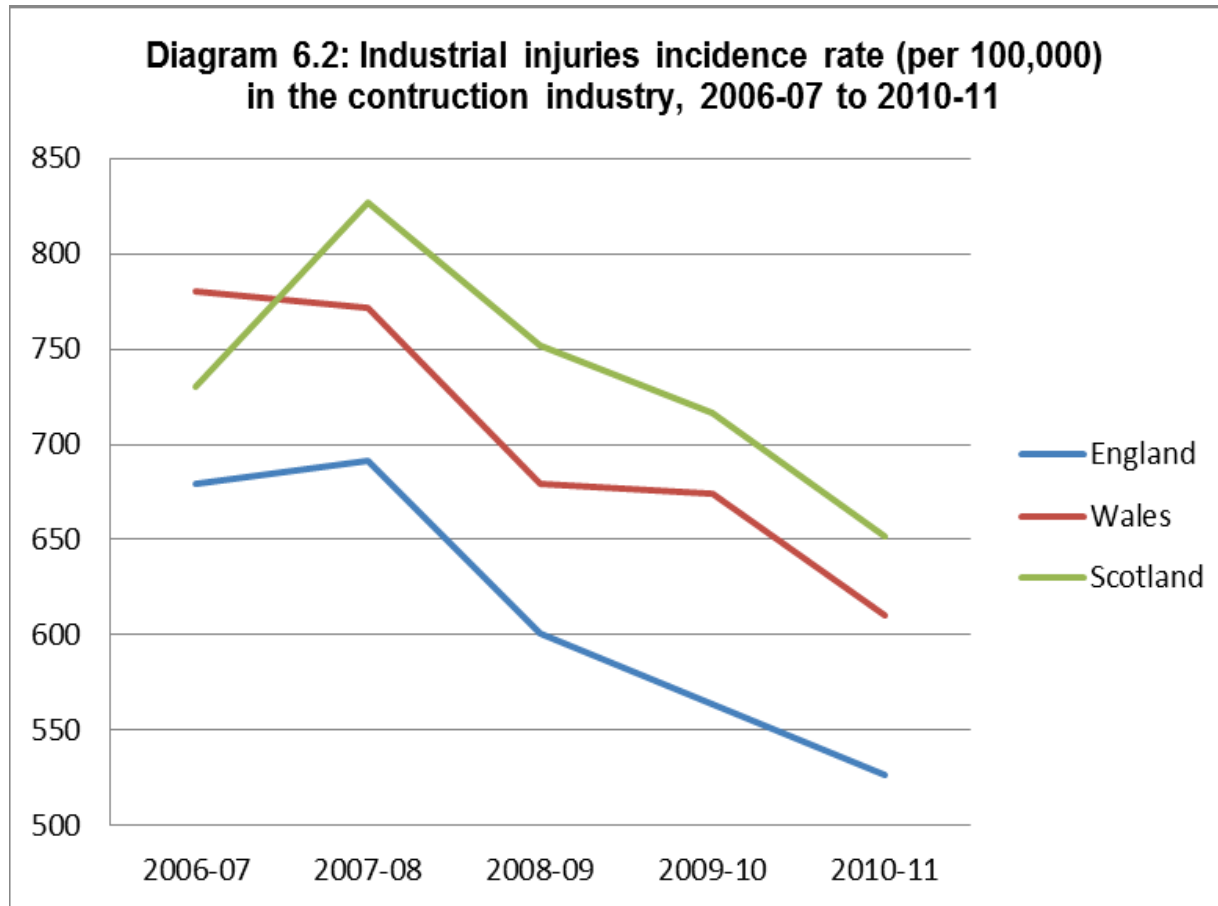
- Partnership on Health and Safety in Scotland (PHASS) - established in 2005, acts as advisory body to HSE
- Comprises wide spectrum of Scottish H&S stakeholders including:-
  1. Federation of Small Businesses (FSB)
  2. Scottish Council for Voluntary Organisations (SCVO)
  3. Scottish Trade Union Council (STUC)
- Main objectives are:-
  1. Targeting Scotland's resources more effectively to deliver higher H&S standards
  2. Co-ordinating efforts across devolved and reserved government interests
  3. Promoting benefits of working in safe and healthy working environment to people, businesses and the Scottish economy



# Would Scotland need to establish its own H&S Regulatory Body?

- HSE currently has approximately 270 staff in Scotland spread across offices in Edinburgh, Glasgow, Aberdeen & Inverness
- Scottish Government proposals on this topic are scarce
- Scottish Labour Devolution Committee Report - published March 2014
- Report makes specific reference to Scottish construction sector as greater proportion of workers compared to England & Wales
- Scottish construction sector also suffers from higher fatality rates and incidences of industrial injuries

# Would Scotland need to establish its own H&S Regulatory Body?



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- Scottish Labour Devolution Committee advocates creation of Scottish Health & Safety Executive
- Would be responsible for setting enforcement priorities, goals and objectives in Scotland
- Labour not recommending separate H&S regime for Scotland.
- Para 480 of Devolution Committee's report states that:-

*“This body would still be required to operate within the reserved health & safety framework and regulations, but it would be for the body - reporting to the Scottish Government, scrutinised by the Scottish Parliament and accessing funding provided by that Parliament - to set and achieve the health & safety objectives of most relevance and importance to Scotland”*

# Where does the HSE stand on independence?

- HSE yet to disclose official position on independence.
- In April 2008, Calman Commission asked to carry out independent review of Devolution since April 1998.
- After hearing oral evidence from the HSE, the Commission concluded in its final report that:-

*“The creation of a separate Scottish HSE could lead to duplication of effort (in both primary and support functions) as well as a deterioration of expertise on both sides of the Border.”*

# Where does the HSE stand on independence?

- Judith Hackitt - current chair of the HSE.
- In oral evidence submitted to the Commission, Ms Hackitt stated that:-

*“We have a tried and tested system that has worked and evolved over the 30-plus years since the Health & Safety at Work etc Act 1974 was put in place. We have responded to Scotland’s specific needs in the ways that we have described. We are more than willing to make whatever other adjustments our stakeholders identify as being required in order to improve matters further. However, it seems that the creation of a separate Scottish inspectorate at this time would be difficult to justify and could introduce a great deal of confusion into a system which appears to be working well.”*

- Feasible that HSE will adopt similar stance on independence.

- Significant portion of H&S law originates from EU Directives which UK government cannot ignore
- Scottish Government's campaign underpinned by principle that Scotland would become sovereign State on independence
- Feasible that Scotland would find itself in a similar position to UK in that ability to enact independent H&S legislation curtailed - or at least heavily influenced - by Brussels

Thank you for listening

Any questions???

### Further reading

Government Health & Safety Progress Report (published 29 November 2013)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/262703/improving-health-and-safety-progress-report-november-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262703/improving-health-and-safety-progress-report-november-2013.pdf)

*'Common Sense, Common Safety'* (published October 2010)

[www.gov.uk/government/publications/common-sense-commonsafety-a-report-by-lord-young-of-graffham2](http://www.gov.uk/government/publications/common-sense-commonsafety-a-report-by-lord-young-of-graffham2)

*'Reclaiming health & safety for all: An independent review of health & safety legislation'* (published November 2011)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/66790/lofstedt-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf)



Health & Safety Executive, ‘*Striking the balance between operational and health and safety duties in the Police Service: An explanatory note*’ (first published June 2011)

<http://www.hse.gov.uk/services/police/explanatory-note.pdf>

SNP, ‘*Member’s bill to recover millions for NHS launched*’ (published 21 February 2014)

<https://www.snp.org/media-centre/news/2014/feb/members-bill-recover-millions-nhs-launched>

Health & Safety Executive, ‘*HSE announces important legislation changes*’ (published 1 October 2013)

<http://press.hse.gov.uk/2013/hse-legislation-changes>

Health & Safety Executive, ‘Consultation on replacement of the Construction (Design & Management) Regulations 2007’ (published March 2014)  
<http://www.hse.gov.uk/consult/condocs/cd261.htm>

The Scottish Government, ‘Scotland’s Future’ (published 26 November 2013)  
<http://www.scotland.gov.uk/Publications/2013/11/9348>

The Scottish Government, ‘Choosing Scotland’s Future: A National Conversation: Independence and Responsibility in the Modern World’ (published 14 August 2007)  
<http://www.scotland.gov.uk/Publications/2007/08/13103747/0>

Scottish Labour Devolution Commission, ‘*Powers for a purpose - Strengthening Accountability and Empowering People*’ (published March 2014)

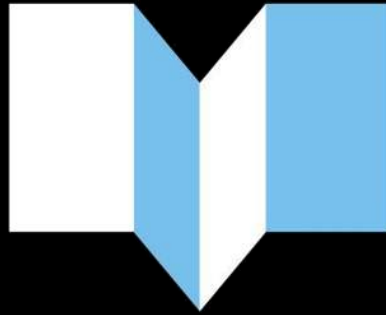
[http://b.3cdn.net/scotlab/c07a7cdb97a522f4c5\\_h1m6vwh8l.pdf](http://b.3cdn.net/scotlab/c07a7cdb97a522f4c5_h1m6vwh8l.pdf)

Commission on Scottish Devolution, ‘*Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century*’, (published June 2009)

<http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf>

Commission on Scottish Devolution, HSE Oral Evidence Transcript, pages 656 - 667 (3 April 2009)

<http://www.commissiononscottishdevolution.org.uk/uploads/transcript-3-April.pdf>



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G L A S G O W

E D I N B U R G H

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