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Health and Safety

CMS Cameron McKenna Newsletter

March 2012

Foreword

CMS Cameron McKenna LLP is recognised as a leading firm in the area of Health and Safety. We provide specialist advice on regulatory compliance, prosecutions, investigations and corporate governance.

Incident response

Our dedicated team is on call 24 hours a day to provide assistance and respond to incidents on site. Our lawyers are qualified to practise in England, Wales and Scotland but we also regularly advise clients in relation to health & safety matters in other jurisdictions and can draw on the expertise of CMS' network of European offices.

The steps a company takes immediately following an incident can be pivotal and, depending on those steps, significantly increase or decrease the likelihood of a subsequent conviction. Health and Safety Inspectors have substantial powers to enter and examine premises, remove articles and demand documents necessary for them to carry out their investigations. Immediate, on the spot advice and support can prove to be invaluable.

If your company has a health and safety emergency, you can contact us on:

020 7367 3000 - London
01224 622 002 - Aberdeen
07811 362 201 - Out of hours

News

Changes to RIDDOR come into effect

From 6 April 2012, subject to approval from Parliament, changes to reporting requirements under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR Regulations) will come into effect.

Currently, employers are required to report 'over-three-day' injuries to the Health and Safety Executive. However, the threshold is set to change to 'over-seven-days' injuries. This means that work-related injuries where a worker has been incapacitated for more than seven consecutive days must be reported to the relevant enforcing authority. Such an injury must be reported within 15 days of the date of the accident, an increase on the current time limit of 10 days.

Incidents which lead to a worker being incapacitated for more than three consecutive days must still be recorded, for example in the employer accident book, but no longer require to be reported to the enforcing authority unless they fall within one of the specified major injuries as specified in RIDDOR. The details which must be recorded are set out in Schedule 4 of the Regulations and include information such as the date and time of the incident; the name, occupation and nature of injury of the injured worker and the location where the incident occurred.

The RIDDOR Regulations apply a single set of reporting requirements to all work activities in Great Britain and in the offshore oil and gas industry. The main aim of the Regulations is to generate reports to the Health and Safety Executive and local authorities and thus make them aware of individual incidents and also show where and how risks and trends can arise.

The updated Health and Safety Executive guidance on RIDDOR can be found at www.hse.gov.uk/pubns/priced/l73.pdf

Consultation launched on abolition of Health and Safety rules

A consultation on the abolition of more than half of the UK's health and safety rules is to be launched by the Government following an independent review.

The Government-commissioned review, led by Professor Lofstedt of King's College London, looked at the scope for 'reducing the burden of health and safety regulation on business while maintaining the progress made in improving health and safety outcomes'.

The Lofstedt review has concluded that the problems lie more with the interpretation and application of regulations rather than their content, with this leading to several instances where regulations aimed at covering real risks are being used to cover trivial ones. Professor Lofstedt makes several recommendations aimed at streamlining health and safety regulation and cutting down on, what is seen as, needless bureaucracy.

One of the key recommendations made is for an exemption from health and safety law to be introduced for self-employed people whose work poses no risk of harm to others. The Lofstedt review suggests that this exemption could benefit up to a million people. The review also recommends enacting legislation giving the HSE responsibility to direct the near 400 local authorities who currently deal with monitoring low-risk environments in a move to improve consistency in the application of health and safety regulation.

The most important change however may come from the Government's approach to streamline and simplify health and safety regulation. Upon the publication of the review, the Government said they will launch a consultation into the abolition of more than half of the 200 or so regulations currently in place over the next three years – with the first regulations being removed within the next few months. Specific regulations which the review recommends are revoked include the Notification of Tower Cranes Regulations 2010 and the Construction (Head Protection) Regulations 1989. Furthermore, Professor Lofstedt recommends that several regulations are amended, clarified or reviewed, including the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR); the Construction (Design and Management) Regulations 2007 and the Work at Height Regulations 2005.

One thing the report does note is that the ability to reduce regulation in the UK will be heavily limited by the duty to comply with European law. What is therefore suggested by Professor Lofstedt is that the UK Government engages closely with the European Commission to try and ensure that the correct approach is taken.

The reaction from the business world has been largely positive with Dr Adam Marshall, director of policy at the British Chambers of Commerce, saying businesses would welcome the conclusions aimed at reducing some of the unnecessary burdens placed on them.

The Royal Society for the Prevention of Accidents (RoSPA) also reacted positively, with chief executive Tom Mullarkey approving of the findings of Professor Lofstedt. He said the RoSPA were glad that the report showed that the UK system was largely fit for purpose, although they agreed that there was always scope for improvement and a reduction in repetitive and unnecessary regulation. The RoSPA were also pleased with the recommendation that the HSE control local authority enforcement of certain regulations, although they warned caution on the implementation of an exemption from health and safety law for the self-employed.

Further positive reaction came for Sir Merrick Cockell, chairman of the Local Government Association, who said the organisation was looking forward to working more closely with the HSE going forward, with a more consistent approach being developed.

The reaction has not all been positive, however, with Union bosses slamming the proposals. The TUC General Secretary Brendan Barber has said the Government should forget about tinkering with regulations and focus on taking steps to improve Britain's health and safety record. George Guy, from the building worker's union Ucatt, was also sceptical, saying that the focus was on reducing burdens on businesses rather than on improving the safety of workers.

The Institution of Occupation Safety and Health had a lukewarm reaction to the news saying that although they were in favour of a more simplistic approach to regulation, they could not 'see the scope for reducing the number by half without potentially putting workers and the public under increased risk of injury or ill health'.

The full text of Professor Loftstedt's review can be found at www.dwp.gov.uk/docs/lofstedt-report.pdf

Cameron pledges to 'take the fear' out of the Health and Safety 'monster'

David Cameron used his first public appearance of 2012 to announce further relief for businesses complaining of excessive health and safety regulation.

Speaking to an audience of small businesses in Maidenhead, the Prime Minister said that Health and Safety legislation has become an 'albatross around the neck of British business', costing them billions of pounds a year and leaving them in fear of facing speculative claims.

The Government has already said it will set up a consultation on the possible abolition of over half of the UK's health and safety rules and Mr Cameron re-affirmed their commitment to reducing the burden on businesses at the briefing held at the headquarters of Intuit. One proposal which he announced was the plan to cap the amounts which can be earned by lawyers from personal injuries cases for claims up to £25,000. This aims to protect businesses from many legal actions where weak claims are settled by businesses in order to avoid paying legal fees in defending the action. Mr Cameron said he thought it would 'take a lot of fear out of the health and safety monster and make sure businesses can get on... plan... invest and grow without feeling they are going to be strangled by red tape and health and safety regulation'.

The Prime Minister's remarks have been condemned by the Institute of Occupational Safety and Health with head of policy and public affairs, Richard Jones, saying it was 'appalling and 'unhelpful' to label 'workplace health and safety as a monster'. In his opinion the problem which has been identified by government reviews is not the law, rather an exaggerated fear of being sued.

It would seem likely however, that any move to reduce costs and discourage vexatious legal claims would be welcomed by the business community although more details of the proposal will need to be released before being able to comment fully on its possible effect.

Findings announced in first Fatal Accident Inquiry to be re-opened twice

The findings of a Fatal Accident Inquiry into the death of a woman who died after falling down a mineshaft in East Ayrshire have been announced. The Inquiry made Scottish legal history when it became the first Inquiry to be re-opened twice to hear fresh evidence.

Margaret Allison Hume fell 40ft into a disused mineshaft in Galston in 2008 while taking a shortcut on her walk home. Emergency services were called to the scene at around 2.15am but she lay injured for almost six hours before being freed after health and safety rules had delayed a rescue. Mrs Hume then suffered a heart attack upon being brought to the surface and subsequently died in hospital.

The Inquiry held at Kilmarnock Sheriff Court under Sheriff Leslie, found that the death of Mrs Hume could have been avoided had certain reasonable precautions been taken by the emergency services involved. These included early identification, by the Police and Strathclyde Fire and Rescue Services, of the stability of the mine shaft and surrounding area and having a thorough knowledge and understanding of the capability and properties of the line rescue equipment used.

The Fatal Accident Inquiry also made Scottish legal history when it became the first Inquiry to be re-opened twice. The Inquiry was originally adjourned in March 2010 after Sheriff Leslie finished hearing evidence but was re-opened to hear further evidence in the August of that year after a retired fireman contacted Sheriff Leslie about the safety rules in question and requested that his input be considered. The Inquiry was then re-opened for a second time in February 2011 to hear evidence from a leading member of the Scottish Cave Rescue Organisation who had also contacted the Sheriff and asked to testify.

The Sheriff, in his determination, acknowledged that the Inquiry had strayed somewhat from ordinary procedure but expressed his view that the procedure that should be applied in a Fatal Accident Inquiry is to be fluid and seek to provide the best possible appreciation of the circumstances which caused the death or accident.

A Fatal Accident Inquiry is the Scottish equivalent of a Coroner's Inquest held in England and Wales, although there are some differences between them. For example, in a Fatal Accident Inquiry, although always initiated and led by the Crown, all interested parties may lead evidence and call their own witnesses.

The full text of Sheriff Leslie's findings can be found at www.scotcourts.gov.uk/opinions/2011FAI51.html

HSE to charge employers who contravene Health and Safety law for their enforcement costs

The HSE have confirmed that the 'Fee for Intervention' scheme will come into force on 6 April 2012 whereby employers who contravene health and safety law will be forced to pay the HSE's formal enforcement costs (currently set at £124 an hour). The FfI scheme will be introduced by the Health and Safety (Fees) Regulations 2012 and will be subject to annual review. Costs will be recovered where the HSE have to make a formal written intervention to address an alleged contravention of health and safety law, for example an enforcement letter or enforcement notice. For the avoidance of doubt FfI will not apply in relation to verbal advice and the pre-existing ability to recover prosecution costs will remain in force following successful conviction (England & Wales only).

The scheme will apply in nearly all sectors enforced by the HSE other than those where a charging scheme already exists, such as offshore energy and certain other hazardous industries, but will not be applied by those regulated by local authority inspectors for health and safety (eg shops and office based businesses). It remains to be seen exactly how the charging regime will work in practice and whether the inconsistency of the HSE making charges for intervention when local authority inspectors cannot will prove problematic.

Cases

Company fined after unguarded machinery death

An engineering company has been fined after the death of an employee in December 2008.

John Smith, 53, had been working on a piece of equipment at the company's premises when he was struck by an unguarded piece of moving machinery – the 'chuck' – suffering fatal head injuries. Mr Smith had been operating an axel lathe to clean sets of wheels on railway vehicles at the time and the equipment he was using was around 25 years old and, given its age, did not come with interlocking guarding. However guarding had been available for the dangerous parts of the machine but this had not been used in this case.

Following an investigation by the Health and Safety Executive, the company was fined £133,000 at Glasgow Sheriff Court (reduced from £200,000 on the basis of their guilty plea) for a breach of s2 of the Health and Safety at Work etc Act 1974. Among the failings identified was not just the lack of guarding being in place but also a complete lack of sufficient risk assessment being carried out for the work that was being done.

Following the decision, Elaine Taylor, Head of the COPFS Health and Safety Division, said 'This case yet again demonstrates the crucial importance of employers carrying out suitable and sufficient assessment of risks to their employees in the course of their daily work, taking the steps necessary to identify such risks, and thereafter ensuring that safe systems of work are in place and dangerous machinery parts are properly guarded.'

Global steel firm prosecuted after workers crushed

A global steel firm has been sentenced after two workers suffered badly broken legs when a warehouse door fell on them. The employees were attempting to repair a roller shutter door when it and a supporting pillar, collapsed and gave way on 20 April 2009.

As well as suffering a badly broken leg, one of the workers, Anthony Ryecroft, sustained severe cuts to his head and shoulder when part of the falling structure hit him, splitting his hard hat. He was unable to return to work for 15 months as a result of his injuries.

A Health and Safety Executive investigation found that the company had failed to ensure a suitable risk assessment had been carried out for the work, putting the lives of its employees in danger.

Workington Magistrates' Court heard that the firm did not have a robust system in place for ensuring that maintenance staff were planning and carrying out work safely. The company admitted to breaching Section 2(1) of the Health and Safety at Work etc Act 1974 by failing to ensure the safety of the workers. The court fined the company £13,300 and ordered it to pay £11,631 in prosecution costs on 22 December 2011.

The case highlights the importance for firms to have procedures in place to ensure that maintenance work is properly planned in advance and make sure that employees are working in a safe environment.

Mining company sentenced for safety failings that cost four lives

A mining company has been ordered to pay over £1 million in fines and costs for the safety failings that led to the deaths of four mineworkers in four separate incidents in 2006 and 2007.

The company had pled guilty to four breaches of Section 2(1) and three breaches of Section 3 of the Health and Safety at Work etc Act 1974 in connection to the deaths at an earlier hearing before being sentenced for the breaches at Sheffield Crown Court on 14 December 2011. The company was fined £112,500 and ordered to pay £187,500 costs for each fatality, giving a total of £1.2 million.

Each of the fatalities was found to be preventable were safer systems in place. In the incident which occurred on 6 August 2006 a worker died after falling from a poorly maintained underground transporter into the path of a moving 'train'. The company accepted it was a failure not to prevent unsafe 'man-riding' on the transport and not to replace the ageing system. The two 2007 incidents involved the deceased being crushed when inadequately supported coal and rock collapsed on top of them and could have been prevented were safer systems of support introduced.

These cases serve as a reminder of the importance of having a high standard of management system and hazard control in place and the tragic consequences if they are not. HSE Mines Inspector, Bob Leeming, commented that the fact there had been four deaths within an 18 month period was made 'even more stark' by the fact that 'fewer than 4,000 people are employed in the UK mining sector.'

Companies fined after Arsenal stadium injury

Three construction companies have been fined after a worker had to have his leg amputated after being injured while working on Arsenal's Ashburton Grove Stadium, more commonly known as the Emirates Stadium.

The incident occurred on 30 June 2005 when Michael O'Donovan was kneeling to clean steel 'shuttering' and a dumper truck drove over his right leg, fracturing his pelvis and injuring his leg so severely that it required amputation above the knee.

The City of London Magistrates' Court heard that the HSE investigation had shown that principal contractor and two sub-contractors had failed to ensure proper segregation between vehicles and pedestrians on the site and that the cleaning of the shuttering had not been properly planned or carried out safely.

All three construction companies pled guilty to breaching Section 3(1) of the Health and Safety at Work etc Act 1974 and were each ordered to pay fines and costs of just under £30,000.

Housebuilder fined after child seriously injured

A housebuilder has been fined £20,000 after a young boy suffered serious injuries when timber roof trusses fell on him.

The incident occurred in April 2009 when the eight year old entered an unsecured storage area on a housing development that was nearing completion. Some of the houses had been finished and people were living in them while the other homes were being completed. While the child was playing with friends in the storage area, which was only partially fenced off, some timber roof trusses fell on him resulting in the boy sustaining a serious injury to his liver and abdominal bleeding, causing him to be hospitalised for eight days.

The HSE investigation found that there was a large gap at the side and rear of the construction site which meant it could be easily accessed by members of the public and also that the trusses had been stacked in an unstable upright position. An Improvement Notice was also served on the company following the visit of a HSE Inspector to the site requiring them to improve the fencing to prevent further unauthorised access.

The company pled guilty to breaching Section 3 of the Health and Safety at Word etc Act 1974 and was fined £20,000 in Paisley Sheriff Court on 29 November 2011.

Global manufacturer prosecuted over factory worker's death

A global manufacturer has been fined £180,000 after a worker was killed at a factory in Barrow-in-Furness.

28 year old Christopher Massey was killed on 8 November 2007 when he was struck on the head by a piece of machinery used at the factory. A Health and Safety Investigation found that a dangerous part of the machinery had been left unguarded and when Mr Massey had looked through a gap in the machine to check it was working correctly, a large reel moved striking him fatally on the head.

The investigation also found that the machine had been modified around four months earlier which required extra machinery to be added with the result being the creation of the dangerous gap which Mr Massey had been looking through. Furthermore the workers had not received training on how to use the machine after its modification and were not told how to safely check if paper was being fed through correctly.

The manufacturer pled guilty to a breach of the Health and Safety at Work etc Act 1974 and was ordered to pay a fine of £180,000 and prosecution costs of £20,000 at Preston Crown Court on 14 December 2011.

Oil and Gas focus

Focus on: The European Commission's proposal to regulate offshore oil and gas and the EU legislative process

The European Commission's recent proposal to regulate offshore health and safety across the EU has provoked significant reaction with The Netherlands, Malta and The United Kingdom all coming out against the idea.

The proposal, mentioned in our previous newsletter, is for a regulation to be introduced setting strict health, safety and environmental standards for offshore operations in the European Union. As a regulation this would become directly applicable in all Member States – meaning those countries with comprehensive offshore safety regimes in place, such as the UK, could see changes to the systems they currently have.

The proposed regulation does largely reflect the UK regulatory regime and covers important areas such as licensing, transparency, emergency response and liability for environmental damage. However the worry is that there could be areas where the Regulation deviates from the UK position, either in its original form or in the future, and even in areas where there appears to be little material difference there could be unintended consequences arising from a new regime.

This is part of the reason why the UK, and other countries, have come out against this proposal, with Oil and Gas UK being particularly vocal in their opposition and preferring to see a Directive enacted which it believes could achieve the Commission's goal of raising safety standards across the European Union while allowing the UK regime to continue unaffected.

One question arising from all this is what can these countries and organisations do to try and persuade the European Commission, European Parliament and the Council of Europe round to their way of thinking?

To understand this, it is first important to understand the EU Legislative Procedure and also the lobbying process by which parties can attempt to influence the decision-making process. Although the focus of this article is on the proposal to regulate offshore oil and gas, the below could be equally applicable to any regulation in any industry.

The European Legislative Process

It is well worth noting that this is currently only a proposal. For the proposed Regulation to come into force it will have to pass through the entire EU 'co-decision' decision-making procedure. This means that the Regulation will have to be approved by both the European Parliament and the Council of Europe, made up of the governments of all 27 Member States. As this proposal takes the form of a Regulation it will be directly applicable and therefore could immediately come into force across all Member States upon being adopted by the Council and European Parliament. The European Commission envisage that this may happen sometime in 2012 and, initially, the legislation would only apply to new installations with transitional periods of up to two years for existing installations foreseen. The new rules could therefore be in force for existing production installations in 2014. A one year transition period is planned for planned production installations and also for non-production installations, for example drilling installations, meaning that, according to the European Commission's timetable, the new rules would be in force at some point in 2013.

In brief - the process for the proposal passing through the European Parliament and Council begins by both institutions reviewing the proposal and suggesting amendments to it. If they cannot agree upon the amendments, a second reading will take place. In this second reading, amendments will again be proposed by both the Council and the Parliament, with Parliament having the power to block the Regulation if it cannot agree with the Council. If there is no

agreement, a conciliation committee (made up of 27 Members of Council and 27 representatives from the European Parliament) can try and find a solution, although both institutions can block the proposal at this final reading.

Initially the proposal will be considered by the European Parliament in a 'first reading' where a position will be delivered by the relevant parliamentary committee. This will then be debated in plenary session where it can be adopted by a simple majority. There is no time limit set for the opinion to be delivered, although in practice this may take an average of around 15 months and may take much longer depending on the complexity of the issues involved.

Once the committee (or committees if the issue covers several areas) has finalised its position the proposal will be placed on the agenda of the plenary session. In the course of this debate, the Commission will announce and explain their position on the changes suggested by the Committee. A simple majority is then required to adopt the amended proposal and this, invariably, is obtained. Should the proposal fail to gain majority approval then the Commission may be asked to withdraw. Should they refuse to do so, the matter will be passed back to the relevant committee.

The Commission can then amend its proposal accordingly, incorporating the changes which it supports - either as suggested or suitably reworded.

While the European Parliament is considering the proposal, the Council will also be reviewing the proposed legislation, although it cannot adopt its position until after the Parliament has acted. The Council's position will be prepared by specific working parties which are made up of expert representatives from the Member States and chaired by the Member State currently holding the Presidency. These parties then report to the Committee of Permanent Representatives which will prepare the Council's decision. Their position will be finalised on the basis of the Commission's proposal, amended where necessary following the first reading of the Parliament. There are three possible scenarios at this stage:

— The act will be adopted where the Council accepts, without alteration, a proposal which has not been amended by the European Parliament.

— The act will be adopted where the Council accepts all the European Parliament's alterations which have been incorporated into the final proposal; or

— In all other cases the Council will adopt a common position.

If the Council is approving a proposal which incorporates the Parliament's amendments or simply has no amendments then a qualified majority (currently 73.91% of the vote) will be required for it to be adopted by Council. Should the Council be approving a proposal as amended by the European Parliament but where the changes have not been incorporated by the Commission then unanimity will be required.

The Council will adopt a common position when it does not share the stance taken by Parliament and this will be submitted, along with a statement of reasons, to the European Parliament. The common position is usually initially prepared by the working parties and then adopted by the Council of Ministers, with or without a debate, and a qualified majority is required. It is possible that the Council reaches a position before the European Parliament does – if this does happen then this position will be termed a 'general approach' and the Commission will wait until the Parliament gives its opinion on the proposal before it reacts.

Again no time limit is laid down for the Council to reach a common position. In recent years the average time as been around the two year mark although much will depend on the complexity of the proposal.

Once the Council has submitted its common position, the European Parliament has a three month period to respond. The adoption procedure for this second reading is largely similar as described above for the first reading, except the document the relevant committee will be dealing with is the Council position rather than the Commission's proposal. The amendments suggested must either include those adopted at the first reading but not accepted by the Council or be concerned with a part of the common position which is significantly different from the initial proposal or did not appear in it at all, or introduce an element of compromise between the parties. These amendments will then be put to a vote in the parliamentary committee with a simple majority required. An absolute majority (half of the members rather than half the vote) in the European Parliament is then required for Parliament to adopt the amendments.

Should the European Parliament endorse the common position without amendment, fail to obtain the absolute majority required to adopt the amendments or fail to make a decision within the time frame then it will be declared that the common position is approved at the act will be enacted accordingly. Parliament also has to option to reject the Council position by an absolute majority vote.

If the amendments are adopted the Commission must then deliver an opinion on these amendments with the position taken at this stage affecting the type of vote required in the Council. Should the Commission give a negative opinion on at least one of the amendments; a unanimous verdict will be required by the Council as regards overall acceptance of the Parliament's position.

Upon receipt of the Parliament's amendments, the Council will have a period of three months to approve them – either unanimously (in the above situation) or by qualified majority (if they are accepted by the Commission). Again the internal process is similar to that in the first reading. If the Council agrees that it will accept all the amendments then the act will be adopted, according to the wording after the Parliaments second reading.

Should the amendments not be approved by the end of the three month period then the conciliation procedure shall begin. A conciliation committee will have to be convened within six weeks from the time of the Council's formal decision (or the end of the time period). This committee will bring together members of the Council and an equal number of representatives from the European Parliament (27 of each), along with the Commissioner responsible. The committee will the attempt to negotiate and approve a joint text for the proposal – within a stipulated time limit of six weeks (which can be extended to eight weeks) from the first meeting. The Council delegate will have to act by qualified majority when making decisions while the European Parliament's delegation may act through a simple majority. If a joint text is approved with in the time frame then the act will be adopted, otherwise the act will be deemed to have not been adopted and the procedure is ended.

Lobbying

Interested parties may wish to attempt to influence the decision made by the European Parliament or Council of Europe and the direction of the proposal going forward.

Lobbying can be carried out directly to one of the decision making elements of the EU or indirectly through other channels. The Council of Europe is arguably the least accessible of the main bodies in terms of lobbying, although views can be expressed to national interest groups and to national governments. The relevant national minister may then take these views into account and put them forward to the Council when discussions regarding a proposal begin.

The European Parliament and Commission are perhaps more easily accessible to lobbyists. A joint-register is now in place, from which interest representatives can be accredited and allowed access to the Parliament and speak with MEPs. The register currently has over 1200 organisations listed, from which over 2000 individuals are also listed – although it is likely there are even more lobbyists and lobbying organisations present in Brussels. The types of organisations listed range from multi-national companies and industry associations to regional representatives and not-for-profit organisations.

Interested parties can attempt to put forward their views and influence the decision making process of the EU either by being accepted onto this Transparency Register and then being accredited to the European Parliament or by going to an organisation that already has been. It is an approach that can yield results – for example the European Parliament voted against a proposal to force food manufacturers to add 'traffic light' labels to products to highlight the levels of salt, sugar and fat after intense lobbying by the food industry in 2010.

Conclusion
The European Commission's proposal to regulate offshore oil and gas is certainly one that is exercising those involved in the current regime in the United Kingdom. They, along with representatives from other member states, are concerned that the proposal will do little to benefit offshore health and safety in countries with an established regime in place and, in fact, may be detrimental to those regimes.

However, the European legislative process is long and complicated with many hurdles to overcome before this proposal becomes law. This will take time and provide significant opportunity for debate. Considering there is also the possibility of lobbying the European Parliament, European Commission or the Council of Europe in several ways – it can be seen that it is by no means a certainty that the proposal will become a regulation.

With the UK in many ways being the Member State that stands to lose the most and gain the least from a European-wide Regulation in this area it will be very interesting to see how this develops over the coming months and the actions taken by those with a major interest in this area.

Oil and Gas UK announce position against EC proposal to regulate offshore safety

Oil and Gas UK have released a paper detailing their position in relation to the European Commission's proposal to regulate offshore safety.

The Commission is proposing to introduce a new Regulation setting strict health, safety and environmental standards for offshore operations across the EU (as mentioned in our previous newsletter).

Oil and Gas UK have come out strongly against any such Regulation in their position paper and accompanying press release saying that it would have an immediate detrimental effect on offshore safety standards in the UK with no significant improvement being seen in the long-term. Chief Executive Malcolm Webb has said, in a press release on the issue, that 'while we (Oil and Gas UK) will always support proper moves to improve safety standards, this proposal to dismantle the UK's world-class safety regime which is built on decades of experience and replace it with new centralised EU Regulation, is likely to have exactly the opposite effect'.

As an alternative, they suggest the goal of raising standards across the European Union could be achieved by an appropriate Directive. This could be used to facilitate improvement in those Member States currently without a significant safety regime while allowing countries who do have such systems in place, such as the UK, to continue unaffected.

While the European Commission remains committed to introducing a Regulation in this area debate will no doubt continue, especially now that Oil and Gas UK have declared their stance against it. The Oil and Gas UK press release can be found www.oilandgasuk.co.uk/news/news.cfm/newsid/693 and the position paper can be viewed at www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=1914.

Independent review of the UK offshore oil and gas regime published

On 14 December 2011 the Department of Energy and Climate Change (DECC) announced the findings of an independent review of health and safety and environment standards for the UK offshore oil and gas regime. Chaired by Professor Geoffrey Maitland of Imperial College, the panel review was commissioned by ministers following regulatory scrutiny at UK, EU and international level following the Deepwater Horizon incident. The review panel was tasked with considering recommendations from official reports relating to Deepwater Horizon, their relevance to the UK and to inform any modifications to the present regime as necessary. There are a number of significant implications arising. Regulators have been asked to work with industry to produce an agreed response to the report and action plan by July 2012.

The key points arising out of the review

The review acknowledged amongst other points the strength and robustness in the existing regime, the high regard held for UK regulators both domestically and internationally and the extent to which pro-active efforts by the industry and regulators have been made to further enhance measures since Deepwater Horizon. However, the review also identified areas which could be improved and has set out recommendations for further action aimed at improving the effectiveness of the existing system.

Main areas for improvement

In proposing 26 recommendations the review identified six areas for key improvements. Each area had numerous recommendations, outlined below on a non exhaustive basis:-

1. The assured implementation of safety and environmental management systems

— The development of the concept of the 'Environmental Assurance Plan' presently being considered by industry by using the Environmental Statement or the Environmental Management System as live tools to facilitate continuous goal setting approach and improvement.
— The identification and consistent treatment of more generic aspects of environmental assurance documents to ensure focused attention on areas of localised or specific risk.
— Industry taking a greater ownership role of existing regulatory requirements including the review of contractual arrangements for preparing and updating documents and devising tools to progress improvement in assessment and protection.
— The regular review and revision of guidance documents relating to offshore environmental impact assessment, enforcement and regulatory activities.
— The independent periodic review of a selection of approved Environmental Statements and Oil Pollution Emergency Plans (focusing on high risk wells).
— Regular testing of the deployment of capping devices and requirements for maintenance, testing, training and verification.
— R&D regarding subsea application of dispersants and associated guidelines.

2. Improved learning and processes for disseminating best practice

— The industry should agree principles to ensure concerns about proprietary information and legal exposure do not prevent rapid knowledge sharing amongst operators which could help mitigate against serious incidents.
— Regulators to work with industry to develop competency guidelines for different offshore job functions and audit processes.
— Operating companies to take steps to ensure safety representatives are provided with appropriate training (above the minimum), are involved in safety cases and encouraged to report process safety concerns.

3. Further integration of regimes with the existing regulatory system

— More formal mechanisms should be established to ensure seamless working between regulators. The preferred option is the creation of a joint 'Competent Authority' similar to the mainland.

4. **Clarification of the command and control structures in the event of a spill**

— The point at which command responsibility for the containment/clean-up operation should transfer from operator or contractor to the Government should be clarified.
— The establishment of a communication function to brief media and Government in the event of an incident of national significance.
— More frequent contingency exercises and smaller scale exercises.

5. **Robust arrangements to cover liabilities in the event of spills**

— The requirement to submit to DECC independent third party verification by an insurance expert of both the estimated costs and the ability to pay including the suitability of insurance cover to meet costs prior to consent being provided to drill a well.
— Third party costs for high risk deepwater wells should be revised upwards. The costs should cover a 90 day release.
— DECC should discuss ecosystem/biodiversity damage with industry with a 'view to introducing provision to cover this aspect'. The suggestion is that the provision may be a charge in the event of an incident to fund long term remedial work.
— The urgent adoption of a clear claims and compensation procedure taking into account evaluations of the Deepwater Horizon claims.

6. **Intensified R&D to develop improved avoidance, capping, containment, clean up and impact monitoring of major offshore oil spill incidents.**

— The industry should work with operating and service companies to identify potential technology solutions to lower the risks of deepwater drilling, monitor compliance, improve best drilling practice, oil spill remediation and clean-up.
— Regulators should encourage the development and implementation of new technology addressing offshore safety and environmental concerns.
— Regulators should identify key offshore safety and environmental technology gaps. Government should make this a priority area for joint-industry government project funding.

A copy of the report of the review is available at www.decc.gov.uk/assets/decc/11/meeting-energy-demand/oil-gas/3875-offshore-oil-gas-uk-ind-rev.pdf

DECC clarification of environmental guidance for operations published

On 6 December 2011 the Department of Energy and Climate Change (DECC) issued clarification of DECC guidance relating to environmental aspects of drilling, well intervention and well abandonment operations. The information was initially communicated to oil and gas operators and Mobile Drilling Unit operators following the Deepwater Horizon incident. Many may already be familiar with the points raised. However, DECC has recommended that operators should study the most recent iteration to develop an overall picture of environmental requirements.

The Guidance

Guidance is provided in relation to four aspects:

— Environmental Statements and Direction applications
— Other Environmental Application Submissions
— Oil Pollution Emergency Plans
— Environmental Reviews and Inspections.

A copy of the collated guidance can be found at og.decc.gov.uk/en/olgs/cms/environment/leg_guidance/deepwater/deepwater.aspx

Health and Safety - what we do

Our expertise

CMS Cameron McKenna is recognised as a leading firm in the area of Health and Safety. We provide specialist advice on regulatory compliance, prosecutions, investigations and corporate governance. We have specialised knowledge of the offshore and energy sector in particular, which faces greater challenges and regulation than most. However, our client base and expertise spans a broad range of sectors, including:

— Construction
— Communications
— Energy
— Leisure
— Manufacturing
— Renewables
— Transport

Regrettably, accidents at work can be serious and sometime result in fatalities. Our clients appreciate the high level of attention and support we are able to offer during what can be a difficult time for any organisation. We are able to provide assistance with every aspect of incident response, including incident investigations, dealing with witnesses, defending prosecutions and advising senior management on relations with the Health & Safety Executive.

Emergency Response Team

Our specialist team is on call to provide assistance and respond to incidents 24 hours a day. Our team is qualified to practise in England, Wales and Scotland but also regularly advises clients in relation to international working practices and health & safety matters in other jurisdictions.

Our clients come to us for advice on:

— Health and Safety prosecutions
— Accident Inquiries
— Formal interviews and investigations undertaken by inspectors
— Corporate Manslaughter investigations
— Inquests and Fatal Accident Inquiries
— Appeals against Improvement and Enforcement Notices
— Compliance with UK and European regulatory requirements
— Drafting corporate Health and Safety policies and contract documentation
— Safety aspects of projects and property management
— Due diligence in corporate acquisitions/disposals
— Directors' and officers' personal liabilities
— Management training Courses
— Personal injury defence
— Risk management and training

Recent experience

— Defending Health and Safety prosecutions of client companies.
— Appealing other types of enforcement action against companies (e.g. Prohibition Notices).
— Conducting numerous Coroners' Inquests and Fatal Accident Inquiries - including some of the most high-profile and complex Inquiries to have taken place in relation to offshore incidents.
— Obtaining the first ever award of expenses against the Crown in favour of a client company following a Fatal Accident Inquiry.
— Taking Appeals to the High Court of Justiciary.
— Taking Appeals on human rights issues to the Privy Council.
— Defending Judicial Reviews.
— Advising on forthcoming Health & Safety legislation.
— Assisting clients in consultations with the Health and Safety Executive and other regulatory bodies, including the Department for Energy and Climate Change.
— Advising clients in relation to Safety Cases, Corporate Governance issues and Directors' duties and liabilities.
— Undertaking transactional due diligence in relation to Health and Safety matters.
— Advising clients on incident investigation, legal privilege and dealing with HSE inspectors.
— Preparing and drafting incident investigation reports.
— Advising clients on media, public relations and reputational issues following incidents.

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