

Transcending the deregulation debate? Regulation, risk, and the enforcement of health and safety law in the UK

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Abstract

This paper considers the context for the development of the concept of responsive regulation, namely the transcending of the deregulation debate. It argues that claims regarding responsive regulation when allied to risk-based rationales for enforcement can, in fact, allow a “deregulatory” momentum to develop. This argument is grounded with reference to a case study of the regulation of workplace health and safety in the UK, with a particular focus upon the period 2000–2010. The paper casts doubt on the relevance and robustness of the concept of responsive regulation. In a context that might have been fertile ground for developing genuinely responsive regulatory policy, empirically we find the development of policies that are better described as “regulatory degradation.” Thus we argue in this paper that, whatever the intentions of its proponents, there is a logical affinity between responsive regulation, and effective de-regulation, and that it is this affinity that has provided a convenient political rationale for the emergence of a neo-liberal regulatory settlement in the UK.

Keywords: deregulation, neo-liberalism, occupational health and safety, responsive regulation, risk.

1. Introduction

Writing in 1992, Ayres and Braithwaite sought to develop “creative options to bridge the abyss between deregulatory and pro-regulatory rhetoric” (Ayres & Braithwaite 1992, p. 15). This special issue is testament to the widespread impact of their efforts in this respect. Over 20 years, their main conceptual bridgehead – responsive regulation – has been applied, developed, tested, affirmed, and subjected to critique across Australasia, North America, and Western Europe, in a diverse range of contexts from “corrections to school bullying to international peacemaking” (Burford & Adams 2004, p. 12; Nielsen & Parker 2009, pp. 376–377). However, we suggest here that responsive regulation – while appearing to be theoretically and conceptually sophisticated – may, in fact, be fundamentally and perilously ambiguous in so far as it reduces the fundamentally antagonistic social relations that are embedded in the regulatory process to a dispute between “left” and “right” (1992, p. 12). Thus, responsive regulation offers no way of understanding or responding to antagonistic social relations, but rather, proposes a means of transcending

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temporal political disputes. We shall argue in this paper that the apparent political nuances of the concept of responsive regulation are, in fact, barely concealed ambiguities, which allow it to be all too easily incorporated into policy initiatives with a deregulatory, rather than a “transcending,” effect.

The aim of this paper, through extended reference to recent developments and trends in occupational health and safety law enforcement in the UK during 14 years of the Labour Government, is to question the extent to which responsive regulation does entail a transcending of regulation/deregulation. Specifically, we argue that policy developments compatible with the concept of responsive regulation can allow a “deregulatory” enforcement practice to gather momentum. The dramatic shifts in occupational health and safety regulation that we describe in this paper have been conceptually legitimized by a responsive regulation rationale. This rationale has, in turn, been used to advocate techniques of “risk-based” targeting. Ayres and Braithwaite ground their concept in the need to focus upon limited regulatory resources – and the pyramid enforcement schema which they develop is central to this task; what they do not do is set out the forms of risk-based targeting through which scarce enforcement resources will be allocated. In other words, they do not enter into a detailed discussion of risk-based targeting. However, in the case study that we present, we find that concepts of responsive regulation are inseparable from the risk-based techniques that have been introduced as a means of allocating ever-decreasing levels of regulatory resources (Tombs & Whyte 2006). Thus, the central contention here is that, notwithstanding the intentions of its proponents, there is a *logical affinity* between responsive regulation and the declining credibility of regulatory intervention – so that responsive regulation is vulnerable to effective deregulation. Any claims that responsive regulation as a concept may provide solutions to policy design for practical people (Ayres & Braithwaite 1992, pp. 1–2) appear to be limited; such limitations require additional, detailed exploration through future research. Further, as we argue, they require reference to actual enforcement data, practice, and trends, therein.

The structure of the paper is as follows: First, we note briefly the relationship between responsive regulation and risk regulation, as well as the associated enforcement practice of risk targeting. Second, we outline the contours of the regulation of workplace safety in the UK that, while gesturally acknowledging responsive regulation and the work of Ayres and Braithwaite, entrenches a shift towards a risk-based, targeted enforcement approach. Third, we examine the effects of this policy agenda upon the enforcement of occupational and safety law in the UK over the first decade of this century. We conclude that the deregulation debate has been far from transcended in this context, and note that responsive regulation – because it opens the door to risk-based targeting and cedes ground to those who would argue for deregulation – contains the seeds of its own perennial degradation.

2. Transcending the deregulation debate: The rise of risk regulation

While the concept of responsive regulation was explicitly forged in the efforts to transcend what Ayres and Braithwaite viewed as a sterile debate over “deregulation,” its origins are also an enduring problem for studies of regulation: how to develop effective regulation in the face of inevitable resource constraints on the part of regulatory agencies. This approach had already been made clear in an earlier piece by Braithwaite and Fisse (1987), extensively drawn upon and developed in *Responsive Regulation* (Ayres & Braithwaite 1992, pp. 101–132). The piece had considered the prospects for self-regulation as a strategy to control corporate crime on the basis that, “we know it is politically and fiscally

unrealistic to expect that our generation will see the public resources devoted to corporate crime control approach anywhere near those expended on crime in the streets” (Braithwaite & Fisse 1987, p. 221).

Thus, “a fundamental principle for the allocation of scarce regulatory resources ought to be that they are directed away from companies with demonstrably effective self-regulatory systems and concentrated on companies that play fast and loose” (Ayres & Braithwaite 1992, p. 129). Companies that failed to demonstrate such systems would be “told that they will be targeted for more interventionist direct enforcement” (Braithwaite & Fisse 1987, p. 245). Such “fundamental redeployment” of state resources (Ayres & Braithwaite 1992, p. 131) within “schemes of escalating interventions” (Ayres & Braithwaite 1992, p. 132) – the rationale underpinning the regulatory pyramid – equates to the targeting of regulatory resources. That said, there is no indication of how regulators will determine which companies are failing to effectively self-regulate or which practices at the base of the regulatory pyramid are to be subject to formal enforcement.

Since the publication of *Responsive Regulation*, the use of risk technologies to inform regulatory targeting has become part and parcel of the regulatory landscape, with risk-based forms of regulation now ubiquitous across UK regulatory bodies (Black 2005; Hutter 2005; Rothstein *et al.* 2006). Conceptually, the “risk regulation” couplet has established itself as academically pre-eminent in the past decade.¹ Thus, “Risk regulation refers to the governance, accountability and processing of risks, both within organizations as part of their risk management and compliance functions, and also at the level of regulatory and other agencies that constitute ‘risk regulation regimes.’”² Regulation extends beyond and indeed is “de-centred” from the state (Black 2002) – to various non-state bodies within the economic sphere, not least operating through market-based relationships, and through civil society (Hutter 2006). “At a minimum,” determining the risk-regulation balance entails “the use of technical *risk-based tools*, emerging out of economics (cost-benefit approaches), and science, (risk assessment techniques)” (Hutter 2005, p. 3, emphasis in original).

These affinities are, of course, widely recognized in the regulation literature. For example, in a series of papers, Baldwin and Black have argued recently for *really responsive risk-based regulation* (Baldwin & Black 2007, 2008; Black & Baldwin 2010), in an explicit attempt to develop the affinities between both sets of literature.³ To be clear, these authors do not reduce responsive regulation to risk-based regulation, and nor is that our intention – and, in fact, in their original text, Ayres and Braithwaite did not even discuss risk. Our point, very simply, is that there are logical compatibilities between responsive regulation and risk-based regulation approaches. Indeed, this is a point we shall return to following our case study of occupational safety and health law enforcement in the UK.

If work within the risk-regulation paradigm is clearly independent of that on responsive regulation, and has developed its own diverse trajectories, this burgeoning and now voluminous literature shares several assumptions with that around responsive regulation. One is that state capacity has dwindled with respect to private actors and “the market,” while state resources are not and never will be sufficient for the task of overseeing compliance with regulation. A second is that this requires a targeting of regulatory resources at those firms or sectors where risk is greater or the chances of non-compliance are more significant or both. Third is the assumption that the preferred regulatory option is to leave the management of risks to institutions beyond the state – notably to business organizations and their managements themselves, but also other private actors, including

trade associations, insurers, and investors – so that corporations should be encouraged to act as responsibilized, self-managing, risk-mitigating organizations. A fourth assumption is that this is not only desirable, but also feasible, because corporations⁴ can and do have moral commitments to preventing and mitigating risks – they are not reducible to artificial amoral, calculating entities, legally constructed as purely profit-driven.

Ayres and Braithwaite's work on responsive regulation, then, stood at the vanguard of a whole policy-oriented regulatory literature, one within which their concept of responsive regulation is intimately linked to more recent and current ideas around risk-based regulation. For, notwithstanding differences between the two schemas, each sits within a conceptual terrain defined by the same basic assumptions – and within which, indeed, each provides support for the legitimacy of the other.

3. Transcending the deregulation debate? The new politics of regulation

As a prefatory note for our empirical focus,⁵ it should be emphasized that there are good reasons for supposing that occupational health and safety – not least in the UK – might be a particularly fertile ground for considering the merits or otherwise of a responsive regulation approach; this seems to be a place where many of the assumptions upon which this concept is based appear to be realized.

For one thing, health and safety law in the UK requires that employers do all that is “reasonably practicable” to ensure the health, safety, and welfare of employees and members of the public – and this legal test of reasonable practicability is one that is both context-specific while also, therefore, inherently open to contest and compromise. Thus, the argument that state regulatory functions should be responsive to different industry structures, to the diverse objectives of trade associations, industries, and individuals within them, so that enforcement best proceeds via bargain, negotiation, and compromise to secure future compliance with the law, is one that is woven into the institutional fabric of the health and safety regime in the UK.

Further, Ayres and Braithwaite's text makes it clear that the most fruitful context for effective responsive regulation is a regulatory context characterized by tripartism (see also Wright & Head 2009), within which organized countervailing interests to corporate power are genuinely empowered (Ayres & Braithwaite 1992, pp. 54–100). This fosters cooperation in regulatory encounters in a way that minimizes capture and corruption, and is likely to generate higher levels of compliance with law. The modern UK system of health and safety regulation is indeed founded on tripartism, both at policy level, through the Health and Safety Executive (HSE) Board which comprises of employer and employee representation, as well as at workplace level through the safety representatives and safety committees system which at least guarantees employee representation in occupational health and safety in workplaces where trades unions are recognized. Thus, Ayres and Braithwaite note themselves that, “the simplest arena to understand how tripartite regulation would work is with occupational health and safety” (Ayres & Braithwaite 1992, p. 59; see also Prosser 2010, pp. 89–110), citing the “thrust of recent occupational health and safety reform in most Australian states” (Ayres & Braithwaite 1992, p. 59) – reforms which, in many ways, have been modeled on the UK system of regulation.

Now, the UK, as in many other western economies, has, from the mid-70s onwards, experienced a long period of ideological reframing of the idea of regulation, through which it has become ontologically associated with populist political concepts of “red tape” and “burdens on businesses.” It is in this context that we can understand how a “mod-

ernized” Labour Party, coming to government in 1997, in fact, achieved more in terms of “deregulation” than its Conservative predecessors had managed to do, even though this was only possible on the basis of ground laid by those governments, and albeit, that its regulatory policy was couched in terms of “better,” rather than “de-,” regulation. In other words, notwithstanding policy and practice, rhetorically at least, Labour committed itself precisely to transcending regulation/deregulation, drawing upon the Third Way discourse popularized by Giddens (1998) in the context of a communitarianism shared also by Braithwaite (Tombs 2002). Such transcendence is based upon a rejection of the idea that regulation is a process that seeks to resolve fundamentally antagonistic social relations in favor of a conception of regulation as aimed at “win–win” solutions, “wherein actors are seen as virtuous when they take seriously not only their own concerns but the concerns of others” (Braithwaite 1997, pp. 356–357).

An early indication of New Labour’s enthusiasm for a newly refashioned “Third Way” form of regulation came in its first year of office when the Conservatives’ flagship Deregulation Unit was consolidated under a new name, the “Better Regulation Unit,” with the Better Regulation Task Force established in the Cabinet Office. Regulatory Impact Assessments (RIAs) were introduced the following year. In 1999, the role of the Better Regulation Unit (renamed the Regulatory Impact Unit) was extended with a remit to ensure that RIAs were being implemented across government departments. RIAs aim to measure the costs and benefits of all proposed policy and legislative reforms on business. Yet they contain structural biases toward less, rather than more, regulation. Their very rationale is the need to consider “the impact of any new regulations, before introducing them, to ensure any regulatory burden they add is kept to a minimum.”⁶ Moreover, their economic form tend toward less regulation, as the costs of meeting new regulatory requirements on the part of businesses are generally more calculable than the benefits (Cutler & James 1996).

Then, in April 2001, the Regulatory Reform Act allowed government ministers to order the reform of legislation with a view to removing or reducing regulatory “burdens.” This law set the tone for New Labour’s second period in office. In the same month, Tony Blair launched New Labour’s manifesto for business before 100 corporate leaders in London. He committed Labour to develop, in its second term, a “deeper and intensified relationship” with business (Blair, cited in Osler 2002, p. 212). Commenting on Blair’s pledges, Osler notes that, “policies on offer that day included deregulation” (2002, p. 212).

In the flush of Labour’s landslide victory in 2001, a material and ideological assault on regulation was launched. The ideological assault took the form of a long-term, drip–drip type of discursive framing of regulation, which explicitly revived the Thatcherite language to cast this as “red tape” that created a “burden on business.” In 2005, Chancellor of the Exchequer, Gordon Brown, called for a break with the “old regulatory model” within which “everyone was inspected continuously, information demanded wholesale, and forms filled in at all times, the only barrier being a lack of regulatory resources.” Launching what became known as the “Hampton Review,” he argued for a new model, which he characterized as “not just a light touch, but a limited touch” (Brown 2005). As we indicate below, it should be noted that internal discussions within the HSE were, even as Hampton was being appointed, considering the nature of a “modern regulator” in ways which cohered with – even presaged – the agenda which was to be laid out through the Hampton Review.

This Hampton Review sought no less than to reconstruct the “regulatory landscape” (Hampton 2005, p. 76). Its report – *Reducing Administrative Burdens: Effective Inspection and Enforcement* – called for more focused inspections, greater emphasis on advice and education, and, in general, for removing the “burden” of inspection from most premises. Most fundamentally, inspections were to be cut by a third across the board (equating to one million fewer inspections) and regulators were to make much more “use of advice” to business. These proposals were implemented in the Legislative and Regulatory Reform Act, in November 2006.

In December 2007, a new “Compliance Code” – a code of practice for regulators – was published. According to this, “[r]egulators should recognise that a key element of their activity will be to allow or even encourage economic progress,” and that “[t]hey should only adopt a particular approach if the benefits justify the costs” (Department of Business, Enterprise and Regulatory Reform 2007, p. 11). In short, the Code was intended to ensure that regulatory interventions do not obstruct the economic prospects of those they regulate.

It is worth noting in the context of this paper that the Hampton Review acknowledged the concept of responsive regulation in the development of UK regulatory policy. The resulting Hampton Report used this approval of responsive regulation to prompt a broader discussion on risk-based regulation and targeted intervention. Thus, in its chapter on Assessing Risk, the Hampton Report pointed out “Ayres and Braithwaite believed that regulatory compliance was best secured by persuasion in the first instance, with inspection, enforcement notices, and penalties being used for more risky businesses further up the pyramid.” “This approach,” it continued, “has been adopted by many regulators, and has resulted in the largescale random inspections of the past being replaced by more targeted intervention”. Thus, “[f]rom these developments has come a general acceptance among business and regulators that inspections are an inefficient enforcement mechanism in lower-risk or high-performing businesses, and that risk assessments should inform the work programmes of Inspectorates” (BERR 2007, p. 7). It is clear that Ayres and Braithwaite’s work is viewed, in this highly influential policy document, as the conceptual basis for opening up risk-based practices of targeted intervention.

Hampton’s linkage of responsive regulation and a targeted enforcement strategy is explicit. Of course, Hampton’s reference to the work of Ayres and Braithwaite may be considered gestural at best, while these authors might fairly claim that Hampton has exploited their work in order to legitimize a withdrawal from inspection on a scale that they would never have advocated. But this may be less a misuse of the concept than a quality of the concept as it has been developed. As Baldwin and Black have observed, responsive regulation is flexible to the point of being “hard to pin down” (Baldwin & Black 2007, p. 16), and note how it has been used very broadly beyond its original version – including by Braithwaite himself (Baldwin & Black 2007, p. 17). For us, the most instructive point in the Hampton reference to the concept is the fact that Ayres and Braithwaite’s work has been invoked to bolster what is, in essence, a politically driven, deregulatory agenda – a function, we argue, of the ambiguities within the concept itself.

More specifically, Hampton sought to transcend the de- and pro-regulation debate by squaring a circle between the withdrawal of external regulatory scrutiny and the need to secure compliance. He did this by using the following line of argument: First, regulatory

resources are limited, and, indeed, are likely to be limited further; because enforcement strategies are resource intensive, regulatory agencies can no longer be expected to maintain current levels of inspection and enforcement. Second, reduced inspection and enforcement does not necessarily lead to less effective regulation; regulation may indeed become more effective under conditions of reduced resources if a series of compliance levers are used to secure self-regulated compliance. If Ayres and Braithwaite might contest the conclusions that this line of argument led to, the similarity of this reasoning and that of their seminal text is clear. Hampton had found in “responsive regulation” a politically convenient hook upon which to hang his prescriptions for a radically changed regulatory regime.

Hampton based his argument for a further reduction of regulatory activity upon a set of technical claims. Here, his argument turned to a “risk-based” approach. In so doing, it also depoliticizes regulation in a way that is common to both the risk-regulation and responsive regulation approaches; regulation and enforcement here become technical matters of calculation, policy-oriented scientific discourses that transcend political contests around, for example, “regulation”/“deregulation.”

Hampton’s version of a risk-based approach relies upon the claim that the most likely offenders can be clearly identified through a series of knowable variables that allow the likelihood of offending to be predicted. In this argument, Hampton severed “reactive” regulatory activity from “risk-based” regulation. But therein lies a major contradiction. The Hampton Report’s first recommendation was that “all regulatory activity should be on the basis of a clear, comprehensive risk assessment,” evaluating “past performance and potential future risk” (Hampton 2005, p. 115). Thus, risk-based regulation helps regulators to “structure choices across a range of different types of intervention activities, including education and advice” (Black 2010, p. 186). Within Hampton, the logic of risk-based regulation – albeit in a mechanical and quantitative form (Black & Baldwin 2010, pp. 182–183) – provided a rationale for a shift toward more consensus or compliance-based strategies, which appeal to the cooperation and goodwill of business. These assumptions about the regulated population enabled the Hampton Report to enthusiastically endorse twin-track regulation, whereby regulatory interventions are targeted at the worst offenders.

The risk-based redefinition of regulation articulated by Hampton assumes that most businesses are law-abiding; that they are likely to comply when faced with a combination of persuasion and market incentives; and, therefore, that only the minority of recalcitrant businesses need to be monitored via inspection regimes – in general, then, companies strive to be socially responsible and pursue compliance. As then Chancellor of the Exchequer, Gordon Brown, now infamously stated when announcing the Hampton Review, the policy trajectory was towards “a new, risk-based approach to regulation to break down barriers holding enterprise back;” the “new” model will entail “no unjustifiable inspection, form-filling or requirement for information . . . Instead of routine regulation trying to cover all, the risk based approach targets the necessary few.” This new approach will “help move us a million miles away from the old belief that business, unregulated, will invariably act irresponsibly” (Brown 2005). In short, “the Hampton review . . . placed risk-based regulation at the center of its recommendations for improving regulatory inspection and enforcement . . . this manifests the new regulatory governance with its emphasis on the responsibility of the business organization and light touch regulation for the responsible organization” (Hutter 2011, p. 463).

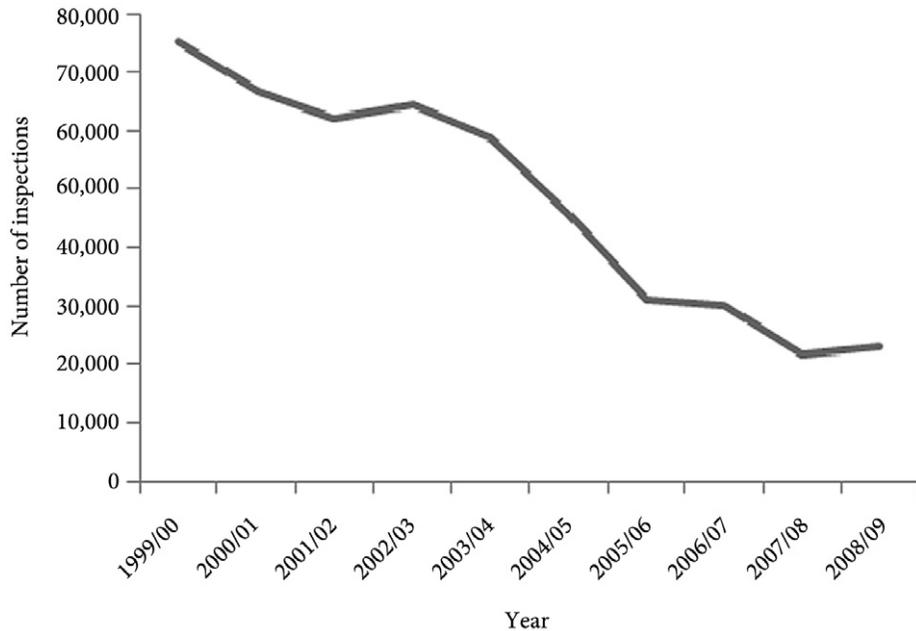


Figure 1 Health and Safety Executive Field Operations Directorate inspections.
Source: HSE.⁸

4. Transcending the deregulation debate? HSE policy and practice

In this section, we present some overview data which indicate how the idea of risk regulation has played out in a key regulatory body in the UK, namely the HSE. The HSE was established under the Health and Safety at Work Act (1974) to prevent death, injury, and ill health to those at work and those affected by work activities. It has enforcement responsibility across all so-called high hazard sectors, including nuclear, gas, oil and chemical plants, factories, mines, farms, hospitals, and schools, while also coordinating the enforcement activities of local authorities which enforce health and safety law across, for example, offices, shops, retail, leisure, and hotel premises. The data we present here is of two forms: First, we present quantitative data relating to the formal enforcement activities of the HSE; second, we use HSE strategy and policy papers, board briefings and board minutes, as well as governmental reviews of the organization's work, to explore the link between the trends evident in the quantitative data and the policy assumptions and trajectories underlying these.

4.1. Regulating health and safety in the UK: recent enforcement data

Figure 1 shows that inspections by HSE's Field Operations Directorate⁷ in 2008/09 constitute less than a third of the inspections recorded in 1999/00. Inspections normally occur as a result of a program of planned work. A second major activity undertaken by inspectors is investigation, which may follow an incident or injury to a worker, or may follow a report to the HSE.

If we turn to look at investigations, we find a decline of a similar order to that in the numbers of inspections, so that between 1999/00 to 2008/09 the percentages of incidents reported to the HSE that were subsequently investigated fell by 54 percent.⁹

This decline in investigation has occurred across *every category* of reportable incidents to which the HSE might be expected to respond – that is, dangerous occurrences, injuries

Table 1 Health and Safety Executive investigations of major injuries as a percentage of reported major injuries by type

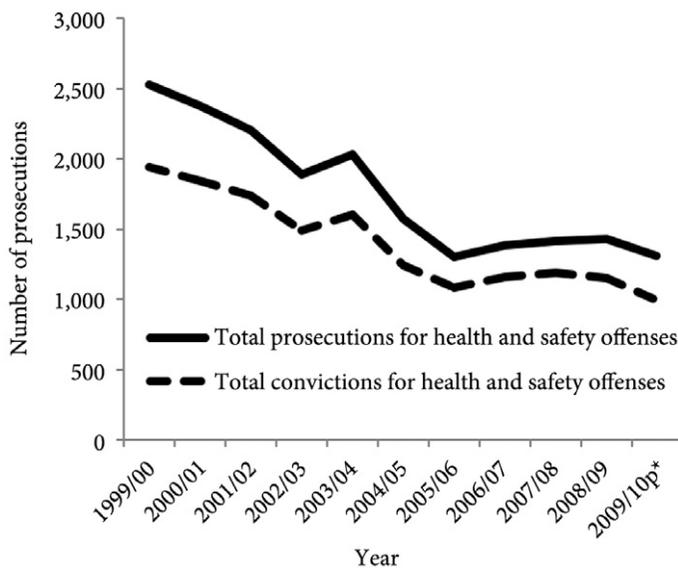
Injury type	1990/00	2008/09p*	% fall
Amputations	42.9	33.6	22
Major fractures	10.5	6.2	41
Major dislocations	4.9	4.4	10
Major concussions & internal injuries	15	16.1	(+7)
Major lacerations and open wounds	21.9	9.9	55
Major contusions	23.3	17.4	25
Major burns	34.6	25.4	27
Major poisonings and gassings	47.4	33.7	29

Source: HSE.

*p = provisional

to members of the public, over three-day injuries, and major injuries. Between 1999 and 2009, investigations of major injuries fell by 49 percent, and those of injuries requiring an absence from work for over three days fell by 85 percent. By 2009, less than one percent of over three-day injuries and fewer than one in ten – eight percent – of reported major injuries that were reported to the HSE were actually investigated; the HSE did *not* investigate 66 percent of amputations, 84 percent of major fractures, 96 percent of major dislocations, 84 percent of major concussions and internal injuries, 90 percent of major lacerations and open wounds, 83 percent of major contusions, 75 percent of major burns, and 66 percent of major poisonings and gassings. Moreover, as Table 1 shows, the proportion of some very serious injuries investigated declined significantly during this ten-year period.

As investigations fell, so too did prosecutions for health and safety offences – by 48 percent over this period. Convictions fell by more than half. Most prosecutions were laid by the HSE, typically amounting to around 80 percent of total prosecutions for health and safety offenses. HSE prosecutions halved over this period, falling from 2115 to 1026. Local Authority prosecutions fell by 30 percent, from a total of 412 to 289 since 1999/00 (Fig. 2).

**Figure 2** Prosecutions and convictions for health and safety offences.

Source: HSE.¹⁰

*p = provisional

As prosecutions have exhibited a steady decline, the use of notices has fluctuated. Prohibition notices are marginally down over this period, having fallen five percent. Improvement notices fell 11 percent (Fig. 3).

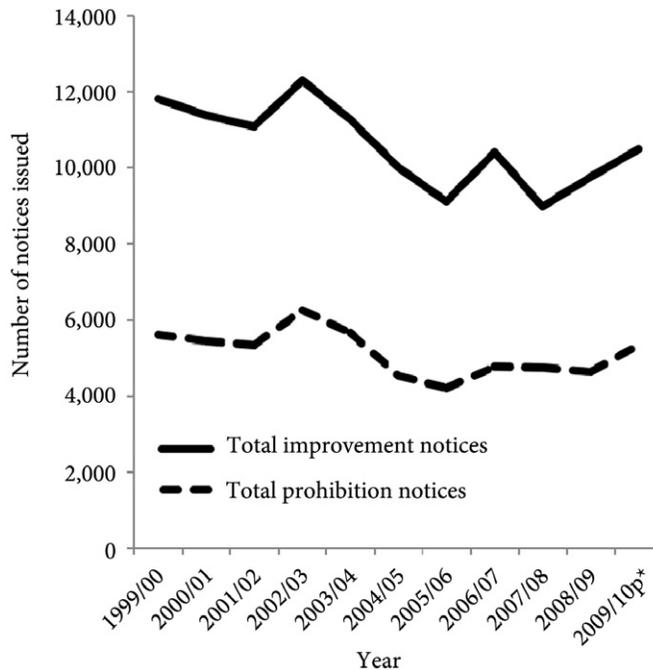


Figure 3 Enforcement notices.

Source: HSE.¹¹

*p = provisional

Again, more dramatic declines are visible in HSE data. Local authority issued enforcement notices marginally declined in this period and local authority issued prohibition notices rose by 10 percent. In the HSE, we can identify a sharp decline in the use of notices to the year 2005/06, before both types of notices then begin to rise – though never reaching anything like the levels experienced before the decline. Those trends are shown clearly in Figure 4. Within those figures it is worth noting that whilst local authorities only initiated a minority of health and safety prosecutions, they are more equally represented as issuers of enforcement notices. Thus, on average, local authorities issued as many improvement notices as the HSE, although they typically issued only a quarter of the total number of prohibition notices issued for health and safety offenses in Great Britain.

We can draw two broad conclusions from the data presented in this section. First, it is clear that there has been a series of less linear trends in the least punitive forms of enforcement. Elsewhere we have noted that inspectors report that the recent rise in enforcement notices can be explained as a result of pressure to get results without having the resources or political support to prosecute (Tombs & Whyte 2010a, b). The quickest route to be seen to be “doing something” without taking the political or institutional risk of prosecution when an inspector comes across a dangerous practice or a serious offence, is to resort to an enforcement notice. Second, there is a remarkable synergy between the

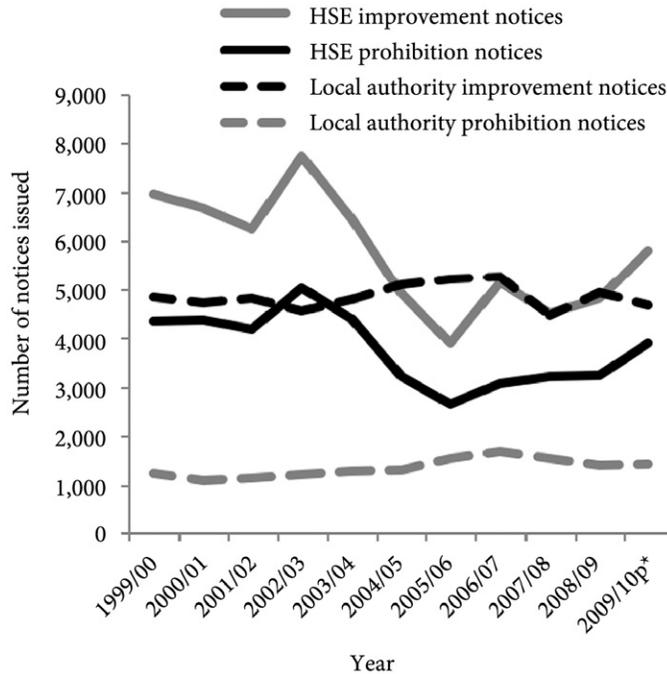


Figure 4 Enforcement notices by issuing authority.

Source: HSE.¹²

*p = provisional

momentum that gathered around a “better regulation” agenda, which promised a more “targeted” regulatory intervention, and the downward trends in inspection and prosecution. In this sense, the better regulation agenda has legitimized a neutering of some forms of regulatory intervention. Those trends – and the close synergy with government policy that they indicate – are much more pronounced in the national agency, the HSE, than they are in local authorities (although clearly there will be large discrepancies across different local authorities). Now there may be other good reasons for these different trends, not least of all that local authorities are responsible for regulating different industrial sectors than the HSE. However, notwithstanding this point, our argument here is that it is significant that those trends are consistent with what was being urged by politicians and policymakers at a national level. What this indicates, when understood alongside the rest of our analysis in this paper, is that the HSE is rather easily institutionally led by shifts in policy.

In summary, the data displays a remarkable consistency: that is, a dramatic downward trend of inspection and prosecution to the point that we might question whether, in the HSE at least, a credible threat of enforcement remains.

4.2. Regulating health and safety in the UK: strategy, policy, scrutiny

As the data in the preceding section indicates, the HSE had embraced the Hampton Agenda enthusiastically *before* the report was written – a point which helps to explain how the dramatic decreases in enforcement activity outlined above began in the period immediately prior to Hampton being established. Indeed, when undertaking their review, the

Hampton team had acknowledged that “HSC’s¹³ strategy had been influential in shaping their thinking” (HSC 2004a). And unlike some other regulators, such as the Food Standards Agency, the Health and Safety Commission (HSC) did not resist the Hampton agenda (Tombs & Whyte 2010b). Quite the opposite: A HSC Board minute from 2005 notes that “The Commission thought the [Hampton] report was a vote of confidence in HSC/E and the work it was doing” (cited in Tombs & Whyte 2010b, p. 68). More generally, then, the HSE, far from being cowed into a shift in strategy by Hampton, not only embraced but, in fact, was a key contributor to the construction of this new policy trajectory. It had explicitly set out to influence the Hampton review – and was successful in its efforts.

If the approach that we find in the Hampton Report is not the guiding rationale for the wider deregulatory trajectory of consecutive governments in this period, this Report can be credited with one key achievement – it provides the stamp of policy approval for the formal institutionalization of targeted intervention in regulatory practice. Nor does Hampton’s approach “explain” the enforcement trends that we pointed out in the previous section. It is of no small significance that the Hampton review and its political assault upon inspection and enforcement had been anticipated, and to some extent pre-empted, by HSC/E; and in the policy discussions that shape this pre-emptive response, the concept of responsive regulation is clearly discernible.

In 2004, the HSC had formally launched its *Strategy for Workplace Health and Safety in Great Britain to 2010 and Beyond* (Health and Safety Commission 2004b). In many respects this was a rather bland document, which downplayed formal enforcement, dedicating just two paragraphs of its 17 pages to this issue. Yet this document proved to be a key indicator of what appeared to be the emergence of a shift in HSE enforcement practice. Central in this shift was a HSC Board discussion throughout 2004. An April 2004 discussion paper had been developed against the backdrop of the Commission’s determination “to lead the debate on becoming a modern regulator and to think imaginatively about . . . new ways of working” (Etheridge 2004a, p. 1). The paper, titled ‘Becoming a Modern Regulator’, part of an explicit HSE attempt to influence the Hampton Review (Etheridge 2004b), chimes closely with the common assumptions that underpin both responsive regulation and risk-based regulation, addressing the role of the regulators when they “will no longer be the principal drivers for improvement,” but when “corporate social responsibility and sensible health and safety become the accepted norms, the moral and business cases are well understood, and employees play a greater role” (Etheridge 2004a, p. 1). Thus, in phraseology and thinking that could have come from the pages of *Responsive Regulation*, Etheridge suggests a series of questions to be addressed, which follow from an exploration of the “limits of the regulator-regulated relationship,” with “compliance with the law a limited ambition” and “enforcement a tool that will become increasingly redundant:”

Is the regulator/regulated relationship a barrier to joint problem solving? We have signalled in our strategy that we will not turn automatically to new legislation to deal with new problems. Does this mean that we could look to rely on negotiated agreements rather than inflexible standards expressed in regulations? How far can we push the agenda of earned autonomy and should there be penalties for breaking the deal rather than breaking the law and what role might other forms of accreditation play? Should we reopen and push the debate about alternative penalties and restorative justice. (Etheridge 2004a, p. 5)?

In July 2005, the HSC launched its own review of regulation under the rubric of “a debate on the causes of risk aversion in health and safety” (HSE 2005). In its draft “simplification” plans, published four months later, it outlined its strategy to follow, to the letter, the Hampton recommendations. In this document, the HSC promised a risk-based, targeted approach to enforcement that was to be supported by a 33 percent reduction in inspections (HSC/HSE 2005). In fact, the HSC had achieved a one third reduction in inspections over the course of the three years before Hampton reported. In this context, also in 2005, the HSC launched its Business Plan for 2005/06 to 2007/08 (HSC 2005), central to which was its “Fit3” – “Fit for Work, Fit for Life, Fit for Tomorrow” – Strategic Delivery Programme, essentially a data gathering process designed to allow the HSE to “be much more effective in targeting its services to businesses” and to “have much greater awareness of the kinds of issues businesses face when tackling health and safety issues.”¹⁴ This targeting strategy was to result in “fewer, but longer and deeper, inspections.”¹⁵

This shift was not uncontroversial. In March 2008, the National Audit Office (NAO 2008b) rated the HSE¹⁶ “highly” in terms of its working within the “Hampton principles and Macrory characteristics,” endorsing the fact that it “works well with business, including recognising the need to minimise burdens on business” (NAO 2008a, pp. 5, 12). However, it also noted the failure of many businesses even to register their existence with the HSE, leaving the regulator to expend resources even trying to identify premises before their risk could be assessed.¹⁷ So what we have here is a targeting strategy, premised on the assumption that most businesses are responsible, undermined by the fact that “many business premises remain unregistered” (NAO 2008b, p. 10) – that is, they are violating law, in its most minimal form. The report also found that the Fit3 strategy for targeting was being undermined by the focus on high-risk issues, rather than duty holders’ “past performance and other factors,” which it stated were inadequately taken into account (NAO 2008b, p. 21). This aspect of the deficit was attributed to the relative lack of inspections: “Due to the relatively small number of inspections undertaken by the HSE, it may frequently be the case that the HSE has little or no information on past performance of an individual firm” (NAO 2008b, p. 23).

And here we are brought sharply to the key contradiction in targeted intervention strategies: how might the past performance of businesses central to risk calculus be measured in a system where there is a diminishing chance of the business having been inspected? Data gathered in previous visits or contacts are crucial within risk-based targeting, as is any record of prosecution and other enforcement notice activity. Nor does the HSE – beyond certain specified major hazard installations – have access to data from any form of licensing system, which, at least in principle, makes available knowledge of what and where the regulated population is, along with other basic data that may be collected as licenses are applied for or renewed (Black 2010). These are the most fundamental forms of intelligence which HSE inspectors can devote considerable resources to seeking to generate; and their absence should focus attention on developing other, improved means “to gather information about the risks of non-compliance” (NAO 2008a, p. 15). Thus, Hampton’s strategy becomes self-defeating, at least in the terms it formally sets for itself, for it compels a reduction in the types of activity most likely to gather useful data for targeted intervention, so that regulation can be based upon targeted intervention.

In other words, the diminution of routine inspection at such a sharp rate leads inevitably to an “intelligence deficit” (Tombs & Whyte 2012a, p. 81; see also Whyte

2010) on the part of the regulator, which has profound implications for monitoring real rates of death, injury, and, indeed, legal compliance in the workplace. This point is well illustrated when we consider the relatively small proportion of enforcement actions that is triggered by employers' self-reporting. The reports made by employers following incidents required under UK law typically lead to between a quarter and a third of total prosecutions, and between five and seven percent of enforcement notices (Tombs & Whyte 2010b). Most other enforcement actions occur after routine or proactive inspections. Moreover, in the past decade, reports made by employers to the HSE have fallen steadily and investigations following those reports have fallen at an even steeper rate than the reports themselves. While there was a decline in statutory reports to the HSE of 23 percent between 1999/00 and 2008/09, there was a 63 percent decline in numbers of HSE investigations of those reports in the same period (Tombs & Whyte 2010b). It is very clear, then, that a system that is increasingly reliant upon employers to self-report injuries and incidents is not only untenable, but increasingly deprives regulators of the necessary intelligence upon which to base a risk-informed, targeted, enforcement practice.

5. Conclusion

On the basis of the evidence set out above, it is very clear that what may have appeared in 1992 to be "Pyrrhic" victories for deregulationists (Ayles & Braithwaite 1992, pp. 7–12) look a lot more thoroughgoing and secure some 20 years later.

Certainly in the context of UK health and safety law, we would argue that there is now "an emasculated enforcement pyramid" which can only "fail to deter" (Gunningham & Johnstone 1999, p. 123). The "threat" of credible enforcement – the sometimes explicit, but increasingly unspoken basis on which "responsive" regulatory arguments are proposed – is notable only for its absence. One of the implications of the analysis of this paper is that future research into the feasibility and dynamics of responsive regulation needs to take into account actual *enforcement data* and trends therein on the part of specific regulatory agencies.

The trends we describe in this paper are still in train. The election of the Coalition Government in the UK in May 2010 gives us further grounds to describe what we are witnessing as an emasculation of the regulatory system of social protection. Early into its term of office, the government announced that funding for the HSE would be cut by 35 percent over five years. Then, in March 2011, the Department for Work and Pensions announced that the "HSE will reduce its proactive inspections by one third (around 11,000 inspections per year)" (DWP 2011, p. 9). Recall that our data shows that there has already been a reduction of inspections by over two-thirds over a ten-year period. The current government is now expecting a further cut of inspections by a third! Those targets, introduced explicitly as an encouragement to business and entrepreneurship, are to be achieved by a formal extension of Hampton's risk-based targeting strategy. This extension involves the removal of businesses captured by a broad definition of "low-risk" work from HSE inspection regimes (Young 2010; HSE and Local Government Regulation 2011). A widening range of industrial activities have been defined as "low risk" by government ministers, including work in agriculture and docks, traditionally industries with some of the highest fatality, injury, and illness rates. Only a small core of government-defined hazardous industries are likely to remain

under the scrutiny of HSE inspection regimes. The majority of employers will be effectively left to self-regulate and will most likely only come into contact with the regulator when a death, injury, or incident is reported (Taylor 2012).

Although beyond the scope of our discussion here, elsewhere we have analyzed what those trends mean for the role of workers in what appears to be a collapsing system of tripartite regulation (Tombs & Whyte 2012b). In short, we argue that the retreat of proactive inspection brings the significance of the day-to-day regulatory functions of workers themselves, the monitoring role of worker organizations, and the safety management role of systems of workplace safety committees, into sharp focus. Yet the collapse of the UK health and safety inspection and enforcement regime has occurred at the same time as a series of government promises to the business community that they will further restrict labor rights. Generalized attacks on workers' rights will certainly restrict the ability of workers and their organizations to fill the emerging regulatory vacuum in health and safety.

None of this is to claim that what we have witnessed in the UK has been a true experiment in responsive regulation as envisaged by its authors. The argument and data in this paper indicate, however, that the concept has been, in general terms, politically seductive (see Mascini, this volume) and easily incorporated into a broader neo-liberal agenda (see also Shamir 2004, pp. 679–680).

In the UK – and we suspect in many more jurisdictions that are currently acknowledged in the literature – workers are now confronted with something that has not been experienced in several generations: a new, institutionalized *realpolitik* of regulatory regimes from which regulators are absent and any credible threat of enforcement has all but disappeared. Any future interventions, be they influenced by the concept of responsive regulation or not, will need to expose how this new *realpolitik* disempowers pro-regulatory forces within and around organizations, and, in turn, undermines compliance efforts. We must further determine what effects these processes may already be having and will have on the levels of deaths, injury, and illnesses, produced in and by workplaces. These rather age-old questions – and struggles – have hardly been transcended.

Notes

- 1 See, notably, the work of the Centre for the Analysis of Risk and Regulation, <http://www2.lse.ac.uk/researchAndExpertise/units/CARR/home.aspx>
- 2 <http://www.lse.ac.uk/collections/CARR/aboutUs/Default.htm>.
- 3 Though we agree with Haines (2011, p. 28) that “really responsive risk-based regulation” may be an aspiration too far.
- 4 While responsive regulation rightly draws attention to the need to understand the motivations and contexts of actors and sets of actors within firms, we note the tendency to anthropomorphize the corporation.
- 5 The data presented here was collected as part of a broader project on regulatory enforcement under the Labour Governments in the UK 1997–2010. Much of the quantitative data was generated through a series of Freedom of Information requests made to the HSE between November 2009 and November 2011; while requests were for data back to 1997, consistent data series were for the most part only available back to 1999/2000. This is supplemented with qualitative data, the result of analyses of key Governmental and HSE Board documentation relating to enforcement policy and practice from 1997–2010.

- 6 Scrutinizing New Regulations, at <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/page44076.html>
- 7 The Field Operations Directorate (FOD) is by far the largest division of the HSE and conducts most of the agency's inspections.
- 8 Data obtained from the HSE by Freedom of Information request, 12 April 2010. Since the introduction of the HSE's current operational information system in 2005/06, inspection records have captured multiple visits and exchanges with the same duty holder at the same site. This streamlining of the recording system has led to a reduction in the number of inspection records created since 2005/06. However, this change does not appear to have affected the long-term trend, given that the most severe reduction in inspections occurred before the point at which the system for recording inspections changed.
- 9 Data on investigations (including the data in Table 1) was obtained from the HSE following a series of Freedom of Information requests between February 2010 and November 2011.
- 10 The data from which this figure is constructed is in the public domain and has been compiled from various issues of the Annual Reports of the Health and Safety Executive. Data relating to enforcement in this section does not include enforcement data relating to the Office of Rail Regulation (ORR) from 2006/07 onwards, as this new agency took responsibility for rail regulation for reporting purposes from this date onwards. The absence of this data is not statistically significant. The website for the ORR details a total of 29 prosecutions laid by ORR since 2006/07, amounting to an average of seven to eight per year.
- 11 The data from which this figure is constructed is in the public domain and has been compiled from various issues of the Annual Reports of the Health and Safety Executive.
- 12 See above note 11.
- 13 The Health and Safety Commission (HSC) was a UK non-departmental public body responsible for overseeing and directing the work of the Health and Safety Executive. The HSC merged with the Health and Safety Executive on 1 April 2008. The work of the HSE is now directed by the Health and Safety Executive Board.
- 14 HSE Fit3 Survey, at <http://www.hse.gov.uk/contact/faqs/fit3survey.htm>. HSE's Fine Tuning Review, a "targeting and intelligence project," commenced in September 2006 (HSE 2008, p. 4) and subsequently "identified that our current approach to targeting resources is not as good as it needs to be to maximise the impact we expect from our planned proactive activities" (Mallagh 2008, para. 4). By 2009, FIT3 had been formally succeeded by a "segmentation" framework (Mallagh 2008; HSE 2008).
- 15 Freedom of Information Request Reference No, p2010020046, 12 April 2010, page 8 of 8. Fit3 was to provide one focus of a further House of Commons Work and Pensions Inquiry into the work of the HSC/E, in 2007/08, and this prompted the Committee to conclude that, "the programme, whilst designed to create an efficient, target-based approach to inspection, is in fact limiting the ability of inspectors to apply their professional judgement on a site by site basis" (House of Commons Work and Pensions Committee 2008, para. 120).
- 16 <http://www.dwp.gov.uk/newsroom/press-releases/2008/april-2008/emp070-010408.shtml>.
- 17 The problem of increasing numbers of unregistered premises, and the strain that created on enforcement activities, was highlighted some 30 years ago (Tombs 1990, p. 342), and of course since.

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