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This autumn edition of SHE Matters goes to press during a period of economic turbulence in the UK. We've seen hikes in gas and energy prices, a shortage of HGV drivers, and chaos at the petrol pumps.

This has added to an air of nervousness across the country, due to uncertain economic arrangements following Brexit along with the cutbacks that are likely to follow the Covid 19 crisis. Nevertheless, the UK seems to be on the point of weathering the Covid 19 crisis, and there are now signs of significant recovery in many sectors in the economy. Indeed, many of the shortages which are now being experienced are, at least in part, reflections of that recovery.

Covid 19 may have delayed some policy initiatives, but the general shape of regulation post Brexit is becoming apparent. The selection of articles here seek to shed some light on how this might look.

It should also be said that there is currently a distinct appetite on the part of the public for holding both Government and businesses to account. That public appetite is reflected in the higher level of fines which are increasingly imposed by the courts and regulatory bodies. Those courts and regulatory bodies are influenced by Government guidance which itself is sensitive to public opinion.

There may be a lesson here for businesses to bear in mind as the economy recovers from Covid 19. The costs of litigation, both criminal and civil, may potentially be considerably greater than those of the more tedious task of ensuring compliance.

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Environment Bill recap

As many of our readers will be aware, the Environment Bill (the **"Bill"**) is currently making its way through the House of Lords, with four sessions of parliamentary debate to take place over the two weeks beginning 6 September 2021. The Bill is currently in a state of "ping pong" between the Houses over Lords amendments which are apparently unacceptable to the Government. These include amendments which would effectively force the Government to accept that there is a Climate and Biodiversity "emergency", In the light of this, doubt has been cast over whether the Bill will receive Royal Assent in time for the COP. However, since the Bill is at least nearing the end of its journey through Parliament, this article provides a brief remainder of its aims and its potential impacts on UK environmental law.

The Bill proposes to create a legislative framework for the future transformation of the UK's environment. The Bill aims to put in place powers for the UK to set its own environmental laws following the country's departure from the EU. The Bill acts as a key vehicle for delivering the UK Government's 25 Year Environment Plan, which set out goals for significantly improving the environment within a generation.

Once passed, the Bill will give the Government the ability to establish more detailed secondary legislation which may diverge from current EU environmental legislation in the same areas, and impose different or more strict obligations in the UK compared to the position in the EU. On that point, we note that in statements accompanying the Bill the UK Government has previously insisted that the UK will not be bound by future EU green rules and may even '*go beyond the EU's level of ambition*' on the environment.

Some aspects of the Bill that we consider to be particularly significant are summarised below.

Part 1: Environmental Principles, targets and improvement plan

TARGETS

Part 1 contains provisions to require the Government to set both long-term and short-term targets in relation to the status of the natural environment and people's enjoyment of it. It requires the Government to set, by October 2022, at least one long-term target in each of the priority areas of air quality, water, biodiversity, and resource efficiency and waste reduction.

From 31 January 2023, the Government must also set at least one interim target in respect of those same matters (achievable within five years from being set), which must make an appropriate contribution towards meeting the long-term target.

The level that these targets are set at will directly influence the detailed legal requirements that follow the Bill via secondary legislation.

THE OEP

Part 1 also sets out the requirement to create a new, statutory and independent environmental body, the Office for Environmental Protection (**"OEP"**). The OEP will be able to hold the Government to account on environmental law and its Environmental Improvement Plan (the first one being the 25 Year Environment Plan, referred to above).

Part 3: Waste and resource efficiency

EXTENDED PRODUCER RESPONSIBILITY

Provisions in this part of the Bill allow for producer responsibility obligations to be imposed in relation to the reuse, redistribution, recovery and recycling of products.

These provisions appear set to both reform the existing producer responsibility schemes and introduce schemes for additional products in the future.

RESOURCE EFFICIENCY OF PRODUCTS

The Bill will allow the Government to establish obligations regulating the resource efficiency of products, in a similar vein to the EU Ecodesign Directive and its implementing measures (although the Bill does not limit these provisions to energy-related products).

Future regulations made under these powers may place obligations on manufacturers and producers to provide extensive information about the resource efficiency of their products and/or stipulate resource efficiency requirements that products will need to meet.

WASTE

New rules are proposed for the separate collection of waste through amendments to the Environment Protection Act 1990 (**"EPA"**). The collection of this waste must meet certain conditions, including that recyclable waste is collected separately from non-recyclable waste, and further that separately, recyclable waste within different "recyclable waste streams" must also be collected separately.

Other proposed clauses under this part of the Bill make provision for the future creation of new obligations in respect of electronic tracking of waste.

Other proposed amendments to the EPA include empowering the relevant authorities to put regulations in place which: restrict activities relating to hazardous waste, allow waste regulation authorities to give directions with respect to hazardous waste, and require registration of hazardous waste controllers or places where hazardous waste activities are carried out.

TRANSFRONTIER SHIPMENTS OF WASTE

In respect of the movement of waste, the Bill allows broad regulations to be made in future prohibiting or restrict waste imports and exports, as well as the loading and transit of waste for export out of the UK.

Part 5: Water

Part 5 of the Bill sets out provisions relating to water resources management. Among other things, these provisions allow for changes to be made to the circumstances in which a licence to abstract water from the environment can be revoked or varied without paying compensation, a statutory duty for water companies to develop long-term drainage and sewerage management plans, and powers to amend the land valuation process for internal drainage board.

Part 6: Nature and biodiversity

Part 6 makes provision for biodiversity net gain to become a new general condition of all planning permissions in England (subject to certain exceptions). The objective is that the biodiversity value, expressed in biodiversity units, attributable to the development exceeds that which existed before development by at least 10%.

This part also contains provisions to address illegal deforestation in supply chains. See our Summer 2021 publication of "Carbon Matters" for more detailed discussion of these "Forest Risk Rules".

Part 7: Conservation covenants

The Bill provides for Conservation Covenants, which are voluntary, legally binding private agreements between landowners and responsible bodies, designated by the Secretary of State, which conserve the natural or heritage features of the land, enabling long-term conservation. They can bind subsequent owners of the land, so have the potential to deliver long-lasting conservation benefits.

Part 8: Miscellaneous and general provisions (including REACH)

The final provision we wanted to flag gives the Secretary of State the power to amend UK REACH. As with most EU legislation, REACH has for now been retained in UK law post-Brexit, largely unchanged at present. However, part 8 allows for UK REACH to be amended going forward, provided that such amendments are consistent with the aim and scope of UK REACH.

Timing

It is worth noting that not all parts of the Bill will come into force on the day on which the Act is passed, but will instead be phased in over the following months/years. Of the measures highlighted above, only the ability to amend UK REACH is intended to apply immediately. Some other provisions are set to come into force 2 months after the Bill is passed into law, including in respect of responsibility for disposal costs, resource efficiency information and standards, electronic tracking of waste, and water abstraction. All remaining provisions will come into force only upon the passage of regulations appointing a specific day that this should occur.

Even the provisions that come into force quite soon (early 2022 if the Bill still becomes law in the fourth quarter of 2021 as planned) are themselves only framework laws, so for the most part no practical change will be felt until later when secondary legislation is made under those powers.

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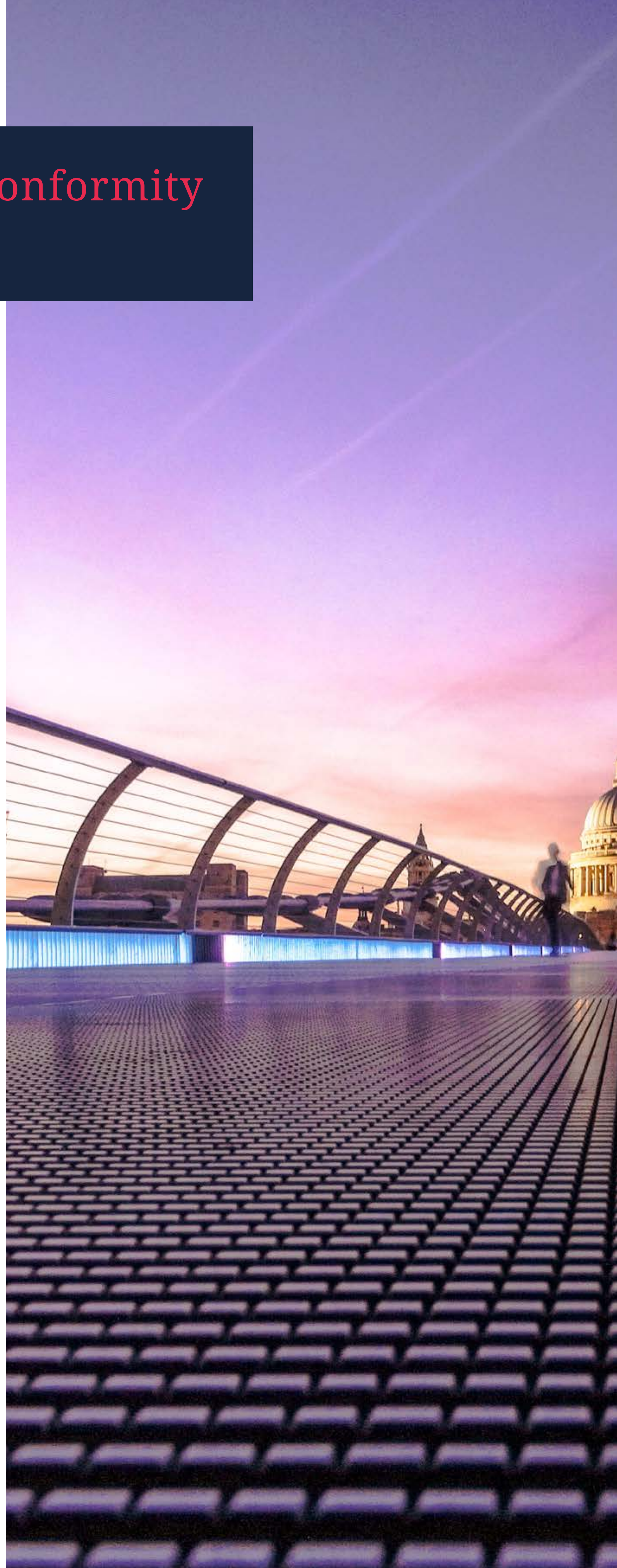
More time for UK conformity assessed marking



On 24 August 2021, The Department for Business, Energy and Industrial Strategy announced that most businesses will have an extra year to apply UK Conformity Assessed (UKCA) marking to goods placed on the market in Great Britain (the GB market). The deadline will now be 1 January 2023, rather than 1 January 2022.

This reflects lobbying from businesses affected by the significant disruption caused by the COVID-19 pandemic.

However, businesses are nevertheless encouraged to switch to the new regime.

What's required?

UKCA marking is replacing 'CE' marking as the standard mark of conformity for goods subject to 'New Approach' legislation which are to be placed on the GB market. Additionally, UKCA marking will apply to aerosol products placed on the GB market, which previously were subject to a 'reverse epsilon' marking.

For the time being, the substantive requirements of the 'New Approach' legislation will remain the same for the GB market, as the relevant EU legislation has been transposed into UK law for the purpose of continuing in effect after the end of the 'Transition Period' on 31 December 2020.

Furthermore, legislation will be introduced so that after 1 January 2023 the UKCA marking can be placed on a label affixed to the product, or on a document accompanying the product, until 31 December 2023. That is the arrangement which was to have applied from 1 January 2022 to 31 December 2022.

Exclusions to the extension

The extended transition arrangements do not apply to medical devices, which will not require UKCA marking until 1 July 2023. However, the arrangements will also not apply to certain goods which have required third party conformity assessment, in cases where this assessment has been provided by a UK Notified Body. In such cases those products already require UKCA marking if placed on the GB market.

UKCA marking does not apply to goods subject to the 'Old Approach' legislation, such as medicines and veterinary medicines, to products subject to non-harmonised national rules, and to certain products other than aerosols which were subject to special marking under the EU regime. There are also a number of categories of product which are subject to special rules in addition to UKCA marking.

UKCA marking also does not apply at all in Northern Ireland. Under the Northern Ireland Protocol, the EU single market rules remain in force in the Province, so CE marking, where relevant, will continue to apply. However, there is provision for goods placed on the market in Northern Ireland to utilise a UK Notified Body, where this is required under the relevant legislation, and for this purpose the relevant products will bear an additional UKNI marking. Furthermore, goods placed on the market in Northern Ireland which have been CE marked, or where relevant CE and UKNI marked, will continue to be accepted on the market in Great Britain.

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R W Wood Treatment Limited

On 17 July 2015 a huge explosion occurred at Bosley Mill in Cheshire, destroying the mill which dates back to the 18th century. Four people died as a result, with the body of one never being recovered. Many others were injured.

The works had originally been constructed to process copper and brass but had been converted for various purposes during its history and reopened to grind wood into a fine flour as the basis for wood products. At the time of the explosion, it was being operated by Wood Treatment Limited to manufacture a variety of wood fibre and wood powder products.

Wood flour is highly explosive, and it appears that health and safety management at site was lacking. The severity of the explosion made the ensuing investigation by Cheshire Police, HSE and Cheshire Fire and Rescue very difficult. However, following its conclusion, Wood Treatment Limited was charged with four counts of corporate manslaughter, its managing director with four counts of manslaughter by reason of gross negligence, and the company and two of its managers were charged with offences under the Health and Safety etc at Work Act 1974.

Wood Treatment Limited pleaded guilty to an offence under section 2 of the Health and Safety at Work etc Act (employer's general duty to ensure health, safety and welfare of employees at work) but the other counts went to trial.

At the close of the prosecution case the judge at the Crown Court accepted a submission by the defence of no case to answer on the counts relating to corporate manslaughter and manslaughter by gross negligence.

That was because the investigation had concluded that it was not possible to show what event had caused the explosion. There were four likely scenarios considered by the two expert witnesses who appeared for the prosecution. Three of these scenarios were only consistent with some degree of negligence by the defendant company and its managing director. Scenarios 1, 2 and 4 relied on evidence that there were considerable accumulations of dust in the mill which were not adequately cleaned, and that leaks from poorly designed and maintained machinery had also produced dust. Crucially, however, one of the four scenarios, Scenario 3, which was accepted by one of the expert witnesses as a "highly credible" possible cause of the explosion, involved a large release from a piece of equipment within the mill, a sifting machine which had just been brought back into use following repair. The large release in this scenario led to settled dust, and an explosive cloud which was then ignited by chance and this levitated the released dust into the explosion without a secondary explosion.

As this scenario was presented by the prosecution witnesses, it did not necessarily involve a breach of duty by either the corporate defendant or its managing director which had caused the four deaths.

Even on that scenario, there might have been evidence to go to the jury on the relevant counts if there had also been evidence that the release could only have occurred if machinery had not been properly maintained or treated, but the Crown failed to advance such evidence.

Accordingly, the Crown Court judge accepted the defence submissions that the jury would be unable to rule out a possible cause which was consistent with the innocence of the accused.

That ruling is what is termed a terminating ruling, and the prosecution appealed against it under section 58 Criminal Justice Act 2003.

The appeal

The appeal was heard by the Court of Appeal Criminal Division very speedily at the end of April 2021, despite, or perhaps because of, the pandemic. The Court of Appeal upheld the judge's ruling that in these circumstances the counts relating to corporate manslaughter and manslaughter by gross negligence had to be withdrawn from the jury. Accordingly, Wood Treatment Limited and Mr B, its managing director, had to be acquitted on those four counts.

The Court of Appeal followed an earlier case, *R v Broughton,* where a conviction for manslaughter was quashed. In that case, a young man had failed to ensure that medical assistance was given to a young woman to whom he had given a cocktail of drugs at a music festival. The evidence for the prosecution alleged gross negligence in failing to secure the necessary medical treatment. However, the evidence had also shown that there was a realistic, if only 10%, chance that the woman would have died in any event. Accordingly, no jury could have been sure that the negligence on the part of the defendant had actually caused the death.

The court took the view that whereas in some civil cases such as those relating to mesothelioma (caused by exposure to asbestos fibres), the rules on causation could and should be relaxed, that would not be appropriate in criminal cases.

Following the ruling in the Court of Appeal, Wood Treatment Limited were fined GBP75,000, having pleaded guilty to the offence under section 2 HSWA. Mr B, who was charged in relation to that breach under section 37 of the Act was fined GBP12,000 and disqualified from being a director for four years.

The two other managers were acquitted, but this appears to have been on the basis of arguments put forward by the defence that it could not be shown that they individually had sufficient responsibility in relation to the management of the business at Bosley Mill, or of a significant part of it, to be properly regarded as a "Director, Manager, Secretary or similar officer" of the company for the purposes of a charge under section 37 of the Act.

Why this case is important

The case highlights the point that, in order to obtain a conviction of a corporate entity for corporate manslaughter, or an individual for manslaughter by reason of gross negligence, it is necessary to prove that the defendant's breach of duty caused the deaths. By contrast, it is not necessary to prove any results caused by breach of duty to secure a conviction for a breach of one of the general duties under the Health and Safety at Work etc Act 1974, such as those under sections 2 and 3 of the Act. The prosecution therefore face a somewhat harder task in order to secure a greater return in terms of the potential sentence which might be imposed on the defendant if convicted. (Prosecutors are often, however, under pressure to pursue the more serious homicide charges where there is a fatal outcome, out of consideration for the families of the deceased.)

It should also be noted that had the prosecution been more alive to the vulnerability of their case before witnesses gave evidence, it might not have been very difficult to adduce evidence to suggest fault on the part of the defendant in relation to all of the possible scenarios. No doubt in future prosecutors can be expected to be more careful in that regard.

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Workplace fatalities

The Health and Safety Executive ('HSE') has published provisional workplace fatality statistics[1] for Great Britain ('GB') up to March 2021.

In the 12 months up to 31 March 2021, a total of 142 workers were killed in GB; this represents a rise of 29 fatalities (or 26%) compared to the previous year. In addition, during the same period, 60 members of the public were also killed as a result of work-related accidents; this represents a decrease, down by 43%, compared to the 106 deaths from the previous year.

When considering sectoral death rates, we can see that:

- over half of all fatal injuries to workers in 2020/21 were in the construction and agriculture, and forestry and fishing sectors, with 39 and 34 deaths, respectively; and
- a further 20 deaths were attributed to the manufacturing sector.

The statistics also show that the three most common types of accident which lead to death are:

- falls from height (35 deaths);
- being struck by a moving vehicle (25 deaths); and
- being struck by a moving object (17 deaths).

In addition, both being trapped by an object collapsing or overturning, along with making contact with moving machinery, accounted for 14 deaths each, a total of 28.

The natural, and surprising, observation from these headline figures alone is that there has been a rise in fatalities during a time when fewer people have been at work; this may suggest a degree of procedural drift from safe systems of work and risk assessments, in so far as ensuring that the highest standards of safety are being adhered to in the workplace.

That said, the rise is measured against the backdrop of a particularly low number of fatalities in 2019-2020. In part, as suggested by the HSE, this may be explained by the fact that the previous years statistics could have been impacted by the first lockdown in March 2020. However, we are not entirely persuaded on that point given that the first lockdown did not occur until March 2020, with the 2019-2020 figures running between March-March.

Further, the HSE notes that "*the long-term picture for the fatal injury rate is similar to that for fatal injury numbers: a generally downward trend but has been broadly flat in recent years*".

[1] Note that these statistics exclude deaths from occupational diseases and diseases arising from certain occupational exposures, including COVID-19.

It should also be remembered that these figures do not provide a complete picture of workplace fatalities; the true number will be higher. These statistics exclude deaths relating to occupational disease and those which happened at sea and in the air.

For non-employees, the significant decrease in fatalities is explained by the fact the public in GB have been largely living under lockdown restrictions for much of the period to which these statistics relate.

We can expect a fuller and more detailed assessment of work-related ill-health and injuries in December 2021, when the HSE's release the annual health and safety statistics.

How you can manage these risks

In the meantime, the release of these figures is a stark reminder for you to ensure that you are effectively managing risks in the workplaces, particularly as many people are now starting to return to the workplace and there will undoubtedly be marked difference in the way people are now working.

To that end, on a practical level, you should review your safety documents to identify and address any gaps, particularly as a result of changing work practices, along with ensuring new and/or temporary employees, and contractors are appropriately inducted and existing employees are given appropriate refresher training to ensure competence. Upon the return to the workplace, you should ensure vehicle and machinery maintenance is up to date, especially for those that have been out of use for prolonged periods of time.

Critically, you should engage with your employees and communicate safety expectations and standards in clear terms, along with answering any questions or addressing any concerns those employees may have.

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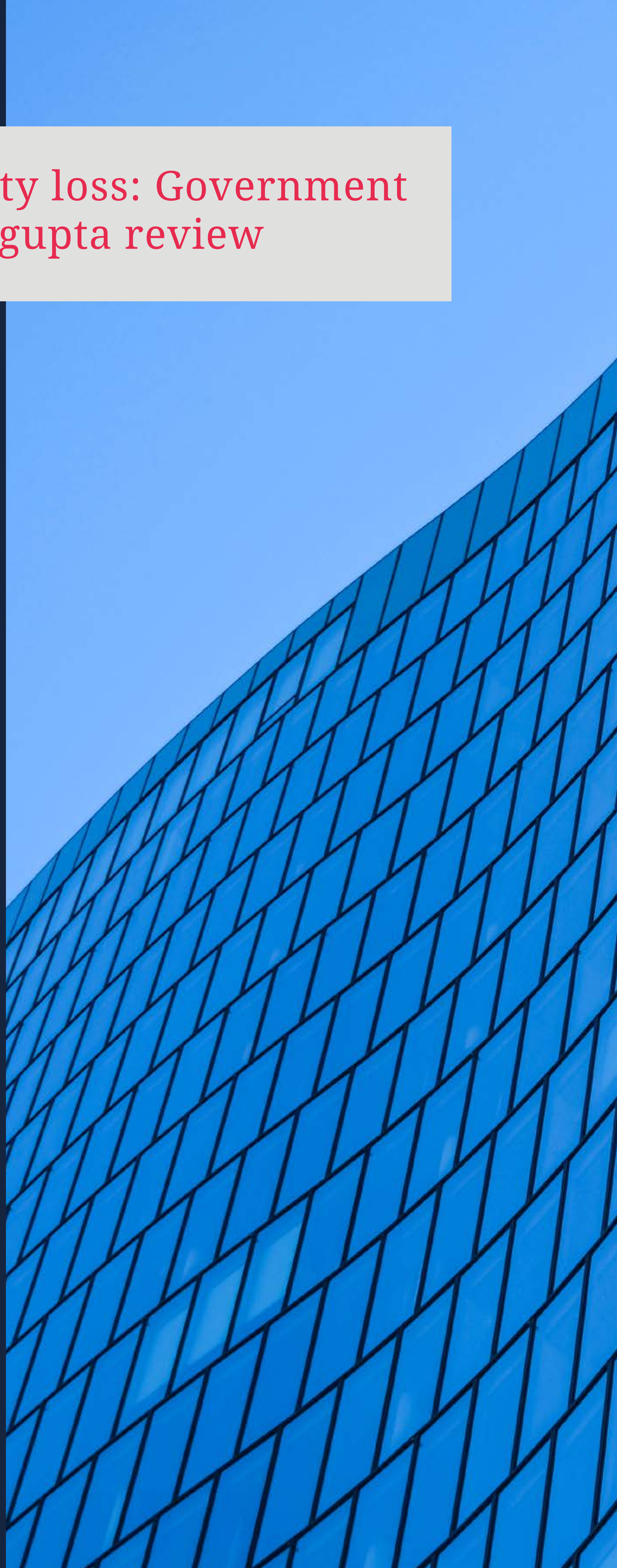
Tackling biodiversity loss: Government response to the Dasgupta review



The Dasgupta Review is an independent, global review on the Economics of Biodiversity led by Professor Sir Partha Dasgupta (Frank Ramsey Professor Emeritus, University of Cambridge). The Review was commissioned in 2019 by HM Treasury and has been supported by an Advisory Panel drawn from public policy, science, economics, finance and business.

On 2 February 2021, the Dasgupta review published its final report, which proposes a new framework to account for nature in economics and decision-making. The Review calls for changes in how we think, act and measure economic success to protect and enhance our prosperity and the natural world and reverse biodiversity loss.

On 14 June 2021, HM Treasury published the government *response* to the Review. The government agrees with the Dasgupta review's central conclusion that nature and biodiversity sustain economies, livelihoods and well-being. A wealth of new measures were included in the Government's response from greener schools to most significantly applying net gain to major infrastructure projects.

On June 18 2021 the Government published an amendment to the Environment Bill 2021-22 so that new nationally significant infrastructure projects (NSIPs) in England, such as future transport and energy projects, will need to provide a net gain in biodiversity and habitats for wildlife (biodiversity net gain).

Existing provisions in the Environment Bill would require developers to deliver 10% net biodiversity gain in most new schemes, applying to all development permitted under the Town and Country Planning Act 1990. The government's amendment extends this obligation to larger infrastructure projects, inserting a new Schedule 2A to the Planning Act 2008. It would require the creation of a biodiversity gain statement setting out a biodiversity gain objective. There is however a definition of '*excluded development*' within the proposed amendment that can be set out in later regulations, leaving the door open for certain NSIPs not to have to provide biodiversity net gain.

Green groups have cautiously welcomed the amendment to the Environment Bill but have warned that some major infrastructure schemes may not be covered. A consultation on the details of the policy will open later this year, including on when it will be introduced and what exemptions may apply. Pre-empting the policy's introduction, the government have stated that the Crewe-Manchester branch of the HS2 railway will aim to deliver net gain too, going beyond the earlier commitment to deliver "*no net loss*" in biodiversity.

In addition to the changes relating to NSIPs, the Government has also tabled an amendment to the Bill to require an additional legally binding species abundance target in England for 2030, aiming to halt the decline of nature. It has also:

- Incorporated biodiversity into the Government's Green Financing Framework, published on 30 June 2021, and which covers expenditure related to biodiversity, as well as expenditure related to the net zero transition;
- Promised to work with the Office for National Statistics to improve the way nature is incorporated into the UK's national accounts. The government will also improve its guidance for embedding environmental considerations into policy-making processes; and
- Promised to join the OECD Paris Collaborative on Green Budgeting, an initiative to encourage governments to incorporate climate and environmental considerations into their financial and fiscal decisions.

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Highest H&S fine under the sentencing guideline

The impact of the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline (Guideline) was once again felt in July this year, when WH Malcolm Limited (WH Malcolm) was sentenced to a fine of GBP6.5 million for a breach of section 3 of the Health and Safety at Work etc. Act 1974 (HSWA).

This is, to date, the highest fine under the Guideline and the highest health and safety fine imposed in England for over 20 years. It eclipses the fine handed down to Merlin Attractions for the Smiler incident and an equivalent fine for Tesco, both of which stood at GBP5 million. It is not however the highest fine imposed under HSWA (a fine of GBP15 million imposed on Transco in Scotland in 2005).

WH Malcolm Prosecution and Conviction

The facts of the WH Malcolm are relatively straightforward. The company is a logistics business and as part of its estate, it operates Daventry International Freight Terminal (Terminal). This was a railway terminal which had moving trains and overhead lines (OHLE).

In 2017, a young boy and a number of his friends gained access to the Terminal to retrieve a football. Whilst in the Terminal, the young boy climbed on top of a stationary freight wagon and received a fatal electric shock from the OHLE.

The Office of Rail and Road (ORR), the regulator and enforcing authority in respect of railway safety brought a prosecution and after a 4-week trial in Northampton Crown Court, the company was ultimately convicted of an offence under section 3 HSWA and another of failing to make a suitable and sufficient risk assessment, contrary to regulation 3 of the Management of Health and Safety at Work Regulations 1999.

Sentence

On Friday 30 July, WH Malcolm was sentenced to a fine of GBP6.5 million and ordered to pay the costs of just over GBP240,000. In relation to the application of the Guideline, the judge found that the defendant's culpability was High (the company fell far below the applicable standards) and the Harm Category was 1 (there was a high likelihood of death or very serious injury). The finding of high culpability was impacted

by the company's apparent failure to heed previous warnings following previous warnings, a serious failure within the organisation to address obvious risks, the ignoring of concerns and failure to make changes following prior risks to health and safety.

For a large company (with a turnover in excess of GBP50 million), this gives rise to a notional starting point of GBP2.4 million. The judge then found that the incident exposed a number of children to harm and moved up the range, the judge then justified a further movement up given that the incident resulted in death, relying on the dicta in Whirlpool Appliances [2018] 1 Cr.App.R. (S.) 44. This led to an ultimate starting point of GBP4 million.

Whilst there was some acceptance that the company had carried out remedial works following the incident, the poor enforcement history combined with the failure to carry out basic steps before the incident and the impact on the three children who witnessed the incident led to a fine of GBP6.5 million. There was of course no credit for guilty plea given that the matter was contested. On this point specifically, the sentencing judge observed "*In contesting this matter the company did not take responsibility for what was, on the evidence at trial, a serious and obvious failure to prevent public access to a highly dangerous environment.*"

Trespass Challenges, Enforcement Risk and Issues relevant to sentence

No-one can doubt the tragedy of this incident. However, the subject of trespass is a challenging one. This is one of a range of recent prosecutions brought by ORR and other safety regulators in relation to trespass which have led to serious injuries to trespassers, mainly children and teenagers. Whilst the issues are not unique to railway infrastructure, the greatest risk tends to lie with those who operate high risk environments. Trespass prevention is an issue troubling duty-holders in the rail, construction, utilities and other sectors as trespass becomes more prevalent and trespassers become more determined and more sophisticated in their efforts to access sites for a myriad of different reasons.

Section 3 HSWA requires employers to ensure the safety of those affected by its business operations, so far as is reasonably practicable. This duty extends to trespassers and requires an employer to deploy measures proportionate to the material risks arising from its operations. This obligation poses challenging questions for landowners and site operators (without infinite time or resource) to manage an issue which is perhaps not a core safety concern compared to the day-to-day operations on site.

What is clear is that duty-holders must ensure they carry out rigorous risk assessments and in relation to those risks introduce appropriate controls (e.g., fencelines, borders, security patrols) and monitor the continued effectiveness of those controls. Monitoring is key as is an open minded and responsive approach to issues identified and corrective measures and or enhancements.

In relation to trespass specifically but health and safety prosecutions more generally, even with the best of intentions incidents cannot always be prevented and this of course gives rise to a risk of enforcement action. Where however an organisation can show that it has a proportionate system in place, exercises due diligence and responds to concerns and issues, this reduces the risk of enforcement and even where a prosecution and conviction arises, it will have a material impact on sentence. On the contrary, evidence of failing to close out concerns, missed opportunities to learn lessons and a laboured approach to improvement are hallmarks of high culpability and are likely to materially aggravate a sentence.

Sentencing Trends

The present landscape for sentencing of regulatory offences is a challenging one. The fine handed down to WH Malcolm is yet another example that 7 figure fines are now the norm for large organisations convicted of health and safety offences.

It quickly follows the highest sentence for a food safety offence for Tesco (GBP7.5 million) and an eye watering fine for Thames Water (GBP90 million). The WH Malcolm fine is a further movement closer to fines in the double-digit millions which are being seen in an environmental context, the guidelines for which was introduced a few years before the reciprocal health and safety ones.

Given that high risk organisations may have previous convictions and with the potential for fines to be multiplied for organisations with turnover well in excess of GBP50 million (the bracket for large organisations), it is only a matter of time before we see a fine exceed GBP10 million in a health and safety context.

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Record environmental fines for sewage breaches

On 26 May 2021, Thames Water Utilities Limited was fined GBP4 million after untreated sewage escaped in February 2016 from sewers in Greater London served by its Surbiton treatment works into a park and woodland traversed by the Hoggsmill River in New Malden. The park is much used as an attractive recreation ground by local people and the chalk stream provided an important habitat for fish aquatic birds and insects.

Approximately 79 million litres of sewage sludge covered an area of some 6,500 sq metres. It took 30 people a day for almost a month to clear up the sludge and associated paper and other detritus etc.

The pollution incident was the result of a pumps failure, which caused sewage effluent to back up the pipes network, coupled with a failure on the parts of the responsible members of Thames Water's staff to respond to over 50 warning alarms over a period of five hours.

Since 2017, when it was fined GBP20.3 million for a similar offence, Thames Water has been fined in total over GBP28 million for 10 cases of water pollution.

However, this total has recently been dwarfed by the fine imposed on Southern Water Services Limited on 9 July 2021 at Canterbury Crown Court following the company having pleaded guilty to 51 counts of knowingly discharging sewage into the sea at 17 waste water treatment works in North Kent, West Sussex and Hampshire over a number of years. The Court fined Southern Water GBP90 million plus costs to be assessed. The company had, while pleading guilty, attempted to argue that the sewage dumping had not in fact been deliberate. However, that position was not accepted by the Court.

The company had also attempted to obstruct investigation by the Environment Agency, and three former members of its staff have been convicted for obstructing data collection. The significant disparity compared with the fine imposed on Thames Water doubtless reflected the fact that in this case the offences were deliberate. The GBP90 million would have been even higher (GBP135 million), but for the "discount" for a guilty plea, It was also clear that the company had not invested improvements after previous but separate cases since 2013, in which it had been fined some GBP2.7 million.

Accordingly, Mr Justice Jeremy Johnson determined that the fine needed to have a "significant financial impact which will bring home to both managers and shareholders the need to improve regulatory compliance".

In 2019 OFWAT imposed a GBP126 million penalty on Southern Water as a result of the company's regulatory failings in matters subject to OFWAT's jurisdiction.

It appears that these penalties have had some effect, as institutional shareholders have indicated their disappointment and expressed their wish that Southern Water should end its ways. It has also recently been announced that shareholders are diluting their equity by selling a majority of their shareholding to Macquarie Asset Managers. Macquarie has announced that it will invest, on behalf of the long term investors including pension funds and insurance companies over GBP1 billion in "new equity to recapitalise the business and implement a more sustainable financing strategy" for Southern Water. It is understood that Southern Water will then spend GBP2 billion over the next four years to upgrade its infrastructure. Macquarie has said that it aims to strengthen "a zero-tolerance mindset to environmental pollution by significantly improving Southern Water's environmental track record".

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Scottish Covid-19 public inquiry to be established by end of 2021

The Scottish Ministers have announced that a public inquiry into the Scottish Government's handling of the Covid-19 pandemic will be established by the end of 2021. A consultation process has been launched, inviting views from the public and stakeholders on the aims and principles and suggested approach for the inquiry. The consultation is now live, with responses invited by 30 September 2021.

What has been announced?

With restrictions starting to ease and life beginning to return to the "old normal", attention is turning to what has just gone before us – in particular, the decisions made in response to the global pandemic and the lessons that can be learned.

The Scottish Government have announced that an independent public inquiry into the handling of the Covid-19 pandemic in Scotland will be established by the end of 2021. The purpose of the inquiry will be to scrutinise decisions made in the course of the pandemic so far, and identify lessons to be learned for future pandemics.

The Scottish Government stated that the purpose of the public inquiry will be to:

- Investigate events causing public concern, for example the experience of COVID-19 in care homes;
- Establish the facts in relation to such issues;
- Determine the explanations for decisions taken, and causes of anything which may not have gone as expected;
- Consider if and how different outcomes could have been achieved;
- Establish any lessons to be learned from what has happened; and
- Make any recommendations that the inquiry considers appropriate.

A consultation process has now been launched, seeking feedback on the draft aims and principles for the public inquiry and the approach to be taken. Responses are invited from the public, including bereaved families and other stakeholders (for example, businesses and care home operators).

The responses will be considered by the Scottish Ministers when determining the approach to be taken and in framing the terms of reference for the public inquiry. Once established, the inquiry will be independent of the Scottish Ministers; with a Judge to be appointed to lead the inquiry. It will be a statutory inquiry, operated under the framework and controls of the Inquiries Act 2005.

Scotland is the first devolved nation in the UK announce the commencement of the public inquiry process into the Covid-19 pandemic. The scope of the inquiry will be limited to consideration of devolved matters in relation to Scotland.

In May 2021, the UK Government announced its intention to commence a public inquiry in Spring 2022. Whilst the terms of reference for the UK inquiry are still to be announced, it was understood that all four devolved nations would participate in the inquiry. In announcing the public inquiry to be established, the Scottish Government advised that "*While all relevant matters will be in scope, consideration will be given to how duplication of investigations between the Scottish and UK wide inquiries can be avoided*". The expectation, therefore, is that Scotland will remain a participant of the UK Covid-19 public inquiry.

Scope of the public inquiry

In launching the consultation process, the Scottish Government advised that the public inquiry will "*take a take a person-centred, human rights based approach with a focus on outcomes and timely reporting to identify lessons and recommendations*"[2].

Whilst the aims and approach of the public inquiry are to be confirmed, the Scottish Government advised that the inquiry will pay particular consideration to the following "four harms" of the pandemic:

- Direct health impacts of Covid-19 (including cases and deaths in care homes);
- Other non-Covid-19 health impacts;
- Societal impacts, including education; and
- Economic impacts.

These are broad areas with wide application. Although the public inquiry will be limited to devolved matters, it can scarcely be imagined that anyone living in Scotland has not been impacted by health, education and/or the economy during the Covid-19 pandemic.

No further guidance has been provided as to the scope of the four categories of harm to be considered.

However, with the express reference to Covid-19 cases and deaths in care homes, it is anticipated that this will be a key issue for consideration at the public inquiry.

In May 2020, the Crown Office Covid-19 Deaths Investigation Team was established to investigate all suspected or confirmed coronavirus deaths in care homes, and the deaths of people who may have Covid-19 at their workplace. The Crown Office has been working with other agencies (including the Health and Safety Executive, local authorities and the Care Inspectorate) in respect of confirmed or presumed Covid-19 deaths in care homes in Scotland. In April 2021, it was reported that more than 3,400 such cases were being considered by the Crown Office.

With the Crown Office investigating deaths to determine whether to hold Fatal Accident Inquiries (or raise criminal proceedings), it is anticipated that the public inquiry will consider broader issues of wider application in respect of Covid-19 cases and deaths in care homes. For example, the Scottish Government's policies at stages throughout the pandemic, and practices implemented at a local level.

The scope of the other "harms" to be considered is less clear. For example, the breadth of "societal impacts" to be considered, and what "economic impacts" will encompass.

Almost without exception, lockdown and ongoing restrictions have had a significant negative impact across all sectors and the continued operation of businesses in Scotland. For example, hospitality, retail, construction and manufacturing. Even with the recent easing of restrictions, it has been widely reported that a number of businesses have experienced difficulties in reopening, with high numbers of staff shortages due to the requirements of track and trace – the "pingdemic".

Throughout the pandemic, the Scottish Government issued a series of publications to businesses in the form of advice and guidance, and regulations, directives and orders. Some, but not all, of which had legal effect. It may be anticipated that the public inquiry will follow the chronology of these publications, and consider the approach taken and the resultant economic impact on businesses.

Another significant economic impact has been the allocation of financial support to businesses and individuals throughout the pandemic. For example, in the form of grant funding, loans and furlough. It may be likely that the level of support, qualifying criteria and distribution of the grant of awards will be reviewed at the inquiry. However, with an overlap in certain policies, it is not clear at this time whether any of these issues will be reserved to the UK inquiry.

How to respond

The Scottish Government has invited feedback to the consultation from members of the public and stakeholders by 30 September 2021. Responses should be submitted by email to the following address: COVID-19publicinquirysetupteam@gov.scot.

[2] https://www.gov.scot/news/a-covid-19-inquiry-for-scotland/

Beyond the consultation

The public inquiry will be conducted under the Inquiries Act 2005 (the **"Act"**), by reference to the terms of reference produced by the Scottish Ministers following the consultation process. The Scottish Ministers are presently in consultation with the Lord President regarding the individual Judge to be appointed as the chairman of the inquiry. It is not known if any other persons will be also be appointed to form an inquiry panel.

Whilst it has been announced that the inquiry will be established by the end of the year, the other timescales are less certain. Once established, there are no time periods prescribed in the Act – for example, for the hearing stage to commence, or for the report of the inquiry to be issued. However, with the nature and potential scope of the issues to be considered, it is anticipated that the inquiry process will be lengthy.

In terms of the Act, subject to certain restrictions, the Judge will have broad discretion to direct the procedure and conduct of the inquiry. For example, to require the production of documents, and to compel the attendance of witnesses to give evidence under oath. It is considered that a statutory inquiry brings greater transparency, and is more likely to discharge the requirements under the European Convention on Human Rights. Notably, the Act requires that reasonable steps be taken to secure public access to the inquiry (in person or by simultaneous transmission of the proceedings), and to obtain or view a record of the evidence and documents produced to the inquiry. The Judge will also have the power to make awards in respect of the cost of legal representation at the inquiry.

There are also notable limitations and protections afforded to participants of the inquiry. In particular, in terms of the Act the inquiry is not to rule on (and has no power to determine) any person's civil or criminal liability. However, the recommendations of the inquiry may give rise to such inferences, with the result that further proceedings (civil or criminal) may be raised at a later date.

Following consideration of all of the evidence, the Judge is required to deliver a report to the Scottish Ministers setting out the facts determined by the inquiry and its recommendations. Subject to certain limitations, the report will also be published in full.

[3] https://www.gov.scot/news/a-covid-19-inquiry-for-scotland/

Comment

Despite the easing of restrictions, Covid-19 continues to impact lives around the world. In Scotland, this can be seen in the rise in Covid-19 cases and hospitalisations in recent weeks.

In announcing the public inquiry and consultation process, the Scottish Government stated that "*The proposed inquiry would be established by the end of the year, to scrutinise decisions taken in the course of this pandemic, and learn lessons for future pandemics*"[3].

The timing for establishing an inquiry into the Covid-19 pandemic is complex. Undoubtedly, there is a need to have an independent review of the Scottish Government's response to the pandemic and identify valuable lessons for the future.

However, with the ongoing impact of Covid-19, it may be considered whether now is the time to look back and assess the decisions made in response to the pandemic and lessons to be learned. New issues are also continuing to emerge as variants of the virus emerge and restrictions are eased. There will also inevitably be aspects of the pandemic that cannot be considered in full at this time. For example, the data required to properly analyse the true impact of Covid-19 on the deaths of residents in care homes and people living in the community may not be available for several years. Any benefit of delaying scrutiny of decisions at an inquiry must, however, be contrasted with the potential for evidence to be lost or diminish over time.

Depending on the duration of the public inquiry, it may be that the resultant recommendations will be limited to interim findings, with a further review of certain matters to take place at a later date. The inquiry could however make valuable interim recommendations that can be used to inform policy and practice as we continue to navigate the Covid-19 pandemic.

With the public inquiry due to be established be the end of 2021, it is anticipated that in the coming weeks and months the Scottish Government will provide greater clarity as to the scope of the issues to be considered and approach to be taken at the inquiry.

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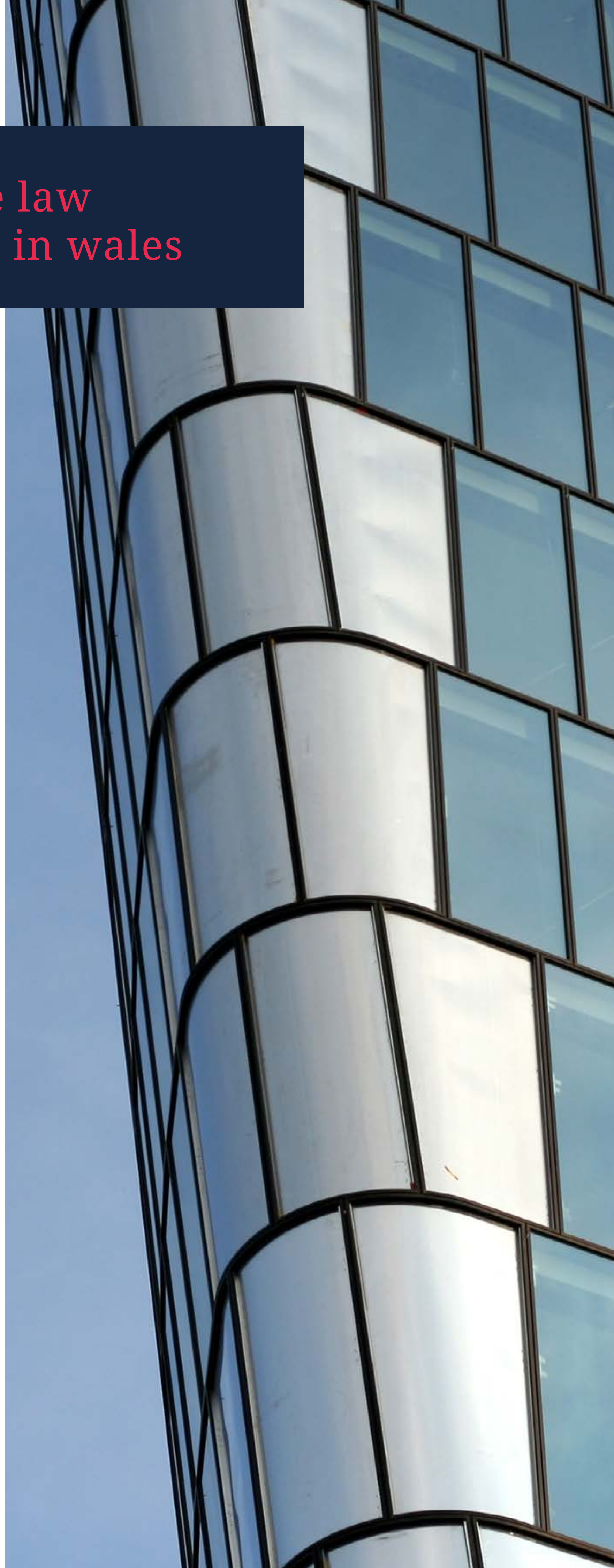
Consultation on the law relating to coal tips in wales



In October 1966, a catastrophic event occurred at a Welsh colliery. The collapse of the colliery spoil tip engulfed the local junior school and a row of adjoining houses, killing 116 children and 28 adults.

A subsequent Tribunal of Inquiry lay blame for the disaster squarely on the National Coal Board (**NCB**). Its report spoke of "ignorance ineptitude and a failure of communications…bungling ineptitude on the part of those of who had the duty of supervising and directing".

The disaster was due to the failure to appreciate and manage the risks of siting a colliery spoil tip on a site which was conveniently located for the colliery management, but wholly unsuitable from the point of view of geology and safety engineering.

The NCB had in fact already promptly admitted civil liability for the disaster, on the basis that the tip amounted to a "dangerous accumulation". As landowner, the NCB was strictly liable for the consequences (i.e. liable without proof of any fault) under the common law, pursuant to what is known as the Rule in *Rylands v. Fletcher.*

However, neither the NCB nor any of its officials were prosecuted in the criminal courts. In those days there was no legislation on Corporate Manslaughter, and no general criminal legislation on health and safety at work.

The Health & Safety at Work Act etc 1974 (**"HSWA"**) which laid down and continues to provide the general framework legislation on health and safety at work in Great Britain, resulted from the subsequent work of a committee established to consider the reform of health and safety legislation.

In 1969, in response to the findings of the Tribunal of Inquiry, Parliament passed the Mines and Quarries Tips Act. This applied to all tips associated with mines and quarries, not merely colliery tips. However, while the act provided for local authority inspection of disused tips and where necessary the carrying out of remedial works on tips which pose a threat to public safety, the main focus was on the safety of tips associated with active mines.

What this means today

The UK mining industry has now almost completely ceased. While the legacy of the industry remains, the potential problems posed by the remaining tips are particularly acute in Wales, owing to local geography and geomorphology, and the fact that the climate is notably wetter than in many other parts of the UK.

While there is a very small number of tips associated with operational coal mines in Wales, there are more than 2,000 disused coal tips.

In addition to being often potentially unstable, particularly in the event of heavy rainfall, they can also cause pollution and are even subject to spontaneous combustion. As regulatory control under the 1969 Act rests with local authorities, this is highly fragmented.

There is no mechanism to assess the risks posed by Welsh coal tips in a holistic way. Regulatory intervention is discretionary, and there is no general regulatory duty placed on landowners (other than the general duty owed by employers and self-employed persons to non-employees under section 3 HSWA) to ensure the safety of disused coal tips.

Local authorities do not have power to intervene, unless there are concerns that a tip is unstable, nor do they have the powers to undertake preventive maintenance works before a tip becomes a danger.

Law Commission consultation

At the request of the Welsh Government, the Law Commission recently consulted on proposals for a new regime to govern the management of colliery tips in Wales.

This would involve the creation of a single supervisory authority to monitor all disused coal tips in the Principality.

It would compile and maintain a coal tips register, carry out inspections, and design a tip management plan.

Inspections would cover all risks, not only the risk of tip slides, but also flooding, pollution, and other risks. It would enforce and enhance safety regime would be applied to coal tips designated as high risk, and the supervisory authority would have special powers to manage and reduce the chances of significant dangerous incidents.

Following a preliminary consultation, the Law Commission is likely to produce a report with more detailed recommendations in early 2022. The detailed proposals of this will be of interest to the many organisations and individuals owning land in Wale which is occupied by disused coal tips.

The Law Commission is somewhat coy on the subject of how the financial burden of implementing the regime will be borne, stating that this is beyond its remit. Ultimately this will be a matter for political decision, given that many of the envisaged activities would appear to go well beyond the needs of ensuring basic tip safety, which currently falls within the remit of the owners and occupiers of the land. In particular the proposals envisage that they will form a framework for the longer term environmental improvement of the land in question.

However, given the current poor state of public finances, the background of the common law rules on liability for such tips, and the fact that the proposals envisage powers for the supervisory authority to order the carrying out of works and provisions for cost recovery where it carry out works, there are no prizes for guessing on whose shoulders the main financial burdens are likely to rest. In that connection it is also significant that the paper makes a number of references to the regime under Part IIA Environmental Protection Act 1990. That regime is expressed to be based on the “Polluter Pays” principle, but in practice results in liabilities being usually placed on current landowners and occupiers, given that the original “polluter” can very often no longer be “found”.

It is also of interest that the Welsh Government should be pursuing a project in an area which does not only concern environmental law, a field which is clearly devolved, but also health and safety law, which is not. However, in the light of history, it is understandable that there should be a desire to avoid repetition of a disaster such as that which occurred in Aberfan, and also to take steps to avoid other threats to wellbeing posed by an unfortunate legacy from the industrial past in Wales.

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Substances of concern in articles, as such or in complex objects (Products) (“SCIP”)

In the previous edition of SHE Matters, we provided an overview of the new database and reporting requirement for substances of very high concern (**“SVHC”**) present in articles above 0.1%.

The database is now accessible and allows consumers and waste operators to access product information. It is intended to allow consumers to make more informed decisions about products purchased and allow waste operators to access information that helps to develop the reuse and recycling of articles. The push for chemical transparency can be seen as meeting part of the wider green deal and circular economy initiatives.

An SVHC is a substance identified as having certain characteristics that pose a risk to the environment or human health, for example they are carcinogenic or toxic. SVHCs are regulated under REACH and producers or importers of articles (products) containing SVHCs above a concentration of 0.1% w/w are under a duty to provide sufficient information to professional users to allow safe use of the article. The same requirement also applies when a consumer asks for such information. Additionally, in certain cases there are notification requirements to ECHA.

From **5 January 2021**, suppliers of articles containing an SVHC above 0.1% have had an additional obligation to notify ECHA about such products and the SVHC present. This is done through the SCIP database. Information that is required to be notified includes details of the SVHC, product identifiers and characteristics and information on its safe use. There is no fee to submit the notification.

A press release by the European Chemicals Agency explains that the most commonly notified products categories are:

- machinery and their parts;
- measuring instruments and their parts;
- articles made of rubber;
- furniture;
- electronic equipment and their parts; and
- vehicles and their parts.

The most common SVHCs in the notifications include lead, lead monoxide, lead titanium trioxide and Dechlorane Plus™

The ECHA press release also indicates that there are now over four million article notifications included in the database.

Importers or manufacturer of articles in the EEA will need to continue to monitor whether any SVHCs are included in products above 0.1% and ensure that where required submissions to the database are made.

Note that it is important to keep up to date with the candidate list, which is generally updated twice a year, as additional notifications may be required. For those that have made notifications these should be kept under review and updates to ECHA made as required, for example, if an SVHC is no longer used in the product.

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