



Prospect's submission to Lord Gill's inquiry into the circumstances leading up to the incident on 11 May 2004 at the premises occupied by the ICL group of companies, Grovepark Mills, Maryhill, Glasgow.

Executive Summary

1. The 11th May 2004 incident was a tragedy that demonstrated a serious shortfall by society as a whole in the current system of occupational health and safety regulation in the United Kingdom. Prospect recognises and sympathises with the grief and loss suffered by the deceased, the injured and their relatives. We hope that this inquiry will trigger improvements so every reasonable step is taken to prevent any other group of workers being exposed to this scale of risk in future and that every stakeholder will recognise their role in delivering this necessary change.
2. All employers in the UK are bound by the Health and Safety at Work Act 1974 and secondary legislation under that act. That body of legislation requires employers to undertake regular risk assessments and introduce controls to adequately reduce the risk to employees, other workers and members of the public. At Grovepark Mills that responsibility lay with the ICL group of companies.
3. The HSE's role is to assess whether or not dutyholders, including employers, have complied with their legal duty to control risk at work and to manage work safely. Although the HSE is highly committed to occupational health and safety, the primary responsibility for health and safety at work lies with employers and their staff. To reinforce this responsibility, the HSE will advise, inspect and enforce legislation but this does not reduce the responsibility of employers and their staff to manage work safely and to act safely at work.
4. Public perceptions that the HSE is an intrusive regulator controlling occupational health and safety at work are simply wrong. Inspection is a snapshot assessment of information gathered by the inspector and the lack of enforcement action following an inspection does not signal that the HSE believes that an employer is absolutely safe and fully compliant with the Health and Safety at Work Act 1974.
5. Resource constraints have substantially reduced the level of staff employed by the HSE and an average employer is likely to be inspected once every 14 years. Recently the UK Government decided to freeze funding of the HSE in absolute terms up to 2011 and to continue to cap salary increases at a far lower level than private sector employees thus threatening the quality of service to the public.

6. The lack of resources has constrained the scope of HSE activity, reducing the number of proactive inspections and restricting the development of working relationships with dutyholders.
7. To respond to the resource constraints facing the HSE, the HSE developed topic-based inspection that places a lower value on the professional judgment of inspectors and a higher priority on national topics. The ability of inspectors to exercise their professional judgment was restricted to issue of evident concern that would trigger enforcement action such as an improvement notice or prosecution.
8. Despite being aware of Prospect's concern about this approach, the HSE advised inspectors not to seek out issues of evident concern. Training of new inspectors focused on national topics and ignored the loss of deeper local and specialist knowledge vital to the organisation.
9. Prospect recommends that the three following steps are taken to address the issue raised by the ICL deaths and injuries:
 - **Adequate HSE resources to fulfil reasonable public expectations;**
 - **Allowing inspectors to use their discretion and professional judgment to deal in a risk based and proportionate way at an individual site level whilst taking into consideration national priorities; and**
 - **Adequate training and specialist support for frontline inspectors**

10. This submission responds to the substantive areas to be addressed in the inquiries terms of reference, namely the circumstances leading up to the incident and any recommendations that may arise.
11. When addressing the circumstances leading up to the incident this submission focuses on the regulation of health and safety legislation at the site as this is the only activity that directly involved our members employed by the HSE.

Prospect

5. Prospect represents over 100,000 professional, technical, scientific and managerial staff across the economy but concentrated in the civil service, energy utilities and the nuclear sector. We are the largest union in the HSE representing over 1700 inspectors, policy advisers, scientists and managers. With our experience of representing other groups of staff in hazardous industries, we believe that we understand the views of both regulators and professional staff subject to regulation.

Section A: Circumstances leading up to the incident with particular reference to regulation of safety aspects of the activities at Grovepark Mills.

Legislative Context

6. Health and Safety legislation in the UK is now largely based on goal setting by the dutyholder to meet aspirations for a safe workplace, such as a requirement to manage electricity safely, rather than setting defined standards within which people and business can behave as they chose fit, such as a speed limit. It places the duty for compliance firmly with the business, the legal entity or dutyholder. The current enabling act for health and safety legislation is the Health and Safety at Work Act 1974 (HASAWA), this act places a number of duties on employers, employees and the self employed. These duties are absolute, but are couched in terms of what is reasonably practicable¹.
7. The concept of reasonable practicability infers that any dutyholder should make some assessment of the risks and the measures to be employed to control that risk. This level of self-regulation by the dutyholder is further supported by the legal duty to provide systems of work that are, so far as reasonably practicable, safe and the duty to produce a policy with respect to health and safety that includes specific reference to the organisation and arrangements put in place by the dutyholder to ensure that they comply with the law.

¹ Reasonably practicable, as traditionally interpreted, is a narrower term than 'physically possible' and implies that the dutyholder can compare the level of risk incurred with the cost, whether in money, time or trouble, required to take measures necessary to avert the risk is placed in the other; thus if it be shown that the risk is insignificant in relation to the cost, the dutyholder can show the requirement to take action was not reasonably practicable. This comparison must take place before the incident occurs if a dutyholder is to argue that mitigation of the risk was not reasonably practicable so it is not legitimate to calculate that mitigation was not reasonably practicable after an incident has occurred

8. Prior to 1988, secondary legislation that support the Act, usually in the form of regulation but sometimes in Acts of Parliament such as the Mines and Quarries Act 1954, was largely prescriptive: these regulations set out specific controls and conditions that employers had to adhere to. However, largely as the result of European Directives, the UK's health and safety framework has been modified to introduce the concept of risk assessment. Prospect believes that risk assessment is consistent with HASAWA and the idea of reasonable practicability and provides a robust legal framework for health and safety.
9. This concept was introduced with the Control of Substances Hazardous to Health Regulations 1988 (CoSHH) which required dutyholders to specifically assess the risks to health arising from substances used in their organisation. The regulations then specified that following that assessment of the risks the dutyholder should also assess the adequacy of the control measures in place to prevent harm and injury to employees and other workers. If, following this exercise, the dutyholder found the control measures to be adequate then the only action needed was to record the significant findings. If however the controls were found to be inadequate then CoSHH introduced a duty to increase the controls until the risks were adequately controlled.
10. Over the past twenty years the UK's health and safety regulatory framework has increasingly emphasised this risk assessment based goal setting model. In summary an employer should take the following steps:
 - a. Suitable and sufficient risk assessments must be carried out for the significant risks to health and safety arising from work activities:
 - b. A judgement must then be made concerning the adequacy of control measures. The duty to make this judgement clearly lies in the first instance, with the person responsible for the work activity.
 - c. They also have the legal duty to put in place preventative and protective measures identified in the risk assessment are put in place.
11. The Health and Safety Executive (HSE) and the local authorities enforce health and safety legislation in the UK to ensure that dutyholders do comply with their legal duties. Health and Safety legislation in the industrial units at Grovepark Mills was enforced by the HSE. In practice this involved HSE staff, including warranted inspectors authorised under section 19 of HASAWA, visiting the site to carry out duties such as safety inspection on behalf of the HSE.

Public Expectation

12. The HSE interacts directly with dutyholders at their sites either reactively through investigation of incidents and responding to concerns that are raised by interested parties (often employees), or proactively through inspections.

13. There appears to be an impression in the public domain that the HSE intrudes into every aspect of business life. This impression supports the deregulatory agenda that strives to claim that business is stifled by a disproportionate regulatory burden.
14. Although trade union and worker representative groups often express a view that the profile and presence of the HSE is not high enough, however in our experience they do appear to promote an exaggerated view of the extent of the responsibility held by our members who enforce the law and the scope of proactive inspection.
15. These impressions of an over zealous inspectorate who are responsible for looking at and making judgements on the legal compliance, with health and safety legislation, of every aspect of a business are supported in the press and through lobby groups. In particular following tragic incidents where there have been breaches in health and safety legislation the experience of our members is that the HSE is, and on occasion individual members are, in some way held to be responsible because, 'someone did not ensure that the law was complied with' to the extent that obscures the fact that the primary responsibility for health and safety lies with dutyholders, that is with the owners, managers and employees of the business and with any other workers such as contractors working within the business. This public perception is unrealistic.

The nature of proactive inspection

16. **Inspection** is the process carried out by HSE warranted inspectors which involves assessing relevant documents held by the duty holder, interviewing people and observing site conditions, standards and practices where work activities are carried out under the dutyholders control. Inspection aims to secure compliance with legal requirements for which HSE is the enforcing authority and to promote improving standards of health and safety in organisations.
17. When on site an inspector judges the competence of management of health and safety on the site. This is done through conversation with the dutyholder, and assessing the adequacy of any control measures actually seen during the inspection. This process requires a substantial degree of professional judgment based on experience and training.
18. Any proactive inspection will only ever provide the inspector with a snapshot of activities taking place at the time of the visit. Unlike inspectors from the food standards authority HSE's inspectors are not embedded in premises, indeed due to funding constraints an average employer is only inspected once every 14 years: so the HSE cannot supervise the safety of all the activities all of the time. The activity of proactive inspection is not and has never been an all encompassing assessment of all the risks present at a premises and the adequacy of all the controls.

19. Therefore, if an inspector fails to comment on any matter then this does not mean either that the risk is not present at some time, or that the controls in place have been assessed as being adequate. It merely means that the inspector has not commented on that aspect of the management of health and safety at that time at that premises. Thus the HSE does not confirm that an employer is safe.
20. In fact in *Mitchell v North British Rubber Co Ltd* 1945 JC 69, 73, 1946 SLT 129, for example, commenting on a definition of 'dangerous', Clerk Cooper LJ said:
21. "The question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory inspector had so reported; nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributorily negligent. The test is objective and impersonal. Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent on his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part?"

Impact of resources on frontline activity

22. The current level of HSE resources is not sufficient to meet the expectations held by the public and on occasions by employers, unions and politicians. In the absence of a full public debate over the appropriate level of occupational health and safety advice and enforcement, the HSE remains condemned to reductions in funding. Despite recent concern over health and safety standards, the Government has decided to freeze HSE spending in absolute terms so in real terms the HSE faces a 4% cut in funding during 2008. This implies that the UK Government believes that the public would wish to see the service provided by the HSE cut.
23. HSE has seen falling numbers of full time equivalent staff since 1995 when it employed around 4500 staff in total. In 2004 this figure had fallen to around 4000 and is currently fewer than 3000. This cut in staff and the cut in funding over the same period has impacted on HSE's frontline activities.
24. Most obviously there have been fewer frontline inspectors available to carry out HSE's functions. This has led to the average time a dutyholder could expect to go between visits from the HSE more than doubling to its current figure of around 14.5 years between visits.

25. Government pay policy has led to real cuts in pay for experienced staff who in recent years have seen a 2% lower increase than their counterparts each year. Therefore those staff that most commonly leave are those with the longest service and the most experience. This leaves a workforce of decreasing experience, and Prospect believes, knowledge. We feel that HSE has failed to effectively manage a process of retaining expertise and corporate knowledge as staff leave. Whilst cynics would expect prospect to complain about pay of its members, we believe that this scale of cuts is disincentive for experienced inspectors to remain employed in the HSE.
26. A secondary impact is that remaining frontline staff are left with ever increasing workloads. Therefore our members continually have to re-prioritise the work expected of HSE with the inevitable result that some pieces of work are allocated a lower priority than before. This damages relationships with a dutyholder as establishing such relationships is normally by its nature resource intensive, even if the benefits to occupational health and safety are substantial.
27. In addition HSE's published criteria for incident investigation and its target response rate for complaints mean that there is a core of reactive work that HSE is committed to. In some areas of Great Britain, the balance of this work and staff available has led to a situation where far from a 60:40 split in proactive and reactive work no proactive inspection occurs at all.
28. In addition to these direct effects on our members Prospect believe that some structural alterations to the way staff carry out frontline work have been as a direct response by HSE to reducing resources. In particular revitalising health and safety significantly altered the way our members were expected to carry out their work and significantly changed the criteria defining the core of reactive work HSE was committed to carry out.

Impact of 'revitalising Health and Safety'

29. After 2000 the HSE made a policy decision to 'revitalise health and safety'. This meant that our members were instructed to focus their activities on the causes of the greatest numbers of injuries and days lost. In itself this provides the basis for a targeted proportionate way of enforcing health and safety legislation. The topics inspectors were instructed to focus on when on site were dictated centrally in light of national statistics, and by instructing staff to focus on these specific topics HSE hoped to increase its effectiveness.
30. In practice the work instructions given to our members allowed no recognition of local priorities and did not allow for a risk assessed approach at an individual site. In fact when this point was put to HSE management by Prospect, the following response was given;

'This is a risk based approach; the Commission chose these topics precisely because of their present and future significance in the overall causes of occupational injury and ill health in the economy. They may not be the biggest risks at every one of the individual premises inspectors visit, but they do reflect a risk-based national inspection agenda.'

31. There was room within this structure for inspectors to respond to specific issues raised by the dutyholder, or employee representatives. There was also provision made for inspectors to deal with 'matters of evident concern'. A matter of evident concern was broadly defined as a condition that would normally attract enforcement action. Inspectors were specifically told in an internal briefing that they were 'not expected to go looking for these things'.
32. Prospect members could foresee that this curtailing of the discretion of our members and reducing the impact of their professional judgments would lead to a greater chance that specific risks not covered by the topics would not be raised. In our view, this approach increased the risks of an incident arising from a breach of health and safety legislation. The HSE took no action to reduce this risk.
33. This point was raised by Prospect on numerous occasions, with an additional concern regarding the culpability of any individual member who had followed HSE's work instructions and in so doing not raised concerns about a matter that may have warranted comment under the previous regime.
34. Prospect at the time secured assurances from HSE that inspectors following the topic based approach would receive full support when, for example, an incident occurred at a premise after a visit, and this involved a matter which had not been encountered by the inspector or raised by the management or workforce at the time.
35. To compound these structural changes HSE recruited large numbers of inspectors in the early 2000's. This led to an increased training burden on operational teams: over time this has created a situation where inspectors who have only ever worked under a topic based regime train new recruits. Though training was supposed to encompass 'full inspections' the reality was that if you have inspectors carrying out training who are only used to conducting topic inspections then topic based inspection will be the output and 'deeper' knowledge will be lost to the organisation.

Section B: Prospects views of potential recommendations that may arise, in the light of the lessons identified during the course of the inquiry.

Adequate resources to fulfil public expectation

36. We believe that the HSE's funding can be assessed as a proportion of GDP devoted to health and safety.
37. Maintaining the proportion of GDP spent on the HSE would ensure that the cost of the service did not grow faster than the capacity of the economy to support it. In 1987, the HSE employed 3,500 staff and spent 0.024% of UK GDP: by 1992 this had increased to 4,500 staff and 0.033% of GDP. By 2007 the HSE had reduced to fewer than 3,300 staff spending 0.017% of GDP with further cuts anticipated up to 2011.

38. The effectiveness of the HSE has mirrored the changes in funding with the greatest benefits occurring as the staff and budgets increased and the plateauing of accident rates, with increases in some key sectors such as construction, occurring as the investment was run down. Maintaining the proportion of GDP spent on the HSE would imply at least a return to the 1987 level of 0.024% spend and an increase in staff numbers to 4,500.

Allowing inspector discretion to deal in a risk based and proportionate way at an individual site level whilst taking into consideration national priorities.

39. Evidence from the HSE and elsewhere shows that enforcement remains the most effective form of intervention for reducing accident rates. The reduction in the frequency of inspection correlates closely with the end to a fall in accident rates and there is no strong evidence to show that another cultural factor is the cause of this decline in HSE effectiveness.
40. Small and medium enterprises tend to rely on external interventions to ensure compliance. Although they recognise that they have a duty to comply with HSE regulations and guidance, in practice they will normally believe they are compliant until someone credible, such as the HSE, inspects and informs them otherwise. We do not believe that any more than a small minority of employers deliberately breach health and safety law and the issue is one of finding a form of regulation that improves knowledge and compliance.
41. We believe that the use of skilled experienced inspectors with enforcement powers is one of the key strengths of the British system of regulating health and safety. Naturally such effectiveness requires efficient policy, scientific and administrative support.
42. Such effective inspection and enforcement relies on trusting the professional judgment of inspectors. Under the revitalising programme the HSE intended to restrict the remit of inspections to key targets areas. This may have reduced the length of inspections but it could override the professional judgment of inspectors who use their professional judgment to consider other issues that are likely to be important dependent upon the specific circumstances of the site, the organisation and its staff.

Adequate training and specialist support for frontline inspectors

43. In order to enable effective inspection and proportionate credible judgements to be made by inspectors HSE must ensure that our members are adequately trained. This does not just mean training on the key topics, it means deeper training on a full range of industry specific and potentially catastrophic situations and hazards. We are aware that HSE has put more resource into this aspect of training for new recruits but we feel that there is a large number of our members who have not received training that they feel to be adequate.

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16th May 2008