previously also provided crucial support to the SALTSA project. We wish to place on record our appreciation of the significant contribution that NIWL made to both this project and its predecessors. In our view the subsequent abolition of NIWL was a tragic development and a decision entirely deserving of the international condemnation it received at the time.

In November 2005 a workshop on the project was held at the University Paris-13 (Bobigny), hosted by the Research Group on occupational cancer (GISCOP93). The meeting was to consider preliminary results from a number of studies and to better align the points of comparison and future research in terms of the project. Again there was an important Danish contribution to this from Dr Klaus Nielsen and Dr Annette Kamp from Roskilde University who were undertaking related activities in Denmark. In April 2007 Dr Nielsen and Dr Kamp organized a workshop at Roskilde University where further findings were discussed and the project refined. A key outcome of the Paris and more especially Roskilde meetings was the decision that the examination of systematic OHSM had to be placed within a framework that recognized and addressed the broader political economic setting, especially the substantial global changes in work organization such as the growth of more contingent or precarious forms of work. Since most researchers involved in the project already had familiarity with if not active involvement in researching the OHS and regulatory effects of these changes this decision did not entail a major redirection in existing research that formed part of the project. Getting the balance right in terms of the final outcome of the international project (namely this book) did, however, require careful consideration.

By September 2008 substantial parts of the book had been drafted, including most of the country case studies. Meetings held in Québec City (September 2008, with the support of the Chaire en gestion de la santé et de la sécurité du travail, Université Laval), at Cardiff University (March 2009) and in Santiago (January 2010) were used to refine the book structure. Professor Katherine Lippel (University of Ottawa) helped to facilitate some of these meetings and made an indirect but important contribution to the book. Support from the Business School of Auckland University of Technology (AUT) enabled David Walters to make a substantial contribution to the manuscript during November and December 2010 and we are grateful to Dr Felicity Lamm of AUT for her contribution to organizing Professor Walters' visit. Finally, in January 2011 a conference supported by the UK Institution of Safety and Health (IOSH) in honour of Professor Theo Nichols, enabled most of the authors to attend a meeting at Cardiff University to consider the final draft manuscript.

While acknowledging the help we received from all these sources, the responsibility for the content and views in the following pages and any inaccuracies and misrepresentations therein remain the authors. While the book is co-authored by the six of us, the first draft of each chapter was authored as follows. Chapter 1 was authored by David Walters; Chapter 2 by David Walters with Michael Quinlan and with contributions from each of the co-authors; Chapter 3 by David Walters and Richard Johnstone, with contributions from each of the co-authors; Chapters 4 and 5 by Richard Johnstone and Michael Quinlan; Chapters 6 and 7 by Kaj Frick; Chapters 8 and 9 by David Walters; Chapter 10 by Geneviève Baril-Gingras; Chapter 11 by Annie Thébaud-Mony; and the final two chapters by David Walters.

3. The development of regulatory inspection of health and safety at work

INTRODUCTION

In most countries, the OHS statute establishes an OHS inspectorate, and vests it with broad powers to enter and inspect health and safety in workplaces. Its powers further include the capacity to impose administrative sanctions and to prosecute OHS offences in the criminal courts. As we shall see in later chapters there are variations in the detail of such powers and the means with which they are administered, as there are in the penalties for those found guilty of transgressions in different countries. More significant in the relationship between OHS management (OHSM) and inspection is the broad discretion that inspectors in Europe, Canada and Australia have as to the enforcement action they will take when contraventions are detected.

This chapter explores the development of regulatory inspection internationally, with a particular interest in the countries that are the focus of our detailed analysis in subsequent chapters. Its aim is to present a general understanding, based on previous studies, of how and why inspectorates frame their tasks in the ways they do and how they use their broad discretion in seeking compliance with the health and safety measures they are charged with enforcing. To do so we outline the historical development of inspection across the five countries with which this book is concerned. We review the analysis presented in previous studies and identify both common and divergent patterns in the comparative development of inspection and the thinking behind it as well as the reasons that have been proposed to explain it.

We begin by considering some of the more prominent ways in which inspection practices and their context have been understood by previous scholars, first reviewing the relevant literature from the UK and Australia – because this is quite a rich source of both empirical and theoretical analysis – and then examining the available analysis of the development of inspection in France, Québec, and Sweden. Following this we present a discussion

of pertinent aspects of the theorizing of inspection found in the (mostly English) socio-legal and regulatory literature, in which we consider its implications for our particular concerns about the role of inspection in the surveillance of the management of OHS in a changing world of work.

WAYS OF THINKING ABOUT OHS REGULATION AND INSPECTION

UK and Australian Perspectives – ‘the Conventionalization of Factory Crime’

There has been a long-standing debate regarding the role of the inspectorate in maximizing compliance with OHS statutory standards. Central to this debate has been the question of whether it is more effective to advise and persuade employers to comply with standards or to punish them for not doing so (see, for example, Hutter 1997 and Hawkins 2002). This is a debate that originated when the predominant statutory requirements in question were mainly specification standards, but it becomes even more relevant with process standards, particularly when notions of ‘management’ are involved.

The ‘advise and persuade’ model is centrally concerned with achieving the goals of the regulatory system and to prevent rather than to punish contraventions. It essentially relies on persuasion to achieve compliance, and emphasizes co-operation rather than confrontation, and conciliation and negotiation rather than coercion. The threat of enforcement remains in the background, to be used where all other strategies fail (see Gunningham and Johnstone 1999, 111–2). There is, however, little, if any, empirical evidence showing that the ‘advise and persuade’ model on its own does indeed lead to reduced workplace injury and disease (see Shapiro and Rabinowitz 1997, 722, Wright et al. 2004).

The dominance of this approach, in relation to OHS, was established in the mid-nineteenth century in the UK, and in Australia from the 1870s. A series of excellent historical studies (see Carson 1979 and 1980, and Bartrip and Fenn 1980a, 1980b, and 1983; and also Henriques 1979, Hutchins and Harrison 1966, and Thomas 1948) shows that soon after the formation of the inspectorate in the UK in the Factory Regulation Act of 1833 there emerged an enforcement culture that focused on securing compliance through advice, persuasion and negotiation, rather than prosecuting contraventions in the courts (see Gunningham 1984, 56–65; Bartrip and Fenn 1980a, 179–83 and 1980b). Bartrip and Fenn (1983, 206) conclude that:

The enforcement culture that came to predominate in the nineteenth century factory inspectorate was, then, one in which there was an emphasis on persuasion, in all its varieties, rather than on prosecution following a detected contravention against the Act. Prosecutions were reserved for 'serious' or 'wilful' offences, while most detected offenders were given the opportunity subsequently to comply with the law and therefore escape liability.

Bartrip and Fenn (1980b and 1983, 210–22) argue that inspectors adopted this approach because they had limited resources, and resort to persuasion and advice was the most cost-effective enforcement technique.

Carson (1979 and 1980) provided a different and more complex explanation, grounded in the political economy of the origins of the Factory Acts. He has shown that by 1833 a number of large, urban manufacturers had already voluntarily introduced improved factory conditions and supported the provisions of the 1833 Act. Their motives were partly philanthropic, and partly borne of self-interest. The Act played a role in creating and maintaining a healthy and disciplined workforce (that was useful for economic and military purposes). Protective legislation would ensure that the state received the support of the British worker, but only if it was regarded as effective (Carson 1979 and 1980). Further, the large, urban manufacturers sought compulsory and effective regulation of working conditions to reduce long-term competition from smaller, less scrupulous manufacturers and from rural manufacturers, who might be tempted to require their workers to work excessive hours (Marvel 1977, 387–8).

Carson argues that the Factories Acts manifested the contradictory tendencies of their own development, and institutionalized the 'ambiguity' of factory crime, so that it was not seen as 'really criminal' (Carson 1980). He points out that while factory offences have been statutorily described as crimes and proscribed by law, they have been frequently breached and substantially tolerated in practice (that is, 'conventionalized') (Carson 1979). Moreover these factory offences have been dealt with by administrative agencies (the factory inspectorate) that have different origins from and are far removed from the normal machinery of criminal justice (the police).

This was reinforced by the fact that from 1844 the Factories Acts generally imposed strict liability – this absence of *mens rea* (mental intention) signalled to many that the Factories Acts did not impose proper criminal offences. Carson (1979 and 1980) argues that the inspectorate adopted this approach to inspection as a way of coping with the clash between the movement towards effective regulation and the fact that contraventions of the Factories Acts were widespread. In these circumstances, heavy use of prosecution would have entailed 'collective criminalization' of employers 'of considerable status, social respectability

and ...growing political influence' (Carson, 1979, 48). Further, faced with the difficulty of checking on the operations of mills in between visits, inspectors devised regulations to require the maintenance of time books, certificates of age and similar documentation. Employers then questioned their moral culpability for offences they considered to be the result of administrative oversight, and not 'substantial' violations.

Carson suggests that these contradictions, and the low penalties imposed by magistrates, induced inspectors to adopt enforcement strategies incorporating the notion of *mens rea* into their prosecutorial decision-making. Inspectors also developed informal and conciliatory approaches to enforcement, based on advice, persuasion and warnings, with prosecution the last resort (see Carson 1979, 52–3). He concludes that by the late 1840s the 'pattern of factory law enforcement had been set, and the ambiguity [and conventionalization] of factory crime established' (Carson 1980, 169) as the dominant culture of the enforcement of OHS legislation.

Studies of the contemporary UK Factory Inspectorate by Carson (1970) show that this enforcement culture was deeply entrenched in the British inspectorate in the 1960s. Australian studies (Maconachie 1988; Gunningham and Johnstone 1996, appendix 1; Johnstone 2000, 2003 and 2009) demonstrate the same pattern.

The early British Factories Acts shaped 'taken for granted' views of OHS in other ways. Carson (1985, 65–6) has argued that:

Factory legislation helped to 'defuse' or 'declass' the employer/employee relationship at one of its most critical and socially obtrusive points, the price being extracted from industrial wage-labour in terms of occupational injury and disease. More broadly, it served to 'mask' one of the potentially most unpalatable aspects of class relations in an industrialising society. It did so by purporting to pluck issues such as questions of occupational health and safety out of the fraught and, at that time, potentially disastrous arena of industrial conflict, and making them a matter of 'classless' state regulation.

Of course, the Factory Inspectorate itself did not articulate its understanding of its actions in quite this way. From the nineteenth century onwards, spokespersons for the Inspectorate repeatedly emphasized its role in prevention and its contribution to the enlightenment of employers – rather than solely as an enforcer of legal standards – arguing that to be effective in this way required a more versatile approach towards achieving compliance from duty-holders with very different understandings of their responsibilities and capacities to deliver them. The approach to achieving compliance that was adopted by the inspectorate was therefore portrayed as one responsive to this challenge and consisting of a judicious mixture of

strategies to advise, inform, educate, coerce or enforce through the use of legal powers, as appropriate, with an overall aim of achieving and spreading a more enlightened approach to prevention on the part of duty-holders. In this respect, little has changed in its current portrayal of its role.

Perspectives Elsewhere

While it is undoubtedly the case that the influence of the approach of the British Factory Inspectorate was felt throughout its colonies and continued to be a major element in the post-colonial development of approaches to health and safety inspection, as we have outlined previously it was by no means the only evolving national system during the nineteenth century. However, with the exception of the Australian studies mentioned, there does not seem to have been similar rigorous, socio-legal, historical analysis of the way in which inspection and enforcement of legal requirements on health and safety developed in the other countries on which our case studies are focused. It seems unlikely that the situations confronting inspection in these other countries would have differed significantly in general principle from the British and Australian experience. That is, the original inspectorates were in all cases quite small organizations and even though their responsibilities usually extended to only certain types of workplace or sectors of industry, their resources for surveillance were limited, as were their enforcement powers. As in the UK, therefore, state inspectorates needed a strategy with which they could be most effectively deployed. Within the constraints of the regulatory framework that created them, they seem to have been allowed discretion to determine this for themselves, in Bartrip and Fenn's terms, most 'cost effectively' (Bartrip and Fenn 1983a). Inspectors operated in newly industrializing capitalist societies in which 'public opinion' largely represented that of the existing order and the emergent middle classes and which, initially at least, allowed little platform for the voice of labour. The compromises inspectors sought as they steered a course through the nascent legislative requirements, their own prescriptions and what employers were prepared to accept, would therefore most likely have been much the same as those described by Carson and others in relation to the British case. Certainly there is no overt evidence of inspectors adopting a more confrontational approach towards employers or the enforcement of the law in other countries. Nor anymore than was the case in the UK does there appear to have been in place anywhere the infrastructural support of the courts and judicial system that would have been necessary to sustain such enforcement action.

Later, with the growth of industrialization, workers' health and safety often was among the pivotal issues around which labour became organized;

but aside from the large-scale strategies around workers' compensation and legislative reforms aimed to offset potential major political unrest, the increased role and voice of labour does not seem to have resulted in any radical reorientation of the labour inspectorate. In some countries such as Sweden, as Frick describes, the increased strength of labour and its interest in the work environment added weight to calls for measure to increase the regulatory powers of inspectors. However, there seems to be no robust evidence to suggest it changed its practices in ways that were radical departures from voluntary improvements through 'enlightenment' and leaving the resolution of matters to local employers and unions to determine (Lundh and Gunnarsson 1985, chs 2 and 3; Johansson 1989, ch 5; Frick 1994, ch 3). In this, the approach was not radically different from that described in the UK.

That is not to say there were no differences between British and continental European approaches to inspection. At the institutional level several were obvious. The more generic concept of 'labour inspection', which went hand in hand with the inclusion of provisions for health and safety in general Labour Codes in countries such as France and Germany, contrasts with the specific health and safety legislation and narrower specialist functions of factory inspectors in the UK and (to a great extent) Nordic countries and may have led to differences in practice. The linkage of social insurance provisions to those on preventive health and safety was more developed in continental European countries than in the UK, and their explicit use in efforts to prevent labour unrest also seems to have been more acknowledged in continental Europe. This may have led to further operational differences in the everyday practice of inspection. The role of the courts, and especially civil litigation in relation to employers' liability for industrial injuries and fatalities, also has a different history in the UK to elsewhere, and a separation between preventive actions such as those the factory inspectorate could support and the issue of accident compensation, whether through private litigation or social insurance, was always maintained in the UK. Moreover, the common law basis and institutional structure of the British legal system made for some fundamental legal differences between it and other European countries. These helped determine significant differences in the relationship between the British factory inspectors and the courts and those between inspectors and the judiciary in continental European jurisdictions. This in turn led to further differences in operational practices of regulatory inspection between the UK and continental European countries.

The attitude of society towards the notion of 'factory crime' and to the role of labour inspectorates in policing and preventing it does not seem to have differed markedly from that described in the UK. Indeed, in the case of

Sweden, while the early legislation provided absolute requirements on employers to eliminate accidents and ill-health, the inspectorate was given little in the way of enforcement powers with which to intervene and, far from occupational accidents and ill-health being eliminated, in fact their incidence increased apace with industrialization (Lundh and Gunnarsson 1985, chs 2 and 3). The 'absolute requirements' of the legislation were never regarded as much more than a statement of principle and good intent (Larsson 2000). The Swedish approach to inspection seems to have focussed on 'advice and persuasion' from its origins. It was more concerned with the role of inspectors in supporting, through advice and information, the prevention practice that was the responsibility of employers to implement and in supporting local dialogues between employers and workers to achieve this, rather than being concerned with enforcing legal standards and being instrumental in punishing failure to implement them. As Frick details in Chapter 6, measures to strengthen the powers of the Swedish inspectorate came much later in the development of protective legislation and only after considerable agitation on the part of a strong labour movement. If there was a difference between the Swedish and UK experience of the historical role of inspection, it would seem to be that in Sweden, the absence of a significant enforcing role for state inspection in the early health and safety system meant a greater centrality for politically promoted co-operation between the labour market actors, at both the central and workplace levels (Lundh and Gunnarsson 1985, chs 2 to 4; Johansson 1989, ch 5; Rothstein 1992, ch 9; Frick 1994, ch 3).

In France, the role played by the labour inspectorate has been questioned in relation to the effectiveness of labour law (Supiot 1994; Bonnechère 1997). Some degree of division of labour existed between two different actors in relation to prevention in OHS. The 'advice and persuasion' role was supposed to be played by the prevention engineers of the regional health insurance institutions under the Social Security Act, while labour inspectors had legal powers of enforcement and prosecution.

In the French context therefore, focused, as it has been, on compensating rather than preventing occupational injury and ill-health, the discussion about 'factory crime' did not emerge until 1976 when a prosecutor jailed an employer following the work-related death of a worker and more recently, in the wake of the asbestos 'crisis'. Nathalie Ferré's (2008) review of the use of prosecution in relation to exposure to carcinogens provides a good illustration of the state of the debate in France and has identified two tendencies in the practices of labour inspectors towards illegal exposures. As elsewhere, the most frequently used strategy is one of 'advice and persuasion' for better risk assessment and prevention, in relation to the

management process. Prosecution, including special prosecutions in relation to the fact of 'putting somebody in danger', are supported by decisions of the judiciary and the criminal courts, but are a secondary strategy. Similar findings are found in the analysis developed by Thébaud-Mony (2007), explored further in Chapter 11.

For Québec, Lippel (1988, 40–41, our translation) has summed up the weakness of the regulatory regime created by the 'Acte des manufactures' of 1885 and its heritage:

... for an employer to endanger the life or health of a worker has always been illegal, at least in theory. In practice, however, this legislation was traditionally inefficient in protecting workers' health, for many reasons. First, the legal norms regarding safety are most of the time so tolerant that they do not effectively guarantee workers' safety. Second, even when these relatively generous norms are not respected, the available resources to ensure their implementation are often inadequate or non-existent. Third, in the few cases where a penal prosecution is launched the majority of the cases are unsuccessful, either because the legal rules are found wanting, or because of the attitude of the magistrate, who is often reluctant to convict an employer. Finally, in the rare cases where the employer is convicted of a penal offence, the sanctions provided by the legislation are often ridiculously weak.

Lippel (1981–82, 353–4) also underlines the absence of a coherent and unified body of legislation on OHS until 1979 and the dispersion of OHS matters under different ministries: no fewer than 12 different administrative structures held this function between 1885 and 1979. This promoted inconsistency and confusion, and created multiple obstacles to the strict enforcement of prevention principles included in the legislation. Furthermore, the progressive content of the law was weakened by the fact that the provisions it included to make more specific regulations were not used (Lippel 1981–82, 355–6). As a result inspectors often lacked the specific legislative standards needed to enable them to take enforcement action against employers and were therefore obliged to rely mainly on persuasion (Desilets and Ledoux 2006, 34).

There was also a very low level of inspectorate presence. It took three years after the adoption of the 'Acte des manufactures' in 1885 for any inspectors to be hired. The delay was the result of the opposition of the high catholic clergy, who feared the rise of the Chevaliers du travail (the Québec branch of the US Knights of Labor), a workers' organization (Dionne, interviewed in Lamothe 2002, 9). The nomination of a chief inspector, authorized in 1893, took a further seven years; the number of inspectors grew very slowly – there were only 16 by 1932 (Pontaut 1985) – despite the rapid transformation of the economy from agriculture to

industry and services during the same period. Even as late as 1978 the small number of inspectors and their dispersion in different institutions was a cause for concern (Ministère d'État au développement social 1978, 111).

There were few successful prosecutions. According to Desilets and Ledoux's (2006) examination of the annual reports of the first three inspectors, it seems that while they were willing to use their prosecution powers, they had found that the means to do so were missing:

'Regarding the law, the fines that may be applied are so insignificant that even if the inspector wins the action, the costs of prosecuting will exceed the fine imposed on the employer.' [Our translation, Guyon 1890, 263, cited by Desilets and Ledoux 2006, 34.]

There is no detailed historical examination of the actions of the inspectorate to enforce the Québec 'Acte des manufactures' or subsequent legislation at the end of the nineteenth and the beginning of the twentieth centuries comparable to the research conducted in the neighbouring province of Ontario (Tucker 1988 and 1990). Nevertheless, more general historical studies throw some light on the activities of the Québec inspectors. For example, Desilets and Ledoux's (2006, 45, 55) examination of the annual reports of the first three inspectors concludes that the each saw their duty to be 'to protect the workers without doing harm to the acquired rights of the employers' (Côté 1890, 130). These authors observe that this philosophy was developed by each inspector, each year in their annual report. They also note that they did not seem to have much support, either from the judiciary or from the ministry. Dionne (1997) describes the efforts that were made for the 'education' of employers to demonstrate that prevention was possible.

Tucker's (1988 and 1990) in-depth analysis of the implementation of the Ontario factory regulation from 1886 to 1900 gives a more detailed understanding of inspectors' approach to inspection, and the context within which they acted. There is sufficient indication in the much more limited historical accounts of inspection in Québec referred to above to suggest that the experience there would have been broadly similar. Tucker (1988) concludes that:

... scarce resources were the most substantial external constraint on the inspectors' choice of enforcement strategy. Successful prosecutions require the commitment of resources. Violations had to be detected, evidence collected and given, and counsel instructed. In the face of limited resources, a strategy of enforcement that relied primarily on prosecutions would not have been feasible. Nevertheless, efficiency considerations did not dictate a strategy which virtually abandoned prosecution as a tool of enforcement. Inspectors might have

responded differently to the problem of scarce resources in order to maintain a more vigorous prosecutorial component to the enforcement program. [Tucker 1988, 66]

... the inspectors could have invested more effort in pursuing strategies designed to maintain a stronger prosecution component to their enforcement program. They chose not to do so. In part, this may be explained as a rational choice made in the face of external constraints, some of which directly reflected the reality of unequal class power. As well, the decision reflected a set of beliefs and assumptions about the causes of unsafe and unhealthy work conditions and the way these could be reduced or eliminated. On the whole, the inspectors believed that education was the best way to achieve compliance. [Tucker 1988, 70]

[The predominant view among inspectors was also] that there was no fundamental incompatibility between the interests of labour and capital over factory regulation; and that women, and particularly children, required special protection. From this perspective, educating workers and employers on occupational health and safety appeared to be a reasonable approach. [Tucker 1988, 83]

EMERGENT THEMES IN THE HISTORICAL ANALYSIS OF INSPECTION

In summary, what the previous section suggests is that whether one chooses to adopt a functionalist perspective such as that of Bartrip and Fenn to understand the pragmatic strategies of the British factory inspectorate to achieve compliance, or Carson's Marxist analysis of the position of the inspectorate in relation to wider society, both the development of the operational strategies of regulatory inspectorates in general and their relationship to the perspectives and perceptions of the dominant order in wider society seem to have followed a broadly parallel course in all the countries that feature in this book. That there were differences of detail and context is not in dispute, but in the end it is the similarities of the operational strategies and position of the regulatory inspectorate in different countries that is most striking. Several features emerge that are of significance. They include:

- the existence of a small inspection body with little prospect of actually inspecting much more than a minority of the workplaces for which it is responsible;
- a philosophy of 'enlightenment' in which there was widespread focus on promoting more or less voluntary compliance and thereby a prevention of injury and ill-health rather than on the enforcement of the letter of the law – in all workplaces and not just those inspected; and

... **enhancing prevention** through deployment of a mixture of advice and information, the somewhat distant threat of enforcement and the more remote possibility of punishment, and (especially in Scandinavia) through promoting a local dialogue between employers and workers.

During more recent times, again in the name of a pragmatic response to reality, regulatory agencies in some countries have started to express concern about 'reaching the hard to reach', that is having some influence on practices in those work situations, and among employers and workers that they do not inspect directly. When it is acknowledged that these are actually the majority of workplaces in any country, this concern is perhaps not surprising. However it has arisen in part as a consequence of developments in regulatory thinking in which the limits of the traditional 'command-and-control' model of state regulation have been much in focus. The significant elements of this regulatory discourse and their relevance to our concerns with the role of regulatory inspection of OHSM in the changing world of work are outlined in the following section.

CHANGING WAYS OF THINKING ABOUT REGULATION

The Robens model of OHS regulation, discussed in the previous chapter, is symptomatic of changes in the way in which regulators approach regulation more generally. Over the past few decades it has been recognized that there are significant limits to the 'command-and-control' approach typified by the traditional model. Increasingly regulatory scholars argue that these traditional approaches to regulation are no longer effective (that is, they no longer achieve the goals of the regulatory system, if indeed they ever did), and that a principal reason for this is that the social systems that they seek to regulate have become too complex and diverse to be managed by a purely state-centred, 'top-down' approach (see Burris et al. 2008, 42). No longer do we accept the clear divide between the public sphere (the realm of governance or regulation) and the private sphere (the realm of the governed) (Burris et al. 2008, 3-4). States have lost their monopoly on the regulatory functions, and many agencies (including non-state actors such as NGOs, corporations and trade unions, insurance associations and markets) regulate the activities of others (that is, they are sites of governance, governing through a variety of forms of power).

OHS regulation has not been immune to these changes in regulatory thinking. Indeed, the Robens Report itself, as we have noted above, was critical of the command-and-control model, and argued (Robens 1972, 12) that:

There are severe practical limits on the extent to which progressively better standards of safety and health at work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system. ... The objectives of future policy must therefore include not only increasing the effectiveness of the state's contribution to health and safety at work but also, and more importantly, creating the conditions for more effective self-regulation.

Robens envisaged a greater involvement of work people in OHS, including 'constructive discussion, joint inspection, and participation in working out solutions' (Robens 1972, 21). Many, including the authors in this book, have been critical of the Robens Report's failure to understand the inequalities of workplace relations (see Gunningham and Johnstone 1999, 9; Walters and Nichols 2007, 13-23), and OHS statutes in countries like Sweden and Australia have gone beyond the Robens' approach of 'consultation' with work people to vest health and safety representatives with powers to stop dangerous work and to issue 'provisional improvement notices'.¹ However, the point remains that the new-style OHS legislation developed in Europe, Canada and Australia after the Robens Report involved 'the regulation of self-regulation' and established models in which 'the state withdrew from taking full and primary responsibility for the working environment, increasing the responsibility of self-reliance of employers and employees' (Wilhagen 1994, 350-54). It is perhaps important to acknowledge that the 'withdrawal' envisaged by Robens is not necessarily synonymous with the 'withdrawal of the state' that scholars attribute to neo-liberalism and globalization (although it may have subsequently become so). During the period in question, in many jurisdictions it was regarded by policy-makers – and by at least some stakeholders – as the development of something more, in addition and aside from the state, a form of 'empowerment' in line with community health experiments, citizens movements, and so on. Such discourse over the 'empowerment' of the 'workplace' was only to be overwhelmed much later in the context of an

¹ Although such rights are seldom used in practice. In Sweden, they are invoked on average some 50-100 times a year for example. They nevertheless add an ultimate tool for safety representatives to secure the intended normative influence on their managers that is supported by their extensive rights of a dialogue.

increasingly pervasive neo-liberal political ideology that demanded the withdrawal of the state.

In this 'reflexive' approach to regulation, law no longer takes responsibility for substantive outcomes (as it did, in theory at least, in the traditional, command-and-control approach described earlier in this chapter), but rather law is one of many closed, self-referential sub-systems and seeks to use indirect means to achieve broad social goals. In particular, OHS regulation now seeks to encourage organizations to establish processes of internal self-regulation to monitor, control and replace economic activities that undermine the health and safety of workers, and to 'partially resolve the conflict between business priorities, legal obligations and OHS management concerns' (Gunningham and Johnstone 1999, 9, discussing Wilthagen 1994). But there remain major questions about the extent to which such encouragement results in improved practices of OHSM as well as about the nature of the preconditions necessary to support such ends. These questions are addressed in the case studies of experiences in different countries that are discussed in subsequent chapters.

Another strong strand in regulatory thinking about enforcement emphasizes the importance of 'risk-based' enforcement to ensure that enforcement strategies are both:

- effective – in the sense of 'directing regulatory resources where they can have the maximum effect on outcomes' (Hampton 2005, 4); and
- efficient – by allocating inspectoral resources most efficiently to reduce compliance costs and regulators' administrative costs, and by ending 'unnecessary inspections or data requirements on less risky businesses, identify[ing] businesses who need more inspection, and release[ing] resources to improve broader advice services' (Hampton 2005, 4).

Black and Baldwin (2010, 181) describe 'risk-based regulation' as

collections of strategies that, at the very least, involve the targeting of enforcement resources on the basis of assessments of the risks that a regulated person or firm poses to the regulator's objectives. The key components of such assessments are evaluations of the risks of non-compliance and calculations regarding the impact that the noncompliance will have on the regulatory body's ability to achieve its objectives. In its idealized form, risk-based regulation offers an evidence-based means of targeting the use of resources and of prioritizing attention to the highest risks in accordance with a transparent, systematic, and defensible framework.

A risk-based approach to enforcement means that inspectorates move away from random inspections to more targeted intervention, focusing on firms (and industries) creating the most health and safety risks at work. (For an overview of different approaches to targeting, see Fookes et al 2007, 37–41.) Of course, one danger of risk-based enforcement is that it means that regulators will not be doing things that they had done in the past (Baldwin and Black 2008, 66).

Risk-based regulation is widely accepted in the UK (see Black and Baldwin 2010) and elsewhere. The Australian Productivity Commission (2010, 118) concluded that Australian OHS regulators take a targeted or risk-based approach to enforcement. Interesting examples of risk-based approaches to OHS enforcement can also be found in the US Occupational Safety and Health Administration's (OSHA) *Site Specific Targeting Inspection Program* (SST) (see OSHA 2009 and Johnstone 2004a, 160–62) and the approaches to inspection taken by the UK Health and Safety Executive and the Danish OHS inspectorate (see Gunningham 2007b, 100–102, Jensen and Jensen 2004).

A further theoretical framework, which has strongly influenced thinking on OHS regulation since the late 1990s, is 'responsive regulation' (see especially Ayres and Braithwaite 1992). Responsive regulation has many dimensions and components, but for present purposes we are interested in its influence on the OHS inspection and enforcement debate. A theory of responsive enforcement has developed out of the impasse in the punish–persuade debate, which we discussed earlier in this chapter. Regulators have increasingly realized that an approach based entirely on strong penal enforcement may produce a culture of regulatory resistance among some employers, including employers who are prepared voluntarily to improve OHS. Regulators are also beginning to accept that reliance simply on informal measures can 'easily degenerate into intolerable laxity and a failure to deter those who have no intention to comply voluntarily' (Gunningham and Johnstone 1999, 112). Consequently, responsive enforcement opts for a judicious mix of both 'punishment' and 'persuasion' (see Rees 1988; Ayres and Braithwaite 1992; Braithwaite 1993; Scholtz 1984; Nonet and Selznick 1978; Sigler and Murphy 1988 and 1991; Carson and Johnstone 1990; Gunningham and Johnstone 1999) and argues that regulators 'should be responsive to the conduct of those they seek to regulate', or more particularly, 'to how effectively citizens or corporations are regulating themselves' before 'deciding on whether to escalate intervention' (Braithwaite 2002, 29; Ayres and Braithwaite 1992).

Responsive enforcement gives OHS regulators a framework to react appropriately and effectively to the 'motivational diversity' (see Ayres and

Braithwaite 1992, 20–35) demonstrated by firms faced with OHS regulatory requirements. That is, some firms will comply with OHS legal requirements out of a sense of duty; others if they can see a 'business case'. Some duty-holders will need mild enforcement action to spur them on to improve OHS. Others will not comply unless strong enforcement action is taken against them, or at least threatened. For this reason, credible enforcement must include a significant deterrence component, but this must be targeted to offenders and circumstances where 'advice and persuasion' have failed, and where deterrence is likely to be most effective. Strong enforcement measures are also required against the irrational and the incompetent.

An interactive and graduated enforcement response employs advisory and persuasive measures at the bottom, mild, administrative sanctions (improvement and prohibition notices and on-the-spot fines) in the middle, and punitive sanctions (prosecution) at the top. Regulators should start at the bottom of the pyramid assuming that business is willing to comply voluntarily. Where, however, this assumption is shown to be ill-founded regulators should escalate up the enforcement pyramid to increasingly deterrence-oriented strategies, and, if necessary, 'an incapacitative response' (Braithwaite 1993, 88).

Implicit in these ideas are also some notions concerning the reach of regulation. In modern societies in which communication is highly developed, the necessity for a business undertaking to actually experience an inspection in order to be aware of regulatory requirements and the potential consequences of non-compliance is far less than in former times. However, there are nevertheless significant implications for the communications strategies of regulatory agencies if they are to reach beyond the inspected and have an impact on health and safety elsewhere.

Despite the development of these theories, however, there is a wealth of critical literature that suggests that practices in many countries lag behind the theory (Nichols and Armstrong 1972; Woolf 1973; James and Walters 1999 and 2005; Tombs and Whyte 2007; Åmark 1990; Larsson 2000). This is certainly the case in the five countries on which this book is based and subsequent chapters offer some explanation of why this is so.

REGULATORY INSPECTION RESPONSES TO THE CHANGING WORLD OF WORK

A further challenge to traditional regulatory thinking is found in one of the more prominent features of globalization. Where production has been

outsourced from highly regulated advanced market economies to under-regulated newly industrializing ones, the limitations of both state regulation and market-based private regulation have been especially apparent. These problems have led to further thinking concerning what might be the form and role of regulation most appropriate to address these scenarios, and – linked to this – on the nature and role of inspection and surveillance in these situations and also in hard-to-reach situations more generally (see for example, O'Rourke 2003; Rodriguez-Garavito 2003; Heckscher 2006; Weil and Mallo 2007). For this is not just a problem relating to capital located in advanced market economies outsourcing production and labour costs to newly industrializing countries. Research documents how outsourcing, for example in textiles, transport, food and construction, leads to exploitation of labour, and to poor health and safety conditions in the midst of advanced market economies, and such exploitation and poor working conditions lie for the most part well beyond the reach of traditional labour inspection bodies in these countries (Walters and James 2009). What regulatory inspection bodies are able to do to address this challenge remains uncertain as we will explore in greater detail in several of the case studies presented in the following chapters.

However, to do so they also need to take account of the changing structure and organization of work that we very briefly described at the end of the previous chapter.

Government agencies responsible for OHS (see for example NIOSH 2002 and more recently, IALI 2008 and EAOSH 2009) have become increasingly aware of the challenges posed by these changing work arrangements. Modern OHS legislation (including that based on the Robens model) was largely framed on the presumption of permanent (and unionized) workers in large workplaces and legislators have been slow to accommodate to new challenges. The situation is exacerbated for inspectorates by their limited resources, policy gaps and administrative complexities (Bernstein et al. 2001; Quinlan 2004; Lippel 2005). Sub-contracting, franchising, second and third level suppliers and the use of agency workers all create more complex webs of legislative responsibilities in the workplace, with multiple employers or responsible parties – a situation complicated further by joint venture arrangements or use of the corporate veil (Johnstone 1999; Johnstone, Mayhew and Quinlan 2001; Johnstone and Wilson 2006; Bluff and Johnstone 2003; Hasle 2007). The growth of smaller and more fractured work situations (with consequent effects on union representation) has undermined the legislative structures for worker involvement in OHS of many countries (Johnstone, Quinlan and Walters 2005), while growth of

home-based work (and of home-care), transient and remote work, including telework, poses particular logistical challenges for inspectorates (Montreuil and Lippel 2003; HSC 2001).

Few inspectorates have sought to deal with the adverse effects of downsizing and/or restructuring even when such changes are made without risk assessment or consultation with workers' representatives (Quinlan 2007). Action has largely been confined to addressing psychosocial hazards linked in part to these changes, most notably bullying and occupational violence. Inspectorates have also produced codes and guidance material dealing with temporary and agency work, call centres and sub-contracting. The use of elaborate supply chains and contracting networks presents particular challenges and has occasionally led to new forms of regulation (Nossar, Johnstone and Quinlan 2004; James et al. 2007; Walters and James 2009) but at present these address only a tiny fraction of the workplaces and industries affected by such changes. Few agencies have taken action with regard to older workers and actions in relation to younger/new workers and foreign-born workers (most often in the form of information and targeted campaigns) largely overlook the fact that these workers are concentrated in contingent jobs.

CONCLUSIONS: THE CHALLENGE FOR OHS INSPECTION

In this chapter we have examined some past and present thinking about regulation and regulatory inspection that we think is pertinent to our inquiry into inspection and enforcement of regulatory requirements governing employers' arrangements for managing health and safety at work. We discussed current theories concerning the nature and place of these matters in advanced market economies and have considered their relevance to our interest in the relationship between inspection and the management of health and safety in a changing world of work.

In short, we find that regulatory theory has developed significantly since the 1970s, and our discussion above indicates that OHS regulation has been at the forefront of many of these changes – particularly in shifts in approaches to standard setting from specification to process standards, and in greater involvement of 'third parties' in the regulatory framework. This development is much more explicitly discussed in writing in English than in other countries. Yet, the underlying changes have occurred everywhere. The principal aim of this book is to examine whether, and to what extent, OHS inspection and enforcement in a selection of developed countries has advanced to support these other regulatory developments, and if so, what

are the preconditions necessary to ensure such support and the barriers that might prevent it? One such barrier clearly concerns the way in which the organization of work has changed over the same historical period as these regulatory theories have evolved. We therefore need to explore the extent to which OHS regulators have responded to such change.

At the same time, it is inescapable that in recent decades governmental appetite for regulation has waned considerably in most countries, in parallel with the rise of varying degrees of neo-liberal economic strategies. OHS regulation has been strongly affected by the non-regulatory or deregulatory orientations of national and international governance in two main ways. First, existing regulatory frameworks have been modified in various ways to allow more freedom to capital. Second, resources for inspection have been reduced in one way or another in most countries. These developments present further challenges to the means with which regulatory inspectorates are able to inspect OHSM arrangements.

These trends are described in their various different manifestations in the chapters that follow. In each of the national settings presented, it is clear that the wider political economy of OHS regulation has functioned as a major influence on the ways in which regulatory theories are played out in practice and on how inspectorates charged with seeking compliance with health and safety regulations operate. The chapters draw on various methods (including empirical investigation and literature reviews), outline case studies, and examine a range of issues, including how inspectors are recruited, trained and organized to carry out inspection of OHSM in relation to both general and specific issues such as stress management, managing hazardous substances, musculoskeletal disorders (MSDs) and others. The case studies explore how the practice of inspection occurs and how its impact is perceived by the subjects of inspection. They examine how inspection addresses, for example, the management of psychosocial risks, the hidden exposures to risks experienced by contingent and precarious workers and strategies for reaching the so-called 'hard-to-reach' firms and 'vulnerable' workers. They further consider resource and policy issues that determine inspection practice, the communications strategies of regulatory agencies and how inspection reaches the non-inspected as well as the inspected. They examine inspectors' perceptions and regulatory agency strategies in the face of the increasingly 'porous' networks of production and services that are replacing more traditional forms of work and in relation to the potential role of other actors in civil society in maintaining and improving approaches to health and safety management. Similarly they examine inspector attitudes and experiences as well as regulatory agency strategies in the face of supply-oriented business strategies and

explore the extent to which processes thus engendered are used by inspectors in their interventions to improve health and safety management. They address how OHS inspectors go about inspecting the quality of an organization's systematic OHSM, how, or indeed if, they use diagnoses of such quality to ensure that only 'good' firms with sound management of their OHS – for example through effective management systems – are left to self-regulate, and 'poor' performers receive greater attention from the regulator. In all cases, they consider, how and with what results, changing work relations, including the changing ways in which firms have configured themselves, are accounted for in the ways inspectorates conceive and apply their approaches across the widely differing work relations, organization and structure that characterize the nature of economic activity at the present time.

To reiterate, against the contextual background provided in this and the previous chapter, the central question with which the forthcoming case studies are concerned is how, to what extent and with what effect, have regulatory inspectorates and their inspectors responded to changes in the environments in which they intervene to seek compliance with regulatory standards on (managing) health and safety at work. The case studies provide the empirical evidence to help answer this question, and to test the relevance of the regulatory theories explored in the present chapter. Along with the background covered here they will also help place these answers in the wider context of the political economy of regulation and the impact of business, work and societal reorganization on regulatory inspection.

PART II

National experiences

The ILO Convention No 81 on Labour Inspection 1947 is one of the most ratified of all ILO Conventions. Despite this, systems for the regulatory inspection of health and safety at work still vary considerably between countries. Although there are common themes in the regulation of health and safety management found in most advanced market economies, regulation in this area nevertheless differs in detail and focus in different countries. National regulatory styles and the nature of political and economic systems that form the backdrop to regulatory inspection of OHS management (OHSM) in different countries also all have special features, as do national labour markets and the structure and organization of production and services. Partly to take account of these differences, but also to explore the common themes that emerge despite them, in this part we examine issues confronting regulatory inspection of OHSM in five different countries, including Australia, Sweden, the UK, the Canadian province of Québec and France.

We will devote one or two chapters to each of these countries, in which we will outline salient features of both the regulation of OHSM and its inspection in each case. We will consider the national environment and context of regulatory inspection in each country and review the evidence of its experience in order to address wider research questions concerning the role of regulatory inspection in improving arrangements for managing workplace risks and improving health and safety outcomes for workers in times of quite fundamental change in the structure and organization of work in the globalized economy.

However, these national accounts presented represent something more than just a comparative analysis of the experience of the same issues across five countries. As we have already indicated, the nature and context of regulatory inspection of the management of health and safety embraces

quite a complex range of issues. We have therefore taken the opportunity presented by this national focus to highlight particular issues in different countries, and have taken particular advantage of what we find to be greater understandings of certain of these issues in some countries. Therefore, Chapters 4 and 5, on Australia, and 6 and 7, on Sweden, provide the opportunity to present empirical data from field research on the regulatory inspection of OHSM in these countries, which enables both a rich analysis of these experiences and provides material for further comparative analysis in the context of the experiences detailed in other country chapters. Chapters 8 and 9 consider the evolution of policy and practice on inspecting OHSM in the changing political, resource and economic environments characterizing the UK in recent decades. Chapter 10 gives an account of the long-term development and implementation experience of a particular strategy aimed at regulating OHS management in Québec, while in Chapter 11 we focus especially on the relationship between labour inspection and the largely hidden experience of occupational ill-health (in this case measured by the incidence of cancer) among precarious and casual workers in France.