



“DANGER: CONSTRUCTION AT WORK”

Own Motion Investigation by the
Office of the Complaints Commissioner
June 2012



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OWN MOTION INVESTIGATION BY THE OFFICE OF THE COMPLAINTS
COMMISSIONER

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“DANGER: CONSTRUCTION AT WORK.”

“An investigation into the ability of the Department of Labour and Pensions (DLP) – formerly the Department of Employment Relations (DER) – to effectively and properly oversee, inspect and ensure Health and Safety at work for those involved in the construction industry, as mandated under the applicable Law and Regulations”.

COMMISSIONER'S INTRODUCTION

The photograph on the cover of the Report depicts the collapse of scaffolding outside of the Anderson Square building on 4 June 2010. It is important to state right at the outset that this scaffolding collapse was not the fault of the then Department of Employment Relations (DER); indeed, 2 days before this incident happened, two senior DER staff members warned them about the need for secure ties for the scaffolding – both inward ties (scaffolding to building) and outward ties (scaffolding to ground). On being warned, the attitude was reportedly nonchalant. According to a former senior member of DER staff, scaffolding issues were and are still very common.

However, this photograph is emblematic of the state of Health and Safety in the construction industry in the Cayman Islands – a regulatory infrastructure which, if not improved, could collapse at any moment. Despite the reorganization of DER into two departments, one of which, the Department of Labour and Pensions (DLP), deals with health and safety matters, the situation remains the same today.

The OCC acknowledges that, whilst there is room for improvement, the Labour Inspectors are generally doing a good job despite being hobbled by inadequate resources. Three OCC staff attended Occupational Safety and Health Administration (OSHA) Courses run by the then DER in December 2010 and February 2011, and all were awarded certificates by the Honourable Minister Anglin. As Complaints Commissioner, I also endorsed the course, and my remarks praising the course were reported in the media (“DER in push to improve workplace safety” – May 6 2011). My endorsement was repeated in the OCC press release dated 19 August 2011 launching this investigation: “I want to make it clear at the outset that, at present, the Labour Inspectors responsible for Health and Safety are doing good work within the financial and other resource constraints under which they operate. OCC staff has also attended Health and Safety courses run by DER and are now OSHA certified, and as Commissioner I am on record for praising course content”.

However, this should not be seen as a charter for complacency. The proper and effective regulation of Health and Safety in construction affects not only workers employed in this industry, but also members of the general public who could be injured – or worse – from

falling masonry, unsecured scaffolding (as in the Anderson Square scaffolding collapse) and other Health and Safety breaches. This concern for the safety of the general public as well as the employees is one shared by the Cayman Contractors Association.

The OCC will monitor all recommendations made for compliance.

POWERS OF THE OCC

The aim of the Office of the Complaints Commissioner is to investigate complaints against government in a fair and independent manner in order to determine whether injustice has been caused by improper, unreasonable, or inadequate government administrative conduct, and to ascertain the inequitable or unreasonable nature or operation of any enactment or rule of law.

Sec.11(1) of the Complaints Commission Law (2006 revision) empowers the Commissioner to launch an investigation without first receiving a written complaint (i.e. of the Commissioner's Own Motion) for a particular issue that is deemed as having special importance which then makes an investigation by the Commissioner desirable in the public interest.

EXECUTIVE SUMMARY

a) Reasons for investigation

Health and Safety issues are wider than just those that particularly affect the construction industry, and it is true that Health and Safety, even taken as a whole, is only one aspect of the work of DER and DLP over the period covered by this Report, 2005- 2012. It is also true that at a time when there are constraints on all sorts of resources, all government departments are expected to do more with less. **However, the construction industry is in a category of its own. It is a high-risk industry, and there is no price that can be placed on human life. Of all the work the Department undertakes, any failings on their part in this area have the potential to be the most damaging to its reputation.** Put plainly, if there is an accident on a construction site due to negligence or failure to comply with Health and Safety standards that could have been prevented by a more robust programme of inspections, it is possible that not only the offending construction company, but also the Department and the Ministry, could be subject to legal action. At the very least, the resulting negative publicity would concentrate the minds of the public on a Departmental failing rather than any of the other good work it has done and continues to do.

b) Scope of the Investigation and Terms of Reference

The Terms of Reference of this investigation are: “An investigation into the ability of the Department of Labour and Pensions (DLP) – formerly the Department of Employment Relations (DER) - to effectively and properly oversee, inspect and ensure Health and Safety at work for those involved in the construction industry, as mandated under the applicable Law and Regulations” – including examining the effectiveness of existing legislation, and the role of other entities in contributing to proper regulation.

c) Findings

FINDING: Whilst the OCC would strongly support amendments to existing legislation, there is a corresponding duty on Labour Inspectors to cooperate, and work more closely, with the Government Legal Department in a timely fashion, in particular with regard to the delivery of complete instructions and the collection of files. The Department should also be more proactive in looking for matters to prosecute where warranted.

FINDING: OCC interviews with DER staff clearly demonstrated that, as of 2011, there was far less awareness amongst existing DER staff of the importance and effect of these international laws and conventions, and their attendant obligations, than there should be. Unfortunately, there is nothing to indicate that the level of knowledge in this area is any greater since DER became the Department of Labour and Pensions. This must be addressed in training; ignorance should not be seen as an excuse.

FINDING: There is a wealth of collective experience in DLP (formerly DER) but the Department must better demonstrate its professionalism across the board if they are to get and maintain the respect of members of the public and persons in the industry (both employers and employees) alike. Labour Inspectors must carry out more proactive investigations, improve the quality of reports where necessary, maintain valid OSHA training certificates, minimize time spent on negotiations, and conduct a comprehensive outreach programme which must have the full and active involvement of those at Assistant Director level and above.

FINDING: The filing system used by DER and still used by the restructured DLP is both inadequate and inefficient for the needs of the Department, and the Departmental database is not configured in a way that would help the Department to achieve best practice and optimize its efficiency.

d) Recommendations

The intent of the OCC Recommendations is to ensure that Health and Safety in the construction industry is properly and effectively monitored by the Department of Labour and Pensions (formerly the Department of Employment Relations). DLP, like DER before it, is doing as much as it can with limited resources, both financial and personnel. The Labour Inspectors are by and large very committed, but they are inadequately resourced for an important role which, although ultimately protecting the lives of both workers and members of the public, has been reduced to just one of many job functions. The OCC Investigation has taken a 360 degree approach. As a consequence, the recommendations not only impact on the Department but on wider aspects of Health and Safety in this particular area.

The new DLP Director has only recently been appointed to lead this newly restructured Department. **With the new Department in its infancy, this provides the best possible opportunity to implement the following OCC recommendations, thereby demonstrating a clear commitment to proper regulation in this area not only to those involved in the construction industry and members of the public, but also internally to staff.**

DLP

1. DLP should establish a dedicated Health and Safety Unit. This is perhaps the single most important recommendation. Even a small unit comprised of two Labour Inspectors, one senior, would enable them, and DLP as a whole, to be more proactive – preventing accidents from happening rather than reacting to incidents after the fact. The Unit would be able to do more workplace inspections without notice (a proven way of increasing workplace safety), and conduct public education, outreach and training to contractors.

2. Training should be brought and kept up to date. OSHA certification, or its equivalent, for Labour Inspectors is crucial, but training must also include instruction on the relevant ILO conventions, CARICOM Labour Laws and other international obligations. As of December 2011 there was far less awareness amongst existing DER staff of the importance and effect of these international laws and conventions, and their attendant obligations, than there should be. Ignorance would not be seen as an excuse.
3. Better resources, equipment and transportation, including, but not limited to, oxygen meters, light meters, noise level meters and HD cameras. All of the above are essential professional tools enabling Labour Inspectors to properly conduct inspections and otherwise discharge their duties in this area.
4. DLP must cooperate, and work more closely, with the Government Legal Department in a timely fashion, in particular with regard to the delivery of complete instructions and the collection of files. The Department should also be more proactive in looking for matters to prosecute where warranted.
5. In the professional opinion of Samuel Goolsarran, author of the Goolsarran Report, when interviewed for this investigation, any labour inspector owning or running a construction company would be guilty in his view of a serious professional breach. This could be a conflict of interest, and would tend to demonstrate a less than professional approach to the work; indeed, there is clear evidence with at least one former employee that this has been flouted in such a way that created a clear conflict of interest. This opinion was also shared by one of the victims of a construction accident interviewed for this report (see section 8(d), *post*). The OCC agrees with this, and **recommends** that no new staff employed by DLP may own, run, or have a substantial interest in a construction company. However there may well be existing Department staff that are thus engaged in the construction industry outside their core work for the Department, and to either dismiss them or ask them to immediately relinquish their interests in such companies would be too draconian. The OCC therefore **recommends** that all existing DLP staff, at

whatever level, should sign a Register of Interests with a continuing obligation to keep it updated, with failure to do so being considered a disciplinary offence. The OCC is aware that Departmental staff are already expected to declare such interests but this has proven ineffective as currently operated.

6. Contrary to the recommendation in the Goolsarran Report, Labour Inspectors should move back from being generalist to being specialists, especially where Health and Safety is concerned. This is a view supported by the Ministry but has yet to take place in any practical way
7. DLP must set up a better filing system and/or more comprehensive database. This would not only assist staff internally, but would also greatly assist in the preparation of files before they are referred on to the Government Legal Department.

LAW

8. The following are specific legislative changes recommended by the OCC:
 - The Director should have the power to close an entire worksite under S.65(6) of the 2007 Labour Law.
 - All companies, no matter what size, must keep records, and Labour Inspectors should be able to go back more than 2 years when examining records.
 - Increase current fine levels (separate from administrative fines) and other penalties to a level where they are a painful disincentive to compel employers to comply with the law. This concurs with Goolsarran's strongly held view that penalties have to be meaningful – "an incentive to keep the law, and a disincentive to break it".
 - Charities and non-profit, non-commercial organizations should be covered by the Labour Laws and Regulations.
 - Failure by a company or an organization to appoint a Safety Officer should be an offence under the Labour Law and/or Labour Regulations.

9. Consideration should be given to enacting as soon as possible the 2004 Employment Law, Part IX (sections 60-72) of which specifically deal with Health, Safety and Welfare.

OTHER AGENCIES

10. The former DER had a good working relationship with both the Department of Planning and Cayman Contractors Association, and it is to be hoped this will continue under the new DLP. However, there must be better and more effective communication and liaison between DLP and Immigration; Environmental Health; Trade and Business Licensing Board; the Department of Commerce and Investment; Lands and Survey; and all other relevant government entities – **whilst simultaneously taking great care to underscore and emphasise the independence of the DLP, particularly in matters relating to Health and Safety.**
11. Employers who routinely and deliberately flout their legal Health and Safety obligations, therefore risking the lives of their workers and possibly innocent passers-by should not be awarded Trade & Business Licences and/or Work Permits.

OTHER

12. A driver should only be allowed to operate a crane or forklift truck if they are certified to do so. At present, persons driving such equipment need only a Group 4 Licence.
13. Protection of whistleblowers - the Law should be changed to allow penalties for victimization in order to protect reporters of wrongdoing (AKA “Whistleblowers”). This would also help to underscore the seriousness with which unsafe practices, which could endanger the lives of construction workers and members of the public alike, are viewed. **However, it must also be noted that a number of both current and past members of the Department have expressed concerns with the level of confidentiality within the Department itself. This is unhelpful, unfortunate and unprofessional. There is little**

point in legislative change in this area if this continues to be a problem within the new DLP.

WHY HEALTH AND SAFETY IN CONSTRUCTION? BACKGROUND TO THE INVESTIGATION

The area of Health and Safety, particularly as it affects construction workers, is ripe for abuse by unscrupulous employers and contractors. Workers in this field, both Caymanian and expatriate, are generally poorly paid. A significant number of construction companies are small to medium-sized businesses, many of which are family owned and operated. A Caymanian worker, if injured in a family business, is extremely unlikely to complain no matter how serious the injury. Non-Caymanians injured as a result of their employers' failure to comply with their Health and Safety obligations, have in some instances had their work permits revoked, been summarily dismissed and forced to return to their country of origin.

This Report covers the period from April 2005 to April 2012. After the destruction of Hurricane Ivan, the following seven months saw a boom in rebuilding and construction. Even though a decline in construction from the post-Ivan boom was inevitably to be expected – in fact, statistics show that construction overall has declined from 2005-11 - this will not always be the case. If, throughout this period, as is clearly shown throughout this Report, Labour inspectors from DER/DLP were and are unable to carry out sufficient workplace inspections and other duties to effectively and properly oversee, inspect and ensure Health and Safety at work to date, what will happen when the economy improves and construction increases again? This is of particular concern with regard to larger building projects involving countries whose record on health and safety in this field does not even reach the standard of that in the Cayman Islands.

The OCC is aware that DER is now DLP. However, as the Report will show, just because the acronym has changed, the more fundamental changes needed to enable the Labour Inspectorate to properly deal with Health and Safety issues have not taken place. On 7 February 2012, Ministry Chief Officer Mary Rodrigues was quoted as stating that the department restructuring

would be done “within existing budget allocations for the ministry”. (“Government Labour and Pensions Office Soon Come”, Caymanian Compass). If that is indeed the case, and no additional monies are allocated, such changes that are proposed will be largely cosmetic, of minimal effect and will fail to address the deep-seated issues that have prevented effective and proper regulation in this area to date.

THE OCC INVESTIGATION: Methodology

The investigation was formally launched on 19 August, 2011, following preliminary research in order to assess both the viability of such an investigation, and to determine whether such an investigation was in the public interest. To demonstrate complete fairness and impartiality, the OCC has taken a 360 degree holistic approach to this investigation, interviewing and conducting research not only among Labour Inspectors past and present, but also with the CCA who represent the interests of contractors; victims of construction accidents; senior civil servants within and outside the Ministry ultimately responsible; lawyers and lawmakers; and internationally known experts in the field. Formal interviews and informed discussions took place with many interested parties, including:

- current and former staff of DER (now DLP), including Directors / Heads of Department
- a former Government Minister.
- current and former Chief Officers,
- current and former Deputy Chief Officers
- the Attorney General,
- the Director of Public Prosecutions (DPP) (formerly Solicitor General)
- victims of construction accidents,
- Health and Safety experts in the private sector,

- A legal author and expert in the field
- Chief Building Control Officer, Planning Department
- Samuel Goolsarran, author of the Goolsarran Report commissioned by the Ministry in 2007.
- President, Cayman Contractors Association
- Former Crown Counsel, now Deputy DPP

Despite repeated requests from the OCC, the current Minister chose not to assist this investigation by making himself available for interview.

Information has been gathered from, amongst other sources, the Labour Laws of 2001 and 2007; the Labour (Occupational Safety and Health) (Construction Industry) Regulations 2008; the International Labour Organization Conventions in force from 2005 and currently; the Goolsarran Report 2007; legal articles; press articles; and internal Government documents.

The OCC also dip-sampled existing open case files and closed files within the Department.

Not counting preliminary inquiries, approximately 1100 hours of OCC analysts and Commissioner's time has been spent on research, evidence gathering, writing and editing this report.

PAST: The Promise

The devastating damage caused by Hurricane Ivan in September 2004 led to a need for massive rebuilding in the Cayman Islands. As a consequence, the number of construction companies grew very rapidly over a short period of time. Although there are no reliable statistics for the period, it is estimated that, before Hurricane Ivan, there were approximately 100 construction companies in the Cayman Islands; immediately after Ivan, this grew to approximately 260 companies and, according to a former member of DER staff, if one included sole traders (persons

holding themselves out as working in construction but not registered companies) this figure was as high as 700. The main problem with compliance was with the smaller companies and sole traders.

On 13 April 2005 the then Director of DER, Walling Whittaker, issued a press briefing on Occupational Safety and Health Concerns in the Construction Industry. At the conclusion of the briefing, those present were informed of a 2 day Health and Safety workshop that was to be held the following month, but the briefing started with a worrying description of the position as it then was, and the Department's stated commitment to change:

“During the period from August 2004 to March 2005 the number of construction workers on Grand Cayman has increased by 460% from 803 to 4496.....Most of these workers are likely untrained and many of the newly established construction companies are working with unsafe operating practices. This situation has created a high risk for accidents to occur, and regrettably we have already seen two deaths and several serious injuries in the construction industry, and I am very concerned that more deaths and more injuries will occur unless a serious effort is made to correct many of these unsafe work practices.....We expect that **every employer** will be aware of their obligations under the current law, because we will be carrying out safety inspections to ensure compliance with the Law. Due to the high incidence of accidents now occurring, **non-compliance will not be tolerated.** These inspections will focus on the construction industry, but we will also include other high-risk industries. All employers are encouraged to carry out a risk assessment of their operations to ensure that work is being done in accordance with the highest standards of safety in their particular industry.” (Emphasis in bold is that of the Director)

In a press article of the same date (“Construction injuries increase”), in a bid to combat fly-by-night firms which had sprung up in the preceding 6 months, Director Whittaker reminded all employers of their obligations under S.57 (1) of the then 2001 Labour Law to register their companies with DER within a month of commencing operations – a requirement that, up until that point, had been routinely overlooked. He confirmed that, although there had been concerns about construction sites before Ivan, the storm had brought the matter to a head with so much work requiring to be done at the same time. He also confirmed that, as well as the 2 deaths, there had been many other injuries including fractures, lacerations, chemical splashes, burns, shocks

and accidents involving the loss of digits, and appealed for anyone with concerns about safety in the workplace to come forward.

According to a former member of staff who was employed in DER before, during and after Hurricane Ivan:

*When I first took the role there was no Health and Safety Inspector. It was all Labour Inspectors. What they focused more on was the Compliance Section of the Law. Making sure that everyone abided by the Law – that was their area to basically enforce it and also educate people on the law at the same time. **It was not until after IVAN that they started looking into Health & Safety itself and that was when they decided that they needed to start building on that part of the Law.***

Walling Whittaker agrees: *Before I came to the Department, there was no Health and Safety component. I came there, identified the problems and felt I had a legal responsibility under the Labour Law to do something about this. I remember.....expressing concern about “Johnny come lately” construction companies. Doing something about Health and Safety helped to establish and underscore the relevance of our department to outside bodies (i.e., businesses, Cayman Contractors Association). I wanted staff to get trained up in Health and Safety. I got an OSHA certified trainer to do this. I got them all [Labour Inspectors] certified, so not only were they trained but they could train people on construction sites.I also got the Department some inspection equipment. A Health and Safety manual was put together and in use whilst I was there.*

Director Whittaker also claimed that, before Hurricane Ivan, there were also no records kept of workplace fatalities or serious injuries until after Hurricane Ivan, in 2005, when both Public Health and the RCIPS started keeping records.

DEPARTMENT OF EMPLOYMENT RELATIONS 2005 – 11: the reality.

Most of the staff employed by the Department during the period covered by this Report have been in post for several years. For example, one current staff member, Assistant Director Robert Whittaker, has now been so employed for over 21 years and thus has seen the transition from the Department of Labour, to DER, to DLP (the Department was restructured at the end of 2001 and renamed DER under the Directorship of Mr. Walling Whittaker and recently restructured again in February 2012 and renamed DLP under the present Director Mr. Mario E. Ebanks.)

This could potentially be a solid foundation upon which to build - according to one senior Labour Inspector, Gene Hydes, “*We have over 80 years of collective experience...*” in the Department. By the same token, entrenched patterns of working which are not helpful can also become entrenched over a number of years.

a) Inspection and Enforcement

Two months after Walling Whittaker’s press briefing, a draft Occupational Safety and Health Code of Practice for the Construction Industry was published on 28 June 2005. This was timely, not only because of the figures referred to above, but also because the number of construction companies, according to Trade and Business Licensing records, had reached 760 by 1 July 2005. Construction companies were given 3 months to comment on the guidelines by DER. In order to instill “a culture of safety”, as Mr. Whittaker described it, a safety training programme for companies would take place in August, and in October 2005 DER intended to start a worksite inspection programme.

The draft Code of Practice subsequently became the Health and Safety at Work: Safety Policy for the Construction Industry. DER and the Cayman Contractors Association, among others, worked closely on this policy, which was to be implemented in 3 separate phases year on year from 2007-2009, with phase 1 intended to take effect from November 2007.

Both during the period 2005-11, and as of the time of date of the Report, Labour Inspectors have very little enforcement powers. They have the power to conduct worksite inspections without notice under S.73 (1) of the Labour Law 2007 (also S.73 (1) of the Labour law 2001) and S.11 of

the Labour Law Regulations 2008. But whilst inspections do not have to be done on notice, Labour Inspectors have on occasion been refused entry to a site.

Labour Inspectors also have the power to issue a Remedial Notice under S.65 of the Labour Law 2007 (also S.65 of the Labour law 2001), where deemed necessary and appropriate, acting on behalf of the Director. S.65(1) and (5) of the 2007 Law state that, in order to enforce the Health and Safety obligations under Part VIII of the 2007 Law, the Director may,

“.....where he is of the opinion that any steps are required to be taken by any person to ensure compliance with this Part or of any regulations made hereunder, serve upon that person a notice, hereafter referred to as a remedial notice.” (S.65 (1)).

S.65 (5) states: “Without prejudice to the generality of subsection (1), a remedial notice may require –

- a) The cessation, immediate or otherwise, of any activity, operation or process;
- b) The vacation, immediately or otherwise, of any premises;
- c) The alteration of any premises or plant; or
- d) The introduction of such temporary measures as may be expedient pending the institution or completion of permanent measures.

The Remedial Notice must state what Health and Safety issue it relates to, the steps to be taken and the time within which such steps must be taken (S.65(2)). Whilst there is a right of appeal against the Notice, which operates as a stay of the requirements to comply with the Notice (S.65 (3)), if there is imminent danger to the Health or Safety of employees there is no automatic stay. Separate from any penalties for Health and Safety breaches, failure to comply with a Remedial Notice is itself an offence (S.66 (4)). **However, despite the breaches brought to light post-Ivan and the Labour Law being revised in 2007, the financial penalties for such failure have remained the same since 2001.**

Between 2005-11, there were four Directors or Acting Directors at DER - Walling Whittaker, who stated in interview that he had been in post for six years until 2007; Phillip Scott, former

Acting Director; Lonny Tibbetts from 2008-2010; and Acting Director Jennifer Smith. The greatest and most dramatic changes with regard to Health and Safety occurred during Mr. Whittaker's tenure, in the main because of the deficiencies highlighted by the post-Ivan construction boom in a largely unregulated industry, particularly where smaller companies and sole traders were concerned. As a consequence, Director Whittaker made Health and Safety issues more of a priority and brought in 3 key innovations – an internal manual on Health and Safety issues, which formed the basis of the Labour (Occupational Safety and Health) (Construction Industry) Regulations 2008; OSHA training and certification for Labour Inspectors; and, prior to the Goolsarran Report in late 2007, a more specialist approach to Health and Safety as well as other areas of work in the Department.

Before I came to the Department, there was no Health and Safety component. I came there, identified the problems and felt I had a legal responsibility under the Labour Law to do something about this. I remember.....expressing concern about “Johnny come lately” construction companies. Doing something about Health and Safety helped to establish / underscore the relevance of our department to outside bodies (i.e., businesses, Cayman Contractors Association). I wanted staff to get trained up in Health and Safety. I got an OSHA certified trainer to do this. I got them all [Labour Inspectors] certified, so not only were they trained but they could train people on construction sites..... I also got the Department some inspection equipment. A Health and Safety manual was put together and in use whilst I was there. (Walling Whittaker)

Between 2005 and the dates the current post-holders took office, apart from the current post-holders, there were seven other personnel who worked in DER. Of past Labour Inspectors, the person with the main responsibility for Health and Safety matters was Rohan Marshall; according to Mr. Whittaker, Rohan Marshall became a Health and Safety Specialist within the Department, and that whilst he was in post, he and Tricia Powell did the majority of Health and Safety work.

However there were significant contributions in this area from other members of staff. Apart from the Director, Debra Prendergast (initially Programme Co-coordinator, then subsequently appointed as a Labour Inspector) did a significant percentage of H&S work – approximately 35-40%, as did Gene Hydes who still works as a senior Labour Inspector within the department and

who is now recognized as the person with the most Health and Safety expertise. Debbie Prendergast, a former Compliance Officer who became Labour inspector and who worked in the Department from 2002-2007 (she was in post when the OSHA training started, and also when the press release referred to as the starting point for this Report was issued) created the Manual.

When asked if he dealt solely with Health and Safety issues, Rohan Marshall replied: *My responsibility was to set up Occupational Health and Safety for the country. This was the first time and would include taking initial provisions that were initially written by Trisha Powell and expanding and modifying them to suit our needs. She started a Manual so what they did was to expand on it, combining information from stakeholders. This project was spearheaded by Walling Whittaker. As the project expanded they found the need to get out and do more visual inspections. The first year of my specialty in being a Labour Inspector, they used a lot of the inspection photographs and recording to build training material, especially for the DER OSHA course.*

The Health and Safety Manual

The Manual was created to assist Labour Inspectors who, because of the broad range and number of duties they were tasked with, were relatively inexperienced in this area, particularly when conducting site inspections. Although there were contributions from other Labour Inspectors, Tricia Powell and Walling Whittaker had the greatest input. Ms. Powell's architecture background and previous experience in Public Works, allied to Mr. Whittaker's engineering background, gave the manual a solid basis of useful expertise and awareness of the Health and Safety Standards that would be required as best practice. The manual also incorporated elements of OSHA training, after the first accredited training had taken place in 2005.

The Goolsarran Report was tabled in the Legislative Assembly in late 2007, and this had a direct impact on the structure of the Department. Thus, when Lonny Tibbetts became Director in 2008, DER was restructured into 3 parts – Enforcement, Job Placement, and Research and Statistics (in

fact the Report had recommended a 4 part structure, but this was deemed not appropriate for Cayman).

Like Director Whittaker before him, Director Tibbetts also made changes to DER intended to improve the Department's effectiveness. As well as the restructuring above, in accordance with the recommendation in the Goolsarran Report, there was a move away from at least one Labour Inspector specializing in Health and Safety issues to a more generalist approach, where all Labour Inspectors conducted worksite inspections and were responsible for monitoring Health and Safety breaches. Although well-intentioned, and Director Tibbetts cannot be faulted for implementing a recommendation from a Report commissioned by the Ministry at great expense just prior to his appointment, **the OCC disagrees with this approach and has made a Recommendation to this effect** (see Recommendation 6 and section 8(g) of this report).

Director Tibbetts also created a database in 2008, in order to capture the requisite data which would both drive and support policy decisions made by the Department. According to Mr. Yoshneck Mutomba, Assistant Director, Research and Statistics both in the then DER and now in DLP, there was no any other database in place prior to this. This was a good innovation, and sorely needed at the time. However, the OCC has found that better use could be made of the database. Using the database, the Department should be able to (including but not limited to the following):

- track the number and type of construction accidents;
- determine whether or not a company is a repeat offender;
- track the number of remedial notices issued against companies and the time taken to comply with them;
- ascertain what happened to an employee post injury (for example, if the employee was not Caymanian, whether they were deported or their work permit withdrawn as a consequence of this accident)
- track the number of matters referred to Legal

A proper case filing system is a prerequisite for an effective database which would not only assist the Labour Inspectorate but also the Department as a whole, particularly in its communications with the Legal Department. This is especially important now that its wider remit also includes Pensions. On reviewing files for this Own Motion Investigation:

- Files were not in order – for example, pertinent information for a person involved in a workplace accident was incorrectly filed on another person’s file.
- Information on some files was inconclusive, with little or no precise detail
- Handwriting was sometimes not very legible
- Documents were not properly punched, stapled or paper clipped, resulting in missing pages
- Most information was not filed chronologically

The OCC **recommends** that a better filing system and/or more comprehensive database should be set up. This would not only assist staff internally, but would also greatly assist in the preparation of files before they are referred on to the Government Legal Department. It should include the following:

- A checklist should be created and placed on all files, to ensure that the files are complete or to alert if there are any outstanding matters to action, before closing out or forwarding on.
- DLP should consider revising its filing system, by storing the information electronically or by having both electronic and paper files.
- Instead of using paper or manila folders, the DLP may want to budget for and consider using hard cover folders with rings, to prevent documents from falling out and being misfiled.
- Information on files should be filed in chronological order.
- There should be a set area to file these types of cases to allow for easy access and retrieval.

DER Staff in post as at end 2011

As of end 2011, the Enforcement section which was responsible for Health and Safety had a staff of 7 in the following roles:

Jennifer Smith (Acting Head, DER)

Robert Whittaker (Assistant Director)

Gene Hydes Sandra Solomon (Brac) Loval Linwood Locksley Haywood (Senior labour inspectors)

Dwayne Forde (“junior” labour inspector)

Of the 7 DER personnel in post on 31 December 2011, 5 of them are now employed in the DLP, the reorganized structure of which DER is now a part.

Whilst dealing with Health and Safety matters is in the job descriptions of all staff mentioned above, Gene Hydes was and is widely acknowledged as the Labour Inspector most experienced in this area. He has also conducted several training courses in this field.

When the staff thus employed at the end of 2011 were asked in interview what changes they would like to see in order to effectively and properly oversee, inspect and ensure Health and Safety at work for those involved in the construction industry, and to generally help them do their jobs better, a number of proposals were made, as follows:

Law

The concerns expressed by both the Labour Inspectorate and the Directorate fall into 2 categories: changes to the legislation itself, and with regard to the working relationship between the Department and the Government Legal Service. For a full and detailed discussion, please see Section 8(e) of this Report, *post*.

Training and retraining in Health and Safety

This was a major concern for DER staff, and remains so under the new DLP. A training programme was set up during Walling Whittaker's term as Director, both internally for staff to become OSHA certified and externally with a view to Labour Inspectors conducting training programs for construction companies. In the past this has also generated much needed revenue for the Department; according to Director Whittaker, the Department made CI\$33,000 the first year.

Departmental staff stated that training would keep their knowledge current and would give them confidence to deal with even the most serious Health and Safety breaches, as well as garner respect from contractors and construction companies. In addition, Labour Inspectors who were certified and well trained in Health and Safety issues could continue to roll out a number of training programs for companies, thus creating a source of much needed revenue for the Department. In the view of the OCC, this would also serve as useful continuing professional development for staff against which they can be assessed on their annual review. Thus both staff and members of the public who are to be shielded from Health and Safety breaches would benefit.

However, according to a senior Labour Inspector, Departmental staff, as professionals in the field of Health and Safety, must not only be trained but also constantly retrained as part of continuing professional development for optimum effectiveness. This must include updated training from the ILO – particularly as, since most of the ILO Caribbean training is done in Jamaica, Guyana or Trinidad, and the ILO will pay airfare and hotel. This means minimal cost outlay by the Department.

Since July 2011, OSHA training is now no longer available outside the continental United States. Those working in Health and Safety therefore would either have to go to the US to get certified; be certified by another equivalent body, or, in the opinion of Mr. Emerson Piercy, the Chief Building Control Officer since 2005 and who has a close and very positive working relationship

with the Department on Health and Safety matters, the Cayman Islands can set up its own OSHA certification. Mrs. Mary Rodrigues, the Chief Officer in the Ministry ultimately responsible for Health and Safety issues, believes there are 3 options - (a) to have a local training programme, but one that is internationally sanctioned and underpinned; (b) other agencies outside the Department can do the training either on its own or with Departmental staff; (c) find another external provider, possibly in the UK.

A dedicated Health and Safety Unit.

All Labour Inspectors have other tasks to perform within their role apart from Health and Safety matters. With the exception of Senior Labour Inspector Gene Hydes and former Senior Labour Inspector Rohan Marshall, the percentage of time spent by Labour Inspectors on Health and Safety issues was and is to date very small, even under the new DLP.

The scope of this report spans a period of 7 years from April 2005 to April 2012. Throughout this time, Health and Safety issues, including inspections, have been only a small component of the total workload of the Labour Inspectorate. For example, the job description of a Senior Labour Inspector included no less than 15 principal accountabilities, of which 3 deal with Health and Safety, and the following 5 dimensions:

- Responsible for carrying out Labour inspections on an as needs basis usually about 10 social inspections per month including inspection of gratuities and 10 OSH inspections per month
- Post holder addresses approximately 60 – 100 telephone enquiries per month from complainants and employers to prevent the need for mediation.
- To resolve approximately 50 complaints and individual disputes of rights per month.
- Assists the Assistant Director with the revision of procedures, forms and systems to implement the regulatory frame work as provided for in the law.
- Personally develop and lead a minimum of 4 internal and external training sessions per year.

Small wonder therefore that with 2 exceptions, the amount of time available for Labour Inspectors of any level to deal with Health and Safety issues was fractional; currently the person who is the most experienced in Health and Safety issues, Senior Labour Inspector Gene Hydes, by his own account spends no more than 20-33% of his time on this, and this far outstrips the time so spent by anyone else in the Department.

In his Report (see Section 8(g), *post*), Samuel Goolsarran, an internationally experienced Labour Management consultant and author of the Goolsarran Report preferred a generalist, rather than a specialist, approach to the work of Labour Inspectors at all levels, including Health and Safety. **Although the Goolsarran Report makes many good observations and suggestions, in the opinion of the OCC the generalist approach has not been successful in the past**, and in fact all the Labour Inspectors interviewed (including Senior Labour Inspectors) wanted dedicated Health and Safety Labour Inspectors. Mr. Emerson Piercy, the Chief Building Control Officer, is also in favour of a separate dedicated Health and Safety Unit within the Department. These views are contrary to those expressed in a paper produced by the Ministry entitled “The Reorganisation of Labour and Pensions”, which states, on this point, “*DER Senior Labour Officers appear to be supportive of the Broad Generalist Approach*”. When one considers the current size of the Department, only one or two persons could be so employed, but, provided that they have the specialist training to qualify them as true experts, and not, as Goolsarran says, merely people who were concentrating on one area of work, the OCC would **recommend** this as a preferred course of action.

Better resources, equipment and transportation.

When interviewed, Mary Rodrigues, the current Chief Officer in the Ministry ultimately responsible for Health and Safety matters, said: *To me, it's not just about enough resources but how we were using it.* Whilst this is true, considering the importance of the Health and Safety role, the Department appears to be lacking even the most basic equipment to enable them to properly carry out their duties. According to Gene Hydes, who has been a Senior Labour Inspector for over 13 years under both the former DER and current DLP, and is the Health and Safety expert in the restructured DLP, “*We need resources, and equipment – for example,*

oxygen meters; light meters; noise level meters; HD cameras. We had some equipment but now it's gone. We need all of the above to do proper inspections. We need proper transportation. At present we (labour inspectors) only have 2 cars as official vehicles, and no truck.”

Protection of whistleblowers

The Law should be changed to allow penalties for victimization in order to protect reporters of wrongdoing (AKA “Whistleblowers”). This would also help to underscore the seriousness with which unsafe practices, which could endanger the lives of construction workers and members of the public alike, are viewed by the law, Government, and the Ministry. However, it must also be noted that a number of both current and past members of the Department have expressed concerns with the level of confidentiality in the Department itself. According to a former Labour Inspector, even though they would try to protect the identity of whistleblowers by conducting a general inspection without letting the employer know that they had received a call (general staff consensus on this) “.....*unfortunately a lot of things at DER would leak out – a lot of things leak from DER...*” This is unhelpful, unfortunate and above all unprofessional. There is little point in legislative change in this area if this continues to be a problem within the new DLP.

Further recommendations for the imposition of Administrative Fines was also made by 2 senior members of staff, **on the clear understanding that the fines would be set at appropriate levels.** As the structure to impose administrative fines has already been set up under the new DLP, this is the sole reason why these have not been endorsed by the OCC as a future recommendation to be implemented. However, the OCC will observe and monitor the frequency with which such fines are imposed; for what Health and Safety breaches; and in what amounts in order to ensure the fine level is appropriate to the breach. This also applies to public education and outreach, which would have been an OCC recommendation were it not for the fact that the Ministry has given a clear and public commitment that the new DLP will embark on a

comprehensive programme of public education and outreach. Here also the OCC will observe and monitor.

b) Relationship between the Department, the Ministry (Minister, CO's, DCO's), and other government entities.

No government entity can operate at its best in isolation and DLP (formerly DER) is no exception. Happily, this is a view shared by Deputy Chief Officer Christen Suckoo, who stated: *“The Trade and Business Licensing Board, Planning, Immigration, Health and the former DER (now DLP) should all work closely together and not in silos. Currently this is not the case. The intention is that they will work more closely together in future. Jonathan Piercy in the Department of Commerce has taken the lead on this”*.

Some relationships are very good; the Planning Department, and in particular the Chief Building Control Officer Emerson Piercy, are both singled out for special praise. Emerson Piercy even took the OSHA course. However, according to a former senior DER employee, relationships with other entities were lacking. For example, he was of the firm view that, in relation to the Trade and Business Licensing Board, *“What they [DER] would have loved to have done is for every new employees obtaining a new Trade and Business License to be given the information packet and offer the training courses which DER were having on a monthly basis”*.

In addition, according to a former DER Director, *“The Ministry needs to listen to the recommendations coming from DER....”*, adding that, although the senior levels of the Ministry were ultimately responsible for Health and Safety issues, no-one at Deputy Chief Officer rank or above had ever attended a training course or tried to extend their knowledge in this area.

Perhaps not surprisingly, the Ministry had its own views on the work and effectiveness of the Department in dealing with Health and Safety issues. Both the present and former Chief Officers in the Ministry ultimately responsible for Health and Safety matters were interviewed for this Report. Mrs. Mary Rodrigues, the current Chief Officer, was of the view that what was needed to improve the effectiveness of the Department in this area was *“more self-regulation,*

strengthening the law, public awareness, improving how investigations are carried out, and better reporting.”

The former Chief Officer, Mrs. Angela Martins felt that during her time in post (2005-9) “*DER needed credibility in 3 areas, so they could hold their heads high when dealing with the private sector: - technical ability; structure – that both DER and any training they did was fair, ethical and based on new knowledge in Health and Safety; and credibility that DER would be able to manage any Labour issue in a competent manner.*”

Rodney Watler, Site Safety and Health Officer for the Port Authority, would also welcome a closer and more proactive working relationship with the Department and has suggested a number of improvements, of which the OCC agrees with the following:

1. DLP to be actively involved in the Health and Safety issues relevant to the proposed port development;
2. DLP to provide the Port with a regular roster of on call inspectors; and
3. Implement some Health and Safety training or regulation for trucking companies.

c) Relationship between DER /DLP and Cayman Contractors Association (CCA).

The CCA was established in 1972 to create uniform construction standards for the Cayman Islands. It is a self-regulating body, and membership is not compulsory. It is more likely, therefore, that those contractors who operate good Health and Safety practices are more likely to be members than those who do not. On its website the CCA states it is “dedicated to elevating the standards for safety in the construction industry and supports the Cayman Islands Department of Employment Relations (DER) [now the Department of Labour and Pensions (DLP)] in their effort to establish standard Safety and Health practices in the Cayman Islands for the benefit of the public”.

The current CCA Chair is Mr. Rayal Bodden, who is also named on the Association’s website as chair of the Builders Law Committee. As Chair of the CCA, Mr. Bodden recognizes that good

Health and Safety practices in the construction industry benefit both employees in the field and the general public alike.

The CCA's mission statement contains 5 aims:

- To ensure the existence of a high degree of a high degree of ethical standards in the Cayman construction industry
- To assist the growth of the construction industry
- To encourage membership by all contractors, specialty contractors and related business entities
- To represent all CCA members equally
- To represent the needs of contractors with Government and statutory authorities

According to Departmental staff both past and present, the relationship with the CCA has been a good one. They contributed to the Health and Safety Manual for DER staff, and one of the Association's reasons for working more closely with the Department was their concern about the unregulated state of the construction industry. This was a particular worry in the aftermath of Hurricane Ivan, but some of those concerns still exist today. According to Mr. Bodden, the Construction Industry is effectively, one of the largest industries on the Islands, but it is completely unregulated at the moment. As a builders' industry, there is a building code which regulates the way buildings can be built, as well as the Trade and Building Licencing Board, but nothing really regulates and puts responsibility properly on builders. In addition, owners contract with unlicensed companies all the time. He believed enactment of the Builders Law 2007 would provide a greater protection to employees and the public, but that it had been a political football for many years.

Referring to the DER Health and Safety Code of Practice for the Construction Industry, Mr. Bodden felt the standards set in it were very good and it was a step in the right direction for Cayman. The intention had been to implement it in three stages at 12 month intervals. In Stage 1, there were basic steps to introduce Occupational Health and Safety standards for the Cayman Islands for the Construction Industry. Stage 2 was to be a second follow up document building on Stage 1 to add to the first document additional Safety standards. That was to come

approximately a year later. Stage 3 was additional safety standards. The reason for implementing it in three phases was to get contractors and the community acclimated along the way and provide companies the time to get up to speed. The draft code of Practice subsequently became the Health and Safety at Work: Safety Policy for the Construction Industry. DER and the Cayman Contractors Association, among others, worked closely on this policy, which was to be implemented in 3 separate phases year on year from 2007-2009, with phase 1 one due to take effect from November 2007. However, according to Mr. Bodden, as far as he is aware nothing has happened since Stage 1.

d) Victims

Because of the 360 degree approach of the OCC investigation, it was important that victims of construction accidents should be interviewed for this Report. The OCC has had access to files for injuries ranging from moderately severe to maiming and disfigurement (loss of an eye, traumatic amputation of digits and limbs) – and even, in some cases, death. However, although OCC investigators were able to examine victims files retained by DLP, there is little from actual victims themselves, and the few who spoke to us did not wish to be identified. There were a number of reasons for this:

1. In the case of one of the Caymanian victims employed in a small family-owned company, they were reluctant to be involved in any prosecution for Health and Safety breaches, even where the injury was serious. Because of the close-knit nature of the indigenous community there is a very high likelihood that this is happening in other cases.
2. If he or she were expatriate or on a work permit, they were reluctant to take any action that could lead to prosecution for fear of jeopardizing their presence on island.
3. There were also a number of cases that were either in the process of being taken to court, or were in settlement negotiations with their contractor employers and their legal representatives. The OCC is aware that any discussion of such cases in this Report at this time might prejudice either a settlement or a successful prosecution.

According to the Attorney-General, there have been no criminal charges for health and safety breaches since 2005.

Despite this, some victims still wished to assist the OCC investigation where they could and as a consequence the OCC has included the following 3 suggestions, in their own words:

Why don't they have Field Inspectors whose main job it is to do Inspections? That person could go around and take pictures because the truth is there in the pictures. They can record it and penalize these companies, document warnings and fine them if they don't improve or continue with their unsafe practices. Shut the site down if necessary. (This accords with the OCC recommendation for a dedicated Health and Safety Unit).

Inspectors should not be allowed to have businesses that will create a conflict of interest. Some of those companies who are being penalized have passed the comments that the DER Inspectors will only target some companies and not others because they themselves have their own constructions companies which of course can break any of the H & S laws and will never be penalized. (This accords with OCC Recommendation 5).

For those companies who break the Law and if they are fined and don't pay this fine, this information should be sent to the Trade and Business Licensing Board, so that when these companies go to renew their business license, they will either have to pay the fine to get it renewed or not get it renewed at all. DLP needs to work hand in hand with the Trade and Business Licensing Board. This will send the message that if they don't do it, then they won't have their Trade and Business Licence renewed or they can't have any Work Permits issued or renewed. (This accords with OCC Recommendation 11).

If Inspectors make their presence more known, then it will send out the message to all Contractors that they need to adhere to the rules because they won't know when an Inspector will be dropping by to do a spot visit or check. This would cause them to always try to be on top of things because they won't know when an inspector will pop up to inspect.

e) Legal Framework

i) Changes to the legislation itself

There was a strongly held view in the Department that the law needed to be strengthened; a commonly used phrase was to give current Laws “more teeth”. There was complete unanimity on this point. However, it is notable that despite Hurricane Ivan, which highlighted the need for protection in this area, the press release of April 2005, the internal changes, such as the Manual referred to above, and the Goolsarran Report in 2007, that **there was no change to Part VIII of the Labour legislation that specifically deals with Health, Safety and Welfare at Work between the Labour Law (2001 Revision) and the Labour Law (2007 Revision).**

Three of the most senior lawyers in Government were interviewed for this Report, one of whom in particular expressed surprise about the observations of Department staff on the law, as they claimed they had never communicated to them any improvements that could be made to the legislation they considered so weak. It is also noteworthy that two of the lawyers interviewed were of the view that the current legislation was adequate. This view is diametrically opposed to that held by the former DER or the new DLP.

Although it might be argued that the Government Legal Service and DER/DLP have a vested interest in maintaining their respective positions, the OCC does not, and it is the OCC view that **legislative reform in the areas outlined is necessary. Without it there will be no substantial change in the operation and effectiveness of the new DLP from its predecessor.**

In addition, as of the end of 2011 there was far less awareness amongst Departmental staff of the importance and effect of the international laws and conventions – such as the International Labour Organisation (ILO) Conventions, CARICOM Labour Laws - and their attendant obligations, than there should be. **All staff must become more familiar with the international conventions and laws that have effect in the Cayman Islands and this must be addressed in training as a priority; ignorance would not be seen as an excuse.**

The following are specific legislative changes recommended by the OCC:

The Director should have the power to close an entire worksite under S.65(6) of the 2007 Labour Law.

According to Director Tibbetts, although Labour Inspectors are able to stop work being carried out in an unsafe manner, they cannot close an entire project or worksite. Currently the power to so act under S.65(6) above is vested in the Minister only. In the opinion of the OCC, this is an unsatisfactory state of affairs. The Minister is charged with ultimate responsibility for a wide range of departments and issues that ultimately fall within his portfolio. Health and Safety is only one part of the work of one Department within the Ministry. The Minister cannot be expected to have the level of knowledge needed to close down the site as would the Director. Despite several serious Health and Safety breaches, particularly immediately after Hurricane Ivan, there has only been one occasion in living memory when a Minister exercised his powers under this provision. Clearly, this power has no effect on minimizing Health and Safety breaches on construction sites as it is not being used. In addition, any decision by a Minister under this section could be seen as political, whether or not he chooses to exercise his power. In the opinion of the OCC, one of 2 possible approaches could be used:

- Power to do this should be devolved completely to the Director of DLP – this would make any decisions to so act less political
- Power to do this vested in the Director, who is the primary decision maker, with the consent of the Minister – *provided that* (a) the Director, having given detailed reasons as to why such action should be taken, cannot be overridden by the Minister without the Minister showing good cause, and (b) if the danger is imminent, the Director alone can act.

This view is supported by Samuel Goolsarran, who in interview stated that the power to close down a site should be vested in the Director of DER/DLP, along with proper guidelines and a clear understanding that this power should be exercised in a fair, just and equitable manner. In his opinion, if this power was left with any Minister, no matter what political persuasion, this in itself makes it political.

Keeping records.

Currently there is no requirement to keep records if a company has less than 10 employees – this is inherently problematic as, according to Labour Inspectors interviewed, 75% of the companies they deal with have less than 10 people, and most of the Health and Safety breaches take place in small companies. This applies to all records. In the opinion of the OCC, there is no sensible rationale for this, and this should be removed. There is also a further benefit to the Department itself – the more companies that keep records, the easier it would be for the Department to track the national level of Health and Safety compliance.

In addition, according to Senior Labour Inspector Gene Hydes, the Department can only go back 2 years to get records from any company, no matter what its size. Thus, even where companies keep good records, a Labour Inspector investigating Health and Safety breaches will still be hampered in their investigation by such an arbitrary time limit. In the opinion of the OCC, records should be kept for the length of time the person is employed or 7 years, whichever is longer.

Tougher financial (separate from administrative fines) and other penalties for Health and Safety breaches.

According to Christopher Johnston, attorney, author of “Health, Safety and Welfare at Work in the Cayman Islands” for Caribbean Construction Magazine, and formerly one of the Chairs of the Labour Tribunal, the current fine levels for Health and Safety breaches in the Cayman Islands are not appropriate at all. When interviewed, he stated: *In Canada, if you have any strict liability offences – for example, no harnesses – there is a fine of approximately \$100,000 for the first offence, and \$500,000 for any subsequent offence. Fines have to be a painful disincentive to compel employers to comply with the law.* This concurs with Goolsarran’s strongly held view that penalties have to be meaningful – “an incentive to keep the law, and a disincentive to break it”.

Charities and non-profit, non-commercial organizations

According to many of the senior Departmental staff, past and present, who were interviewed, the above are not covered by current Health and Safety legislation. It is not clear from the law whether this is in fact the case, but if this is in fact the case there would appear to be no rational explanation for this, and this anomaly should be rectified.

Site Safety Officers

Although there is an obligation under Reg. 4 of the Labour (Occupational Safety and Health) (Construction Industry) Regulations 2008 for a contractor or operator of a workplace to appoint a Safety Officer for each site on which construction work is being carried out, and a Supervising Safety Officer where a contractor is carrying out work on more than one site, non-compliance is not an offence under either the 2008 Regulations or the 2007 Labour Law, and there is no penalty for failing to comply with this regulation. This is an anomaly in the law that must be rectified.

Employment Law 2004

This is described in the opening preamble as “A Law To Provide For The Regulation Of The Employer – Employee Relationship; And For Incidental And Connected Purposes”. It was passed 19 April 2004 – Part IX of which – S.60-72 - deals with Health, Safety and Welfare at Work. **However, despite this Law having been passed 8 years ago, it has yet to be enacted so that persons affected could benefit from its provisions. OCC research has uncovered no justifiable explanation for this.**

ii) The working relationship with the Government Legal Department

When interviewed for this Report, both the Labour Inspectorate and Directorate were of the opinion that the Government Legal Department was too slow in prosecuting cases, sometimes

resulting in them being time-barred; there was little or no will to prosecute cases even where serious injuries or fatalities had occurred; and that they either did not understand or did not want to admit to not understanding Occupational Health and Safety issues, and would not attend any of the OSHA training courses run by DER, even when offered free of charge.

In the words of a former member of staff, *“The Legal Department actually allowed 3 or 4 cases to pass through – 2 fatalities and 1 loss of limb or eye. But the cases never came to fruition..... What Legal wanted was a platter case where they did not actually have to do any work. They did not want to admit that they did not understand Occupational Health and Safety..... Working relationship was strained between legal and DER. There was the case that you would be working against a deadline. They took too long. We stuck to the deadline that legal gave them, but most of the time we became disheartened, called the victims up and told them it would be better if they took their case somewhere else, because of the length of time it would take. They [Legal] would sometimes take one or two months to provide feedback, we would have to follow-up consistently and then they would receive a batch of feedback which would be about all the things that DER did not do to get the case ready for prosecution as opposed to them starting the case now”*.

Perhaps not surprisingly, there was a difference of opinion on this point when senior lawyers, lawmakers, and legal personnel were interviewed. It was felt that the quality of the files submitted for legal opinion was in many cases poor or incomplete, and the resulting requests by Legal for further information and the resubmission of files added unnecessary delay to potential prosecutions that were already time-sensitive. Even before files were submitted, according to Trevor Ward, former Senior Crown Counsel and now Deputy DPP, far too much time is spent in negotiations which further delay the process. He believed the Department should be more proactive here, particularly, as he observed, *“the law doesn’t require the director to await a complaint before he acts”*.

Mr. Ward has had primary responsibility for dealing with Health and Safety cases for the last 5 or 6 years – a role, he states, he retains to this day. He stated that he and DER have had a very cordial, open door, professional relationship throughout. However, there were teething problems, in his view: *“.... For example case preparation and presentation in the early days a number of files were coming in from the DER and there was a problem with the way the files were put*

together in terms of what material was lacking that would allow us to be able to evaluate the evidence and give a proper ruling. I therefore took the initiative to write to the Director or the officer in charge of the case and set out, for future guidance what we expect to see on a file when submitting it.....”

“One of the things I would say in terms of them being able to deliver better quality work relates to the manner of presentation of material for consideration. It has been a somewhat recurring theme in rulings that we have done to see that, “this is needed” “that is needed” “these documents are needed” as basic to any file that is submitted for an opinion. It is important that when we give advice that that advice is followed because where that happens the prospects of successful prosecutions increase. One of the problems we had with them, as well meaning as it was, they sometimes engage in negotiations and it took a little while to get them to appreciate that, even though you are engaging in negotiations, if, at the end of the day, the matter can’t be resolved and you are looking to bring a criminal prosecution, you have got six months from the time when evidence was available sufficient to justify the.....proceedings to lay the charge. So you can’t negotiate forever. We had a number of cases that by the time the file got to us the matter is statute barred because they have been talking too long. To contrast that with the Health Insurance Commission, which is the other agency which I have responsibility for, their response is different, they were very alert with these things. They took every bit of advice that they got, to the point that we have a 100% conviction record with Health Insurance prosecutions. I can’t help but think what would be the outcome if DER got around to the notion that there is a way to present these files, and there is a way in which you report your investigations; the importance of acting on advice promptly.

“I don’t know what their human resources challenges are. I imagine it is considerable. Realistically speaking that has to be factored in here, I mean how many of them are there to be able to go out and inspect all of the construction worksites? Similarly, we have our own human resource issues and often have to prioritize matters due to importance i.e. a murder investigation where someone is in custody and a Labour Tribunal ruling where no-one’s liberty is restrained.”

RECOMMENDATION: Thus whilst the OCC would support amendments to existing legislation, **there is a corresponding duty on Labour Inspectors to cooperate, and work more closely, with the Government Legal Department in a timely fashion, in particular with regard to the delivery of complete instructions and the collection of files. The Department should also be more proactive in looking for matters to prosecute where warranted.**

f) International Perspective

The International Labour Organisation (ILO), founded in 1919, is a global organization with very many aims and objectives in the work and employment field, including ensuring best practice in Occupational Safety and Health. ILO Caribbean was established in 1969 and the headquarters for the region are based in Trinidad. The Cayman Islands is both an Associate Member of the ILO and is required to report regularly to the ILO through the FCO, and is also a non-metropolitan territory served by ILO Caribbean.

Despite little knowledge of, or training in, ILO Conventions within either the former DER or the current DLP, nonetheless there are several Conventions that apply to the Cayman Islands, a number of which were referred to in the Goolsarran Report (see section 8(g), *post*) and which directly relate to Health and Safety issues:

Convention 81 – Labour Inspection, 1947: this Convention provides for a system of regular labour and safety inspections of commercial and industrial workplaces and undertakings. The inspections are intended to secure the enforcement of legal provisions relating to conditions of work and the protection of employees. This Convention also deals with:

- The organization, structure and functioning of inspection services;
- The responsibility of the central authority; and
- The functions of labour inspectors, for effective inspection services in industrial, commercial and agricultural undertakings.

Convention 85 – Labour Inspectorates (Non- Metropolitan Territories) Convention, 1947.

Convention 155 – Occupational Safety and Health, 1981: this Convention provides for

- A coherent national policy on occupational safety and health and the working environment;
- Regular, systematic labour inspections in line with Convention 81 on labour inspection;
- Protection against all forms of danger in the working environment in compliance with the law and good safety practice for all branches of economic activity.

Convention 167 – Health and Safety in Construction, 1988 (came into force 1991).

CARICOM Labour Policies – CARICOM model labour laws; the Charter of Civil Society, Article XIX.

The Caribbean Community (CARICOM) was established by the Treaty of Chaguaramas which came into effect on 1 August 1973. In accordance with Article 231 of the Treaty, the Cayman Islands has been an Associate Member of CARICOM since 16 May 2002.

In 1995 and 1997, the Caribbean Community’s (CARICOM) Standing Committee of Ministers with responsibility for Labour, in an effort to promote harmonization of essential labour standards through the enactment of a common floor of labour laws and regulations within the Community, adopted four model labour laws, one of which was on occupational safety and health at the workplace and the environment, providing for the registration and regulation of industrial establishments, and for occupational safety and health of persons at work.

CARICOM’s policies commit member states to observe labour policies as set out in supporting treaties, charters and declarations – one of which is the Charter of Civil Society, 1997. Article XIX of this Charter provides for the right and protection of every worker to, *inter alia*, “be treated fairly at the workplace, and to enjoy a safe, hygienic and healthy working environment.

g) Goolsarran Report

On 25 January 2007, Samuel J. Goolsarran was commissioned to conduct “A Review of the Functions and Organizational Structure of the Department of Employment Relations and Labour Legislative Framework of the Cayman Islands”. The resulting report was completed on 29 September 2007 and tabled before the Legislative Assembly on 16 November 2007 by the then Minister for Education, Training and Employment, Mr. Alden McLaughlin.

Mr. Goolsarran reviewed a number of documents and interviewed over 50 people in the course of his research, including all staff then employed at the DER. The resulting Report was generally welcomed very favourably by the Department. Assistant Director Robert Whittaker described it as “....a beautiful report that was regurgitated from their [DER] exact words”, and Senior Labour Inspector Gene Hydes considers it to be the “Health and Safety bible” of the Department.

INTERVIEW

Mr. Goolsarran was happy to assist the OCC investigation, and when interviewed stated that he had worked for the ILO, where he had conducted training courses both for the Organisation and internationally, including in Grand Cayman on a previous occasion.

He had been invited by the Ministry to do the review, which was carried out in line with the following Terms of Reference set out by the Ministry, which were to address 4 key areas:

1. The strategic direction of DER
2. Its organizational structure and capacity
3. An assessment of the adequacy of the existing legislative framework; and
4. An implementation plan and timetable

Goolsarran conducted his Review over 10 days, from 28 February – 9 March 2007. Both he and the Ministry were concerned that DER should operate more effectively in line with international conventions like those of the ILO. Member - and Associate Member countries like the Cayman

Islands - are required to bring their laws and practice up to the ILO minimum standards that are applicable.

There are basic fundamental rights – “Fundamental Principles and Rights at Work (ILO Core Standards) – which are binding on all member states:

- 87 – freedom of association and protection of the right to organise;
- 98 – right to organize and collective bargaining;
- 29 - prohibition of forced labour
- 105 – abolition of forced labour;
- 138 – minimum age (child labour) for employment;
- 182 – protection from the worst forms of child labour (e.g., slavery /human trafficking, child soldiers, the sex trade, drug trafficking, etc.);
- 100 – equal remuneration for work of equal value;
- 111 – non-discrimination in employment and occupation;

When asked whether, in his opinion, the power to close down a worksite should remain solely in the hands of the Minister, as was provided for in the 2001 Labour Law (which was in force at the date of his Report) and is still the case under S.65(6) of the 2007 Labour Law, Goolsarran was firmly of the view that the power to close down a site should be vested in the Director of DER as was, along with proper guidelines and a clear understanding that this power should be exercised in a fair, just and equitable manner. In his opinion, if this power was left with any Minister, this politicises the exercise, or non-exercise, of this power.

He also strongly believed that penalties, financial or otherwise, have to be meaningful – “*an incentive to keep the law, and a disincentive to break it*”.

REPORT

The OCC agrees with DLP that this is a well-researched and comprehensive 64 page document. As stated earlier, as part of the Terms of Reference agreed between him and former Chief Officer Angela Martins on behalf of the Ministry, Goolsarran was mandated to address the following key areas:

- Strategic direction
- Organizational Structure and Capacity
- Legislative Framework; and
- An Implementation Plan

According to the Report, the Minister would be responsible for exercising general direction and control over the Department, especially with regard to policy, whilst Chief Officers should faithfully implement the policy decisions of the day in a fair and impartial manner.

Very early in the Report (pg. 5), Goolsarran stated that “care should be taken to ensure that [DER] is equipped with a cadre of competent and qualified staff to effectively discharge the technical and advisory services inherent in labour administration. The Department should also be provided with.....modern technology, training and development of staff to undertake the broader and wider responsibilities of a strong labour administration”.

Strategic Direction

The author saw the need for DER to assume full responsibility for an effective and integrated labour administration services and system as outlined in ILO Standards on Labour Administration, and with a full complement of suitably qualified staff to enable them to do so; the need to regain public confidence, and counter any negative perceptions, and build its outreach and public education in partnership with employers and their organizations and workers. He was firmly of the view that the staff had to adopt positive approaches in its interventions and communications designed to build confidence and respect by the skilful and

tactful use of person power, technical power and positional power in the discharge of their duties; the need for internal leadership, effective management, improved communication, regular meetings for the reporting and sharing of information and experiences, the need to ensure clear understanding, application and advice on the law in a consistent manner; and the need for enhanced capability of DER staff.

There were 15 substantive recommendations made under Strategic Direction. The author stated: “Accordingly, my considered opinion in this section requires the Ministry with Responsibility of Employment Relations **to take appropriate actions for the progressive implementation of the following recommendations without delay upon the issuance of the final Report in September 2007**”. (report emphasis) (pg.9)

One of the recommendations (Recommendation 3) has already been adopted – to reorganize DER into 4 technical units (3 were used in Cayman due to the absence of trade unions on island), one of which provided for a Labour Inspectorate Unit that would:

- Promote a coherent national occupational safety and health policy;
- Implement an active programme of work for integrated, systematic and regular (OCC emphasis) labour inspections (statutory terms and conditions including working time, remuneration systems, gratuities, social protection – pension and health insurances, child labour) and occupational safety and health inspections;
- Protect workers from all forms of danger and exposure in the working environment, and all branches of economic activity;
- Provide technical advisory service to employers and workers and their organizations
- Promote observance of labour laws, advise employers on corrective action, and ensure compliance; and
- Institute prosecution as last resort, as appropriate, for breaches of the law

Specialists vs. Generalists?

As Goolsarran observed in his Recommendation 3, this new Organisational Structure “.....proposes one integrated labour inspectorate as a ‘one stop shop or multi-skilled service’ for statutory terms and conditions of service, occupational safety and health, pensions, gratuities and (health insurance) under the principle of “*one inspector, one enterprise*” [i.e., business]. This presupposes that inspectors are well-trained generalists, backed up by a small number of specialists/experts from within or outside the Department”.

When interviewed as part of the OCC investigation, Goolsarran said there should be some specialists, but that what existed at the time of the report in DER was not specialism in the true sense of the word – merely people who were concentrating on one area of work. For OCC comment on this point and Recommendation, please see page 56.

Goolsarran also recognized the importance of training for staff in the Department when he recommended that , on acceptance and implementation of the new structure and all staff in place, a programme of internal training courses / briefing sessions should take place for all staff.

Organizational Structure and Capacity

Goolsarran expected the Labour Inspectors working in the Labour Inspections Unit would complete a weekly targeted number of labour inspections – his Report recommended a minimum of 5 per week per inspector (pg. 17). However the OCC considers that a minimum of 3 inspections per week per inspector is achievable.

In interview Goolsarran stated that there needs to be some accountability, some way to measure output. A computerized system would help – this would form part of the performance appraisal (A Departmental database was in fact set up in 2008 by Director Tibbetts).

In interview, Goolsarran also expressed the firm view that any labour inspector owning, running or otherwise involved in a construction company would be guilty in his view of a serious professional breach. This could be a conflict of interest, and would tend to demonstrate a less

than professional approach to the work; indeed, there is clear evidence with at least one former employee that this has been flouted in such a way that created a clear conflict of interest. The OCC agrees with this, and **recommends** that this apply to any new staff employed by DLP. However there may well be existing Department staff that are so engaged in the construction industry outside their core work for the Department, and to either dismiss them or ask them to immediately relinquish their interests in such companies would be too draconian. The OCC therefore **recommends** that all existing DLP staff, at whatever level, should sign a Register of Interests with a continuing obligation to keep it updated, with failure to do so being considered a disciplinary offence. The OCC is aware that Departmental staff are already expected to declare such interests, but this has proven ineffective as currently operated.

Legislative Framework

In his report Goolsarran was of the view that as this relates to Health and Safety at Work, Cayman's laws should be in line with aspects of Conventions 155 and 167 and the CARICOM Model Laws on occupational safety and health. This was just one of the recommended changes made by the author, who recommended they be enacted as soon as possible, following consultation with key stakeholders. (pgs. 27-29).

Implementation Plan

As part of the implementation plan, the Goolsarran Report recommended that the Employment Law 2004 be brought into operation "after further consultations with the proposed National Employment Advisory committee along with the recommended amendments flowing from this report or certain aspects in a new piece of legislation". (pg.44). It also recommended that negotiations begin with other agencies for the transferring of certain services out of DER and offering to assume certain services, within 3-6 months after the final Report is issued, as follows:

- Pensions to DER – Labour Inspectorate within 3 months (new DLP now has responsibility for Pensions)
- Health Insurance to DER – Labour Inspectorate within 6 months
- Business Staffing plans to DER - Employment Services within 6 months

Goolsarran envisaged that the Ministry would take appropriate actions for the progressive implementation of the following recommendations without delay upon the issuance of the final Report in September 2007, and that all except Recommendation 14 would be implemented within 6 months from the issuance of the Report (Recommendation 14 – 12 months). He clarified this in interview by stating that the date for implementation of the recommendations should be from the date the recommendations were accepted. If one assumes that the recommendations were accepted at the date the Report was tabled in the LA by the Minister who commissioned the Report – 16/11/07 – therefore all but one of the recommendations should have been implemented by 16/5/08. **However, as at the date of this OCC Report, the majority of Goolsarran’s Report recommendations are yet to be implemented, more than 54 months later.**

The Goolsarran Report is a comprehensive document, rightly praised both within DER at time of publication and still used as a reference tool in DLP today. Although the cost of obtaining it was high, this in my opinion as Commissioner was fully justified by the experience and depth of knowledge Mr. Goolsarran was able to bring to bear. For these reasons, it was in my view unfortunate that, having agreed Terms of Reference with him on 25 January 2007 and the Report being completed in September 2007, that the passage of the Labour Law 2007, which was consolidated and revised on 19 June 2007, could not have been stayed in order that at least some of the findings and recommendations could at minimum have informed the 2007 Law, if not become part of the Law itself.

In an article in the Caymanian Compass dated 22 May 2012 (“End Of Year Target For Labour Law”), Director Ebanks reportedly announced Government aims to overhaul the territory’s Labour Law by the end of 2012, stating that the Ministry was keen to comprehensively review the Labour Law, and that changes to the law could include recommendations from the Goolsarran Report.

RECOMMENDATION: One area where the OCC takes issue with this Report is on the emphasis that Mr. Goolsarran placed on a generalist, rather than a specialist, approach to the work of Labour Inspectors at all levels, including Health and Safety. This in my opinion, has not been successful in the past, and in fact all the Labour Inspectors interviewed (including Senior Labour Inspectors) wanted dedicated Health and Safety Labour Inspectors. When one considers the current size of the Department, only one or two persons could be so employed, but, provided that they have the specialist training to qualify them as true experts, and not, as SG says, merely people who were concentrating on one area of work, the OCC would **recommend** this as a preferred course of action.

FUTURE: 2012 - “From DER to DLP” – more than a name change?

The Ministry’s plans for the new DLP was set out in a paper produced by the Ministry entitled “The Reorganisation of Labour and Pensions”. In a news article dated June 29, 2010 (“Shake-up underway at DER”), Minister Anglin was reported as announcing that DER would be split into 2 departments - the Human Capital Development Agency and the Department of Labour and Pensions (DLP). In another article dated 7 February 2012 (“Gov’t Labour and Pensions Office Soon Come”), Employment Minister Rolston Anglin announced at the Chamber of Commerce Business Expo that the new Department of Labour and Pensions would be “formally launched” in the first quarter of this year. The Minister expressed the view that the new system would allow for more proactive workplace inspections, while causing minimal disruption for employers who abide by local laws.

Ministry Chief Officer Mary Rodrigues said the department restructuring would be done “within existing budget allocations for the ministry”. It is difficult to see how DLP could be more effective in carrying out their duties particularly with regard to inspection and enforcement, thereby protecting the lives of both construction workers and members of the public alike, without additional resources.

Under the reorganization, Health and Safety matters would be dealt with by the General Labour Inspectorate who would be expected to proactively inspect workplaces for compliance with any and all labour-related legislation. Among their many other duties, they would deal with occupational safety and health inspections; follow up on remedial reports; deliver training relating to the labour law including complaints of a safety and health nature; and refer cases to the relevant Deputy Director for investigation and/or prosecution under the governing legislation when required. However, this is not a specialist unit – in fact, there is a clear indication that the Ministry envisions that General Labour Inspectorate would “follow the best aspects of the Generalist approach” proposed by Goolsarran. The Inspectorate still remains inadequately staffed for the amount of work it will be expected to undertake.

The proposed Labour Investigation Unit, which would stand alongside the General Labour Inspectorate in the Department, would also be responsible for delivering training relating to the labour law including complaints of a health and safety nature – but again, this is also a small unit with many other duties.

In February 2012, Mr. Mario Ebanks was appointed as Director of the new Department of Labour and Pensions – the conclusion of a process that was first publicly discussed by the Ministry in 2010. With regard to health and safety issues, as Director he is responsible for the sign-off of remedial notices and overseeing national occupational safety and health policy. However, this is among no less than 24 other stated duties.

The Director is also expected to liaise with the Ministry on any proposed closure of business – he still has no power to do this, apparently, of his own volition. This would appear to fall short Recommendation 9 of this Report, thereby indicating no change to S.65(6) of the Labour Law 2007.

As mentioned earlier, in an article in the Caymanian Compass dated 22 May 2012 (“End Of Year Target For Labour Law”), Director Ebanks reportedly announced Government aims to overhaul the territory’s Labour Law by the end of 2012, stating that the Ministry was keen to comprehensively review the Labour Law.

DLP is in its infancy. Nevertheless, it is up to the Department to prove that this is more than just a change of acronym. Many of the areas of concern highlighted in section 8 of this report have not been addressed adequately or at all.

FINDINGS AND RECOMMENDATIONS

Findings

FINDING: Whilst the OCC would strongly support amendments to existing legislation, there is a corresponding duty on Labour Inspectors to cooperate, and work more closely, with the Government Legal Department in a timely fashion, in particular with regard to the delivery of complete instructions and the collection of files. The Department should also be more proactive in looking for matters to prosecute where warranted.

FINDING: OCC interviews with DER staff clearly demonstrated that, as of 2011, there was far less awareness amongst existing DER staff of the importance and effect of these international laws and conventions, and their attendant obligations, than there should be. Unfortunately, there is nothing to indicate that the level of knowledge in this area is any greater since DER became the Department of Labour and Pensions. This must be addressed in training; ignorance should not be seen as an excuse.

FINDING: There is a wealth of collective experience in DLP (formerly DER) but the Department must better demonstrate its professionalism across the board if they are to get and maintain the respect of members of the public and persons in the industry (both employers and employees) alike. Labour Inspectors must carry out more proactive investigations, improve the quality of reports where necessary, maintain valid OSHA training certificates, minimize time

spent on negotiations, and conduct a comprehensive outreach programme which must have the full and active involvement of those at Assistant Director level and above.

FINDING: The filing system used by DER and still used by the restructured DLP is both inadequate and inefficient for the needs of the Department, and the Departmental database is not configured in a way that would help the Department to achieve best practice and optimize its efficiency.

Recommendations

The intent of the OCC Recommendations is to ensure that Health and Safety in the construction industry is properly and effectively monitored by the Department of Labour and Pensions (formerly the Department of Employment Relations). DLP, like DER before it, is doing as much as it can with limited resources, both financial and personnel. The Labour Inspectors are by and large very committed, but they are inadequately resourced for an important role which, although ultimately protecting the lives of both workers and members of the public, has been reduced to just one of many job functions. The OCC Investigation has taken a 360 degree approach. As a consequence, the recommendations not only impact on the Department but on wider aspects of Health and Safety in this particular area.

The new DLP Director has only recently been appointed to lead this newly restructured Department. With the new Department in its infancy, this provides the best possible opportunity to implement the following OCC recommendations, thereby demonstrating a clear commitment to proper regulation in this area not only to those involved in the construction industry and members of the public, but also internally to staff.

DLP

1. DLP should establish a dedicated Health and Safety Unit. This is perhaps the single most important recommendation. Even a small unit comprised of two Labour Inspectors, one senior, would enable them, and DLP as a whole, to be more proactive – preventing accidents from

happening rather than reacting to incidents after the fact. The Unit would be able to do more workplace inspections without notice (a proven way of increasing workplace safety), and conduct public education, outreach and training to contractors.

2. Training should be brought and kept up to date. OSHA certification, or its equivalent, for Labour Inspectors is crucial, but training must also include instruction on the relevant ILO conventions, CARICOM Labour Laws and other international obligations. As of December 2011 there was far less awareness amongst existing DER staff of the importance and effect of these international laws and conventions, and their attendant obligations, than there should be. Ignorance would not be seen as an excuse.

3. Better resources, equipment and transportation, including, but not limited to, oxygen meters, light meters, noise level meters and HD cameras. All of the above are essential professional tools enabling Labour Inspectors to properly conduct inspections and otherwise discharge their duties in this area.

4. DLP must cooperate, and work more closely, with the Government Legal Department in a timely fashion, in particular with regard to the delivery of complete instructions and the collection of files. The Department should also be more proactive in looking for matters to prosecute where warranted.

5. In the professional opinion of Samuel Goolsarran, author of the Goolsarran Report, when interviewed for this investigation, any labour inspector owning or running a construction company would be guilty in his view of a serious professional breach. This could be a conflict of interest, and would tend to demonstrate a less than professional approach to the work; indeed, there is clear evidence with at least one former employee that this has been flouted in such a way that created a clear conflict of interest. This opinion was also shared by one of the victims of a

construction accident interviewed for this report (see section 8(d), post). The OCC agrees with this, and recommends that no new staff employed by DLP may own, run, or have a substantial interest in a construction company. However there may well be existing Department staff that are thus engaged in the construction industry outside their core work for the Department, and to either dismiss them or ask them to immediately relinquish their interests in such companies would be too draconian. The OCC therefore recommends that all existing DLP staff, at whatever level, should sign a Register of Interests with a continuing obligation to keep it updated, with failure to do so being considered a disciplinary offence. The OCC is aware that Departmental staff are already expected to declare such interests but this has proven ineffective as currently operated.

6. Contrary to the recommendation in the Goolsarran Report, Labour Inspectors should move back from being generalist to being specialists, especially where Health and Safety is concerned. This is a view supported by the Ministry but has yet to take place in any practical way

7. DLP must set up a better filing system and/or more comprehensive database. This would not only assist staff internally, but would also greatly assist in the preparation of files before they are referred on to the Government Legal Department.

LAW

8. The following are specific legislative changes recommended by the OCC:

- The Director should have the power to close an entire worksite under S.65(6) of the 2007 Labour Law.
- All companies, no matter what size, must keep records, and Labour Inspectors should be able to go back more than 2 years when examining records.

- Increase current fine levels (separate from administrative fines) and other penalties to a level where they are a painful disincentive to compel employers to comply with the law. This concurs with Goolsarran’s strongly held view that penalties have to be meaningful – “an incentive to keep the law, and a disincentive to break it”.
- Charities and non-profit, non-commercial organizations should be covered by the Labour Laws and Regulations.
- Failure to appoint a Safety Officer should be an offence under the Labour Law and/or Labour Regulations.

9. Consideration should be given to enacting as soon as possible the 2004 Employment Law, Part IX (sections 60-72) of which specifically deal with Health, Safety and Welfare.

OTHER AGENCIES

10. The former DER had a good working relationship with both the Department of Planning and Cayman Contractors Association, and it is to be hoped this will continue under the new DLP. However, there must be better and more effective communication and liaison between DLP and Immigration; Environmental Health; Trade and Business Licensing Board; the Department of Commerce and Investment; Lands and Survey; and all other relevant government entities – whilst simultaneously taking great care to underscore and emphasise the independence of the DLP, particularly in matters relating to Health and Safety.

11. Employers who routinely and deliberately flout their legal Health and Safety obligations, therefore risking the lives of their workers and possibly innocent passers-by should not be awarded Trade & Business Licences and/or Work Permits.

OTHER

12. A driver should only be allowed to operate a crane or forklift truck if they are certified to do so. At present, persons driving such equipment need only a Group 4 Licence.

13. Protection of whistleblowers - the Law should be changed to allow penalties for victimization in order to protect reporters of wrongdoing (AKA “Whistleblowers”). This would also help to underscore the seriousness with which unsafe practices, which could endanger the lives of construction workers and members of the public alike, are viewed. However, it must also be noted that a number of both current and past members of the Department have expressed concerns with the level of confidentiality within the Department itself. This is unhelpful, unfortunate and unprofessional. There is little point in legislative change in this area if this continues to be a problem within the new DLP.

GLOSSARY

- DER - Department of Employment Relations
- DLP - Department of Labour & Pensions
- CCA - Cayman Contractors Association
- ILO - International Labour Organization
- CARICOM - Caribbean Community
- OSHA - Occupation Safety & Health Administration