

APPENDIX
(para 12)

MEMORANDUM OF UNDERSTANDING between the Health and Safety Executive (HSE) and Tourism Quality Services Ltd (TQS), the adventure activities licensing authority designated under the Activity Centres (Young Persons' Safety) Act 1995.

Purpose

1. This memorandum of understanding sets out the working arrangements between HSE and TQS to avoid unnecessary duplication of effort, to ensure effective co-ordination when needed and to ensure a free exchange of relevant information. It only applies in relation to providers for which HSE is the enforcing authority for health and safety legislation.

Health and safety legislation relating to adventure activity providers

2. The Health and Safety at Work etc. Act 1974 (HSWA), and its relevant statutory provisions deal with the protection of people affected by work activities. There is a duty under HSWA to protect those not at work from the risks arising out of work activities; this includes participants in adventure activities where the facilities are provided by people who are employers or are self-employed. A number of Regulations made under HSWA also apply to adventure activity providers. In particular, the Management of Health and Safety at Work Regulations 1992 (MHSWR) have a key role with requirements on organisation, arrangements, training, and working practices necessary to protect the health and safety of employees and participants.

3. The Activity Centres (Young Persons' Safety) Act 1995 and Adventure Activities Licensing Regulations 1996 (AALR) set up a licensing scheme for certain providers of facilities for certain prescribed adventure activities to young people under 18 years of age. Most of the providers subject to licensing will also be subject to HSWA and its relevant statutory provisions. Some organisations, not subject to HSWA because staff are volunteers, will be subject to licensing if they provide facilities to the public for payment. The safety requirements for licensing are drawn directly from, or are more specific statements of general duties from, HSWA or MHSWR. These requirements are to secure the safety of the young people participating in the activity and the safety of adults participating with them such as instructors, teachers, party organisers or adult clients.

4. The licensing scheme creates an overlap of responsibilities for ensuring health and safety in the adventure activity sector. TQS has powers through licensing; the health and safety enforcing authorities (HSE and local authorities (LAs)) have wider enforcement powers. (Demarcation of enforcement responsibility between HSE and LAs is shown in Annex I).

TQS's responsibilities and use of powers

5. TQS has primary responsibility for matters relating to health and safety in connection with the providers and the facilities for adventure activities prescribed by AALR as subject to licensing. Where the provider and activities are subject to licensing, TQS is obliged to (i secure safety standards by:

- inspection to ensure the provider is meeting the safety requirements;

- granting a licence only if it is satisfied the provider has demonstrated that the safety requirements have been met;
- imposition of standard conditions and optional non-standard conditions in licences;
- the investigation of complaints; taking action if required and if in its remit, otherwise passing them on to HSE; notifying complainant of the outcome of its investigations or the referral of the complaint to HSE.

6. TQS will make full use of its powers under the Adventure Activities Licensing Regulations 1996 and take action through the licensing procedures to ensure that appropriate health and safety standards are met. It is expected these licensing powers will be adequate in the great majority of cases.

7. TQS's powers through licensing cannot be applied:

- with an immediate effect to matters in scope of the licensing scheme,
- or
- to matters out with the scope of the licensing scheme.

Where matters of evident concern which it cannot remedy soon enough or at all, come to its notice through inspection or otherwise, TQS will notify HSE without delay (see paragraph 14). HSE may then issue Improvement or Prohibition Notices, or prosecute as appropriate.

8. TQS will have due regard to the Health and Safety Commission's guidance to the licensing authority and to the Commission's enforcement policy statement, in particular with regard to proportionality in applying the law and seeking compliance; consistency of approach; targeting of action and transparency about its operations and procedures.

9. TQS will liaise with HSE in relation to any action which it has taken, or proposes to take, in respect of prescribed adventure activities by sending to the local HSE office a copy of any licence, or letter refusing a licence, it sends to providers for which HSE has enforcement responsibilities.

HSE's responsibilities and use of powers

10. HSE will take into account TQS's activities when it prioritises its approach to the inspection of adventure activity providers. It is HSE's intention to avoid unnecessary duplication of effort and dual inspection. The inspection of, and issue of a licence to, a provider of prescribed adventure activities will be an important factor in determining whether HSE should undertake a preventive inspection visit.

11. HSE has primary responsibility for matters relating to health and safety which are outside the scope of AALR and where the provider has duties under HSWA and where HSE is the enforcing authority. These include matters relating to:

- adventure activities which are not prescribed for licensing by regulation 2 of AALR;
- the health and safety of participants in adventure activities which are prescribed by regulation 2 of AALR but where regulation 3 of AALR does not require the provider to hold a licence (e.g. adult only groups, under 18s)

accompanied by parent/guardian, pupils on activities run entirely by their own school);

- the health and safety at work of employed and self-employed people when they are not involved in the undertaking of prescribed adventure activities;

12. HSE also has primary responsibility for the following in relation to matters which are in the scope of AALR and where HSE is the enforcing authority, whether or not the provider has duties under HSWA:

- enforcement action (Prohibition and Improvement Notices or prosecution) when considered necessary and licensing powers are inadequate;
- the investigation where appropriate of complaints (other than those covered by para 5) notified to HSE;
- the investigation where appropriate of accidents and dangerous occurrences which the provider has to report to HSE;

13. HSE will liaise with TQS in relation to any action which it has taken, or proposes to take, in respect of prescribed adventure activities:

- by informing TQS of its intention to investigate accidents, dangerous occurrences or complaints involving licensed providers;
- by copying to TQS letters sent by HSE to licensed providers;
- by copying to TQS Improvement and Prohibition Notices served on licensed providers;
- by informing TQS Of its intention to prosecute a licensed provider.

Matters of evident concern

14. Matters relating to serious deficiencies in the undertaking of prescribed and non-prescribed adventure activities (examples are given in Annex 11), which come to the attention of TQS in the course of its inspections or otherwise, will be drawn to the attention of HSE in the following way:

- where an immediate risk to life, or risk of serious personal injury, appears to be involved, TQS will notify the local HSE office immediately by telephone followed by written confirmation of any action taken, or proposed, in respect of prescribed adventure activities (e.g. withdrawal of licence). HSE will then notify TQS of any subsequent action decided on; or
- where an immediate risk to life is not involved and there is no risk of serious personal injury, TQS will take what action it considers necessary in respect of prescribed adventure activities using its powers under AALR. It will also notify the local HSE office in writing of such matters falling out with the scope of the Regulations,

15. Matters relating to deficiencies in the undertaking of prescribed adventure activity which come to the attention of HSE will be drawn to the attention of TQS in the following way:

- where an immediate risk to life, or risk of serious personal injury, appears to be involved, HSE will take appropriate action (e.g. serve a Prohibition Notice) and inform TQS, in writing, of action taken and/or proposed. TQS will then notify HSE of any subsequent action it decides on; or
- where an immediate risk to life, or risk of serious personal injury is not involved, HSE will notify TQS in writing.

TQS assistance to HSE regarding investigations and proposed enforcement action

16. Where requested by HSE, TQS will provide any expert evidence it can on technical matters relating to prescribed and non-prescribed adventure activities. This is likely to arise when investigating accidents or incidents which may result in the prosecution of either a provider or an individual acting on the provider's behalf. HSE may request that a representative of TQS accompany an HSE inspector to provide technical advice, where necessary in the course of their investigations. Where this results in costs to TQS for additional services and actions beyond those otherwise agreed in this memorandum and which it would not otherwise incur, HSE will cover the costs of TQS. These costs will be subject to negotiation and agreement between both parties on a case-by-case basis.

17. Where an inspector of TQS becomes aware of a situation which requires referral to HSE, he/she should obtain as much information as is possible within his/her powers by making all reasonable requests to the provider or the provider's agent as will assist HSE in making a decision on action to take or, which could be used as primary evidence of an offence having been committed. Such information might reasonably be expected to include the following when a licensed activity is involved: names and addresses of instructors, responsible persons, and witnesses; date; time; location; and where possible copies of relevant documents and photographs. When a licensed activity is not involved, the TQS inspector will have no power to obtain such information from others but a record should be made of what he/she witnessed

Resolution of difficulties with this memorandum

18. It is expected that most difficulties in operating to this memorandum will be resolved by discussion at local level. Where difficulties arise which cannot be resolved in this way, the matter should be referred to HSE's Field Operations Director, Scotland and TQS's Chief Inspector for them to come to an agreement on interpretation of the memorandum and whether there is any need to recommend a revision to Executive/Board level.

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John Walsh-Heron

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(for the Health and Safety Executive)

Chief Executive
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ANNEX I
(Appendix para 4)

Health and Safety (Enforcing Authority) Regulations 1989: demarcation of enforcement responsibility between HSE and local authorities (LAs)

1. Allocation of enforcement responsibility is determined by the Health and Safety (Enforcing Authority) Regulations 1989. In the outdoor activity industry this is divided between HSE and LAs depending on the nature of the undertaking and the main activity offered.
2. HSE is the enforcing authority for health and safety legislation where:
 - the provider offers activities which are mainly educational, i.e. part of the curriculum for outdoor education;
 - where the provider is a LA;
 - where a provider occupies no base premises;
 - where the provider's only base is domestic premises.
3. The relevant LA (usually the Environmental Health Department) is the enforcing authority for health and safety legislation where the premises are used to provide facilities mainly for leisure or corporate activities, most of which will fall within the private/commercial sector.
4. Where educational premises are used as a base by a provider during the school holidays, then HSE is the enforcing authority (although HSE and the relevant LA may agree to a transfer of enforcement responsibility under reg.5 of the HS(EA) Regulations if this is appropriate). Where a provider offers activities during term-time to school parties and to other young people during the holiday periods, then enforcement responsibility may fall to either HSE or the LA depending on the main activity. In such situations the enforcement responsibility will be determined on a case-by-case basis.
5. The Adventure Activities Licensing Regulations 1996 extend the enforcement provisions of HSWA to apply to the licensing regulations. The Adventure Activities Licensing (Enforcing Authority and Licensing Amendment) Regulations 1996 maintain the allocation of enforcement responsibilities between HSE and LAs the same as for HSWA. However, they extend the enforcement powers of LAs so they cover not only activities conducted at premises allocated to them but also adventure activities conducted elsewhere if those premises are used as a base. (HSE already has these powers). Thus enforcement responsibility for adventure activities, such as climbing at a crag remote from the home base, will fall to the enforcing authority responsible for the home base, whether or not this is a permanent base.