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## **HEALTH AND SAFETY COMMISSION**

### **DRAFT DISCUSSION DOCUMENT IN CONTEMPLATION OF A HSC STATEMENT ON THE PUBLIC SAFETY ROLE OF HSE**

**A Paper by Jonathan Russell**

**Advisor(s): Geoffrey Brown**

**Cleared by Jonathan Rees and Giles Denham on 27 April 2005**

#### **Issue**

1. Publication of Discussion Document (DD) in contemplation of an HSC statement that sets out the public safety role of HSE (see annex 1). This is important because it will help
  - Take forward HSC's commitment, as set out in the Strategy, to promote a debate on the public safety role of HSE
  - Provide greater clarity for HSE's public safety role, particularly in light of recent developments regarding HSC's section 3 HSWA, policy (which addresses risks to non-employees from work activities) and Hampton's final report.
  - Foster increased support from stakeholders for how HSE proposes to discharge that role.

#### **Timing**

2. Proposed timetable as follows:
  - May 4 – HSE Board to consider draft DD and comment
  - May 10 – HSC invited to consider draft DD and agree consultation exercise
  - June – Publication of DD for consultation
  - October – HSE Board to consider revised position statement
  - October/November – HSC invited to agree and publish position statement
3. Due to consultation taking place over the holiday period, a 14-week consultation period is proposed, two weeks more than the Cabinet Office minimum of 12 weeks. Even to

the current, tight timescale anticipated the earliest that the final position statement can be published is late Autumn 2005.

## **Recommendation**

4. The Commission is invited to approve publication of the draft statement.

## **Background**

5. HSC's strategy commits HSE to
  - Moving away from intervening in those areas of public safety that are better regulated by others or by other means
  - Promoting a debate about the appropriate contribution of workplace health and safety law to the wider public and consumer safety regimes.
6. One of the drivers for addressing this issue was and is to allow HSE to focus its resource where it will have the greatest impact by enabling us to deal better with pressure from third parties who try to involve HSE as an investigator of last resort, in matters outside our priorities, when other avenues have been explored and not delivered the outcome that they had sought. This pressure diverts resource away from our priorities, making delivery of the PSA targets more difficult.
7. Recent developments have underlined the importance of promoting a debate about the appropriate contribution of workplace health and safety law to the wider public and consumer safety regimes. These are
  - HSC's revision of its policy on the enforcement of Section 3, HSWA. This has the potential to make it harder for HSE to move away from intervening in any matters affecting public safety.
  - The need to manage the change envisaged by Hampton's recommendations, which propose a community of fewer but larger regulators, and some expansion of HSE's public safety remit – such as its incorporation of the Adventure Activities Licensing Authority.
  - Increasing media criticism for being too interventionist and/or nannying. Most of this relates to public rather than worker safety - conkers, gravestones, swimming and paddling pools, etc – and can occur regardless of HSE/LA intervention or otherwise. This obstructs the communication of our key message of sensible health and safety.
8. This DD represents the first stage of this debate.

## **Argument**

9. Hampton's proposals may provide the opportunity for legislation to clarify aspects of the regulatory landscape, including that relating to section 3 HSWA. In particular, the proposed consumer and trading standards agency may offer an opportunity to remove unnecessary overlaps in this area. In the meantime, HSC needs to fulfil its Strategy

commitments, its statutory responsibilities and also help HSE in delivering its PSA targets and implementing Hampton's recommendations.

10. A public position statement from HSC on the role of HSE in public safety, following consultation, would enable progress on all of these issues by helping to
  - Provide clearer public understanding, in light of Hampton's proposals, of what HSC considers HSE's role in public safety to be.
  - Promote greater understanding within HSE of its public safety role, thereby enabling better decisions to be made, in line with the HSC Enforcement Policy Statement and in the context of the revisions to the section 3 HSWA policy.
  - Identify where policy or operational changes may be needed for HSE to secure the commitments given in the HSC Strategy, and to achieve its PSA targets through efficient and effective working.
  - Reinforce efforts to position HSC/E as champions of risk management, not risk avoidance.
11. The basis of the approach in the draft DD is questions pertaining to a series of principles, based on key themes tied to the Strategy and wider developments such as Hampton. It also affirms other, key HSE aims – to work with other regulators to achieve a coherent overall approach to public safety, and to promote a culture of sensible health and safety.
12. At this stage, the debate is restricted to the public safety role of HSE only. Our partners in the LAs are not included although we have discussed with LACORS. Their decision is to be involved at a later stage. However, we hope that this discussion will help to stimulate debate as to the role of LAs in this area, taking account of their particular connection to local communities.
13. We consider that at this stage, there are no specific implications for Scotland and Wales arising from publication of this DD.

## **Consultation**

14. HSE Directors of Policy Programmes and Strategy Division, FOD, COSAS, Legal Adviser's Office, OPSD, Communications Directorate, NSD, LACORS. HSE Board considered on 4 May.

## **Presentation**

15. At this stage of the debate, we are seeking primarily to engage key opinion formers in the health and safety community. As we take the debate forward, we will seek alternative methods of engagement such as seminars, focus groups and public events.
16. Ministerial and media interest is likely due to linkage with the debate surrounding HSC's adoption of the revised section 3 policy and the Hampton Review.

## **Costs and Benefits**

17. Resources and Planning Directorate (RPD) has indicated that over 30% of HSE's spend relates to work with a significant public safety component. This embraces a wide range of activity: work on major hazards, rail, gas safety, fairground inspections, guidance on water safety etc. There is a risk that, following HSC's revision of the policy on the enforcement of section 3 HSWA, this figure could grow. Greater understanding and appreciation of the public safety role of HSE, by Government and stakeholders, that is one of the intentions of this debate, may help to manage the expectations of others in this area, thus enabling HSE to focus on its priorities.

### **Financial/Resource Implications for HSE**

18. To be discussed in the Board and Commission papers post-consultation.

### **Environmental Implications**

19. None

### **Other Implications**

20. To be discussed in the Board and Commission papers post-consultation.

### **Action**

21. The Commission is invited to agree the DD and approve the consultation exercise.

### FOREWORD

In its publicly available *Strategy for workplace health and safety in Great Britain to 2010 and beyond*, the Health and Safety Commission (HSC) undertook to promote a debate about the appropriate contribution of workplace health and safety law to the wider public and consumer safety regimes. HSC's aim was to help to promote and ensure a coherent overall approach to public safety, with greater clarity of responsibilities for the very many agencies involved in protecting the public.

This Discussion Document (DD) represents the first stage of that debate. HSC is seeking your views as to what HSE's role should be in protecting the public from work-related risks.

HSE takes its public safety role very seriously. It wishes to play its part, with other authorities, in helping to ensure public safety and is committed to doing so in the most efficient and effective manner. For example, HSE will continue to apply its unique expertise to provide assurance that risks to the public from major hazards industries are properly managed. The reasons for this are clearly set out in Principle 1 of this document. However, it should be noted that at the end of this year, HSE will cease to have regulatory responsibility for rail safety, including passengers.

HSE, like all other regulators, has limited resources. It cannot do all that it may want to do, nor can it meet everyone's expectations. Because of this it has to set priorities, targeting its resources where they can have the best effect, to help ensure that we meet our targets to reduce the number of workplace deaths, serious injuries and instances of ill health.

Your views will help us shape those priorities in the public safety arena, thereby helping enable HSE to continue to work efficiently and effectively.

Following this discussion, HSC will publish a Position Statement that sets out what it considers to be HSE's current role in public safety. This will promote greater public understanding as to what people can generally expect from HSE as a regulator of risks to public safety arising from work activities. It will also help HSE to lead the wider debate, involving Government departments and others, about how a coherent overall approach to public safety can be achieved.

This DD is concerned only with HSE's role in public safety, not that of its partners in the local authorities. However, HSE hopes that this discussion will help to stimulate debate as to the role of local authorities in this area. To this end, HSE would particularly welcome responses to this DD from local authorities.

No aspect of this DD should be interpreted as meaning that HSE would rule out involvement in certain incidents affecting members of the public just because they fall into a particular category or activity. HSE will continue to consider the facts of each case before deciding whether to involve itself. All HSC/E policies, in particular the HSC

Enforcement Policy Statement, will be taken into account when making each such decision, and will involve consideration of HSE's priorities.

The DD presents a number of questions. You may reply on all of the questions raised or only on those in which you have a particular interest. We have a dedicated web page that will allow on-line completion and we would prefer to receive replies electronically as this will help us to analyse the results more easily, but we welcome your replies in whatever format you choose. Paper copies of the DD will be made available on request.

The consultation period is 14 weeks. Please reply by .....

## **INTRODUCTION**

The Health and Safety at Work etc Act (HSWA) 1974 regulates risks to people arising from work activities in Britain. It has a very broad scope, imposing duties on all employers and all self-employed persons to protect themselves, employees and the wider public, so far as is reasonably practicable, from all of the risks to health and safety that their work activities create.

This gives HSE a role in regulating risks arising from work activities that affect both workers and the wider public. HSE's interventions in matters affecting public safety are conducted in accordance with its statutory responsibilities, its published priorities and the HSC Enforcement Policy Statement.

HSE thinks it important to promote discussion on where it should, and should not, target its resources in respect of its activities that affect public safety. These decisions are not straightforward, arising in part from the very broad scope of HSWA. To illustrate, we can note that there is sometimes a clear link between a work activity and a risk; for example, where a builder erects unstable scaffolding in an area to which the public have access, a public safety risk is imposed on those members of the public who have to walk beneath the scaffolding.

In other cases the link is less clear but still exists – such as risks arising from congestion at public events, or clinical decisions made by doctors. Indeed, many of the risks that people regularly encounter as part of everyday life – from visiting a park to using a public beach – may be linked in some way to a work activity. HSE is very aware of this and, where it is asked to do so, always looks to apply its expertise to such situations sensibly. For instance, although HSE has provided advice on how to manage risk, it has not sought to use its enforcement powers in respect of public swimming in open waters such as Hampstead Heath ponds.

Such links have the potential to bring many everyday activities within the provisions of the Act and therefore under the regulatory supervision of HSE. This use of HSE resources reduces HSE's ability to concentrate on the regulation of areas where the risks of injury are higher or where there have been a greater number of injuries. This is one of the reasons why HSC's Strategy clearly states that it expects HSE to:

- Work with other regulators who have public safety responsibilities to ensure that their expertise is used to best effect.

- Move away from intervening in those areas of public safety that may be better regulated by others or by other means.
- Ensure that overlaps in public safety provision are minimised, leading to a coherent overall approach to public safety.
- Help to identify perceived 'gaps' in public safety provision, to ensure that there is clarity of responsibilities among efficient, effective regulators who possess appropriate enforcement powers.

This DD seeks to develop this approach by setting out a set of principles to guide HSE's priorities. These priorities will be developed in line with wider, strategic factors and developments affecting HSC, HSE and the wider regulatory system, such as the findings of Hampton's review of regulation and enforcement (see [http://www.hm-treasury.gov.uk/media/AAF/00/bud05hampton\\_641.pdf](http://www.hm-treasury.gov.uk/media/AAF/00/bud05hampton_641.pdf))

To clarify what this means, HSC has based the DD on the following key strategic factors. We would be interested in whether you believe there are other, additional factors that we should take into account.

### **HSC's vision**

To gain recognition of health and safety as a cornerstone of a civilised society and with that, to achieve a record of workplace health and safety that leads the world.

### **HSC's strategy**

Created after wide consultation with the public and interested parties, this sets out how HSC will promote this vision.

### **HSC's and HSE's mission**

Working with local authorities to protect people's health and safety by ensuring that risks in the changing workplace are properly controlled.

### **HSE's priorities**

Which target its resources where they can make the greatest impact.

### **HSC's goal of sensible health and safety**

Which promotes a society that is not risk free, but one where risk is properly appreciated, understood and managed.

### **HSC's belief in firm but fair enforcement of the law**

Which is informed by the principles of Better Regulation, in particular the need for proportionality, consistency, targeting, transparency and accountability.

## **The wider regulatory framework**

The presence and impact of other expert, regulatory bodies that have a public safety role and whose work overlaps with HSC/Es, and the need to assist the Government in the implementation of the findings of Hampton's review of regulation and enforcement.

# **DRAFT PRINCIPLES FOR HSE'S REGULATION OF PUBLIC SAFETY**

## **Principle 1**

**HSE will apply its expertise to provide public assurance that risks in the major hazard industries are properly managed.**

Major hazard industries can attract high levels of public concern. These are those industries where a failure effectively to manage and control risks has the potential to result in multiple fatalities, widespread and adverse effects on health and wider societal, economic and political impact. For example, nuclear power stations or oil refineries.

HSE believes that people who live and work in the vicinity of such industries, and other members of society both nationally and internationally, should be able to do so with confidence and devotes considerable resource to enable people to realise this. Indeed, HSC's strategy states that HSE will continue to contribute its unique expertise to protect people and provide public assurance that risks in these industries are properly managed.

**HSE regards this principle as uncontroversial.**

## **Principle 2**

**HSE will continue to work with other regulators that have public safety duties, and specific expertise, to promote a coherent overall approach to public safety, including greater clarity of responsibilities among the regulatory bodies.**

HSC considers that there are instances where other regulators are better placed to regulate risks created by work activities. This may be because their regulatory activities are governed by more appropriate legislation, including enforcement powers, or because they have expertise in a particular area. An example of this is food safety, which is regulated by the Food Standards Agency. In such instances, and in accordance with the principles of Better Regulation, HSE would look to others to take the lead and would not seek to intervene.

In other instances, HSE will work in a more limited way, alongside other regulatory bodies, to help ensure public and consumer safety. For example, HSE staff may regulate, in accordance with HSE's published priorities, the manufacture and storage of fireworks. This is to help ensure the control, at source, of risks to both employees and the public from fireworks. However, Trading Standards Officers, working to Department of Trade and Industry legislation, have responsibility for the regulation of product and consumer safety matters relating to fireworks, including their sale.

There are other instances where there is confusion about who leads with regard to public safety. There are also some rare instances where they may be the perception of a 'gap' in public safety regulation. Where there is this confusion or 'gap', we mean that there is either

- no clear public understanding of which regulatory authority, if any, is best placed to deal with an incident affecting public safety; or
- there is such a regulatory authority but that authority is not provided with sufficiently effective enforcement powers to ensure compliance with the law, the control of risk and where necessary, holding those who fail to meet their statutory responsibilities to account.

In both instances, the wide scope of HSWA often brings incidents of this nature within the ambit of HSE. This risks HSE becoming the 'enforcer of last resort', with demands made of it to investigate matters with only a peripheral association to a work activity; for example, a case of alleged stress to a party in legal proceedings, allegedly caused by the overly lengthy legal process. Even assessing whether to investigate uses HSE resources, which would otherwise be devoted to our published priorities.

**Please consider the following**

**Should HSE continue to work with other regulators that have public safety duties, and specific expertise, to promote a coherent overall approach to public safety?**

**How important is it that there be greater clarity of responsibilities among regulators with public safety responsibilities?**

**How concerned should we be about confusion and perceived 'gaps' in enforcement in public safety provision? What should be done about them?**

**How concerned should we be about HSE as the 'enforcer of last resort'?**

**Would establishing criteria by which it could set its priorities for public safety protection help HSE to work efficiently and effectively, targeting its resources?**

## **Principle 3**

**HSE will not generally seek to regulate in a manner that unnecessarily restricts the liberty of the individual to engage in certain hazardous activities.**

HSE considers that a risk free society is both unattainable and undesirable. Rather, it wants to promote a society where risk is properly understood, managed and appreciated – and where people are free to engage in activities, of their own free will, that carry a measure of risk. Such activities include, for example, certain sporting and leisure activities. HSE will, of course, continue to expect that those organisations that provide access to such activities as part of their undertaking, or business, comply fully with their legal requirements to ensure that risk is effectively controlled, so far as is reasonably practicable.

**We welcome your comments.**

## **Principle 4**

**HSE will consider giving particular priority to intervention when the risks to the public from a particular work activity and the risks to workers from that same work activity are linked.**

Some work activities present the same risk to workers as they do to members of the public; for example, a collapse of poorly erected scaffolding in a public area may harm workers and/or passers-by equally. Similarly, the health of workers and non-workers may be equally exposed to risk by ineffective control of work involving hazardous substances in public areas, such as isocyanate-based paints or asbestos. In these cases there is a link between the risks to both workers and the public, from the same work activity. Any HSE action taken to help control the risks to workers would also help control the risk to the public.

There are other work activities that present some risks to workers but a greater risk to members of the public; for example, shoddy work by an electrician at someone's house may present some risk to the electrician carrying out the work but a greater risk to the person who must use the installation every day.

There are also work activities that present a risk to members of the public but not to workers. For example, an incorrect clinical decision by a doctor may result in harm to a patient.

**Please consider the following**

**Should the guiding principles include a clear link between the risks to the public arising from a particular work activity and the risks to workers from that same work activity?**

## **Principle 5**

**That where possible and appropriate, risks to public safety that arise in a particular locality be dealt with by those within that locality.**

Where not covered in other principles, such as involving major hazards, HSC considers that it would be helpful to explore how the expertise of local authorities in managing risk may best be utilised in managing risks arising from work activities that affect public safety.

Local authorities enforce health and safety law in workplaces allocated to them – including offices, shops, retail and wholesale distribution centres, leisure, hotels and catering premises. They work in partnership with HSE and are required to follow HSC's Enforcement Policy Statement. HSE regulates health and safety law in activities that are managed by local authorities – such as leisure centres and schools. Similarly, local authorities regulate health and safety law in HSE offices.

Local authorities therefore, have access to significant expertise in the control and management of risks arising from work activities.

HSE wishes to explore how this expertise may be used in addressing risks to public safety that arise from work activities that are managed by local authorities and so are regulated by HSE - such as swimming pools or local public events such as firework displays or open-air concerts. HSE also wishes to explore the extent to which HSE should consider such local authority managed activities, a priority.

### **Please consider**

**How local authority expertise in the management of health and safety may best be used in managing risks to public safety arising from local authority activities regulated by HSE – such as swimming pools, public events, etc.**

The level of priority that HSE should attach to local authority managed activities.

## **Principle 6**

**HSE will, where circumstances demand, provide its unique expertise in the control and management of risk to pressing issues of public and national concern.**

The expertise of HSE in the control and management of risk is nationally and internationally acknowledged. HSE will, where circumstances demand, use its resources to control and manage such risks in response to pressing issues of national concern, such

as public emergency. The level of HSE input to these matters will correspond to the nature and scale of the issue faced and other factors, such as the involvement of other authorities.

For example, HSE does not treat occupational road related risk as a priority because it views police involvement, using legislation that HSE would generally consider more appropriate, as generally satisfactory in managing any breaches of road legislation.

In other instances, where there are issues of national concern such as the Foot and Mouth outbreak among livestock in Britain during 2001, HSE reacted swiftly and diverted significant amounts of its resource to apply its expertise in support of the Government's response.

**Please consider the extent to which HSE should consider occupational road related risk a priority.**

**Please consider how best HSE should, where circumstances demand, provide its unique expertise in the control and management of risk to pressing issues of public concern.**