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HEALTH AND SAFETY COMMISSION

Transfer of responsibility for the regulation of health and safety on the railways

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Issue

1. The transfer of responsibility for health and safety on the railways from HSC/E to the Office of Rail Regulation (ORR), scheduled for 1 April 2006.

Timing

2. For information.

Recommendation

3. That the Commission note the progress made towards transfer on the target date.

Background

4. The Secretary of State for Transport announced in July 2004, in the White Paper 'The Future of Rail', that responsibility for health and safety on the railways would move from HSC/E to ORR. The Railways Act 2005 establishes the statutory basis for the transfer. For this to happen, further regulations supporting the Act need to be in place, as well as other measures including the transfer of staff from HSE and financial arrangements. The transfer requires a commencement order to be made by the Secretary of State once ORR has signalled its readiness to take on its new responsibilities.
5. The Chair wrote to the Secretary of State in July 2004 to set out the principles which the HSC believed should be upheld in the transfer and subsequent regulation of health and safety on the railways by ORR (Annex 1). Since then HSE officials have been working with the Department for Transport (DfT) and ORR to effect the move of policy and enforcement responsibilities to ORR so as to ensure that these principles are upheld. An update on progress was last given to the Commission in June 2005 (MISC/05/14). This paper updates the Commission on this work.

Argument

6. The principal means by which the transfer is being effected are:

- A commencement order to bring into force the relevant parts of the Railways Act 2005; this has been made giving effect to the health and safety provisions from 1 April 2006;
- The Enforcing Authority Regulations 2006, which are due to come into effect on 1 April 2006;
- A Memorandum of Understanding (MoU) between ORR and HSE which describes how the demarcation of responsibilities will work in practice, and arrangements for cooperation in areas of mutual interest;
- Regulations to introduce a levy, based on industry turnover, to fund ORR's health and safety regulation. These regulations were laid by DfT on 17 February and will be debated in both Houses of Parliament in March, with the intention that they will come into force on 1 April. If the regulations are not approved by that date, DfT are committed to meeting ORR's health and safety regulation costs.

7. In addition arrangements have been made for the transfer of resources including staff (see Annex 2). This programme of work has been progressed so that the transfer can take place on 1 April 2006.

Enforcement

8. Officials from ORR, HSE and DfT have reached final agreement on 'The Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006', known as EARR 2006, which give ORR powers to enforce health and safety legislation; give ORR inspectors the same powers as HSE and local authority inspectors in relation to matters concerning the operational railway; and define who the enforcing authority is in particular premises or activities. They will be signed shortly and are expected to come into effect on 1 April this year.

9. It is important to note that HSC/E will continue to have some rail safety responsibilities – for most cableways, for miniature railways and railways within industrial premises including factories, mines, quarries, and COMAH and nuclear licensed sites. In addition, following further discussions with DfT about the scope of the Railways Act 2005, a set of Regulations (the Railways Act 2005 (Amendment) Regulations 2006) has been made to remove guided bus and trolley vehicle systems from the scope of ORR and clarify that responsibility for fairground safety remains with HSC/E.

10. ORR has developed an Enforcement Policy Statement along the lines of that used by HSC/E. It was drawn up in consultation with HSE's Enforcement Policy Unit and is designed to be consistent with HSC/E's Statement.

11. A number of new Agency Agreements are being put in place to preserve HMRI's enforcement powers in respect of certain non-HSWA requirements such as Employers'

Liability Compulsory Insurance. HSC's existing Agency Agreements on these requirements are also being amended to reflect the fact that they will no longer cover rail-related health and safety matters.

Memorandum of Understanding

12. A summary of the issues covered by the MoU is at Annex 3. It covers arrangements for high-level formal liaison between HSE and ORR, explains the demarcation of enforcement responsibilities in practical situations and sets out ways in which policy advice, technical knowledge and other information will be shared. The MoU is close to being finalised in discussion between HSE and ORR officials and will be signed by the Chief Executives of HSE and ORR before 1 April.

Channel Tunnel Safety Authority

13. The ORR Board has agreed that the staff of the UK Secretariat should transfer from HSE to ORR subject to the full costs of the Secretariat being reimbursed by DfT. After the transfer it is intended that the Head and other Members of the UK Delegation should be appointed by the Secretary of State for Transport, rather than the Commission as at present. It is intended that the costs of the Head of the UK Delegation should be met by DfT and that the costs of other Members of the UK Delegation, one of whom is expected to continue to come from HSE, should be met by their parent organisation. The Secretary of State is expected to write to the Commission to terminate the current agency agreement under which appointments are made by the Commission and confirming that appropriate consultation will take place with other bodies, including HSC/HSE, before future appointments are made.

ORR's future strategy for health and safety

14. ORR has issued a draft Corporate Strategy 2006-09 for public consultation, which includes a chapter on 'Improving health and safety performance'. This was written in consultation with HSE. The strategy 'aims to deliver [a] vision of continuous improvement in health and safety, alongside improved performance and efficiency, whilst sustaining and developing the railway. It builds on that previously developed by the HSC/E, but reflects the combined safety and economic regulation role of ORR. It makes a commitment to continue the Rail Industry Advisory Committee in the immediate future but review its role in 2006-07. A summary of the chapter is at Annex 4. The public consultation ended on 23 February.

Future areas of mutual interest between ORR and HSC/E

15. The Commission should note that there are a number of strategic issues on which close cooperation with ORR will be necessary at least in the immediate future. Among them are:

- The response to cross-cutting government initiatives such as those on inspection and better regulation, where a coordinated approach is desirable;
- The response to international legislative developments which would have implications across the board for the regulation of health and safety – particularly

the European Court of Justice case over the use of 'so far as is reasonably practicable';

- The contribution of ORR to the overall health and safety strategy for GB, and in particular the contribution it could make to HSC/E's programmes and PSA targets.

Consultation

16. With RPD, Legal Adviser's Office, Railway Policy Division, HMRI, ORR

Presentation

17. The Chair is to make a 'valedictory' statement which will be made public via a press release and HSC/E's website at the time of transfer. It will emphasise the considerable improvements made in health and safety in the rail industry during the period of HSC/E's responsibility for it, point to some of the lessons learned and look ahead to some of the possible challenges facing the new ORR.

Financial/Resource Implications for HSE

18. See Annex 2.

Action

19. The Commission is invited to note the paper.

Annex 1

The following principles were set out by the Chair in his letter to the Secretary of State for Transport about the proposed transfer of responsibility for health and safety in the rail industry to ORR in 2004:

- Ensure safety is maintained, or improved so far as is reasonably practical
- Continued application of the Health and Safety at Work etc Act 1974
- Having adequate resources for HMRI work on inspection, enforcement and promotion of good practice to give assurance to the public and to ensure compliance with the law
- Enforcement action continue to be taken where that meets the better regulation tests, including those of proportionality and transparency
- Effective consultation with stakeholders (not just the railway companies) about the overall approach to regulation, as well as any other proposals
- A governance structure for ORR that demonstrates the independence necessary for a safety regulator, including from its other functions, as well as safety competence

Financial Arrangements

HSE has made a detailed assessment of the resources currently invested in rail safety. This assessment includes the cost of operations (minus operating income), policy, legal, press and science. The costs of corporate support services have also been assessed (many of which cannot be reduced in direct proportion). Efforts have also been made to assess the ongoing ORR resource requirement for HSE technical and specialist staff support (and vice versa) in steady state. The MoU provides for separate arrangements in the light of a major incident. ORR does not require a direct resource transfer in view of their proposed levy arrangement. HM Treasury are therefore considering HSC/E's proposal on the amount of resource to be surrendered.

HSE's proposal to HMT is based on the fundamental premise that resource may only be surrendered to the extent that HSC/E has the capacity to reduce its costs as a result of the transfer. A response is awaited. It has been agreed with ORR that HSE will provide IS/IT desktop services to ORR for 2006/07 via HSE's REFIT contract. Similarly HSE will continue to house and, to an extent, support ex-HSE staff in HSE field offices for the foreseeable future. While ORR will fully reimburse HSE for the actual costs of providing both services, associated receipts will fall due to HMT (on the basis that HSE is already funded to provide these services to its staff).

Staff Transfer

HMRI will retain its identity within ORR. Linda Williams, former HSE Regional Director and Head of Operations in HMRI, was appointed Chief Inspector of Railways in September 2005. In addition ORR has established a new Safety Policy Directorate, headed by former HSE official Rob Andrews. Many of the senior posts in the Directorate are to be filled by HSE staff. Arrangements have been made for all staff in post in HMRI and Railways Policy (currently around 180 people) to transfer to ORR. Most staff will initially retain HSE terms and conditions on transfer. ORR intends to harmonise terms and conditions for the new organisation over time, through full negotiation with TUs and other staff representatives. Staff transferring will have the right to apply for posts in HSE for three years after the date of transfer.

Gatherings for HSE's railways policy and inspectorate staff are being held on 16 March to mark the event; a 'welcome' from ORR and a farewell from HSE.

Summary of MoU between HSE and ORR

The MoU is in 2 parts, with an Appendix describing the enforcement arrangements.

Part I describes the purposes of the MoU – ‘to ensure effective coordination and cooperation [between ORR and HSE] in relation to the regulation of health and safety including the enforcement of health and safety law in Great Britain’.

This coordination and cooperation is to have certain key elements:

- ensuring consistent standards
- sharing knowledge and resources to avoid duplication, promote efficiency and reduce burdens on business
- cooperation to ensure that the division of responsibilities works effectively and is clear to duty-holders
- the mutual provision of expertise
- regular review of the arrangements

Arrangements for formal high level liaison are made, including annual meetings between the respective Chief Executives. It is agreed that each organisation will have a central contact point responsible for overseeing liaison with the other.

Part II outlines the arrangements for the sharing of expertise and policy advice between HSE and ORR. These include specific procedures for requesting and paying for specialist expertise. It covers:

- Arrangements for consideration of policy issues of mutual interest, including formal consultations. These areas may comprise among others, programmes to promote general health and safety and associated targets, cross-government initiatives and cross-cutting international and legal issues.
- Sharing of statistical information – ORR is to provide HSE with RIDDOR data.
- Clarification of incident investigation arrangements.
- ORR staff are to occupy space in HSE’s regional offices, with HSE giving support to them as outlined in a memorandum of terms of occupation
- HSE will provide joint training of inspectors where appropriate with ORR funding their staff’s share.

Appendix A explains the demarcation of enforcement responsibilities between HSE and ORR in practical situations, including construction, retail premises in stations, docks and nuclear installations. HSE continues to be responsible for most cableways, miniature railways and railways within industrial premises including factories, mines, quarries, and COMAH and nuclear licensed sites.

Summary of 'Improving Health and Safety Performance' (ORR Corporate Strategy consultation document, December 2005)

ORR's general approach will be to:

- Monitor and enforce compliance with health and safety law;
- Encourage and promote the achievement of continuous improvement in health and safety by the rail industry through good management, improved processes and renewal of equipment;
- Encourage and facilitate more efficient ways of delivering this continuous improvement;
- Facilitate an informed debate about options to address risks which are of concern to society, but where there is currently no legal requirement, and
- Engage effectively with the full range of stakeholders on health and safety issues

The Strategy notes that the transfer of HSC/E's rail responsibilities and the introduction of the Railways and Other Guided Transport Systems (Safety) Regulations (ROGS) represent a significant change in the way the rail industry will be regulated.

The Strategy has four main elements:

1 Putting in place a risk-based regulatory framework and intervention strategy

ORR says that it intends to identify priorities on the basis of risk; keep its policies under review 'not changing for the sake of changing but ensuring [the policies] are consistent with our overall vision'; and keep under review existing rail-specific legislation.

The activities of the inspectorate 'will primarily be driven by risk'. Plans for 2006-07 focus on reducing key risks to workers and passengers based on 'topic strategies' concentrating on specific areas such as level crossings, human factors, SPADs; helping industry to adjust to the ROGS regulations; continuing Safety Case assessment and acceptance work; and investigating accidents and complaints.

2 Learning from experience and building relationships

ORR undertakes to 'develop and maintain our relationship with HSC/E to:

- Share knowledge and benefit from each other's specialist skills and thus improve the efficiency of regulation
- Ensure consistency between ORR's health and safety policy for the rail industry, and general health and safety policy developed by HSC/E; and
- Ensure a consistent approach to enforcement of health and safety law between enforcement authorities'

ORR intends to develop its relationships with key stakeholders including trade unions, passenger and other customer representatives, the Rail Safety and Standards Board, the Rail Accident Investigation Branch and those parts of the rail industry not subject to

economic regulation by ORR. It undertakes to address 'robustly' recommendations for improvement by independent enquiries, including those in hand by HSC (e.g. Potters Bar).

3 Influencing the European agenda

ORR will provide advice and technical support to DfT on future development of relevant issue at EU level. It will also engage with the rail safety regulator for Northern Ireland and the UK delegation to the Channel Tunnel Safety Authority.

The Strategy notes that ORR needs to maximise the effectiveness of a combined safety and economic regulator and reports the establishment of the separate rail safety policy and inspectorate function within the organisation. It says 'we will ensure that this [the policy] function, and the railway inspectorate, are resourced to meet the needs of this strategy, both in terms of skills and capability.'

Whilst stressing the need for continuity and a seamless transfer from HSC/E, the Strategy notes that over time ORR will start to address certain key issues in 2006-07, specifically:

- The continued development of topic strategies;
- Input to the DfT/Scottish high level output specification for the main line railway;
- Review the effectiveness of RIAC and other stakeholder relationships;
- Review guidance on the interpretation of reasonable practicability and issue such guidance as stakeholders may find helpful;
- Develop mechanisms to report regularly on the health and safety performance of the industry, and deliver a report to the European Rail Agency;
- Start to review the effectiveness of legislation promoting simplification where it is seen as an effective use of resources.