

<b>Health and Safety Executive Board Paper</b>		<b>HSE/04/051</b>	
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## HEALTH AND SAFETY EXECUTIVE

### The HSE Board

#### More specific and prescriptive approaches

#### A Paper by John Ewins

**Cleared by Justin McCracken on 28 September 2004**

#### **Issue**

1. A draft policy for using more specific approaches in our 'published' guidance and when staff give advice direct to duty holders.

#### **Timing**

2. No specific deadline although the issue is covered by a Strategy commitment.

#### **Recommendation**

3. The Board are invited to:
  - a) Consider the draft policy statement (see annex) in light of the advice from Solicitor's Office in para 10;
  - b) Note that a related statement on support for and indemnification of staff is being prepared by Solicitor's Office;
  - c) Note the links with other workstreams and ask Strategy Division to consider how future work should be handled (para 12), and
  - d) Note the uncertainties about the overall resource implications of adopting more specific approaches (para 16).

#### **Background**

4. The Strategy says that we will use "a more specific and prescriptive approach as a relevant tool where businesses respond better to it". We already use such an approach in some of our published and on-line guidance, commonly that aimed at particular sectors or topics. Internal operational circulars often include specific information about how to control risks; many of these are already 'open' to duty holders and most will become so under the Freedom of Information Act.

5. There is considerable variation in the use of specific advice by operational staff. It has always been a feature of advice given by some inspectors to individual duty holders although less so in recent years, probably due to e.g. the declining average level of experience of inspectors (in FOD) and the growth of a 'risk assessment culture'. Until the Strategy reference there was no definitive line for staff to follow but many seem to believe (incorrectly) that our policy did not favour such an approach. There are also concerns about individual or organisational liability (for potentially incorrect advice).
6. The Operations Management Team (OMT) recently considered this issue (OMF/45/4) and agreed that action was needed on several fronts:
  - a) Operational policies and procedures to be reviewed to ensure they fully support more specific approaches;
  - b) Operational staff training needs to foster greater self-reliance and ability to work from first principles where specific guidance is not available, and
  - c) Added impetus to the rationalisation/improvement of internal guidance and knowledge management.
7. The OMT concluded that we needed a clearer statement of policy and senior management support as the basis for reducing variation and increasing overall use of more specific approaches.

## Argument

8. A draft short statement of policy aimed at the internal audience is attached (see annex). This can easily be adapted to provide a concise statement of intent for public consumption by removing the sections in square brackets.
9. The policy aligns with current thinking in Communications Directorate and the Communications Delivery Services Division about the future approach to published guidance. A key related issue is whether HSE should produce guidance itself, support others (e.g. trade bodies) in doing so or consider endorsing existing industry codes etc. We need to develop clear criteria for choosing the best route in each case and this will be essential for operating the proposed 'clearing house' system.
10. Solicitor's Office have advised that the policy may go beyond what HSE is required to do under HSWA in advising individual duty holders. They raise a number of concerns that the Board should consider:
  - a) A greater risk of inconsistency in advice given;
  - b) That warning duty holders about "grossly disproportionate" action goes way beyond HSE's function;
  - c) The need to ensure that staff have experience and qualifications commensurate with the advice being sought, and
  - d) The need to record in detail advice given in every case (*which could have serious operational implications*).

11. The policy includes advice on civil liability and support for and indemnification of staff. This part of the policy is provisional at this stage and will need to align with the formal statement currently being prepared by Operations Group and Solicitor's Office for Board approval.
12. The proposed policy is closely related to work flowing from the Science & Technology Review on when to use generic or specific guidance and to the statement on 'providing accessible advice and support' agreed by the Commission on 7 September. It links with Communications Directorate and Communications Delivery Services Division proposals for 'published' guidance. There appears to be a strong case for subsuming further work on this policy and its implementation into these related workstreams. Strategy Division (who lead on 'accessible advice') are probably best placed to broker the arrangements.
13. This policy has been developed so far as an HSE approach, although the Local Authority Unit and the LA Strategic Programme Manager have been consulted. Further discussions are needed with local authorities to consider implications of the policy for them.

### **Consultation**

14. Communications Directorate, Resources & Planning Directorate, Operations Group, Policy Group, Strategy & Intelligence Division, the Local Authority Unit and Solicitor's Office have all been consulted prior to discussions at OMT and on the draft policy statement. The draft policy has been sent to HSE trade unions and their views will be summarised when the paper is presented.

### **Presentation**

15. Our policy in this area will be of interest to stakeholders and might help in dealing with negative media coverage about HSE as an 'overzealous' or 'unhelpful' regulator. The arrangements for publicising the policy should be developed in conjunction with the closely related projects mentioned above.

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

16. There are conflicting resource and efficiency implications in a policy shift to greater use of more specific approaches. The overall effect will only become clear once a changed policy is in place. The issues are:
  - a) Developing more specific guidance in-house is resource intensive. Supporting others to produce it should be less so. Endorsing guidance produced by others would consume the least resource. Whichever route is taken, there may be a longer-term resource benefit (to UK plc) as duty holders spend less time having to interpret goal-setting requirements;
  - b) The existence of more specific guidance should reduce demand for advice about how to comply with goal-setting legislation and so save

resource. However, a reverse effect is possible if the specific guidance prompts queries about variations or alternative methods of complying;

- c) Giving more specific advice to duty holders may take longer in some cases (c/f telling them to do a risk assessment and sort it out themselves). Therefore it might reduce the number of duty holders influenced per unit of frontline staff time.

### **Action**

17. The Board is asked to consider and endorse the draft policy .

## **DRAFT POLICY ON THE USE OF MORE SPECIFIC APPROACHES**

The Strategy for workplace health and safety in Great Britain to 2010 and beyond proposed that:

*“While goal-setting standards are more flexible and promote innovation, HSE and LAs will use a more specific and prescriptive approach as a relevant tool where businesses respond better to it. In time, this will increase confidence and competence and promote effective self-regulation.”*

This note sets out HSE’s policy for putting this approach into practice.

### Published information and guidance

All information and guidance we publish, whether generic or aimed at a particular industry/sector, will be as specific as possible about what duty holders need to do. Where broad, risk assessment style guidance is needed we will, if possible, include short and specific information on more ‘ready-made’ solutions or current good practice.

[We will establish a ‘clearing house’ system to ensure that proposed guidance adheres to this publishing policy. This will check whether:

- it is something HSE needs to publish (rather than e.g. a trade body);
- it fits with existing and other proposed guidance (e.g. avoiding duplication) and the proposed style is right for the intended audience, and
- the language and style are as simple and specific as the subject matter allows. ]

### Advice given by HSE staff

We will be as specific and helpful as possible when advising duty holders. This applies however and whenever advice is given irrespective of whether it has been requested or is offered proactively. For example:

- When advising duty holders about goal-setting legal requirements, we will give information on specific ways to comply or examples of good practice if available;
- We will be prepared to confirm whether health and safety precautions achieved or proposed by duty holders are acceptable (both formally, e.g. in permissioning regimes, and informally, e.g. during routine inspection), and
- We will warn duty holders if we believe action they intend taking to comply with legal requirements would be grossly disproportionate to the risk.

Whenever more specific advice or good practice information is given we will make clear to the duty holder that they can use other methods of complying with the relevant legal requirement providing they achieve a similar standard of health, safety or welfare. Where the degree of risk and the complexity of solutions mean that advice by HSE staff is unlikely to be sufficient, we will encourage duty-holders to use practical advice and support from competent intermediaries.

[Possible consequences/civil liability implications of giving specific advice

If we offer or endorse a particular set of health and safety precautions, an incident subsequently occurs and the precautions are shown to be defective, the question of civil liability may arise. The legal position and support from the HSE Board is outlined below (full details are available in xxxxxx<sup>1</sup>).

There is no legal bar to giving such advice either generally in published guidance or specifically to individual duty holders providing that HSE staff act in accordance with the Commission's Enforcement Policy Statement. Civil liability action against HSE (or an individual member of staff) is a risk that we must consider but, as the law stands at the moment, such actions are unlikely to succeed.

The Board has recently reaffirmed<sup>2</sup> that it will support and indemnify staff against the whole of any damages and costs or expenses arising from civil action provided they honestly believed that the act complained of was within their powers, that their duty (e.g. as an inspector) required or entitled them to do it, and provided they were not wilfully acting against instructions. ]

Note

The sections in square brackets could be removed to produce a more concise statement of intent for public consumption.

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<sup>1</sup> A formal statement on indemnification and legal support to staff is currently being prepared by Solicitor's Office in consultation with Operations Group

<sup>2</sup> Assumes that the formal statement has been agreed. The wording of this section will need to be aligned with the final text of that statement once it is agreed.