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HEALTH AND SAFETY EXECUTIVE

The HSE Board

Tackling 'Rogues'

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Issue

1. Endorsement of an HSE 'rogues' position statement, the creation of a new 'rogues' focal point within Operations Group and the scale of activity required to target and tackle 'rogues'.

Timing

2. Routine.

Recommendation

3. The HSE Board is asked to:
 - i. Endorse the draft 'rogues position statement attached at Annex A, subject to comment;
 - ii. Endorse the proposals for a 'rogues' focal point within Operations Group;
 - iii. Provide a steer on the scale of activity to target and tackle 'rogues'.

Background

4. The 2005 Hampton report (para 2.71) characterised 'rogue businesses' as those operating beneath the vision of regulators and tax authorities. The report discussed the importance of effective control of such illegal activity, and noted difficulties such as the sometimes slow and ineffective targeting of persistent offenders, and low levels of deterrent as a result of fines handed down by the courts that do not reflect the full economic advantage gained through non-compliance.
5. HSC then published 'Sensible Health and Safety at Work, The Regulatory Methods Used in Great Britain'. The StEP Enforcement Programme took responsibility for oversight of guiding points 14 and 15 in this document and established a 'rogues' work stream to explore the issues. The guiding points, which relate to targeting and tackling 'rogues' are reproduced at the end of the position statement (Annex 1). The Board is asked to note that the StEP Board has expressed concern over the wording of these points and possible changes are currently being explored.
6. The phase 1 StEP Board considered the extent to which HSE and Local Authorities should target enforcement activity at 'rogue' businesses. Guiding point 14 in the Sensible Health and Safety document suggests that HSE will target 'rogues'. However, the StEP board concluded that enforcing authorities should continue to take a risk-based, proportionate approach that focuses resource on

delivering health and safety priorities. Targeting in this way will still bring poor performers, including those flouting the law, to our attention in the normal course of business. It was agreed that more could be done to build on successful pilots to share information on potential 'rogues' and improve intelligence. The 'rogues' work stream was tasked with setting out HSE's position and exploring the scope for increased joint working with other regulators.

7. The draft Hampton Implementation Review (HIR) Report recognises that HSE's fine tuning project has work in hand to improve the use of intelligence. The draft report indicates that HSE is not strong at identifying 'rogue businesses' and that HSE could improve the use of intelligence to improve targeting of business, including identifying and tackling those less likely to comply.
8. Levels of 'rogue' activity vary across Operational Group. Whilst FOD seems to have the bulk of issues, there is some significant activity within HID sectors. ND has no identified 'rogues' at present, but the directorate remains vigilant given the changing nature of the industry. FOD and HID inspectors do currently tackle duty holders that may be considered 'rogues', as examples illustrate in the attached position statement. FOD is currently seeking to do more in terms of its approach to persistent offenders/ poor performers it comes in contact with (which may include rogues), and will be assisted by the fine tuning project (which is also now beginning to engage with HID) in exploring how we might improve intelligence on 'rogues' who are as yet unknown to us. This paper aims to explore whether the Board considers this approach to be sufficient.

Argument

(i) Endorsement of the draft 'rogues position statement

9. The position statement (annex 1) provides a snapshot of our current activity involving 'rogues'. Developed prior to the recent HIR, it describes a risk-based, proportionate approach and illustrates the range of activity with examples. It seeks to set out how the Enforcement Policy Statement (EPS) and Enforcement Management Model (EMM) provide an effective framework for HSE to enforce proportionately and consistently against all those failing to comply, including 'rogues'.
10. The position statement is already proving useful. HSE's representative on the Vulnerable Workers forum was informed by a draft version, and Enforcement Policy Unit are hoping to be able to refer to a final approved version in their draft statement on how HSC meets the obligations in the regulators compliance code. We recommend that it is kept updated, as part of an oversight role proposed below.

(ii) Endorsement of the proposal for a 'rogues' focal point within Operations Group

11. It took considerable effort to develop the position statement, because the work is currently dispersed and uncoordinated. The lack of oversight for 'rogues' issues is also creating difficulties in handling both our own initiatives and increasing numbers of requests from other regulators for HSE involvement in joint working and other information sharing initiatives. Examples of such initiatives include our own 'rogues' working group which has EA, Local Authority and LACORS representatives, and recent attempts by the Serious Organised Crime Agency (SOCA) and the International Labour Office (ILO) to engage with HSE on 'rogue' related matters.

12. To date the Enforcement Programme has gone some way to providing a lead on handling 'rogues' issues. However, the 'rogues' work stream has now closed and the Phase 2 Enforcement board is expected to meet for the last time in Dec 2007.
13. We consulted parts of Operations Group and Policy Group on where this focal point might best be placed. Cross Cutting Intervention Division (XCD) has the policy lead for 'rogues' - providing ownership of EPS and high-level enforcement policy, making connections across Whitehall and representing HSE at cross government forums such as the Vulnerable Workers Forum.
14. As tackling 'rogues' is also a targeting matter, responsibilities would include influencing high-level targeting priorities as well as coordinating HSE led initiatives and external requests related to tackling 'rogues' at an operational level.
15. There is general agreement amongst those consulted that a complementary operational focal point should be established. OMT could establish this focal point and agree where within OG it should rest. This will enable progress to be monitored and reported to OMT and the HSE Board as required.

(iii) The scale of activity to target and tackle 'rogues' – do we need to do more?

16. HSE's risk-based approach with a focus on priority areas does not neatly align with targeting those who may wilfully be putting workers at risk. In light of the draft HIR report and the approach being taken by FOD, the board is invited to consider whether more should be done to better target and tackle 'rogues'.
17. Doing more will involve improving our intelligence which in turn should lead to more activity involving 'rogues'. Tackling 'rogues', particularly if uncooperative and potentially hostile can be resource intensive. An increased level of intelligence will increase tensions between workload and resources as more potential 'rogues' come to our attention requiring action. This may have implications for priority work and delivery of PSA targets.
18. The Board is invited to consider whether we should:
 - a. encourage operational staff at a local level to
 - i. put more effort into building informal networks to gather softer intelligence and set up mechanisms to coordinate information received;
 - ii. take a more proactive approach to working with other agencies such as the police;
 - b. conduct research to develop a better understanding of where and how 'rogues' operate to help us better target our efforts e.g.:
 - i. to explore whether 'rogue' activity is concentrated in certain sectors, allowing us to segment 'rogues' and target accordingly, or
 - ii. to explore the potential link between wilful non-compliance with H&S law and other regulations to help us target our intelligence needs and links with other regulators.
19. Research options would need to be considered in more detail but could potentially help us better target our effort in key areas and so help us balance the delivery of priority work against wider priorities.

Consultation

20. Consultation has been carried out with staff on the creation of a focal point for 'rogues' and on the content of the position statement with a number of staff from across HSE including Andrew Cottam (OPSD – Operational Policy Unit), Steve Woolley (XCD – Enforcement Policy unit), Les Beaumont (FOD HQ –Legal and Enforcement), Ann Peatfield (FOD HQ - Operational Strategy), Ian Thomson (HID HQ), Norman Byrom (ND).
21. The phase 2 StEP Enforcement Board has cleared the draft position statement for HSE board approval and Giles Denham has also been consulted on all aspects of this paper.

Presentation

22. We envisage no publication or publicity costs. Although we expect it will be fully open once cleared, there are no plans to publish the statement. The target audience is internal, for the purposes of explaining our approach to external parties and to inform further work on 'rogues' including cross government groups such as the Vulnerable Workers Enforcement Forum.

Costs and Benefits

23. The position statement will help clarify HSE's approach to tackling 'rogue businesses' and help to demonstrate the level of activity in this area. It will also help inform HSE staff working in this area, including those involved in joint working arrangements, or representing HSE on cross government working groups such as the Vulnerable Workers Enforcement forum.

Financial/Resource Implications for HSE

24. The scale of 'rogue' intelligence gathering decided upon will influence the demand for resource to collate, analyse and act on information received. However there is no additional resource requirement. This work would involve a rebalancing of resources to match priorities. There is insufficient information at this time to estimate what the impact on resource deployment would be for the various options outlined.
25. The proposed operational focal point for 'rogues' will also involve a reorganisation of resources to handle work such as the monitoring and coordinating of external requests for relevant joint working/info sharing initiatives. This work is already being undertaken in various parts of HSE. The creation of a focal point will concentrate resources to provide an anticipated net gain in efficiency through a more clearly focused and better coordinated approach. This should lead to an overall reduction in the resources deployed across HSE to handle 'rogue' issues.
26. An agreed position statement on 'rogues' will help ensure that HSE resources continue to be deployed in accordance with HSC strategy and the priorities implicit in the EPS.
27. The investment already made to develop the draft statement will help prevent individual HSE staff being distracted by, and having to explain and defend HSC/E's stance on 'rogues'- savings that cannot be quantified. .

Environmental Implications

28. None

Other Implications

29. None

Action

30. The team taking ownership of 'rogues' issues to provide the new focal point will need to ensure HSE staff are aware of and understand this new role, and provide contact details so anyone approached with, or identifying a 'rogues' issue can channel enquiries appropriately.

Hampton's 'Rogues' – HSE Position Statement

HSE targets resources based on risk and risk management to maximise delivery of improved H&S outcomes

The Hampton report alluded to a loose definition of 'rogues' as those who operate outside the vision of the regulator, are persistent offenders, deliberately flout the law and undercut honest business. Many of the duty holders HSE enforces against, in line with HSC's Enforcement Policy Statement (EPS), are not necessarily 'rogues' as conveyed by Hampton, but are failing to comply for other reasons. HSE does intervene with duty holders that may be termed 'rogue', however, we remain cautious about the use of this term (see annex A).

The HSC 2007/08 business plan refers to 'Enabling Justice' - one of four key HSE business areas. The objectives of the 'enabling justice' agenda are to promote a just and fair society in HSE's area of responsibility, through actions in line with the EPS and the Code for Crown Prosecutors; and to provide equitable conditions for all businesses to operate, ensuring those who do comply with the law are motivated to continue doing so. Incident and complaint investigation and enforcing the law remain key priorities for HSE.

HSE's Construction Sector is working with Local Authority Building Control Officers to share intelligence on activity in the sector, and to help promulgate key H&S messages among members of the public including home owners, who might employ potential 'rogues'

In line with HSC's EPS and published strategy to 2010 and beyond (and consistent with Hampton's first recommendation) HSE primarily targets resources on those activities that give rise to the most serious risks, or where the hazards are least well controlled. This is an intelligence-led approach. Injury and ill-health statistics and other data, such as failure trends help inform HSE in deploying its resources to secure maximum impact.

Manslaughter charges following the death of a 28-year-old employee after being trapped in heavy machinery in 2005 resulted in 12 and 9-month custodial sentences respectively for a company director and a senior manager in 2007. The company was fined £75k plus costs of £89k.

This was a significant medium sized multi-site company which lacked any H&S expertise or organisation, and where employees had to take their own measures to try to work safely where they saw such a need. The company failed to take HSE advice, or apply improvements arising from Notices across all company sites. HSE is following up this case with visits to all sites now known to be operated by this company, so appropriate steps can be taken to help ensure future compliance.

HSE is increasingly seeking to share intelligence and work with other regulators to identify and tackle those who might otherwise undermine important H&S messages, with some resource deployed outside priority areas, helping to maintain a wider deterrent effect and reinforce key health and safety messages.

Elements of duty holder behaviour influence the targeting of resources. Identifying poor performers, carrying out follow up visits to duty holders convicted of H&S offence(s), and operating a duty holder rating system which takes account of inspectors judgments on management ability all help to increase the focus on those that are more likely be non-compliant, including potential 'rogues'.

Annex 1

The EPS and the Code for Crown Prosecutors, and the Enforcement Management Model (EMM) provide an effective framework for enforcing consistently against the full range of employers with whom we intervene. This includes persistent offenders and duty holders that may display 'roguish' characteristics.

Subject to evidential and public interest matters, the EPS expects that enforcing authorities would normally prosecute, or recommend prosecution in a number of circumstances, including where:

- The gravity of an alleged offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender warrants it;
- There has been reckless disregard of health and safety requirements;
- There have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance
- False information has been supplied wilfully, or there has been intent to deceive, in relation to a matter which gives rise to significant risk; or
- Inspectors have been intentionally obstructed in the lawful course of their duties.

Guided by the EMM, inspectors weigh a wide range of factors in reaching enforcement decisions, including the gravity of a breach and any capacity for 'roguishness'. In line with HSE's enforcement practices, where appropriate we will target individuals as well as companies.

Factors weighed when reaching enforcement decisions include:

- Duty holder attitude – whether hostile, reasonable, positive, etc...
- Whether the duty holder was seeking economic advantage through non-compliance
- The size of the breach
- The general level of compliance achieved by the duty holder
- Duty holder history – relevant incidents, previous enforcement action

Memorandum of Understanding arrangements are in place with a number of regulators which support the sharing and receiving of information on 'matters of evident concern', as they arise, allowing inspectors to share intelligence with counterparts and act on it. HSE's 'early years' training programme also helps ensure inspectors recognise when to share matters of evident concern with other regulators.

HSE and Trading Standards are sharing intelligence and have undertaken joint investigations, some of which may now lead to joint prosecutions. HSE have issued Prohibition Notices (PNs) on traders in the roofing and gas fitting industries, which Trading Standards have then shared across their network to help ensure any breaches of these PNs are notified to HSE, so action can be taken.

HSE is involved in the establishment of a new Memorandum of Understanding: Cooperation in the field of the detection and investigation of criminal offences by government departments and associated agencies

HSE is represented at the cross government 'Vulnerable Workers Enforcement Forum'

Where more formal arrangements add value, HSE will set up local networks to actively seek intelligence, network with external bodies and channel data between inspectors and their counterparts in other agencies.

The explosives sector operates an intelligence network established in 2004. A single officer is responsible for managing the network, building contacts and sharing intelligence with other departments, helping to tackle non-compliance by those that store, transport or sell fireworks.

A cross-regulator working group currently involving HSE, EA and Local Authorities is exploring the potential for joint working and improved information sharing across regulatory boundaries to tackle potential 'rogues' jointly in areas where shared priorities exist.

In line with HSE strategy, where beneficial we seek to work in partnership with Local Authorities and other government departments to secure maximum impact. Our experience also suggests that targeting suspected criminals often has greater impact when working jointly with other regulators that enforce in areas bringing much heavier penalties to bear. HSE will continue to engage

in multi-agency operations, where we can contribute effectively, to tackle 'rogues' and help deliver justice and secure safe working environments for exploited workers.

HSE is taking part in the multi-agency workplace enforcement pilot in the West Midlands, targeting employers potentially involved in worker exploitation, benefit fraud and tax evasion.

In line with our published commitment to seek heavier penalties for 'rogue' businesses, inspectors focus their investigations on appropriate evidence collection. Victim impact statements are often included and inspectors routinely highlight aggravating features to ensure the courts are properly informed before sentencing and issuing fines. The 'Work Related Deaths Protocol' also supports joint working with the police in cases involving fatalities.

An employee sustained serious injuries, including a punctured lung and a fractured pelvis, after a fall from height at a quarry in 2004. The resulting Prosecution, which also included charges relating to a protracted failure to comply with a Prohibition Notice ended with guilty verdicts for both defendants. One defendant, allegedly working for no payment, was prosecuted under S36 of HSWA (any other person) and received a custodial sentence of 9 months. The sole company director was fined a total of 25K plus 30k costs. The company was also fined £470 leaving it with a nominal sum of £20 according to the company accounts.

Although not widely in use, there is increasing interest in the specialist area of forensic accountancy to help inspectors examine financial aspects where this may be a factor. This is a developing area for HSE.

HSE's investigation faced attempts to provide it with false information, and the investigating inspector needed police protection during site visits following threats to staff. The investigation uncovered a reckless disregard for health and safety and financial gain through non-compliance. Forensic accountancy enabled HSE to show the court that funds were transferred from the company prior to sentencing, resulting in fines for the sole director.

The City of London Magistrates Court hears all cases arising from the London boroughs

Efforts are ongoing to work more closely with the courts, to provide revised magistrates guidelines, and to centralise courts for health and safety cases to help build up magistrate expertise in Health and Safety cases and promote consistency of approach.

Publicising successful prosecution cases more widely through local and national media, as appropriate, is another valuable tool, helping to provide a deterrent and share learning. Where a potential 'rogue' may be involved, such publicity also helps HSE to demonstrate, in support of the better regulation agenda, that the burden of compliance rests with all duty holders, not just those that are generally law abiding.

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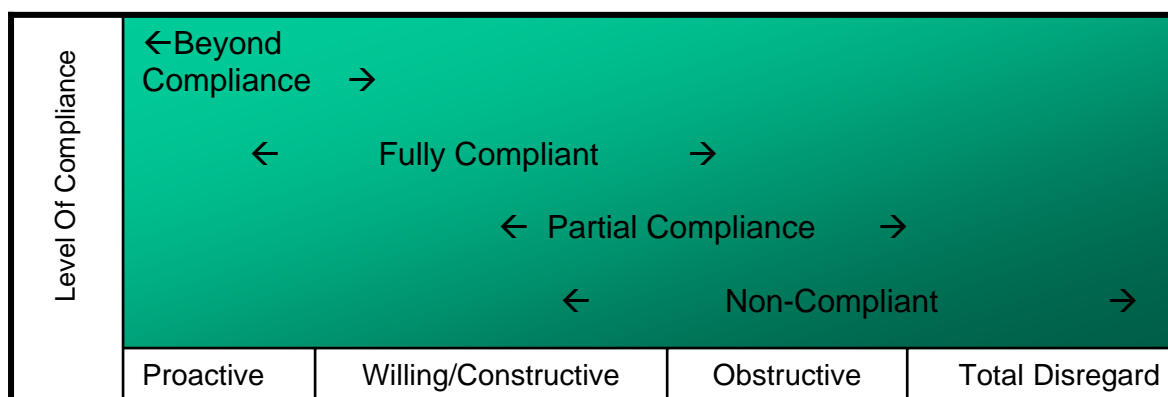
Annex A

‘Rogues’ – A Definition?

The Hampton report alluded to a loose definition of ‘rogues’ as outlined above. However, developing a clear-cut definition of a ‘rogue’ has proved problematic. Any definition cannot be based solely around financial gain, as any non-compliant dutyholder could be profiting in relation to those who are compliant.

The ‘rogue’ community also varies significantly across sectors, and in how it manifests itself to the enforcing authorities. For example, in gas or fairgrounds where there is often a pressing public safety aspect, ‘rogues’ are far more likely to come to the attention of enforcers than in other sectors where ‘rogues’, by their nature, want to remain hidden.

The cross-regulators working group currently exploring joint working and the ‘rogues’ issue has developed a view based on the spectrum of duty holders, considering the ‘rogue’ element to be positioned at the lower right end of this spectrum:



HSE’s current published commitment on tackling rogues:

Extract from ‘Sensible health and safety at work, The regulatory methods used in Great Britain’

Enforcement

- (14) We will seek greater impact for enforcement that we carry out, through the targeting and heavier punishment of rogue businesses, as proposed by the Hampton review, and through the greater publicity that we will seek for those convicted. We will follow up all enforcement actions we take, and make sure that the circumstances and causes have been dealt with.
- (15) We will hit hard any rogue businesses we come across, and press for severe penalties for blatant and deliberate offences.