Health and Safety Executive Board		Paper No: HSE/08/35	
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Trim reference:			
GOVERNANCE IMPLEMENTATION PLAN – UPDATE OF THE ENFORCEMENT POLICY STATEMENT AND SECTION 3 POLICY			

Purpose of the paper

1. The Board is asked to agree the publication of the updated Enforcement Policy Statement (EPS) and the linked Policy Statement on the Enforcement of HSWA (Section 3 Policy) (Annex 1 and 2) which have been changed simply to take account of changes in Governance and to update factual statements.

Background

2. The EPS was originally published in 1995. The current version was published in 2002 following a review and public consultation in 2000. At the request of the then HSC, an evaluation programme for the EPS was agreed in 2003 and specific research entitled "Evaluation of EPS and Enforcement Action" was commissioned from Greenstreet Berman.

3. The evaluation findings were discussed at the January 2007 HSC meeting, which concluded that the EPS was fit for purpose, had stakeholder support and was not in need of review. However, it was recognised that some slight changes to the EPS may be required from time to time in light of future developments.

4. The Section 3 Policy was first issued in 1989. It was last reviewed and revised in 2005 in the light of legal opinion sought following challenge to our approach.

5. The HSC/E merger, which came into effect on the 1 April 2008, precipitated an examination of the EPS and Section 3 Policy in order to reflect the change in governance.

Argument

6. **None of the updates to the EPS or Section 3 Policy represents a change to the policy. Great care has been taken to ensure that this update makes necessary factual changes without altering the policy. As a result there will be no change in current enforcement practice**. As well as reflecting the change in governance, the updated versions of the EPS and Section 3 Policy also contain minor alterations to factual elements of the supporting text to reflect :

a. Changes to HSE's procedures and to publications and leaflets, which have taken place since 2002;

b. Wider Government initiatives, for example the new Regulators Compliance Code and updates to the Code for Crown Prosecutors;

c. The need to correct minor textual inaccuracies in the document ;

d. The transfer of responsibility for Health and Safety regulation on the railways to ORR on 1 April 2006.

7. The section of the EPS containing a table showing maximum penalties will require further factual changes should the Health and Safety (Offences) Bill become law. The Bill will have its second reading debate in the Lords on 4 July. It will then

go on to committee etc. and may not complete its passage until after the summer recess. Should this be the case, web publication of the updated EPS will go ahead, but printing will be deferred to allow for the update position to be included in the leaflet.

8. In accepting the drafts at annex 1 and 2, the board will be endorsing a factual update of the contents as detailed above: **no change to the enforcement policy is proposed**.

9. Details of the updates to the EPS with an explanation follow. All changes have been highlighted in red and underlined in the Annexes, but where a deletion is not apparent an explanatory note will show how the text has been changed. Throughout the documents, all references to the Health and Safety Commission have been removed or replaced with a reference to the Health and Safety Executive. The other updates to the EPS are as follows:

a. Introduction - References to HSC have been deleted or changed. In the second paragraph the text *"HSC is advised and assisted by the Health and Safety Executive (HSE) which has statutory responsibilities to"* has been deleted. Text has been added highlighting the responsibility of ORR and an additional footnote references the section 18 standard in relation to Local Authorities. Paragraph 3 now includes a reference to the Regulators Compliance Code and the Legislative and regulatory Reform Act. References to HELA strategic plans have been replaced with a reference to the HSE Business plan to reflect changes in joint planning arrangements and priority setting.

b. Paragraphs 3 and 6 – References to "formal cautions" have been replaced by "simple cautions" to reflect the new name of this enforcement tool.

c. Paragraph 9 – Reference to the Enforcement Concordat has been deleted and replaced by a reference to the new statutory Regulators Compliance Code and regulatory principles required under the Regulatory Reform Act 2006.

d. Paragraph 26 – A reference to the HSE website has been added and references to 2 obsolete publications (*The Health and Safety Executive: Working with employers* and *The Health and safety Executive and You*) have been deleted.

e. Paragraph 28 – "Publications*"* has been replaced by "*leaflet"* reflecting the deletions above and a reference to the HSE website has been added.

f. Paragraph 32 – References to protocols for investigating deaths on railways have been removed.

g. Paragraph 33 – "Incidents*"* has been added in order to correct an earlier omission to the text and ensure HSE's long standing practice of investigating certain non major incidents in the major hazards sectors is represented.

h. Paragraph 35 – The term "evidential test" has been removed and replaced with "Evidential Stage" and Paragraph 36 – Text has been added. Both to reflect changes to the Code for Crown Prosecutors.

i. Paragraph 39 – Text has been added to the footnote in order to state more clearly the long standing policy on prosecution where there is evidence that a

breach caused a death – the policy has not changed and so we have ensured the footnote's meaning remains the same.

j. Paragraph 48 – Reference to corporate manslaughter and corporate homicide has been added. (see also Paragraph 50)

k. Paragraph 49 – Details have been brought up to date reflecting additional regulatory partners who have signed or acknowledged the Work Related Death Protocol.

l. Paragraph 49 – 51 – Text has been added to reflect the fact that a separate Work Related Death Protocol has now been agreed for Scotland. This protocol did not exist when the EPS was originally agreed.

m. Penalties Section – These details will require factual changes if the Health and Safety (Offences) Bill reaches the statute book.

n. Further Information – Reference to the now defunct 'HSE Quality Statement' has been removed and the list of publications has been updated.

10. Publication costs of the revised material will be recovered from commercial sales.

11. This minor update is not likely to be controversial. However, Press Office have been made aware.

Action

12. The Board is invited to approve the update of the Enforcement Policy Statement and the Section 3 Policy, as detailed in Annex 1 and 2, in order for a new leaflet to be produced and for the relevant sections of the HSE intranet/internet to be updated.

Paper clearance

13. This paper was cleared by Giles Denham on the 20th June and by the Senior Management Team on 2 July 2008.

Annex 1

Enforcement policy statement

Introduction

The Health and Safety **Executive's** (HS**E**) aims are to protect the health, safety and welfare of people at work, and to safeguard others, mainly members of the public, who may be exposed to risks from the way work is carried out.

HS**E**'s statutory functions include proposing new or updated laws and standards, conducting research, providing information and advice and making adequate arrangements for the enforcement of health and safety law in relation to specified work activities. Local authorities also enforce health and safety law in workplaces allocated to them – including offices, shops, retail and wholesale distribution centres, leisure, hotel and catering premises*. **Health and Safety relating to the operation of a railway** is enforced by the Office of Rail Regulation (ORR), in accordance with its own enforcement policy.**

This Enforcement Policy Statement **is in accordance with the Regulators Compliance Code and the regulatory principles required under the Legislative and Regulatory Reform Act 2006.** It sets out the general principles and approach which the health and safety enforcing authorities (mainly HSE and local authorities) are expected to follow. All local authority and HSE staff who take enforcement decisions are required to follow **HSE's** Enforcement Policy Statement. In general, those staff will be inspectors, so this policy refers to inspectors for simplicity.

The appropriate use of enforcement powers, including prosecution, is important, both to secure compliance with the law and to ensure that those who have duties under it may be held to account for failures to safeguard health, safety and welfare.

In allocating resources, enforcing authorities should have regard to the principles set out below, the objectives published in the **HSE Business Plan**, and the need to maintain a balance between enforcement and other activities, including inspection.

***The HSE's Section 18 Standard – "Making a difference" – sets out what constitutes adequate arrangements for enforcement of health and safety law for Local Authorities and HSE's Field Operations Directorate.**

*****Railway as defined in the H&S (Enforcing Authority for Railways and other Guided Transport Systems) Regulations 2006 [currently under revision May 2008]***

The Health and Safety Executive's Policy Statement on Enforcement

The following is the full text of the statement:

The purpose and method of enforcement

1 The ultimate purpose of the enforcing authorities is to ensure that dutyholders manage and control risks effectively, thus preventing harm. The term 'enforcement' has a wide meaning and applies to all dealings between enforcing authorities and those on whom the law places duties (employers, the self-employed, employees and others).

2 The purpose of enforcement is to:

- ensure that dutyholders take action to deal immediately with serious risks;
- promote and achieve sustained compliance with the law;
- ensure that dutyholders who breach health and safety requirements, and directors or managers who fail in their responsibilities, may be held to account, which may include bringing alleged offenders before the courts in England and Wales, or recommending prosecution in Scotland, in the circumstances set out later in this policy.

Enforcement is distinct from civil claims for compensation and is not undertaken in all circumstances where civil claims may be pursued, nor to assist such claims.

3 The enforcing authorities have a range of tools at their disposal in seeking to secure compliance with the law and to ensure a proportionate response to criminal offences. Inspectors may offer dutyholders information, and advice, both face to face and in writing. This may include warning a dutyholder that in the opinion of the inspector, they are failing to comply with the law. Where appropriate, inspectors may also serve improvement and prohibition notices, withdraw approvals, vary licence conditions or exemptions, issue **simple** cautions* (England and Wales only), and they may prosecute (or report to the Procurator Fiscal with a view to prosecution in Scotland).

4 Giving information and advice, issuing improvement or prohibition notices, and withdrawal or variation of licences or other authorisations are the main means which inspectors use to achieve the broad aim of dealing with serious risks, securing compliance with health and safety law and preventing harm. A prohibition notice stops work in order to prevent serious personal injury. Information on improvement and prohibition notices should be made publicly available.

* A **simple** caution is a statement by an inspector, that is accepted in writing by the dutyholder, that the dutyholder has committed an offence for which there is a realistic prospect of conviction. A **simple** caution may only be used where a prosecution could be properly brought. '**Simple** cautions' are entirely distinct from a caution given under the Police and Criminal Evidence Act by an inspector before questioning a suspect about an alleged offence. Enforcing authorities should take account of current Home Office guidelines when considering whether to offer a **simple** caution.

5 Every improvement notice contains a statement that in the opinion of an inspector an offence has been committed. Improvement and prohibition notices, and written advice, may be used in court proceedings.

6 **Prosecution and, if appropriate, simple cautions** are important ways to bring dutyholders to account for alleged breaches of the law. Where it is appropriate to do so in accordance with this policy, enforcing authorities should use one of these measures in addition to issuing an improvement or prohibition notice.

7 Investigating the circumstances encountered during inspections or following incidents or complaints is essential before taking any enforcement action. In deciding what resources to devote to these investigations, enforcing authorities should have regard to the principles of enforcement set out in this statement and the objectives published in **HSE's business plan**. In particular, in allocating resources, enforcing authorities must strike a balance between investigations and mainly preventive activity.

8 Sometimes the law is prescriptive – spelling out in detail what must be done. However, much of modern health and safety law is goal setting – setting out what must be achieved, but not how it must be done. Advice on how to achieve the goals is often set out in Approved Codes of Practice (ACOPs). These give practical advice on compliance and have a special legal status. If someone is prosecuted for a breach of health and safety law and did not follow the relevant provisions of an ACOP, then the onus is on them to show that they complied with the law in another way. Advice is also contained in other HSE guidance material describing good practice. Following this guidance is not compulsory, but doing so is normally enough to comply with the law. Neither ACOPs nor guidance material are in terms which necessarily fit every case. In considering whether the law has been complied with, inspectors will need to take relevant ACOPs and guidance into account, using sensible judgement about the extent of the risks and the effort that has been applied to counter them. More is said about these matters in this statement.

9 HSE expects enforcing authorities to use discretion in deciding when to investigate or what enforcement action may be appropriate. Enforcing authorities should set down in writing the decision-making process which inspectors will follow when deciding on enforcement action, and make this publicly available. HSE expects that such judgements will be made in accordance with the following principles. These are in accordance with the **Regulators Compliance Code and the regulatory principles required under the Legislative and Regulatory Reform Act 2006.**

The principles of enforcement

10 HSE believes in firm but fair enforcement of health and safety law. This should be informed by the principles of proportionality in applying the law and securing compliance; consistency of approach; targeting of enforcement action; transparency about how the regulator operates and what those regulated may expect; and accountability for the regulator's actions. These principles should apply both to enforcement in particular cases and to the

health and safety enforcing authorities' management of enforcement activities as a whole.

Proportionality

11 Proportionality means relating enforcement action to the risks.* Those whom the law protects and those on whom it places duties (dutyholders) expect that action taken by enforcing authorities to achieve compliance or bring dutyholders to account for non-compliance should be proportionate to any risks to health and safety, or to the seriousness of any breach, which includes any actual or potential harm arising from a breach of the law.

12 In practice, applying the principle of proportionality means that enforcing authorities should take particular account of how far the dutyholder has fallen short of what the law requires and the extent of the risks to people arising from the breach.

13 Some health and safety duties are specific and absolute. Others require action so far as is reasonably practicable. Enforcing authorities should apply the principle of proportionality in relation to both kinds of duty.

14 Deciding what is reasonably practicable to control risks involves the exercise of judgement. Where dutyholders must control risks so far as is reasonably practicable, enforcing authorities considering protective measures taken by dutyholders must take account of the degree of risk on the one hand, and on the other the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk. Unless it can be shown that there is gross disproportion between these factors and that the risk is insignificant in relation to the cost, the dutyholder must take measures and incur costs to reduce the risk.

15 The authorities will expect relevant good practice to be followed. Where relevant good practice in particular cases is not clearly established, health and safety law effectively requires dutyholders to establish explicitly the significance of the risks to determine what action needs to be taken. Ultimately, the courts determine what is reasonably practicable in particular cases.

16 Some irreducible risks may be so serious that they cannot be permitted irrespective of the consequences.

Targeting

17 Targeting means making sure that contacts are targeted primarily on those whose activities give rise to the most serious risks or where the hazards are least well controlled; and that action is focused on the dutyholders who are responsible for the risk and who are best placed to control it – whether employers, manufacturers, suppliers, or others.

* In this policy, 'risk' (where the term is used alone) is defined broadly to include a source of possible harm, the likelihood of that harm occurring, and the severity of any harm.

18 HSC expects enforcing authorities to have systems for deciding which inspections, investigations or other regulatory contacts should take priority according to the nature and extent of risks posed by a dutyholder's operations. The dutyholder's management competence is important, because a relatively low hazard site poorly managed can entail greater risk to workers or the public than a higher hazard site where proper and adequate risk control measures are in place. Certain very high hazard sites will receive regular inspections so that enforcing authorities can give public assurance that such risks are properly controlled.

19 Any enforcement action will be directed against dutyholders responsible for a breach. This may be employers in relation to workers or others exposed to risks; the self-employed; owners of premises; suppliers of equipment; designers or clients of projects; or employees themselves. Where several dutyholders have responsibilities, enforcing authorities may take action against more than one when it is appropriate to do so in accordance with this policy.

20 When inspectors issue improvement or prohibition notices; withdraw approvals; vary licence conditions or exemptions; issue formal cautions; or prosecute; enforcing authorities should ensure that a senior officer of the dutyholder concerned, at board level, is also notified.

Consistency

21 Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends.

22 Dutyholders managing similar risks expect a consistent approach from enforcing authorities in the advice tendered; the use of enforcement notices, approvals etc; decisions on whether to prosecute; and in the response to incidents.

23 HSE recognises that in practice consistency is not a simple matter. HSE and local authority inspectors are faced with many variables including the degree of risk, the attitude and competence of management, any history of incidents or breaches involving the dutyholder, previous enforcement action, and the seriousness of any breach, which includes any potential or actual harm arising from a breach of the law. Decisions on enforcement action are discretionary, involving judgement by the enforcer. All enforcing authorities should have arrangements in place to promote consistency in the exercise of discretion, including effective arrangements for liaison with other enforcing authorities.

Transparency

24 Transparency means helping dutyholders to understand what is expected of them and what they should expect from the enforcing authorities. It also means making clear to dutyholders not only what they have to do but, where this is relevant, what they don't. That means distinguishing between statutory requirements and advice or guidance about what is desirable but not compulsory.

25 Transparency also involves the enforcing authorities in having arrangements for keeping employees, their representatives, and victims or their families informed. These arrangements must have regard to legal constraints and requirements.

26 This statement sets out the general policy framework within which enforcing authorities should operate. Dutyholders, employees, their representatives and others also need to know what to expect when an inspector calls and what rights of complaint are open to them. **Complaints procedures are set out on HSE's website. In addition** all enforcing authority inspectors are required to issue the HSE leaflet *What to expect when a health and safety inspector calls* to those they visit. This explains what employers and employees and their representatives can expect when a health and safety inspector calls at a workplace. In particular:

- when inspectors offer dutyholders information, or advice, face to face or in writing, including any warning, inspectors will tell the dutyholder what to do to comply with the law, and explain why. Inspectors will, if asked, write to confirm any advice, and to distinguish legal requirements from best practice advice;
- in the case of improvement notices the inspector will discuss the notice and, if possible, resolve points of difference before serving it. The notice will say what needs to be done, why, and by when, and that in the inspector's opinion a breach of the law has been committed;
- in the case of a prohibition notice the notice will explain why the prohibition is necessary.

Accountability

27 Regulators are accountable to the public for their actions. This means that enforcing authorities must have policies and standards (such as the four enforcement principles above) against which they can be judged, and an effective and easily accessible mechanism for dealing with comments and handling complaints.

28 HSE's procedures for dealing with comments and handling complaints are set out in the **leaflet** referred to in paragraph 26**, and on the HSE website**. In particular, they:

- describe a complaints procedure in the case of decisions by officials, or if procedures have not been followed; and
- explain about the right of appeal to an Employment Tribunal in the case of statutory notices.

29 Local authorities have their own complaints procedures – details are available from individual authorities.

Investigation

30 As with prosecution, HSE expects enforcing authorities to use discretion in deciding whether incidents, cases of ill health, or complaints should be investigated. Indicative targets related to levels of investigation by HSE are normally specified in **HSE's Business Plan**, which is approved by the Government.

31 Investigations are undertaken in order to determine:

- causes;
- whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law;
- lessons to be learnt and to influence the law and guidance;
- what response is appropriate to a breach of the law.

To maintain a proportionate response, most resources available for investigation of incidents will be devoted to the more serious circumstances. **HSE's Business** Plan recognises that **it** is neither possible nor necessary for the purposes of the Act to investigate all issues of non-compliance with the law which are uncovered in the course of preventive inspection, or in the investigation of reported events.

32 The enforcing authorities should carry out a site investigation of a reportable work-related death, unless there are specific reasons for not doing so, in which case those reasons should be recorded.

33 In selecting which complaints or reports of **incidents**, injury or occupational ill health to investigate and in deciding the level of resources to be used, the enforcing authorities should take account of the following factors:

- the severity and scale of potential or actual harm;
- the seriousness of any potential breach of the law;
- knowledge of the dutyholder's past health and safety performance;
- the enforcement priorities;
- the practicality of achieving results;
- the wider relevance of the event, including serious public concern.

Prosecution

England and Wales

34 In England and Wales the decision to proceed with a court case rests with the enforcing authorities. Enforcing authorities must use discretion in deciding whether to bring a prosecution.

35 In England and Wales the decision whether to prosecute should take account of the evidential **stage** and the relevant public interest factors set down by the Director of Public Prosecutions in the Code for Crown Prosecutors. No prosecution may go ahead unless the prosecutor finds there is sufficient evidence to provide a realistic prospect of conviction, and decides that prosecution would be in the public interest.

36 While the primary purpose of the enforcing authorities is to ensure that dutyholders manage and control risks effectively, thus preventing harm, prosecution is an essential part of enforcement. HS**E** expects that where in the course of an investigation an enforcing authority has collected sufficient evidence to provide a realistic prospect of conviction and has decided, in accordance with this policy and taking account of the Code for Crown Prosecutors, that it is in the public interest to prosecute, then that prosecution should go ahead**. The Code for Crown Prosecutors requires the decision to prosecute to be kept under continuous review, so that any new facts or circumstances, in support of or undermining the prosecutions case, are taken into account in the decision to continue or terminate the proceedings**. Where the circumstances warrant it and the evidence to support a case is available, enforcing authorities may prosecute without prior warning or recourse to alternative sanctions.

Scotland

37 In Scotland the Procurator Fiscal decides whether to bring a prosecution. This may be on the basis of a recommendation by an enforcing authority; although the Procurator Fiscal may investigate the circumstances and institute proceedings independently of an enforcing authority. Enforcing authorities must use discretion in deciding whether to report to the Procurator Fiscal with a view to prosecution. The Crown Office and the Procurator Fiscal Service endorse this Statement by HS**E**, and acknowledge that action on reports of offences submitted to them by the enforcing authorities should reflect the approach set out here.

38 In Scotland, before prosecutions can be instituted, the Procurator Fiscal will need to be satisfied that there is sufficient evidence and that prosecution is in the public interest. In Scotland therefore the decision as to proceedings is one for the prosecutor rather than the enforcing authority whose views will, however, be taken into account.

39 Subject to the above, HSE expects that, in the public interest, enforcing authorities should normally prosecute, or recommend prosecution, where, following an investigation or other regulatory contact, one or more of the following circumstances apply. Where:

- death was a result of a breach of the legislation;*
- 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;
- work has been carried out without or in serious non-compliance with an appropriate licence or safety case;
- a dutyholder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk;
- there has been a failure to comply with an improvement or prohibition notice; or there has been a repetition of a breach that was subject to a formal caution;
- false information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives rise to significant risk;
- inspectors have been intentionally obstructed in the lawful course of their duties.

Where inspectors are assaulted, enforcing authorities will seek police assistance, with a view to seeking the prosecution of offenders.

40 HSE also expects that, in the public interest, enforcing authorities will consider prosecution, or consider recommending prosecution, where following an investigation or other regulatory contact, one or more of the following circumstances apply:

- it is appropriate in the circumstances as a way to draw general attention to the need for compliance with the law and the maintenance of standards required by law, and conviction may deter others from similar failures to comply with the law;
- a breach which gives rise to significant risk has continued despite relevant warnings from employees, or their representatives, or from others affected by a work activity.

* Health and safety sentencing guidelines regard death resulting from a criminal act as an aggravating feature of the offence. If there is sufficient evidence **that the breach caused the death,** HSE considers that normally such cases should be brought before the court. However, there will be occasions where the public interest does not require a prosecution, depending on the nature of the breach and the surrounding circumstances of the death.

Prosecution of individuals

41 Subject to the above, enforcing authorities should identify and prosecute or recommend prosecution of individuals if they consider that a prosecution is warranted. In particular, they should consider the management chain and the role played by individual directors and managers, and should take action against them where the inspection or investigation reveals that the offence was committed with their consent or connivance or to have been attributable to neglect on their part and where it would be appropriate to do so in accordance with this policy. Where appropriate, enforcing authorities should seek disqualification of directors under the Company Directors Disqualification Act 1986.

Publicity

42 Enforcing authorities in England and Wales should make arrangements for the publication annually of the names of all the companies and individuals who have been convicted in the previous 12 months of breaking health and safety law. They should also have arrangements for making publicly available information on these convictions and on improvement and prohibition notices which they have issued.

43 Enforcing authorities in England and Wales should also consider in all cases drawing media attention to factual information about charges which have been laid before the courts, but great care must be taken to avoid any publicity which could prejudice a fair trial. They should also consider publicising any conviction which could serve to draw attention to the need to comply with health and safety requirements, or deter anyone tempted to disregard their duties under health and safety law. In Scotland, decisions in relation to publicity of prosecutions are a matter for the Crown Office.

Action by the courts

44 Health and safety law gives the courts considerable scope to punish offenders and to deter others, including imprisonment for some offences. Unlimited fines may be imposed by higher courts. HSE will continue to seek to raise the courts' awareness of the gravity of health and safety offences and of the full extent of their sentencing powers, while recognising that it is for the courts to decide whether or not someone is guilty and what penalty if any to impose on conviction. A list of the sanctions presently available to the courts is attached to this statement.

45 In England and Wales, the enforcing authorities should, when appropriate, draw to the court's attention all the factors which are relevant to the court's decision as to what sentence is appropriate on conviction. The Court of Appeal has given guidance on some of the factors which should inform the courts in health and safety cases (*R v F Howe and Son (Engineers) Ltd* [1999] 2 All ER, and subsequent judgments). HSC notes that the Lord Chancellor has said that someone injured by a breach of health and safety legislation is no less a victim than someone who is assaulted.

Representations to the courts

46 In cases of sufficient seriousness, and when given the opportunity, the enforcing authorities in England and Wales should consider indicating to the magistrates that the offence is so serious that they may send it to be heard or sentenced in the higher court where higher penalties can be imposed. In considering what representations to make, enforcing authorities should have regard to Court of Appeal guidance: the Court of Appeal has said 'In our judgment magistrates should always think carefully before accepting jurisdiction in health and safety at work cases, where it is arguable that the fine may exceed the limit of their jurisdiction or where death or serious injury has resulted from the offence'.

47 In Scotland it would fall to the Procurator Fiscal to draw the court's attention to the seriousness of any offence.

Death at work

48 Where there has been a breach of the law leading to a work-related death, enforcing authorities need to consider whether the circumstances of the case might justify a charge of manslaughter **or corporate manslaughter** (culpable homicide **or corporate homicide** in Scotland).

49 **In England and Wales, to ensure decisions on investigation and prosecution are closely co-ordinated following a work-related death, HSE, the Association of Chief Police Officers (ACPO), The British Transport Police (BTP), the Crown Prosecution Service (CPS), the Local Government Association (LGA) and the Office of Rail Regulation (ORR) have jointly agreed and published Work-related deaths: A protocol for liaison. Other non- signatory organisations, such as the Maritime and Coastguard Agency (MCA), Civil Aviation Authority (CAA) and the Chief Fire Officers Association (CFOA) , have agreed that they will take account of the protocol when responding to work-related deaths.**

In Scotland a separate Work Related Death Protocol has been agreed between the Crown Office, ACPOS, British Transport Police and HSE, Scottish local authorities support the Protocol

50 **In England and Wales** the police are responsible for deciding whether to pursue a manslaughter **or corporate manslaughter** investigation and whether to refer a case to the CPS to consider possible manslaughter charges. The enforcing authorities are responsible for investigating possible health and safety offences. If in the course of their health and safety investigation, the enforcing authorities find evidence suggesting manslaughter or **corporate manslaughter**, they should pass it on to the police. If the police or the CPS decide not to pursue a **manslaughter or corporate manslaughter** case, the enforcing authorities will normally bring a health and safety prosecution in accordance with this policy.

51 In Scotland, responsibility for investigating sudden or suspicious deaths rests with the Procurator Fiscal **who will instruct the police. The police will lead the investigation of any potential offences related to culpable homicide or corporate homicide. HSE or local authority will investigate any possible health and safety offences. Under the Scottish Work Related Deaths Protocol the investigations will be coordinated and evidence shared**. Unless a prosecution takes place in the same circumstances, the Procurator Fiscal is required to hold a Fatal Accident Inquiry into the circumstances of a death resulting from a work-related* accident. An Inquiry may also be held where it appears to be in the public interest on the ground that the death was sudden, suspicious or unexplained, or has occurred in circumstances such as to give rise to serious public concern.

Crown bodies

52 Crown bodies must comply with health and safety requirements, but they are not subject to statutory enforcement, including prosecution. The Cabinet Office has established non-statutory arrangements for enforcing health and safety requirements in Crown bodies. These arrangements allow HSE to issue non-statutory improvement and prohibition notices, and for the censure of Crown bodies in circumstances where, but for Crown immunity, prosecution would have been justified. In deciding when to investigate or what form of enforcement action to take, HSE should follow as far as possible the same approach as for non-Crown bodies, in accordance with this enforcement policy.

* In this case, an accident in the course of employment, if the deceased was an employee, or while engaged in their occupation, if an employer or self-employed person.

Penalties for Health and Safety Offences*

The Health and Safety at Work etc Act 1974 (the HSW Act), section 33 (as amended) sets out the offences and maximum penalties under health and safety legislation.

Failing to comply with an improvement or prohibition notice, or a court remedy order (issued under the HSW Act sections 21, 22 and 42 respectively):

Lower court maximum	£20 000 and/or 6 months' imprisonment
Higher court maximum	Unlimited fine and/or 2 years' imprisonment

Breach of sections 2–6 of the HSW Act, which set out the general duties of employers, self-employed persons, manufacturers and suppliers to safeguard the health and safety of workers and members of the public who may be affected by work activities:

Lower court maximum	£20 000
Higher court maximum	Unlimited fine

Other breaches of the HSW Act, and breaches of 'relevant statutory provisions' under the Act, which include all health and safety regulations. These impose both general and more specific requirements, such as requirements to carry out a suitable and sufficient risk assessment or to provide suitable personal protective equipment:

Lower court maximum	£5000
Higher court maximum	Unlimited fine

Contravening licence requirements or provisions relating to explosives. Licensing requirements apply to nuclear installations, asbestos removal, and storage and manufacture of explosives. All entail serious hazards which must be rigorously controlled.

Lower court maximum	£5000
Higher court maximum	Unlimited fine and/or 2 years' imprisonment

On conviction of directors for indictable offences in connection with the management of a company (all of the above, by virtue of the HSW Act sections 36 and 37), the courts may also make a disqualification order (Company Directors Disqualification Act 1986, sections 1 and 2). The courts have exercised this power following health and safety convictions. Health and

safety inspectors draw this power to the court's attention whenever appropriate.

Lower court maximum	5 years' disqualification
Higher court maximum	15 years' disqualification

* As at January 2002. These penalties can change from time to time.

Further information

More information about the way health and safety legislation is enforced and about health and safety legislation generally can be found on the website and in these free leaflets:

- Health and Safety Executive: Working with employers Leaflet HSE38 HSE Books 2000

- Health and Safety Executive and you Leaflet HSE37 HSE Books 2000

What to expect when a health and safety inspector calls: A brief guide for businesses, employees and their representatives Leaflet HSC14 HSE Books 1998 (single copy free) Web version available at www.hse.gov.uk/pubns/hsc14.pdf

Work-related deaths: A protocol for liaison Booklet MISC491 HSE Books 2003 www.hse.gov.uk/pubns/misc491.pdf

Work-related deaths: A protocol for liaison among the Crown Office and Procurator Fiscal Service, the Health and Safety Executive, the Association of Chief Police Officers (Scotland) and British Transport Police 2006

Local authorities may produce their own further information on enforcing health and safety. You can find your local authority's address and telephone number in your local telephone directory.

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Annex 2

Section 3 Policy

The purposes of the Health and Safety at Work etc Act 1974 include protecting people other than those at work from risks to their health and safety arising out of or in connection with the activities of persons at work. Section 3 of HSWA places general duties on employers and the self-employed towards persons other than their employees. Since the scope of section 3 is very broad, HSE has adopted this policy to assist enforcing authorities in the exercise of discretion when determining action, including selecting incidents for investigation where a breach of section 3 is suspected. It will also assist HSE staff in their consistent application of the principles set out in the HSE's Enforcement Policy Statement in determining which incidents should be given priority, within the resources available.

Arrangements for enforcing section 3 HSWA need to take account of HSE's health and safety priorities - most recently set out in HSC's Strategy for workplace health and safety in Great Britain to 2010 and beyond [PDF 84kb][1] - whilst continuing to meet the section 18 HSWA duty to make adequate arrangements for enforcing the relevant statutory provisions, and thus demonstrate reasonable exercise of our responsibilities.

HSE has therefore decided that:

- enforcing section 3 HSWA in areas key to our mission (for example, in major and high hazards, including the nuclear industry and construction) remains a high priority. HSE will continue to address the most serious risks to the public's health and safety from work activities using its expertise to best effect and taking into account the regulatory responsibilities of others;
- HSE's general approach to public safety is set out in **the** Strategy **to 2010 and beyond** and reflected in priority programmes and incident selection criteria; and
- HSE and other enforcing authorities will take account of **the HSE** priorities and, generally, give less priority to the enforcement of HSWA section 3 in areas outside these priorities.

There are many situations where work activities which may give rise to risks to health and safety are regulated by other authorities using legislation that may address circumstances which are also relevant to health and safety at work issues. HSE's policy, in accordance with the **[delete 'Government's enforcement concordat']** **Regulators Compliance Code and the regulatory principles required under the Legislative and Regulatory Reform Act (2006)**, is to ensure that, wherever practicable, enforcement action by the health and safety enforcing authorities is effectively co-ordinated with that of other, relevant enforcing authorities so as to minimise unnecessary overlaps and time delays. However, initial enquiries, or information from other sources, may indicate that a breach of section 3 was or is the probable cause of, or a significant contributory factor to, the injury or risk complained of. In such circumstances, HSE and other enforcing authorities should generally consider investigating if:

- there was or is a high level of risk; or
- enforcing authorities need to act/investigate in the interests of justice.

There may, however, be a relevant health and safety interest in some aspects of a work activity covered by more specific legislation. HSE seeks to agree with other authorities who should take the lead on an investigation (to avoid unnecessary overlaps and time delays) and, where there may be a need to act alongside each other, which activities are most appropriately dealt with by each authority. HSE expects enforcing authorities to consider the following principles when deciding whether it is suitable for them to take the lead on an investigation:

- Effectiveness: Which authority is best equipped, including appropriate powers, to investigate the alleged risks?
- Capability: is the other body capable of ensuring public safety? Does it have those enforcement powers necessary to do so?
- Health and safety expertise: Which body knows most about the risks concerned and the effective control measures?
- Economy: Is either body already inspecting/visiting the premises or activity in question? Can duplication of visits be avoided?
- Efficiency: Is health and safety enforcing authority involvement a good use of resources when considered against the scale of risk or level of public concern?