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Guidance Note 2018.02.01: HSE Enforcement Policy Statement

The following is a copy of the Health and Safety Executive Enforcement Policy Statement issued October 2015 and copyright of the HSE. As it is written by the HSE, all references to 'We' and 'Our' are relative to the HSE and not the BSGA.

The BSGA Council considers that this document should be placed in the Members' Area of the BSGA website so that all BSGA Members have access to the principles under which HSE consider issuing enforcement notices. It is hoped that this provides guidance and a clearer understanding of how HSE go about their duties as a servant of industry and under which they justify their actions.

1.0 Introduction

1.1 We are responsible for regulating health and safety law across a wide range of work activities and workplaces in Great Britain. Our aim is to protect the health, safety and welfare of people at work, and to safeguard others, including the public, who may be affected by work activities.

1.2 As a regulator, we use a wide variety of methods to encourage and support business to manage health and safety risks in a sensible and proportionate way and secure compliance with the law(1). In making these decisions, we will have regard to economic growth and the impact that our actions are likely to have on businesses.

1.3 This policy statement sets out our approach to enforcement, that is, where our inspectors take action to enforce the law when issues of non- compliance, hazard(2) or serious risk have been identified.

1.4 In addition to providing published information and verbal advice, the enforcement methods available to our inspectors include:

- providing written information regarding breaches of law;
- requiring improvements in the way risks are managed;
- stopping certain activities where they create serious risks; and
- recommending and bringing, prosecutions where there has been a serious breach of law.

1.5 We have published this policy to ensure that our principles and approach to enforcement are clear. All our inspectors are required to follow it. This policy statement applies throughout Great Britain. However, in Scotland decisions to prosecute are made by the Crown Office and Procurator Fiscal Service (COPFS) and we will make our recommendations to the COPFS in line with this policy.

1.6 This Enforcement Policy Statement is made in accordance with the Legislative and Regulatory Reform Act 2006(3), the Regulators' Code 2014(4) and the Deregulation Act 2015(5).

1.7 Local Authorities also enforce health and safety law in workplaces allocated to them. Their inspectors are also required to follow this policy when taking enforcement action. Other regulators, including the Office of Road and Rail and the Office for Nuclear Regulation, also enforce health and safety law, but they have their own enforcement policy statements.

(1) *See http://www.hse.gov.uk/pubns/hse51.htm*
(2) *See: Reference to hazard and risk on page 3*
(3) *See: http://www.legislation.gov.uk/ukpga/2006/51/contents*
(4) *See: https://www.gov.uk/government/publications/regulators-code*
(5) *See: http://www.legislation.gov.uk/ukpga/2015/20/contents/enacted*

2.0 Our Enforcement Policy Statement

2.1 We believe in firm, but fair, enforcement of the law. It is our policy that all enforcement action should be proportionate to the health and safety risks and to the seriousness of any breach of law.

2.2 We consider that appropriate use of our enforcement powers is important, both to secure compliance with health and safety law and to ensure that those who have a legal duty (duty holders) are held to account for significant failures.

2.3 The following sections describe:

- the purpose of enforcement;
- the principles of enforcement;
- the enforcement methods available to our inspectors; and
- how our enforcement principles relate to investigations and prosecutions.

3.0 The purpose of enforcement

3.1 We take enforcement action to prevent harm by requiring duty holders to manage and control risks effectively. This includes:

- ensuring action is taken immediately to deal with serious risks;
- promoting and maintaining sustained compliance with the law; and
- ensuring that those who breach the law, including individuals who fail in their responsibilities, may be held to account (this includes bringing alleged offenders before the courts in England and Wales, or recommending prosecution to the COPFS in Scotland).

You can find out more about this on the regulation and enforcement homepage on our website (6)

(6) *See: http://www.hse.gov.uk/enforce/index.htm*

4.0 The principles of enforcement

4.1 We apply the following principles when conducting our enforcement activities:

- proportionality in how we apply the law and secure compliance;
- targeting of our enforcement action;
- consistency of our approach;
- transparency about how we operate and what you can expect, and
- accountability for our actions.

4.2 These principles apply both to enforcement in particular cases and to our management of enforcement activities as a whole. They are not applied in isolation, but are informed by an understanding of the business environment. They allow for effective enforcement, without stifling economic growth(7), by requiring our inspectors to be proportionate in their decision making and mindful in keeping the burden on business productivity to a minimum. These principles are also mirrored in the National Local Authority Code for Health and Safety at Work(8).

(7) *See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf*

(8) *See: http://www.hse.gov.uk/lau/national-la-code.pdf*

5.0 Proportionality

5.1 We adopt a proportionate approach to enforcing the law across different industries and sectors, recognising the importance of supporting businesses to comply and grow.

5.2 In our dealings with duty holders, we will ensure that our enforcement action is proportionate to the health and safety risks* and to the seriousness of any breach of the law. This includes any actual or potential harm arising from any breach, and the economic impact of the action taken.

5.3 We expect that duty holders, in turn, will adopt a sensible and proportionate approach to managing health and safety, focussing on significant risks i.e. those with the potential to cause real harm.

5.4 Applying the principle of proportionality means that our inspectors should take particular account of how far duty holders have fallen short of what the law requires and the extent of the risks created.

5.5 Some health and safety duties are specific and absolute. Others require action "so far as is reasonably practicable". Our inspectors will apply the principle of proportionality in relation to both.

5.6 Deciding what is reasonably practicable to control risk involves the exercise of judgement. Our inspectors, when considering the adequacy of the protective measures taken, will balance the degree of risk against the money, time or trouble needed to avert that risk. Unless

it can be shown that there is a gross disproportion between these factors and that the risk is insignificant in relation to the cost, duty holders must take measures and incur costs to reduce the risk and comply with the law.

5.7 Some irreducible risks, particularly in the major hazard sectors**, may be so serious that they cannot be permitted irrespective of the consequences.

5.8 We can also adopt a proportionate approach to enforcing the law during the initial phase of an emergency response, so that duty holders, and others, can in turn manage risks effectively and proportionately.

* 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 its outcome.

** Control of Major Accident Hazard (COMAH) sites, offshore installations, certain pipelines and the gas distribution networks, explosive manufacturing and storage, mines, biological agent facilities and other major hazard sites which present a significant risk because of the dangerous substances handled.

6.0 Targeting

6.1 We use a risk-based approach when deciding which duty holders to proactively inspect, taking into account factors such as size, type of activities, industry sector, and the associated death, injury and ill-health rates.

6.2 Further information on our approach to targeting inspections can be found in our sector strategies(9), in the Hazardous Installations Directorate Safety Management in Major Hazard Industries(10) and the Understanding COMAH: What to expect from the Competent Authority(11) publications on our website. We also collaborate and share enforcement information with other regulators.

6.3 We also use proportionate and outcome-based criteria when deciding which incidents, diseases and dangerous occurrences, reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR), have to be investigated. More information on how we decide whether or not we investigate can be found on our website(12).

6.4 This means that we target our inspection and investigation resources primarily on those activities, industries and sectors giving rise to the most serious risks, where and when the hazards are least well controlled, or where competence to manage health and safety is in doubt. Low risk activities will not, in general, be subject to enforcement unless actual harm has occurred.

6.5 We focus our enforcement activity on the most serious risks, and on those who are responsible for and best placed to control these risks - whether employers, employees, the self- employed, designers, manufacturers, suppliers, contractors, landlords or others.

6.6 We recognise that it is neither possible nor necessary to consider all issues of non-compliance which may come to light during an inspection or investigation. Our inspectors will, therefore, target their enforcement action to deal with the most serious risks.

6.7 Where several duty holders have responsibilities, we may take action against more than one, when it is appropriate to do so in accordance with this policy.

(9) *See http://www.hse.gov.uk/aboutus/strategiesandplans/sector-strategies/index.htm*
(10) *See http://www.hse.gov.uk/hid/hid-regulatory-model.pdf*
(11) *See http://www.hse.gov.uk/comah/guidance/understanding-comah-operations.pdf*
(12) *See: http://www.hse.gov.uk/enforce/incidselcrits.pdf*

7.0 Consistency

7.1 We adopt a consistent approach to enforcement of the law across different industries and workplaces, recognising the importance of fair treatment to all in promoting and sustaining economic growth.

7.2 Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve compliance with the law.

7.3 We understand that people managing similar risks in similar industries expect a consistent approach from our inspectors when taking enforcement action. However, consistency is not a simple matter. Every situation is different – by virtue of the industry, workplace, its risks, management systems etc. As a result, our inspectors are faced with many variables in addition to the degree of risk and the seriousness of any breach, including the attitude and competence of management, incident history and previous enforcement action.

7.4 Any enforcement decision therefore requires the appropriate exercise of individual discretion and professional judgement.

7.5 We aim to ensure, through the application of our enforcement decision making framework, the Enforcement Management Model (EMM) (13) and through peer review, that our enforcement decisions are consistent.

7.6 Where enforcement action conflicts with the requirements of other regulators we will work with them to resolve the differences.

(13) *See: http://www.hse.gov.uk/enforce/emm.pdf*

8.0 Transparency

8.1 Our enforcement action should clearly outline to duty holders not only what they have to do but, where relevant, what they don't. Further guidance on complying with health and safety law can be found on the HSE website(14)

8.2 Where non-compliance has been identified, our inspectors will clearly and promptly explain the decision taken, their reasons, and the actions required to achieve compliance. They will discuss reasonable timescales with the duty holder and explain what will happen if they fail to comply.

8.3 Additionally, our inspectors will differentiate between the actions required to comply with the law, and advice given to achieve good practice or inform of upcoming changes to legal requirements. This will ensure that unnecessary economic burdens are not imposed on businesses.

8.4 Transparency also involves keeping employees, employee representatives, injured persons and their families informed of relevant enforcement action. However, this is subject to legal constraints on disclosure.

(14) *See: http://www.hse.gov.uk/guidance/index.htm*

9.0 Accountability

9.1 As a regulator, we are accountable to all and our enforcement actions can be judged against the principles and standards set out in this policy. Whilst not diminishing the responsibility of duty holders to comply with the law, this includes our duty to have regard to economic growth in our regulatory activities.

9.2 Businesses, employees, their representatives and others need to know what to expect when our inspectors visit and how to raise any complaints they may have.

9.3 Our inspectors will provide a copy of the leaflet "What to expect when a health and safety inspector calls"(15) to those who have not been visited before. In addition to outlining basic expectations of us, this leaflet outlines our procedures for dealing with comments and handling complaints.

9.4 In particular, it:

- describes the procedure to complain about enforcement decisions made by our inspectors, or if procedures have not been followed; and,
- explains about the right of appeal to an Employment Tribunal in cases where statutory notices have been issued.

Further information regarding our complaints procedure is available on our website(16).

(15) *See: http://www.hse.gov.uk/pubns/hsc14.htm*
(16) *See: http://www.hse.gov.uk/contact/regulatory-complaints.htm*

10.0 The methods of enforcement

10.1 We have a range of enforcement methods to secure compliance with the law and to ensure a proportionate response to any breaches.

10.2 Our inspectors may provide written information and advice regarding breaches of the law following an inspection or investigation. This may include warning the duty holder that, in the opinion of the inspector, they are failing to comply with the law. Where appropriate, we may also serve improvement and prohibition notices, withdraw approvals, vary licence conditions or exemptions, issue simple cautions (in England and Wales only) and we may prosecute (or report to the COPFS with a view to prosecution in Scotland).

10.3 In determining what level of enforcement action is appropriate, our inspectors exercise discretion and professional judgement according to the circumstances found. They are guided in this process by the EMM, which provides a framework for consistent enforcement decision making and takes account of the business context on a case by case basis. It also considers aspects of economic gain that could undermine other businesses.

10.4 A prohibition notice can be served when an inspector is of the opinion that there is a risk of serious personal injury associated with a particular work activity or process or, if a serious deficiency in measures is identified, to prevent or mitigate the effects of major hazards. There does not need to be a breach of the law. Such a notice can take immediate effect or be deferred for safety reasons.

10.5 An improvement notice can be served when an inspector is of the opinion that there is a breach of the law which needs to be remedied within a certain period of time.

10.6 Failure to comply with either type of notice is a criminal offence and can result in prosecution.

10.7 Both prosecution and, where appropriate, cautions, are important ways to hold those responsible to account for breaches of the law. Where it is appropriate to do so in accordance with this policy, these measures can be taken in addition to issuing an improvement or prohibition notice.

10.8 Further information regarding methods of enforcement and their application can be found on the regulation and enforcement page on our website(17). Where inspectors have choices about how they exercise their functions, they will:

- consider how they might carry out their activities to minimise likely negative economic impact: and,
- adapt their activities to maximise any likely positive economic impact.

10.9 Information on improvement and prohibition notices issued and prosecutions are made publicly available(18) through our website. We will 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.

(17) *See: http://www.hse.gov.uk/enforce/index.htm*

(18) *See: http://www.hse.gov.uk/enforce/prosecutions.htm*

11.0 Investigation

11.1 We use discretion when deciding whether to investigate incidents. It is recognised that it is neither possible nor necessary for the purposes of the Health and Safety at Work etc Act 1974 to investigate all issues of noncompliance with the law. When making such decisions, including the level of resource to be used, we take the following factors into account:

- the scale of potential or actual harm;
- the seriousness of any potential breach of the law;
- our enforcement priorities;
- the practicality of achieving results;
- the wider relevance of the event, including serious public concern.

11.2 The criteria for determining which incidents are mandatory to investigate are published on our website.

11.3 We undertake investigations in order to:

- gather information and establish the facts
- identify the immediate and underlying causes and the lessons to be learnt
- prevent recurrence
- identify breaches of health and safety law
- take appropriate action, including the service of notices and prosecution.

11.4 We devote most resources to investigating incidents involving the more serious circumstances, including the investigation of all work related-deaths.

12.0 Investigation of work- related deaths

12.1 Where there has been a breach of law leading to a work- related death, consideration needs to be given to whether or not the circumstances of the case might justify a charge of manslaughter or corporate manslaughter (in England and Wales) or a charge of culpable homicide or corporate homicide (in Scotland).

12.2 In England and Wales, to ensure decisions on investigation and prosecution are closely co-ordinated following a work-related death, we, together with other regulators, have jointly agreed and published Work- related deaths. A protocol for liaison(19). Further, more detailed guidance can be found in the associated publication Work-related Deaths Protocol: Practical Guide.

12.3 In Scotland, a separate work-related deaths protocol has been agreed between us and other regulators. This has been published as Work-related deaths - A protocol for liaison(20).

12.4 In England and Wales, the police are responsible for deciding whether or not to pursue a manslaughter or corporate manslaughter investigation and whether or not to refer a case to the CPS to consider possible manslaughter charges. We investigate possible health and safety offences. If, during the course of our investigation, we find evidence suggesting manslaughter or corporate manslaughter, we will refer it to the police. If the police or CPS decide not to

pursue a manslaughter or corporate manslaughter case, we will consider whether or not to bring a health and safety prosecution in accordance with this policy.

12.5 In Scotland, where there has been a sudden, suspicious or unexpected death, it is the responsibility of the Procurator Fiscal to investigate it, although this will usually be investigated by the police who report their findings to the Procurator Fiscal. The police will lead the investigation of any potential offences related to culpable homicide or corporate homicide. We investigate possible health and safety offences. The COPFS will decide whether or not to pursue a culpable homicide or corporate homicide case. We can make recommendations to the COPFS regarding any potential health and safety offences in accordance with this policy. The COPFS decides whether or not to bring a health and safety prosecution in line with their Prosecution Code(21).

(19) *See: http://www.hse.gov.uk/enforce/wrdp/*
(20) *See: http://www.hse.gov.uk/scotland/workreldeaths.pdf*
(21) *See: http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution 20Code20_Final20180412__1.pdf*

13.0 Prosecution

13.1 Prosecution is an essential part of enforcement, ensuring that where there has been a serious breach of the law, duty holders (including individuals) are held to account. This includes bringing alleged offenders before the courts in England and Wales or recommending prosecution to the COPFS in Scotland.

14.0 England and Wales

14.1 In England and Wales, we decide whether or not to proceed with health and safety prosecutions. We use discretion when making this decision and we 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(22). No prosecution will go ahead unless we find there is sufficient evidence to provide a realistic prospect of conviction and that prosecution is in the public interest.

14.2 We expect, where sufficient evidence has been collected and it is considered in the public interest to prosecute, that prosecution should go ahead.

14.3 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 our case, are taken into account in our decision to continue or terminate the proceedings.

(22) See: http://www.cps.gov.uk/publications/code_for_crown_prosecutors/

15.0 Scotland

15.1 In Scotland, the COPFS decides whether or not to bring a health and safety prosecution. This may be based on a recommendation by us, although the COPFS may investigate the circumstances and institute proceedings independently of us. We use discretion in deciding whether or not to report to the COPFS with a view to prosecution.

15.2 Before prosecutions can be instituted, the Procurator Fiscal needs to be satisfied that there is sufficient evidence and that prosecution is in the public interest in line with their Prosecution Code(23). In Scotland, therefore, the decision to prosecute is one for the COPFS rather than us.

(23) See: http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

16.0 Public Interest

16.1 In both England & Wales, and Scotland we expect that, in the public interest, we should normally prosecute or recommend prosecution, where, following an investigation or other regulatory contact, one or more of the following circumstances in the (non-exhaustive) list apply:

- death was a result of a breach of the legislation(24)
- 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 duty holder'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 simple 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.

(24) 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.

16.2 We also expect that, in the public interest, we should 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.

16.3 We will continue to seek to raise the courts' awareness of the gravity of health and safety offences to the full extent of their powers whilst recognising that it is for the courts to decide whether or not someone is guilty or not and what penalty to impose on conviction.

17.0 Prosecution of individuals

17.1 Subject to the above, we will identify and prosecute individuals, or recommend prosecution, where we consider this is warranted. We will consider the management arrangements and the role played by individual directors and managers and will consider taking action against them where the inspection or investigation reveals that the offence was committed with their consent or connivance or was attributable to their neglect and where it would be appropriate to do so in accordance with this policy. Where appropriate, we will seek disqualification of directors under the Company Directors Disqualification Act 1986(25).

(25) See: http://www.legislation.gov.uk/ukpga/1986/46/contents

18.0 Crown bodies

18.1 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 us 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, we follow, as far as possible, the same.