

Priorities for enforcement of Section 3 of the HSWA 1974 - July 2003 (rev April 2015)

Priorities for enforcement of section 3 HSWA are set out in HSE's priority programmes. HSE will also give priority to areas where there is a high level of risk involved or in the interests of justice, including those of the injured or bereaved. From 1 April 2011, HSE will follow its 'Guidance for FOD (and associated situational examples) in responding to (non-construction) public safety incidents where section 3 HSWA applies'.

- [Guidance for FOD \(PDF\)](#)
- [Flowchart for the guidance for FOD \(PDF\)](#)
- [Situational examples \(PDF\)](#)

This FOD guidance applies in full where section 3 HSWA applies but the incident is not RIDDOR reportable. Paragraphs of the guidance, on initial enquiries, reviewing investigations and recording decisions for incidents harming members of the public, apply where section 3 HSWA applies and the incident is RIDDOR reportable.

To enable HSE to meet its enforcement priorities, less priority will be given to the enforcement of section 3 in the areas below where other regulators have responsibilities; specific considerations will relate to each of these areas.

- [Clinical judgements of doctors, dentists etc](#)
- [Road traffic incidents](#)
- [Police vehicles](#)
- [Deaths in custody](#)
- [Passenger aviation health issues](#)
- [Inland waterways](#)
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- [Fencing of quarries](#)
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Areas regulated by other authorities and legislative regimes

Incidents relating to clinical judgement and practice, and the training, systems of work etc to deliver those, of doctors, dentists etc

Health and social care are devolved matters and there are different regulators in England, Scotland and Wales. There has been a great deal of change in recent years, and the regulators' powers, roles, remits and ways of working are all different. Therefore, the way that they respond to incidents relating to clinical judgement and practice, and the training, systems of work etc to deliver those may differ.

In **England**, The Care Quality Commission (CQC) is the independent regulator of health and social care. This includes the care provided by the NHS, local authorities and voluntary organisations in registered settings. They regulate:

- Providers of healthcare services to people of all ages, including hospitals, ambulance services, clinics, community services, mental health services, dental and GP practices and other registered locations.
- Providers of social care services for adults in care homes (where nursing or personal care is provided), in the community and in people's own homes. They focus on people who find themselves in vulnerable circumstances, including those with mental health problems, learning disabilities, physical disabilities or long-term health conditions and older people.
- Providers of services for people whose rights are restricted under the Mental Health Act.

CQC registers care services under the Health and Social Care Act 2008 and associated regulations. It regulates those services by using data, evidence and feedback from people who use services and staff; through inspections carried out by expert teams, by publishing information on its judgements including a rating to help people choose care; and by taking action when services need to improve. CQC has a wide range of enforcement powers it can use if it finds care services are not meeting fundamental standards. CQC has published *Guidance for providers on meeting the regulations* and enforcement policy.

- [Guidance for providers](#)
- [Enforcement policy](#)

In **Scotland, as of April 2011** there are two regulatory bodies: Healthcare Improvement Scotland (HIS) and Social Care and Social Work Improvement Scotland (SCSWIS). HIS scrutinise healthcare services and SCSWIS scrutinises social care, social work and child protection services. They inspect, regulate and support improvement of services and provide public assurance on service quality.

In **Wales** there are two regulatory bodies: The Care Inspectorate Wales (CIW) and Healthcare Inspectorate Wales (HIW). CIW regulates social care, early years services and Local Authority care support services. Regulation includes registration, inspection, and investigation of complaints, compliance support and enforcement. HIW's role is to review and inspect NHS and independent healthcare organisations in Wales. Services are reviewed against a range of published standards, policies, guidance and regulations. It registers independent services and has powers to take enforcement action in these matters. It is the Local Supervisory Authority (LSA) for the statutory supervision of midwives. It also has inspection and enforcement powers for the Ionising Radiation (Medical Exposure) Regulations which stem from the Health and Safety at Work etc Act 1974.

In addition, there are 9 **professional regulatory bodies** that ensure standards are maintained and action taken when they are not met. For example, Doctors by the General Medical Council (GMC), Dentists by the General Dental Council and Nurses by the Nursing and Midwifery Council. Other legislation applies to cases of clinical misconduct including manslaughter/culpable homicide or offences under the Medical (Professional Performance) Act 1995, under which the GMC operates.

HSE does not, in general, investigate matters of clinical judgement or matters related to the quality of care. From 1st April 2015 very few new incidents causing harm to hospital patients or social care service users in **England** will fall to HSE to investigate as the Care Quality Commission (CQC) will be a more appropriate regulator. CQC will deal with the major non-clinical risks to patients such as trips and falls, scalding, electrical safety etc. HSE will continue to be the health and safety regulator for workers in health and social care in England.

The current position with patient and service user incidents will remain unchanged in Scotland and Wales.

All incidents continue to be reportable to HSE under RIDDOR. HSE will follow its published incident selection criteria when deciding whether to investigate or, in the case of incidents in England, will forward reports to CQC for consideration.

As has been the case from 1 April 2011, HSE will follow its 'Guidance for FOD (and associated situational examples) in responding to (non-construction) public safety incidents where Section 3 of the HSW Act 1974 applies' but RIDDOR does not require reporting.

- [Guidance for FOD \(PDF\)](#)
- [Flowchart for the guidance for FOD \(PDF\)](#)
- [Situational examples \(PDF\)](#)

It will also follow this guidance for RIDDOR reportable incidents with respect to initial enquiries, reviewing investigations and recording decisions for incidents harming members of the public.

Road traffic incidents

HSE takes the lead on incidents involving work vehicles engaged in specific work activities on the public highway.

Otherwise, road traffic law is enforced by the police and others, eg the highways authorities and traffic commissioners. The police will, in most cases, take the lead in the investigation of road traffic incidents on the public highway. Incidents may, however, be referred to HSE where the police suspect that serious safety management failure was a significant contributory factor. The Association of Chief Police Officers (ACPO) has recently adopted additional guidance, developed in collaboration with DfT and HSE, to help identify such incidents.

Further guidance is set out in [OM/2009/02](#), 'HSE's role in the investigation of work-related road accidents and advice on responding to enquiries on managing work-related road safety'.

Police vehicles

The Independent Police Complaints Commission (IPCC) is carrying out a study of incidents involving police vehicles in order to identify lessons that can be learned in relation to policy and practice. The role of HSE in the investigation of police road traffic accidents will be discussed with IPCC and other police bodies as part of the process of revising the HSE-Police Inspection Agreement. Inspectors should inform the Public Services Sector (Defence Fire, Police & Prisons Unit) if the police or IPCC contacts them in relation to an accident involving a police vehicle

Deaths in custody

In prisons, probation hostels, immigration detention centres and the courts (where the prisoner or detainee was under escort managed by the relevant service), HSE will only lead on investigations of deaths and harm to prisoners when the incident arises out of a work activity, eg work a prison inmate was doing, a transport accident, or due to the structure or fabric of the building.

The Prison and Probation Ombudsman (PPO) and the Independent Police Complaints Commission (IPCC) will deal with deaths or serious harm from self-harm by prisoners (including failed suicide attempts) or attacks by other prisoners. The PPO's inquiry discharges the state's duty to conduct a proper investigation into the death or near death of prisoners required under Article 2 of the European Convention on Human Rights (ECHR) which is set out in Schedule 1 of the Human Rights Act (HRA). Such inquiries are sometimes known as 'Middleton Inquiries'.

Self-harm / attacks that occur in police cells in England and Wales, are taken by the Independent Police Complaints Commission (IPCC). HSE has a protocol with the IPCC that sets this out.

Self-harm and attacks that happen in Ministry of Defence (MoD) facilities, eg military detention quarters will normally be dealt with by the police.

The situation is unclear for self-harm and attacks in facilities operated by Customs. It is understood that the PPO does have a role, but there is yet to be formal agreement on this.

In cases of uncertainty Inspectors should contact the Public Services Sector.

Passenger aviation health issues

Enforcement responsibilities for health and safety on board aircraft are divided between HSE and the UK Civil Aviation Authority (CAA). Details of responsibilities are explained in a [Memorandum of Understanding between HSE and CAA](#). Annex 8 in particular explains responsibilities for occupational health and safety of flight and cabin crew.

As a result of concerns about passenger health and safety issues, the Aviation Health Unit (AHU) was formed on 1 December 2003. Based at Gatwick within the Civil Aviation Authority's (CAA's) Medical Division, its main role is to advise government, through the Aviation Health Working Group (AHWG), on passenger and crew health issues. The Department for Transport (DfT) retains responsibility for any policy changes arising from health recommendations. The AHWG is an interdepartmental organisation, chaired by the DfT, with representatives from the CAA, Health and Safety Executive and the Department of Health. It meets every two months to discuss issues relevant to aviation health and was instrumental in the [decision to form the AHU](#).

The CAA has certain responsibilities for flight and cabin crew occupational health and safety provision under the European Civil Aviation (Working Time) Regulations 2004 and has published [CAP757 Occupational Health and Safety on-board Aircraft - Guidance on Good Practice](#), to provide UK airlines with advice on achieving compliance.)

Inland waterways

There is a range of other bodies that inspect eg Maritime and Coastguard Agency, Environment Agency/Scottish Environment Protection Agency, British Waterways, local authorities, etc. The roles and responsibilities of the various organisations with responsibility for safety issues are set out in a Department for Transport report "Inland Water Safety - Final report of scoping study".

A [Memorandum of Understanding \(PDF\)](#) between HSE, the Maritime and Coastguard Agency (MCA) and Marine Accident Investigation Branch (MAIB) sets out the legislation applicable, accident investigation and enforcement arrangements at the water margin. MAIB has the power to investigate accidents to boats in inland waterways and the people on them. MCA is responsible for enforcing the safety of boats used in navigation, including people on them, and the occupational health and safety of the crew.

Large reservoirs

Where reservoirs fall within the definition of 'large raised reservoir', HSE accepts that the integrity of the reservoir structure is assured through the provisions of the Reservoirs Act 1975.

The Reservoirs Act 1975 places a duty on local authorities to maintain a register of large raised reservoirs which can contain more than 25 000m³ of water above the natural level of any part of the land adjoining the reservoir. The Secretary of State appoints specialist engineers to panels set up under the Act. Panel Engineers are required to advise the undertakers on any aspect of the behaviour of the reservoir that might affect safety.

Planning matters

HSE will continue to enforce in respect of any major hazard sites subject to planning controls, but will not involve itself in matters subject to local planning authorities or public inquiries.

HSE will continue to enforce and provide advice to planning authorities in respect of any developments at or within the vicinity of major hazard sites subject to planning controls.

Fencing of quarries

The Mines and Quarries Act 1954 (MQA) s.151 concerns the fencing of all quarries whether in the course of being worked or not. Section 151(2)(c) deems a quarry to be a statutory nuisance under the Environmental Protection Act 1990 if: (1) it is not provided with an efficient and properly maintained barrier so designed and constructed as to prevent any person from accidentally falling into the quarry; and (2) by reason of its accessibility from a highway or place of public resort constitutes a danger to members of the public. MQA s.151 is not a relevant statutory provision under HSWA. However, HSE will continue to enforce Regulation 16 of the Quarries Regulations 1999, concerning the provision and maintenance of barriers, at active quarries.

Where a public body (eg a local authority) fails to discharge its statutory duties or where the consequence of its decision-making process is alleged to have resulted in risks arising

General duties

A public body's undertaking (such as a local authority) will be determined by the scope of its functions as set by statute or other terms of reference. Such functions include road gritting, the provision of roads and signage, setting speed limits and managing social services' child protection measures.

HSWA does not give HSE the authority to oversee such public bodies in all respects. Their decisions and judgments on policy, strategy, prioritisation of work and allocation of resource are generally likely to fall to Parliament, ministers or others more appropriately placed than HSE to consider and so would tend to be a lower priority for HSE.

In some cases, there may be statutory arrangements which provide another body with appropriate authority and suitable powers to oversee the public body and safeguard against the risk in question. In line with HSE's policy on section 3, those arrangements may also be relevant when deciding whether HSE is best placed to consider the actions of a public body.

Regulatory bodies

HSE's role under HSWA is limited to consideration of what those bodies do to the extent it exposes others to risks to their health and safety. HSE is not responsible for investigating whether or not regulatory bodies have carried out their statutory functions. As with other types of public body, the scope and extent of a regulator's powers and remit, and its precise role and involvement in a particular matter, will be relevant when deciding whether a risk could be said to have arisen from the conduct of the regulator's undertaking.

When deciding upon the priority of an issue factors that might be relevant to any further consideration by HSE may include:-

- the duties placed by health and safety legislation on others who would be better placed than the regulator to control the risk,
- Evidence of specific action taken by the regulator,
- A failure by a regulator to adopt appropriate standards when it was reasonably open to it to do so and

- any sound evidence of a serious breach by the regulator of its own policies or standards.

The focus should be the regulator's conduct of its own undertaking and the risks to health and safety that arise from this. Therefore greater priority should be given where the way that the body conducts its undertaking has created a risk or increased or aggravated an existing risk; rather than where the regulator has failed to eliminate or reduce the risks from others whom it regulates.

Where the risk arises from natural features (unless a work activity is taking place) eg cliff edge, lake, river, stream, falling trees, falling rocks (eg Cheddar Gorge).

When people enjoy the countryside or other open spaces they owe a duty to themselves and their dependents to take proper care. Save in special circumstances eg managed landscapes such as parks, it is not desirable that access be restricted or that other measures be taken that diminishes the amenity from fear that an accident may result in prosecution.

Hazardous leisure pursuits eg bungee jumping, water sports, etc

Responsible risk-taking should be regarded as normal, and we should not discourage members of the public from undertaking certain activities solely on the grounds that there is an element of risk. Excessive paternalism and concern with safety may lead to infringements of personal rights. Those who are competent to judge the risk to themselves should be free to make their own decisions so long as they do not threaten the safety of others. The nature of these pursuits is such that, where there is an accident, a fault on the part of an employer cannot be presumed.

Buildings and other structures*

In addition to the duty on an employer in respect of their employees, section 4 of the HSWA, and certain health and safety regulations, impose duties for the protection of certain classes of persons in relation to the condition of premises. Where persons outside that protection are exposed to risks arising out of the condition of buildings or other structures, HSE inspectors will not ordinarily consider an investigation save in cases where death or serious injury has occurred and they are provided with a sufficient indication that a breach of section 3 was the probable cause or significant contributory factor. In many cases, local authorities are particularly well placed to act because of their specific powers under the Building Act etc and equivalent devolved legislation to deal with defective premises, buildings and structures.

Consumer safety issues*

HSE will not ordinarily investigate cases relating to the safety of consumer goods in cases where Part II of the Consumer Protection Act 1987 provides an adequate penalty.

* NB - A letter from the Secretary of State to HSC dated 7 October 1975 (the 'Foot letter') said we were not responsible for the structural safety of buildings or the safety of products sold to the public and the administration and enforcement of consumer protection legislation.