

THE CENTRE

FOR

CORPORATE ACCOUNTABILITY

RESPONSE TO HSC

CONSULTATION DOCUMENT

"ENFORCEMENT POLICY STATEMENT"

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SUMMARY

Although HSC's proposed Enforcement Policy Statement is an improvement upon the current policy, it is still inadequate and requires significant improvement. The main failures of the current statement are:

Powers of Enforcing Authorities

- It fails to distinguish between those powers which are concerned with the **prevention** of harm (oral/written advice, improvement and prohibition notices), from those concerned with the **accountability** of companies that have committed a criminal offence (written warnings, formal cautions or prosecution). This is in contrast to the enforcement statement of the Environment Agency. **See Paras 2.1 – 2.11**

Prevention and Accountability

- It fails to state that enforcing authorities should concern themselves with **both** prevention and accountability. When an inspector undertakes an inspection of a company or an investigation of an injury, the inspector should consider both:
 - which of its preventative powers should be used to prevent harm from taking place or prevent it from re-occurring and;
 - if, in addition, a criminal offence has been committed, what action should be taken in relation to the offence.

This is in contrast to the enforcement statement of the Environment Agency. **See Paras 3.1 – 3.6**

Resource Based Preventative and Prosecution Policy

- It fails to state that financial budgeting of enforcing authorities should have no bearing upon the decisions made by the enforcing authorities in relation to:
 - which of their preventative powers are used in any particular situation
 - in relation to the commission of a criminal offence, whether they prosecute or issue a formal caution or written warning.

See Paras 1.4 – 1.8

Use of Preventative Powers

- It fails to lay out the criteria that should guide inspectors in its use of its preventative powers. This allows inspectors far too much discretion in determining whether they should use their informal powers (i.e. oral or written advice) rather than their formal powers (i.e. improvement or prohibition notices). **See Paras 4.1 – 4.6**

Response to a Criminal Offence

- It fails to set out those circumstances where formal cautions and written warnings should be issued, rather than undertaking a prosecution.

See Paras 5.29 to 5.32

- It fails to state clearly what is the purpose of prosecution. The policy should state that:

“Prosecution aims to punish wrongdoing, to bring to account those who have committed a criminal offence and to act as a deterrent to the offender as well as to others that may offend.”

See Paras 5.2 – 5.25

- It fails to state clearly those circumstances which should result in a prosecution. In particular, it fails to state that a prosecution should be expected where a criminal offence has been committed that has resulted in death or major injury.

See Paras 5.8 –5.28

Investigation

- It fails to explain clearly the purpose of Investigation. It should state that:

“The purpose of an investigation into a death, injury or dangerous occurrence which has been reported to the authorities, is to

- *determine the cause of the incident;*
- *determine whether action needs to be taken to remedy the situation and, if an injury has taken place, to make sure it does not recur;*
- *determine whether a criminal offence has been committed and whether a warning, caution or prosecution should be issued or undertaken;”*

See Paras: 9 – 9.4

- It fails to have clear criteria to determine which reported incidents should be investigated

See Paras: 11.1 – 11.18

Sentencing

- It fails to set out clearly the criteria to determine when enforcing authorities should press for cases to be referred to the Crown court for trial or sentencing.

See Paras: 6.1 – 6.6

Transparency

- It fails to ensure that the decisions made by the enforcing authorities are made “transparent” to workers and others affected the decisions of the enforcing authorities.

See Paras: 8.2 – 8.6

Informing Company Directors

- It fails to ensure that the enforcing authorities inform company directors of the enforcement action taken by the enforcing authorities in relation to their company.

See Paras: 7.1 – 7.3

1. INTRODUCTION

- 1.1 This is a response to the Health and Safety Commission's (HSC) "Revised Enforcement Policy Statement" and the document titled "Possible Criteria for Investigating RIDDOR Reports". It is our view that the current enforcement policy statement is inadequate and requires serious reform. This consultation process provides an important opportunity for the HSC to rethink how enforcing authorities should use their powers and the extent to which the wide discretion – that they currently have - should be limited. It is our view that the Commission must recognise that arguments over "enforcement" and "compliance" in the law have changed drastically in the last 25 years, and that the public's trust in enforcing authorities requires the HSC to adopt new language and new thinking, different from that contained in the Robens Report.
- 1.2 **Environment Agency:** The HSC must in particular take into account the recent establishment of the Environment Agency (EA) in 1990 and the Statements and Guidelines which the Agency has produced in recent years to assist its inspectors in the enforcement of environment law. In our view the HSC should particularly take these policies into account since the EA is part of the Department of Environment, Transport and the Regions, in which the HSC is also placed, and "environmental" and "health and safety" law have a number of very important similarities. It is our view that the EA's enforcement policy statement and guidelines are based upon sound principles – a number of which should be included in the HSC policy statement
- 1.3 It is not our view that the HSC should simply replicate the EA policy – which is itself not perfect and can be improved upon. However, there is a coherence and rationality to the EA's statement that is currently lacking within both the HSC's current and revised policy. In our view, there should be a presumption that the HSC's statement should follow the main principles of the EA's statement unless there is good reason against it.
- 1.4 **Resources:** The Centre recognises that the ability of enforcing authorities to enforce health and safety law is constrained by the level of resources at their disposal. It is however our view that there are certain decisions and activities of the enforcing authorities upon which resource restraints should have absolutely no influence. These are:
- the decisions about which powers enforcing authorities should use to prevent harm – that is to say the decisions about whether they should impose prohibition notices, improvement notices or provide oral or written advice, and;
 - the decisions about what action should be taken in response to the commission of criminal offences – that is to say the decisions whether written warnings or formal cautions should be issued or whether criminal charges should be laid.
- 1.5 It is our view that these decisions should remain entirely unaffected by the resources of the enforcing authorities. The Enforcement Statement should set out fair and proper criteria that should limit the discretion of inspectors in a reasonable manner in relation to these activities. The criteria should not

allow any room for resource restraints to affect decisions around these issues – otherwise the capacity of the enforcing authorities to ensure compliance with the law in a fair way is brought into serious doubt. It is this allegation which, in the recent past, has brought the enforcing authorities into disrepute.

- 1.6 This is particularly important in relation to questions over whether it is appropriate to prosecute a duty holder. It should be noted, for example, that resource issues are not mentioned at all in the Crown Prosecution Service's Code of Crown Prosecutors, and do not figure at all in the decision-making.
- 1.7 The Commission is aware that the Centre is critical of the low investigation rate into major injuries¹. However we do recognise that the HSC is in no position to fund the investigation of every major injury. That being said, there has to be clear and strict criteria to ensure that lack of resources do not allow the HSE to fail to investigate the most serious of the major injuries. It is therefore our view that very clearly defined circumstances must exist to ensure that the most serious injuries are always investigated.
- 1.8 However, we remain critical of the lack of proper resourcing of the HSC – that forces the Health and Safety Executive to investigate only a small number of injuries and undertake an inadequate number of preventative inspections (see Annex).

2. THE PURPOSES OF THE POWERS HELD BY THE ENFORCING AUTHORITIES

- 2.1 It is our view that the HSC Enforcement Statement needs to clarify that some of those powers available to enforcing authorities are concerned with
 - the “prevention” of harm or the “remedying” of circumstances that have already resulted in harm;whilst other powers are concerned with:
 - responding to the commission of a criminal offence;
- 2.2 It is our view that making this distinction will bring clarity both to the work of the enforcing authorities themselves as well as to the structure of the Enforcement Statement itself. Many of the inadequacies and confusions within the current and revised HSC statement are, in our view, linked to a failure to make this distinction.
- 2.3 Another benefit is that it will also ensure that the enforcement of health and safety law is put on the same footing as the enforcement of environmental law. This is because the distinction is embedded within the EA's Enforcement Policy Statement and in particular its Guidelines. Although, as noted above, we do not think that the HSC statement should necessarily follow the EA statement – particularly when it can improve upon it – it is our view that there needs to be a good and sensible reason for there to be inconsistency between the two statements.

¹ See CCA Evidence to Select Committee on Environment, Transport and the Regions.(Sept. 1999)

2.4 The EA Guidelines state that:

“ the Agency’s enforcement powers are extensive and vary from function to function. Generally the powers fall into two broad categories; those for the prevention or remediation of harm to the environment and those providing a response to a criminal offence.”²

2.5 It then goes on to set out which of these powers fall “within [each of] these categories”:

Prevention/remediation

- enforcement notices
- prohibition notices
- works notices
- Agency’s power to carry out works and recharge
- Suspension, variation or revocation or Environmental Licenses

Criminal Offences

- prosecution
- formal caution³
- warning⁴

2.6 The EA Statement makes clear, for example, that *the purpose* of an EA enforcement notice⁵ is either to prevent environmental harm or remedy a situation where environmental harm has taken place. It is not a response to a criminal offence, though in order for such an order to be imposed a criminal offence may well have been committed. Of course, a notice may (like criminal sentences), have punitive consequences for a company in the same way as the laying of criminal charges may themselves spur a company to take action that will prevent future harm from occurring. However, the primary purpose of notices (and the other powers in the first category) is *prevention*; and the primary purpose of prosecutions, (along with formal cautions and warning) concerns *accountability* and *deterrence*.

2.7 HSC’s revised enforcement statement does not contain these two principles. It states that:

² Paragraph 2.2 of Section 1

³ Paragraph 30 of the EA policy defines a caution in the following way: "A caution is the written acceptance by an offender that they have committed an offence and may only be used where a prosecution could properly have been brought. It will be brought to the court’s attention if the offender is convicted of a subsequent offence".

⁴ Paragraph 31 of the EA policy defined a warning in the following way: "A warning is a written notification that, in the Agency’s opinion, an offence has been committed. It will be recorded and may be referred to in subsequent proceedings."

⁵ See Section 13 of the Environment Protection Act 1990. An EA “enforcement notice” is similar in nature to an HSE improvement notice. Section 13 of EPA 1990 states that a notice can be imposed if “the enforcing authority is of the opinion” that any person is “contravening any condition of the authorisation”. The Enforcement notice must “specify the steps that must be taken to remedy the contravention or to remedy the matters that may make it likely that the contravention will arise, as the case may be”

“The enforcing authorities have a range of tools at their disposal in seeking to secure compliance with the law. Many of their dealings are informal – inspectors may offer dutyholders information, advice, and support, both face to face and in writing. But where appropriate they may also issue written warnings, serve improvement and prohibition notices, withdraw approvals, vary license conditions or exemptions, issue formal cautions (England and Wales only,) and prosecute.”⁶

2.8 The only distinction that this paragraph makes is between informal and formal dealings – not a very useful *defining* categorisation⁷. The paragraph fails to distinguish the “purpose” of the different powers; it implies that “warnings”, “cautions” and “prosecutions” are just another enforcement tool – not tools to serve a different function from “advice” or “improvement” and “prohibition” notices.⁸

2.9 It is our view that the following or similarly worded paragraph should replace the one above:

“The enforcing authorities have a range of powers at their disposal whose overall purpose is to secure compliance with the law and ensure accountability when criminal offences have been committed. Generally these powers fall into two broad categories; those for the prevention of harm and those providing a response to a criminal offence.

The following powers are used by the enforcing authorities in order to prevent harm occurring or to prevent it re-occurring: they may provide information, advice and support, both face to face and in writing, as well as serve improvement and prohibition notices, withdrawal approval or vary license conditions of exemptions.

The following powers are used by the enforcing authorities as a response to the commission of a criminal offence; written warnings, formal cautions and prosecutions.”

2.10 The phrase “and ensure accountability” has been added since one of the purposes of the powers is to achieve this goal. Indeed, Paragraph 13 of the revised HSC statement says that “Persons breaking the law will be held to account.” However, the concept of “accountability” also needs to be incorporated into paragraphs dealing with the overall purpose of the powers of the enforcing authorities.

2.11 There are a number of other small changes that follow on from – or are connected with – this distinction:

- Paragraph 2 of the “Introduction” of HSC’s revised policy should be amended. The final sentence currently states that:

⁶ In Para 2 of “the purpose and method of Enforcement”

⁷ It is our view that the distinction between formal and informal powers assists in clarifying the different between written/oral advice and enforcement notices, but should not be a defining categorisation.

⁸ The HSC revised statement does not even contain any definitions of what exactly are improvement notices, prohibition notices, formal cautions or written warnings

“the appropriate use of enforcement powers, including prosecution, is an important means of securing compliance with the law.”

In our view, in light of the above, the following phrase should be added to the end of the sentence.

“.. as well as ensuring that companies and individuals are held accountable for safety failures.”

- Changes also need to be made to paragraph 1 of the “Purpose and Method of Enforcement” of the revised statement. It states that:

“The Purpose of Enforcement is to:

- prevent accidents and ill health;
- deal immediately with serious risks
- promote and achieve sustained compliance with the law;
- put flagrant breaches and serious or repeat offenders before the courts; and
- enable the Courts to uphold the law by punishing offenders and deterring others.”

It is our view that

- “Prevent accidents and ill health”, should become “*prevent injuries, ill health and unsafe conditions*”. The term “accidents” should not be used.
- The sentence, “put flagrant breaches and serious or repeat offenders before the courts” should be changed. As it stands it does not even reflect the proposed prosecution criteria in the document itself, since the revised policy expects prosecution in a wider range of circumstances. In our view, this sentence should be changed to:

“respond to the commission of criminal offences which may include the prosecution of companies and individuals where the circumstances justify it.”

- Changes need to be made to the paragraph 25 of the revised statement:

“The primary purpose of the enforcing authorities is to help prevent harm, and while prosecution can draw attention to the need for compliance with the law, other approaches to enforcement can often promote health and safety more effectively. Enforcing authorities should take account of this in allocating the resources available so as to strike the correct balance between prosecution and mainly preventative activity.”⁹

This paragraph implies that prosecution is simply another enforcement tool, and also sets up a totally false conflict between “prosecution” and “preventative” activity. There is no conflict between action by the enforcing authorities to prevent harm and actions in response to a criminal offence,

⁹ Para 25

whether or not this may be prosecution. It has to be said that these sentences are perfect examples of the confusion that exists within the revised statement; they need to be amended or removed.

3. CLARIFYING THAT WHEN A CRIMINAL OFFENCE HAS BEEN COMMITTED, ENFORCING AUTHORITIES SHOULD BOTH ACT TO PREVENT/REMEDY AND TO RESPOND TO OFFENCES

3.1 Following on from the categorisation explained above, the HSC's statement should make it clear that enforcing authorities, when faced with conditions that appear to be "unsafe", should consider both:

- what powers they should use to make the situation safe to prevent an injury occurring or re-occurring **and**;
- whether an offence has been committed and if so whether they should issue a formal warning, a formal caution or prosecute.

3.2 This point may seem obvious – and indeed HSC's legal office has indicated to us that this is in fact how HSE inspectors do operate¹⁰. However, in our view, this needs to be made explicit in the enforcement statement; if inspectors don't go about inspection/investigations in this way, they should do; and if they do already, this should be made transparent to all stakeholders so that they understand the principles by which inspectors use their powers. Whatever HSC's legal office may think, it is our view that inspectors often do not respond in any way to the commission of a criminal offence. For example, if they decide against prosecution (for reasons other than one concerned with evidential weaknesses), they will often take no other action that is in response to the commission of the offence. They will not issue written warnings or formal cautions. In fact, inspectors are given no guidance at all on what is a "formal caution".

3.3 This principle is included within EA's enforcement statement and guidelines. The Guidelines state that:

"Where a situation occurs which requires enforcement action, consideration must be given to the use of the preventative/remedial powers to stop harm to the environment from continuing, to prevent future harm and to remedy the damage caused.

Where a criminal offence has also been committed, then in addition to any preventative/ remedial action, one of the criminal offence sanctions i.e., prosecution, formal caution or warning, must be pursued unless otherwise stated in this guidance".¹¹

¹⁰ Conversation with Kevin O'Reilly, Head of Legal Services, 3 October 2000

11. Para 2.6 and 2.7, in section "Use of Powers". This principle is also contained in the enforcement statement itself – though slightly less clearly: Para. 8 of the statement itself states that: "where a criminal offence has been committed, in addition to any other enforcement action, the agency will consider instituting a prosecution, administering a caution or issuing a warning" Paragraph 19 states: "[Prosecution] aims to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others. It follows that it may be appropriate to use prosecution in conjunction with other available enforcement tools, for example, a prohibition notice requiring the operation to stop until certain requirements are met."

3.4 This is made even more explicit in the section specifically concerned with “Environmental Protection” This states that:

In responding to an offence officers must consider deploying the most effective protective enforcement response available as well as considering whether prosecution, formal caution or warning is appropriate.¹²

3.5 The revised HSC policy again does not incorporate this principle. It is therefore our view that the following paragraphs need to be introduced into the HSC policy:

“In the course of either a preventative inspection or an investigation into a reported incident, the enforcing authorities must give consideration to whether they should use any of their preventative/remedial powers to stop harm from occurring or to prevent any future harm if it has already occurred.

Where a criminal offence has also been committed, then in addition to any preventative action, the enforcing authorities must either issue prosecute, issue a formal caution or issue a written warning.”

3.6 Constructing the Enforcement Statement in this manner makes it clear that two further issues require consideration.

- the criteria that enforcing authorities should use when deciding which of the various alternative preventative powers they should use;
- if it is considered that a criminal offence has been committed, the criteria that enforcing authorities should use when deciding whether to issue a written warning, issue of formal caution or undertake a prosecution

4. ENFORCING AUTHORITIES USE OF THEIR PREVENTATIVE/REMEDIAL POWERS

4.1 In our view it is particularly important that the enforcement statement clarifies the circumstances in which different “preventative” powers should be used. For example:

- While a Prohibition Notice can only be imposed when an inspector considers that a duty holder has placed a person at “risk of serious personal injury”, the question arises whether an inspector should *always* impose such a notice when they come across these circumstances or whether they should instead be able to impose more “lenient” or “informal” methods like the imposition of an improvement notice or the provision of advice.
- The same question also concerns improvement notices themselves. Although Improvement Notices can only be imposed when inspectors consider that duty holders are “contravening” or “have contravened” their

¹² Para 2.4

legal duties, should enforcing authorities *always* impose such a notice whenever these circumstances exist or can they simply provide some written advice or even simply 'a word in the ear' of a manager.

- There is also the more general question about when advice should be in writing.

4.2 The HSC's revised statement fails to include any guidance on these questions, and in our view this is a very serious gap. There are two reasons why it is important that the HSC's statement does include guidance; first to ensure consistency between inspectors when they are confronted by similar circumstances and secondly, to prevent any potential 'corruption' through unrestricted discretion'.

4.3 **Consistency:** The need for consistency in enforcement is accepted by the HSC and is behind some of the proposed changes that the HSC have made to its guidelines on prosecution. Consistency is of course important both for the duty holder and the person affected by the risks created by the duty holder. Unjustified inconsistency brings the enforcing authority into disrepute and ensures that it will lose its legitimacy.

4.4 **Limiting Discretion:** It is not our view that inspectors should lose all their discretion, and simply follow a "checklist". However, it is important that inspectors do not have too broad a level of discretion, since this places too much power in their hands. The discretion needs to be controlled. Uncontrolled discretion can of course work both ways' it can result in both too "punitive" or too "lenient" a response – both of which need to be limited. However, it is much more likely that uncontrolled discretion in the hands of inspectors will tend towards the greater use of *inappropriate* "informal" rather than inappropriate "formal" powers. The reason for this it is easier for an inspector to deal with breaches informally rather than formally, and secondly, whilst duty holders can appeal against a decision by enforcing authorities to impose an enforcement notice, neither workers nor others can question the decision by an inspector against imposing a notice. As a rule there will be a tendency for inspectors to take the easier option.

4.5 Our proposed guidance is based around the views that:

- the provision of oral or written advice should not be used when there are grounds to impose an improvement or prohibition notices;
- the presumption should be that all advice should be given in writing, and that when oral advice is provided, it should be followed up in writing. Putting all advice and guidance in writing has a number of important benefits. It precludes any ambiguity in the future and so assists in ensuring action is taken by the duty holder; the advice/guidance is likely to be taken more seriously if it is in writing. Also, by clearly locating knowledge within the company, written advice will assist the enforcing authorities if it decides to lay charges or issue a formal caution in the future.

4.6 It is our view that the following paragraphs should be inserted in the Statement:

“If during the course of an inspection or an investigation into a reported incident, an inspector neither discovers contraventions of health and safety law nor circumstances which involve a risk of serious injury, but still considers that the duty holder could gain from further guidance on best health and safety practice, an inspector should provide the employer advice orally or/and in writing. Any oral advice should be followed up in writing.

“If an inspector does identify a clear breach of health and safety law, the inspector should always impose an improvement notice setting out what improvements are required to ensure that the employer is no longer breaking the law. Oral or written advice in such circumstances is not enough. However, an inspector as well as imposing an improvement notice can in addition provide any oral or written advice the inspector considers necessary.

If an inspector believes the activities of the duty holder pose “a risk of serious personal injury” then the inspector should always impose a prohibition notice.”

5 CRITERIA TO DETERMINE THE APPROPRIATE RESPONSE TO A CRIMINAL OFFENCE

5.1 The question here that needs to be considered is the following: when there is sufficient evidence to prove an offence, in what circumstances should enforcing authorities issue a written warning, issue a formal caution or prosecute? We are dealing here with a hierarchy of options – with prosecution being the most serious, and a written warning, the least serious.

5.2 **The Purpose of Prosecution:**

Before considering what the criteria should be, we shall discuss the purpose of prosecution. The HSC’s revised statement does not contain any clear statement about the purpose of prosecution. The closest to it is paragraph 26 which states that:

“the primary purpose of the enforcing authorities is to help prevent harm and while prosecution can draw attention to the need for compliance with the law, other approaches to enforcement can often promote health and safety more effectively.”

5.3 This paragraph implies that the purpose of prosecution is simply to “draw attention to the need for compliance with the law.” The main reason for the inadequacy of this paragraph is due to the failure of the statement (discussed in section 2 above) to distinguish between powers concerned with “prevention” and those concerned with “response to a criminal offence:

5.4 The Environment Agency’s Enforcement Statement has a much clearer and considered definition.

“[prosecution] aims to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others”¹³

- 5.5 However, this can be improved. The phrase, “to avoid a recurrence” is not quite right; prosecution does not prevent in itself, except through acting as a deterrent which is already stated within the same sentence. Also it does not contain the key concept of accountability. A better formulation would be:

“Prosecution aims to punish wrongdoing, to bring to account those who have committed a criminal offence and to act as a deterrent to the offender as well as to others that may offend.”

5.6 **Resource Questions**

It is our view, noted above, that resource questions should in no way intrude into decisions about which powers should be used either in relation to prevention or in relation to the appropriate response to a criminal offence.

- 5.6 It is therefore important that all references to “resources” should be removed from the Statement in connection with “prosecutions”. So the sentence contained in paragraph 26 of the revised statement must be removed. This states that:

“Enforcing authorities should take account of [the primary purpose the enforcing authorities ...] in allocating the resources available so as to strike the correct balance between prosecutions and mainly preventative action.”

- 5.7 This sentence is of course not only problematic in terms of its reference to “resources” but also its implication that prosecutions and preventative action somehow need to be balanced.¹⁴

5.8 **When should Prosecutions be Expected**

In our view there should be four main criteria determining when a prosecution, rather than the other options, should take place

- the level of harm
- the seriousness of the breach
- the awareness of the duty holder
- the safety history of the duty holder

- 5.9 **Harm:** in our view it is important that the consequences of an offence should be a determining criterion. The greater the harm caused, the more likely prosecution should be expected. It has traditionally been a view held by the HSC that the consequences of any breach of law is of little relevance to any action that should be taken. It has been argued that the injury caused is simply the “accidental consequences” of a breach of duty, and that the enforcing authorities should simply consider the seriousness of the breach. As we discuss below, the seriousness of the breach should indeed be a significant factor in deciding whether to prosecute, but the consequences are in our view also important – since the prevention of harm itself is one of the purposes of these offences.¹⁵

- 5.10 Placing significance on the level of harm caused is also consistent with the Code of Crown Prosecutors established by the Crown Prosecution Service. In

¹⁴ See above

¹⁵ See Disaster Action “The Case of Corporate Responsibility” for discussion of these points.

determining whether or not to prosecute (assuming there is sufficient evidence), the Code says “in cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.” One of the factors which would tend against prosecution is where the “loss of harm can be described as minor”.¹⁶ The inference here is where the harm is “serious” prosecution should take place.

- 5.11 In addition, the Environment Agency’s statement and guidelines has made the level or extent of “environmental” harm as the principal indicator of whether or not prosecution rather than one of the other options should be used. So for example, the section of the Environment Agency guidelines on “environmental protection”, state:

“The seriousness of [environmental protection offences can vary greatly. At one end of the scale, an action could lead to severe contamination of water, air, land, threatening human health. At the other end there could be breaches of “administrative” license conditions ... In reaching a decision on the most appropriate enforcement action account will be taken of all the relevant circumstances including:

Environment Impact

The magnitude of the environmental effect is an indicator of the degree to which the offender has failed to put in place, maintain, adhere to and/or foresee the consequences of not having suitable procedures or systems to prevent the incident. In general, the greater the effect or potential effect, the greater the probability of prosecution. (emphasis added)”

It goes on:

“Where the offence arises out of an incident which falls within [the common Incident Classification Scheme], reference should be made to the environmental impact category. If the impact is category 1, prosecution will normally result. If it is category 2 prosecution or formal caution will be the normal course of action, the choice being determined by other factors set out below. If it is category 3, a warning will usually be sufficient, unless other factors determine a more severe course of action e.g. a repeated offence.”

- 5.12 The Common Incident Classification Scheme sets out the sort of *environmental harms* which are required for an incident to fit within the different categories. Category One incidents are “major” incidents. In relation to water pollution, for example, the following incidents are considered to be Category one
- Persistent and/or extensive effects on water quality
 - Major damage to aquatic ecosystem. This could involve
 - “destruction or major damage to fish population and/or fish habitat
 - “destruction or major impact on invertebrate population and/or other aquatic fauna and flora
 - Serious impact on man: public exposed to concentration levels giving rise to potentially serious health risks in either the short or longer term.

¹⁶ Para 6.5

- 5.13 Therefore, as far as the Environment Agency is concerned, where an offence has taken place which has resulted in significant levels of harm, a prosecution is expected to take place. In our view, if the Environment Agency takes this position, it is all the more important that the HSC does. This is because of the nature of the different harms involved. Although environmental harms are important, they do not, unlike occupational harms, directly involve physical injury to humans. If anything, therefore, the HSC should give even greater significance to the issues of harm than the EA.
- 5.14 In its revised policy, the HSC has given some significance to the issue of harm. It states that: “where death was a result of a breach of the legislation” the “enforcing authorities will normally prosecute or recommend prosecution.” However, when it comes to “serious harm” short of death, the enforcing authorities will not normally prosecute. The revised policy stated that where there has been a serious injury, prosecution depends upon the “gravity” of the offence, and “the general record and approach of the offender”.¹⁷
- 5.15 In our view, this is the wrong approach. Offences that result in serious injury should result in a prosecution, irrespective of the “gravity” of the offence or the “general record and approach of the offender”. This would make the policy more consistent with that of the Environment Agency.
- 5.16 **Seriousness of the Breach:** the question here is “how far short of the appropriate standard” do the enforcing authorities consider that the duty holder “fell in failing to meet the reasonably practicable test.”¹⁸ This is an objective test of the level of failure, and does not require evidence of the subjective awareness of the duty holder of any risks created or breaches of the law. In other words, the question is whether the duty holder has been grossly or seriously negligent.
- 5.17 The HSC’s revised policy states that enforcing authorities will “consider prosecution” (not, expect prosecution) where there have been “serious failures in the management of health and safety.”
- 5.18 In our view, this is inadequate. A prosecution should be *expected* where the management of health and safety of a duty holder has fallen “far below what can reasonably be expected.” This is the same wording used by the Law Commission and Home Office in their test of “gross carelessness”.
- 5.19 It would seem to be appropriate, that where the a duty holder’s “management of health and safety” has been “grossly careless” – whether or not it results in death or serious injury – prosecution should take place.
- 5.20 **Level of Awareness of the duty holder:** If the enforcing authorities consider that the dutyholder was aware that it is disregarding health and safety requirement, it is our view prosecution should take place.

¹⁷ Para 28

¹⁸ This is the language used in the case of *R v Howe and Son (Engineers) Limited*. Court of Appeal , 6 November 1998

- 5.21 The Health and Safety Commission's revised policy does suggest this. It states that: enforcing authorities will normally prosecute where there has been "reckless disregard of health and safety requirements". However the concept of "recklessness" – and its link to questions of 'awareness' - is not often understood and it's meaning needs to be spelt out clearly.
- 5.22 **Safety history of the Duty Holder:** This issue will often be linked to the question of the 'awareness' of the duty holder (discussed above); so, for example, evidence that the duty holder was aware that it was disregarding health and safety requirements will often come from the occurrence of previous injuries or incidents, the previous imposition of enforcement notices, or other advice provided by the HSC. However, the question about the awareness of a duty holder and the issue of its safety history should be considered separately. This is because a duty holder may have a very poor safety history in general, but have no awareness of the particular breach in question.
- 5.23 Again, the HSC's revised policy does give this criterion some significance. It states that prosecution would be expected if "there have been repeated breaches of persistent poor compliance" or "there has been a failure to comply with a written warning or an improvement or prohibition notice."
- 5.24 The policy however says nothing about the significance of the safety history of other sites or operations run by the duty holder in question. The EA Enforcement Guidelines states:

"Where the operator is responsible for a number of sites or operations, then the previous offence history for one site will be relevant to the decision-making process for the others if the circumstances are such that the operator should have learnt from previous enforcement action ...".¹⁹

A similar paragraph should be incorporated into the HSC policy statement

- 5.24b **Consideration of the HSC's Policy**
Paragraph 28 sets out circumstances where the Commission **expects** prosecution to **normally** take place:
- 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 or persistent poor compliance;
 - work has been carried out without or in serious breach of an appropriate license;
 - there has been a failure to comply with a written warning or an improvement or prohibition notice;
 - inspectors have been intentionally obstructed in the lawful course of their duties. Where inspectors are assaulted enforcing authorities will seek prosecution of offenders.

¹⁹ Para. 10.2

- 5.25 Paragraph 29 then sets out circumstances where prosecution will be *considered*, and they are “listed in the order in which they will be given priority where resources are limited.”
- false information has been wilfully supplied, or there has been an intent to deceive;
 - there have been serious failures in the management of health and safety;
 - 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;
- 5.26 **The Centre’s View:** Apart from what has already been stated above, we support the two conditions (which have not been discussed so far) set out in HSC’s revised statement where prosecution would be expected, namely where:
- work has been carried out without or in serious breach of an appropriate license;
 - inspectors have been intentionally obstructed in the lawful course of their duties. Where inspectors are assaulted enforcing authorities will seek prosecution of offenders.
- 5.27 However, we consider that where there is evidence that “false information has been wilfully supplied or there has been an intent to deceive” prosecution should be “expected” rather than “considered.” Such conduct surely constitutes a serious offence and if committed frequently could significantly impact upon the capacity of the enforcing authorities to carry out their tasks. It is important that duty holders know that evidence of such an offence will be dealt with severely.
- 5.28 The Centre therefore proposes that the following paragraphs should be inserted into the Statement:

“The Commission expects that enforcing authorities will normally prosecute, or recommend prosecution, where following an investigation or other regulatory contact, the following circumstances apply:

- *death or serious injury or disease was a result of a breach of the legislation;*
- *there has been a serious breach of health and safety law falling far below what could reasonably be expected;*
- *there has been reckless disregard of health and safety requirements;*
- *there have been repeated breaches or persistent poor compliance indicated, amongst other things, by previous written warnings or formal cautions*
- *there has been a failure to comply with a written warning or an improvement or prohibition notice*
- *work has been carried out without or in serious breach of an appropriate license.*

Where the duty holder is responsible for a number of sites or operations, then the previous safety history for one site will be relevant to the decision-making process for the others if the circumstances are such that the operator should have learnt from previous enforcement action.

The Commission also expects that enforcing authorities will consider prosecution or consider recommending prosecution where following an investigation or other regulatory contact:

- *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;*

5.29 **Warning and Cautions:** When the circumstances do not justify prosecution, the enforcing authorities have two other options; the imposition of “written warnings” or the imposition of “formal cautions”.

5.30 What are these?: The EA document says that a caution:

“is the written acceptance by an offender that they have committed an offence and may only be used where a prosecution could properly have been brought. It will be brought to the court’s attention if the offender is convicted of a subsequent offence.”²⁰ The Guidelines go on to say that “where a “formal caution is offered but refused, a prosecution will normally be pursued.”²¹

5.31 The EA enforcement statement defines a “written warning” as a:

“written notification that, in the Agency’s opinion, an offence has been committed. It will be recorded and may be referred to in subsequent proceedings.”²²

The guidelines further state that:

“A warning may be one of the following:

- site warning: a warning given “on site” by the investigating officer and recorded either on the site inspection report or on a special form designed for the purpose;
- warning letter: a written warning in the letter format.”

The HSC revised statement does not contain any definition of these two terms

5.32 Following the policies of the Environment Agency, it is proposed (as noted above) that when an offence has been committed, and it is decided not to prosecute, the enforcing authorities should issue a formal caution or a written warning. It is not our view that the enforcing authorities should be given any strict guidelines about when a formal caution should be issued rather than a Written Warning. The statement should simply suggest that in deciding which of the options should be used, consideration should be given to a number of factors including the safety record of the company, the level of any harm that has been caused, and the seriousness of the breach. A paragraph should therefore read:

“When an offence has been committed, and the enforcing authorities decide not to prosecute, they should either issue a formal caution or a written warning. A Formal Caution is more serious than a written warning. In deciding which of

²⁰ Para 30

²¹ Para 2.3 of Section 1 of the Guidelines.

²² Para 31

these two should be issued, the enforcing authorities should consider the following factors:

- *the safety record of the company;*
 - *the level of any harm that has been caused, and*
 - *the seriousness of the breach.”*
-

6. REFERING CASES TO THE CROWN COURT

6.1 In the section on “Encouraging Action by the Courts” the revised HSC statement states that:

“in cases of sufficient seriousness, the enforcing authorities in England and Wales should consider indicating to the magistrates the offence is so serious that they may refer it to be heard or sentenced in the higher court where higher penalties can be imposed.”²³

6.2 In our view, this needs to be strengthened. It is important that the enforcing authorities are given some guidelines as to *when* they should press for a case to go the Crown court. Statistics that the Centre published in its evidence to the Select Committee on Environment, Transport and the Regions indicated that:

- only a small percentage of cases involving death resulted in a company being sentenced in the Crown (rather than magistrates) court and;
- a wide disparity between the numbers of cases referred to the Crown Court in different parts of the country.

It is likely that the situation is the same in relation to prosecutions involving major injuries.

6.3 There may be many reasons for the low number of referrals; but it is our view that one of the reasons is that HSE inspectors are given no guidance as to when they should press for appropriate cases to be referred to the Crown Court.

6.3 In our view the enforcing authorities should press for cases to be referred to the Crown Court in three different situations:

- if the offence concerns a death or serious injury;
- if the breach is particularly serious
- if, taking into account the profits and turnover of a company, it is the view of the enforcing authorities that a magistrates courts will not have enough powers to impose a sentence with appropriate punitive and deterrent impact.

²³ Para 35

6.4 The Statement should also state that the enforcing authorities should obtain information about the profits and turnover of a company over a three/ five year period prior to the offence taking place.

6.5 The paragraph above should therefore be amended to state:

“In cases involving:

- a death or major injury; or*
- a company whose profits/turnover are considered by the enforcing authority to be so high that a magistrate court will not have enough powers to impose a sentence with appropriate punitive and deterrent impact; or*
- a serious breach of safety law*

the enforcing authority should indicate to the Magistrates that they should consider referring the case to be heard or sentenced in the higher court where higher penalties can be imposed.”

6.6 The EA statement includes a paragraph which says that:

“Following conviction, the prosecutor shall inform the court of all previous relevant enforcement action.”

Such a paragraph should be included in the HSC statement. It is crucial that the Courts are given a full enforcement history to assist them in sentencing a company. Although this is supposed to be common practice in the HSE, it does not always take place.

7. INFORMING COMPANY DIRECTORS

7.1 The HSC has no national guidance to ensure that company directors are made aware of any enforcement action – whether it be the details of enforcement notices, written warnings, cautions or prosecutions - taken against the company.

7.2 It is our view that it is essential that company directors have no excuse for ignorance about safety failures in their company. Ensuring that company directors have this information would in our view:

- make it more likely that the company will make the safety changes required in good time;
- facilitates any future prosecution or other action that that the enforcing authority might consider taking against a director.

7.3 It is our view that the Enforcement Statement should clarify that the enforcing authorities should inform all the company directors or all the significant directors or a company about any “formal” enforcement action that they take against the company.

8. PRINCIPLES OF ENFORCEMENT

8.1 The HSC Enforcement Statement has a significant section entitled “principles of enforcement”. These are the underlying principles that are supposed to inform all aspects of enforcement. Their original source is the Cabinet Office’s “Better Regulation Unit” and are part of the “Enforcement Concordat” that regulatory agencies can sign up to. They are:

- “proportionality” in applying the law
- “consistency” of approach
- “targeting” of enforcement action
- “transparency” about how the regulator operates

8.2 **Transparency:** The HSC revised policy states that:

“Transparency means helping duty holders to understand what is expected of them and what they should expect from the enforcing authorities. It also means making clear to duty holders not only what they have to do but, where this is relevant, what they don’t”

8.3 It also states what can be expected of a health and safety inspector.

“• in the case of informal enforcement action, inspectors will tell the duty holder what to do to comply with the law, explain why, and, if asked, distinguish legal requirements from best practice advice. Inspectors will, if asked, confirm any advice in writing.

• 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:

• in the case of a prohibition notice the notice will explain why the prohibition is necessary.”²⁴

8.4 The Statement does not however require the enforcing authorities to be transparent in relation to employees/workers who are or might be affected by unsafe activities. In our view this needs to be rectified.

8.5 This would not be consistent with HSC’s general policies. The Health and Safety Commission’s policy statement on access to health and safety information notes the Commission’s belief that “public access to health and safety information improves public understanding of health and safety and helps to strengthen public confidence in the health and safety system.” It further points out that keeping employers, employees and the public informed of matters in relation to the control of risks to people’s health and safety from work activities is enshrined in the 1974 Health and Safety at Work Act.

8.6 There currently exists some considerable scope for improving transparency by extending access to information relating to the day-to-day activities of HSE. Specifically, principles of transparency and accountability could be greatly advanced if HSC adopted the following practices aimed at ensuring employees are informed of their decisions. For Example:

²⁴ Para 18

- *In cases where the enforcing authority has been contacted by a worker/trade union representative/safety representative with a complaint about an incident, the safety of a particular workplace, or the conduct of an employer/duty holder, the HSE should provide the duty holder, the complainant and the complainant's trade union with written notification of either:*
 - *the decision to investigate; or*
 - *the reason for not proceeding with an investigation*
- *In cases where the enforcing authority has been notified of the occurrence of a major injury under RIDDOR, it should provide the injured party and the duty holder with written notification of either:*
 - *the decision to investigate; or*
 - *the reason for not proceeding with an investigation*
- *In cases where an investigation takes place and no further action is taken, it is in the interests of transparency and accountability that employees and employers are informed of the reasons for this decision.*
- *In cases where informal enforcement action is taken, copies of advice given to duty holders in writing should be made available to safety representatives and trade union representatives at the site.*
- *In cases where enforcement notices are imposed, copies should be made available to safety representatives and trade union representatives at the site.*

8.7 **Proportionality:** The HSC Statement says that:

“Proportionality means relating enforcement action to the risks. Those whom the law protects and those on whom its places duties (duty holders) expect that action taken by enforcing authorities to achieve compliance should be proportionate to any risks to health and safety or to the seriousness of any breach”²⁵

In our view this needs to be extended so that the final phrase should read:

“... proportionate to any risks to health and safety, to the extent of harm that has been caused to the safety history of the duty holder or to the seriousness of the any breach.”

8.8 The paragraph in the EA's statement is: “The Agency's first response is to prevent harm to the environment from occurring or continuing. The enforcement action taken by the Agency will be proportionate to the risks posed to the environment and to the seriousness of any breach of the law”

This first sentence should be in the HSC's statement – changing “environment” to “human safety and health”

²⁵ See Para 7

8.9 **Consistency:** the revised HSC policy states that

“The Commission recognises that in practice consistency is not a simple matter. HSE inspectors and local authority enforcing officers are faced with many variables; the severity of hazard, the attitude and competence of management, the duty holder’s accident history. Decision on enforcement action are discretionary.”²⁶

There are two points here.

- In the parallel paragraph of the EA’s policy, one of the variables is “the scale of environment impact”. The HSC statement should add in “*severity and scale of injury*” as one of the variables
- The HSC document uses the phrase “the duty holder’s accident history”. This should instead be “*history of previous incidents or breaches*” – which is the phrase used by the Environment Agency.²⁷

9. **THE PURPOSE OF INVESTIGATION**

9.1 It is our view that the investigation of reported incidents is a crucial part of the role of the enforcing authorities. This is because they will ensure that any dangerous conditions that resulted in the injury or incident can be remedied and also to ensure that any criminal offences that may have been committed and resulted in injuries can be detected and properly considered.

9.2 The revised HSC policy states that:

“Investigations are undertaken in order to learn lessons and influence the law and guidance, to prevent them happening again, and to put gross breaches before the courts.”²⁸

9.3 In our view this is an inadequate explanation of the purpose of an “investigation”. In particular:

- “learn[ing] lessons and influenc[ing] the law and guidance” should not be high on the list of purposes of an investigation”.
- the phrase “put[ting] gross breaches before the courts” does not reflect the Statement’s own prosecution policy which proposes that not only “gross” breaches should be put before the courts

²⁶ See Para 16

²⁷ Also the term “accident” in paragraph 15 should also be changed.

²⁸ See Para 21

9.4 This paragraph should be replaced by the following one:

“The purpose of an investigation into a death, injury or dangerous occurrence which has been reported to the authorities, is to

- determine the cause of the incident;*
- determine whether action needs to be taken to remedy the situation and, if an injury has taken place, to make sure it does not recur;*
- determine whether a criminal offence has been committed and whether a warning, caution or prosecution should be issued or undertaken;”*

10. INVESTIGATING DIRECTORS AND MANAGERS

10.1 It is our view that scrutinising the conduct of company managers and directors – but particularly directors – is crucial. We have discussed this point in section 3 of our response to the Home Office proposals on reform to the law of manslaughter – which is appended to this document²⁹.

10.3 The HSC’s revised statement does contain a paragraph relating to the prosecution of directors and managers³⁰. However, the statement says nothing about the need to investigate directors and managers. The HSC may well think that inspectors currently do investigate the conduct of company directors and there is therefore little need to include this point. Not only is this debatable, but is important that the policy should make it transparent and explicit. Because of the importance of the conduct of company directors to the management of health and safety, it is our view that the following paragraph should be added.

“In the course of conducting an investigation, the inspector should consider the management chain and the role played by individual directors and managers and what improvements they need to make in their management of safety and whether they have committed an offence.”

11. INVESTIGATION CRITERIA

11.1 As noted elsewhere, it is our view that, ideally, all reported incidents should be investigated by the enforcing authorities. However, it is also our view - unlike our position on prosecutions – that realistically under the present financial climate it is not possible for the enforcing authorities to investigate all such incidents.

11.2 That being said, it is important that certain reported incidents will always be investigated whatever the resource implications, and that there is a clear set

²⁹ See Paras 3.4 to 3.20

³⁰ See Para 30

of criteria – which is open and transparent - to determine which other reported incidents should be given priority.

11.3 **The HSC Revised Statement**

The HSC's revised statement considers the question in two parts. First in paragraph 24 which states that:

“The enforcing authorities should ensure that in the selection of which reports of injury or occupational ill health to investigate and in deciding the level of resources to be used, inspectors and others take account of the following factors:

- the severity and scope of actual or potential harm or the high potential for harm arising from an event:
- the seriousness of any potential breach of the law;
- the track record of the duty holder
- the enforcement priorities;
- the practicality of achieving results;
- the wider relevance of the event including serious public concern.”

11.4 In addition, the HSC have produced a separate leaflet entitled “Possible Criteria of Investigating RIDDOR Reports.” This provides a more detailed list of injuries which the Commission expects to be investigated unless there are:

- inadequate resources due to other priorities - though an injury not investigated due to inadequate resources must be referred to the Head of Operations.
- impracticability of investigation e.g. unavailability of witnesses or evidence, or disproportionate effort would be required.
- no reasonably practicable precaution available for risk reduction.

11.5 According to this note, the injuries that are expected to be investigated are:

- deaths, except those relating to most road traffic incidents
- certain “major” injuries at work:
 - amputation of digit past the first joint
 - amputation of hand / and or foot / leg
 - serious multiple fractures
 - crush injuries leading to major organ damage
 - serious head injuries involving loss of consciousness
 - full thickness burns and scalds
 - permanent blinding of one or both eyes
 - scalping
- all major injuries that are the result of:
 - workplace transport incidents
 - electrical incidents
 - falls from a height of greater than 2 m
 - confined space incidents
- all asphyxiations
- all reported diseases

- 11.6 Other incidents should also be investigated, according to this note are:
- any incident that gives rise to a *serious public concern* where the injury is serious or could have been serious or there has been a serious breach of health and safety law. The presumption is that “incidents which involve children, vulnerable adults, multiple casualties” - where the injury is or could have been serious or the breach is serious - do give rise to public concern.
 - all major injuries “where it appears from the report that there is likely to have been a serious breach of health and safety law”. A serious breach of the law is defined as one where it should result in an “enforcement notice or a prosecution.”
 - dangerous occurrences where it appears from the report that the outcome, potential outcome or apparent breach of law is serious.

11.7 **The Centre’s Assessment**

There are a number of points that the Centre would like to make:

- 11.8 **Para 24:** It is unclear exactly how paragraph 24 of the revised statement connects with the note, “Possible Criteria of Investigating RIDDOR Reports”. Whilst, we can understand that there is good reason to keep the detailed guidance separate from the enforcement statement itself – so that it can be changed more regularly if required – the statement itself needs to refer directly to the criteria, and explain how the Statement’s general criteria fits in with the specific detailed guidance.

- 11.9 As long as there is a proper inter-linking of the two documents, we are in general agreement with the factors set out in paragraph 24. It should state something to the following effect:

“When a reported incident does not come within one of the criteria set out in the document setting out those reported incidents that should be investigated the following factors should be taken into account in deciding whether to investigate it”

- 11.10 **“Possible Criteria Document”:** It is completely unclear how the HSC decided why particular sorts of injuries should be investigated but others not. The consultation document should have contained some discussion of the criteria which the HSC used to come up with its list. For example it is unclear why major injuries resulting from:

- workplace transport incident
- electrical incidents
- falls from a height of greater than 2 m
- confined space incidents

are expected to be investigated, whilst major injuries resulting from

- contact with moving machinery
- struck by moving object
- strike against something stationary

- injured while handling, lifting or carrying
- slip, trip or fall
- falls from height less than 2 metres
- trapped by something collapsing/overturning
- exposure to or contact with harmful substance
- exposure to fire or explosion
- acts of violence

will not be investigated unless they resulted from particular forms of injury. There may well be some reasonable explanation, but the HSC has not provided it.

- 11.11 It is our view that the list needs to be simplified. It should be divided into four categories:
- Deaths
 - Injuries
 - dangerous occurrences
 - disease

- 11.12 In relation to **deaths**, the wording of the document should remain:

“All fatalities arising out of work activities, except those relating to most road traffic incidents.”

This of course could change depending on the outcome of the Government’s Work-related Road Safety Task Group.

- 11.13 In relation to **Injuries**, the way in which the statement is written needs to be changed. Paragraph 6 of the Criteria list states that:

“All incidents likely to give rise to serious public concern when this is related to the seriousness of the outcome, potential outcome of breach of health and safety law,”

should be selected for investigation. A footnote states that:

“That is concern to the public in general, rather than to those individuals immediately involved. Unless there is clear evidence to the contrary, the presumption is that incidents involve children, vulnerable adults, multiple casualties and whether also the outcome, potential outcome, or breach is serious, will be included.

- 11.14 Paragraph 7 of the Criteria list states that:

“Irrespective of the potential for serious public concern, all incidents resulting in RIDDOR-defined major injuries, where it appears from the report that there is likely to have been a serious breach of health and safety law.” A footnote to this states that; “A serious breach of law is one where it is expected that, in accordance with the Enforcement Management Model (currently undergoing trials), the “national enforcement expectation” would determine an enforcement notice or a prosecution.”

- 11.15 In our view, these two points should be brought to the fore rather than buried low down in the list. In addition, investigations should also take place where the duty holder has an already known poor track record in compliance with health and safety.

“All Injuries should be investigated where it appears from the RIDDOR report that:

- *it is likely to give rise to serious public concern, or*
- *it is likely that upon investigation, an improvement or prohibition notice is likely to be imposed.*
- *where the duty holder has a poor record of compliance with health and safety law;*

An incident gives rise to serious public concern when it involves children, vulnerable adults, multiple casualties and whether also the outcome, potential outcome, or breach is serious “

- 11.16 It should then go on to state which particular major injuries and over-three day injuries should, in any case, be investigated. In our view, in addition to the list of injuries in the Criteria list:

- all amputations whether or not they are past the first joint should be investigated.
- all reports of blindings should be investigated, since it will not be possible for an inspector to know whether a blinding will be permanent or not.
- all reports of fractures “except those that are the result of slip, trips or falls on the same level” should be investigated. It should be noted that the majority of major injuries are “fractures” of one kind or the other. Many of these fractures will be the result of “slips, trips” etc – and it seems justified that these in normal circumstance should not require investigation. However to limit the investigation of fractures to only those that are “serious multiple” ones, is in our view too narrow.
- all asphyxiations.

- 11.17 In relation to **dangerous occurrences**, the HSC Criteria document should repeat the same paragraph noted above.

“All dangerous occurrences should be investigated where it appears from the RIDDOR report that:

- *it is likely to give rise to serious public concern, or*
- *it is likely that, upon investigation, an improvement or prohibition notice is likely to be imposed.”*

- 11.18 **Qualifications:** In our view two of the three qualifications should be abandoned. The first qualification concerned with “inadequate resources” should be retained as long as there is a requirement to refer any case to the Band One Head of Operations. However it is important that every year each Band 1 Head of Operations, publish the numbers and types of injuries which were not investigated as a result of inadequate resources and for each one an explanation as to why it was not possible to investigate.

In our view the other two qualifications should be abandoned since it is not possible to determine whether an investigation is “impracticable” or “no reasonable practicable precautions” are available, unless an investigation is initiated. However, if the HSC considers that they should remain, referrals should also take place to the Band One Head of operations before deciding against investigation.

ANNEX ONE

The Environment Agency continues to dwarf the HSE in relation to spending. Last year, total expenditure by the Environment Agency was in excess of £600m. This compares to HSE annual expenditure of less than £200m. The Environment Agency will also enjoy a marginally greater rise in expenditure. Over the three year period between 1998/99 and 2001/02, the total increase in Environment Agency spending will equate to an increase of around 11%:

It should also be noted that police forces continue to enjoy higher increases in annual spend when compared to the agencies enforcing regulatory law. The Home Secretary recently announced a 10% increase in police spending over the next year - a projected increase that the HSE will receive over a 3 year period. The Association of Chief Police Officers have pointed out that the projected 20% increase in police expenditure over the next 3 years is equivalent to a further 4000 police officers. In comparative terms, this number alone is roughly equivalent to the total HSE staff complement at 1 April 2000, and well over double the total number of HSE inspectors. Comparisons with other law enforcement functions also highlight the relative lack of priority for HSE funding under successive governments. For example there are currently more British Transport Police officers than the total number of HSE inspectors in the UK.

CCA PROPOSED ENFORCEMENT STATEMENT

Proposed Changes to HSC Revised Statement are made in bold
Footnote references refer to paragraphs of CCA response

INTRODUCTION

Para 1 Unchanged

Para 2 The Health and Safety Commission's aims are to protect the health, safety and welfare of people at work, and to safeguard others, principally members of the public, who may be exposed to risks from the way that work is carried out. The appropriate use of enforcement powers, including prosecution, is an important means of both securing compliance with the law **and ensuring that companies and individuals are held accountable for safety failures.**³¹

Para 4 **DELETE**

PURPOSE AND METHOD OF ENFORCEMENT

Para 1 The Purpose of enforcement is to:

- prevent **injuries, ill health and other unsafe conditions;**³²
- deal immediately with serious risks
- promote and achieve sustained compliance with the law;
- **respond to the commission of criminal offences which may include the prosecution of companies and individuals where the circumstances justify it.**³³
- enable the Courts to uphold the law by punishing offenders and deterring others.

Enforcement is distinct from civil claims for compensation and is not undertaken in all circumstances where civil claims may be appropriate, not to assist such claims.

Para 2 **The enforcing authorities have a range of powers at their disposal whose overall purpose is to secure compliance with the law and ensure accountability when criminal offences have been committed. Generally these powers fall into two broad categories; those for the prevention of harm and those providing a response to a criminal offence.**

The following powers are used by the enforcing authorities in order to prevent harm occurring or to prevent it re-occurring: they may provide information, advice and support, both face to face and in writing, as well as serve improvement and prohibition notices, withdrawal approval or vary license conditions of exemptions.

³¹ See Para 2.11

³² See Para 2.11

³³ See Para 2.11

The following powers are used by the enforcing authorities as a response to the commission of a criminal offence; written warnings, formal cautions and prosecutions.³⁴

Para 2a In the course of either a preventative inspection or an investigation into a reported incident, the enforcing authorities must give consideration to whether they should use any of their preventative/remedial powers to stop harm from occurring or to prevent any future harm if it has already occurred.

Where a criminal offence has also been committed, then in addition to any preventative action, the enforcing authorities must either issue prosecute, issue a formal caution or issue a written warning.³⁵

Para 3 Unchanged

Para 4 Unchanged

PRINCIPLES OF ENFORCEMENT

Para 6 Unchanged

Proportionality

Para 7 **The Enforcing Authorities first response is to prevent harm to human safety and health from occurring or continuing.** Proportionality means relating enforcement action to the risks. Those whom the law protects and those on whom its places duties (duty holders) expect that action taken by enforcing authorities to achieve compliance should be **proportionate to any risks to health and safety, to the extent of harm that has been caused, to the safety history of the duty holder and to the seriousness of any breach.**³⁶

Para 8 Unchanged

Para 9 Unchanged

Para 10 Unchanged

Para 11 Targeting
Unchanged

Para 12 Unchanged

Para 13 Unchanged

³⁴ See Paras 2 to 2.9

³⁵ See Paras 3 to 3.6

³⁶ See Para 8.7 and 8.8

- Para 14 Consistency
Unchanged
- Para 15 Duty holders 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 **injuries and other reported incidents**.
- Para 16 The Commission recognises that in practice consistency is not a simple matter. HSE Inspectors and local authority enforcing officers are faced with many variables: **the severity and scale of injury**, the severity of hazard, the attitude and competence of management, the duty holders **history of previous incidents or breaches**.³⁷
- Para 17 Transparency means helping duty-holders to understand what is expected of them and what they should expect from the enforcing authorities. It also means making clear to duty holders not only what they have to do but, where this is relevant, what they don't. That means distinguishing between statutory requirement and advice or guidance about what is desirable but not compulsory. **In addition, it also means ensuring that those affected by the activities of duty holders are informed about the decisions made by the enforcing authorities when it affect them.**
- Para 18 Unchanged
- Para 18b
- **In cases where the enforcing authority has been contacted by a worker/trade union representative/safety representative with a complaint about an incident, the safety of a particular workplace, or the conduct of an employer/duty holder, the HSE should provide the duty holder, the complainant and the complainant's trade union with written notification of either:**
 - the decision to investigate; or
 - the reason for not proceeding with an investigation
 - **In cases where the enforcing authority has been notified of the occurrence of a major injury under RIDDOR, it should provide the injured party and the duty holder with written notification of either:**
 - the decision to investigate; or
 - the reason for not proceeding with an investigation
 - **In cases where an investigation takes place and no further action is taken, it is in the interests of transparency and accountability that employees and employers are informed of the reasons for this decision.**

³⁷ See Para 8.9

- In cases where informal enforcement action is taken, copies of advice given to duty holders in writing should be made available to safety representatives and trade union representatives at the site.
- In cases where enforcement notices are imposed, copies should be made available to safety representatives and trade union representatives at the site.³⁸

Para 19 Accountability
 Unchanged

Para 20 Unchanged

INVESTIGATION

Para 21 Delete

Para 22 **The purpose of an investigation into a death, injury or dangerous occurrence which has been reported to the authorities, is to**

- **determine the cause of the incident;**
- **determine whether action needs to be taken to remedy the situation and, if an injury has taken place, to make sure it does not recur;**
- **determine whether a criminal offence has been committed and whether a warning, caution or prosecution should be issued or undertaken.**³⁹

Para 23 Unchanged

Para 24 **All Injuries should be investigated where it appears from the RIDDOR report that:**

- **it is likely to give rise to serious public concern, or**
- **it is likely that upon investigation, an improvement or prohibition notice is likely to be imposed.**
- **where the duty holder has a poor record of compliance with health and safety law;**
- **it involves an asphyxiation**

An incident gives rise to serious public concern when it involves children, vulnerable adults, multiple casualties and whether also the outcome, potential outcome, or breach is serious “

In addition, a major injury should also be investigated if it falls within the categories contained in the Criteria list attached to this document.

Para 24b All dangerous occurrences should be investigated where it appears from the RIDDOR report that:

- **it is likely to give rise to serious public concern, or**

³⁸ See Paras 8.2 to 8.7

³⁹ See Para 9 to 9.4

- it is likely that, upon investigation, an improvement or prohibition notice is likely to be imposed. or
- where the duty holder has a poor record of compliance with health and safety law;

Para 24c When a reported incident does not come within one of the above criteria, the following factors should be taken into account in deciding whether to investigate it:

- the severity and scale of actual or potential harm, or the high potential for harm arising from an event;
- the seriousness of the duty holder;
- the enforcement priorities
- the practicality of achieving results
- the wider relevance of the event including serious public concern

Para 24d In the course of conducting an investigation, the inspector should consider the management chain and the role played by individual directors and managers and what improvements they need to make in their management of safety and whether they have committed an offence.

NEW SECTION: USE OF PREVENTATIVE POWERS

If during the course of an inspection or an investigation into a reported incident, an inspector neither discovers contraventions of health and safety law nor circumstances which involve a risk of serious injury, but still considers that the duty holder could gain from further guidance on best health and safety practice, an inspector should provide the employer advice orally or/and in writing. Any oral advice should be followed up in writing.

“If an inspector does identify a clear breach of health and safety law, the inspector should always impose an improvement notice setting out what improvements are required to ensure that the employer is no longer breaking the law. Oral or written advice in such circumstances is not enough. However, an inspector as well as imposing an improvement notice can in addition provide any oral or written advice the inspector considers necessary.

If an inspector believes the activities of the duty holder pose “a risk of serious personal injury” then the inspector should always impose a prohibition notice.⁴⁰

⁴⁰ See Paras 4.1 to 4.6

RESPONDING TO A CRIMINAL OFFENCE

- Para 25 Unchanged
- Para 26 **Where a criminal offence has been committed the enforcing authorities must either prosecute, issue a formal caution or issue a written warning.**
- Para 26a **Prosecution aims to punish wrongdoing, to bring to account those who have committed a criminal offence and to act as a deterrent to the offender as well as to others that may offend.**
- Para 27 Unchanged
- Para 28 **The Commission expects that enforcing authorities will normally prosecute, or recommend prosecution, where following an investigation or other regulatory contact, the following circumstances apply:**
- **death or serious injury or disease was a result of a breach of the legislation;**
 - **there has been a serious breach of health and safety law falling far below what could reasonably be expected;**
 - **there has been reckless disregard of health and safety requirements;**
 - **there have been repeated breaches or persistent poor compliance indicated, amongst other things, by previous written warnings or formal cautions**
 - **there has been a failure to comply with a written warning or an improvement or prohibition notice**
 - **work has been carried out without or in serious breach of an appropriate license.⁴¹**
- Para 28b **Where the duty holder is responsible for a number of sites or operations, then the previous safety history for one site will be relevant to the decision-making process for the others if the circumstances are such that the operator should have learnt from previous enforcement action.⁴²**
- Para 29 **The Commission also expects that enforcing authorities will consider prosecution or consider recommending prosecution where following an investigation or other regulatory contact:**
- **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;⁴³**
- Para 29a **When an offence has been committed, and the enforcing authorities decide not to prosecute, they should either issue a formal caution or a written warning. A Formal Caution is more serious than a written warning. In deciding which of these two**

⁴¹ See Paras 5.8 to 5.28

⁴² See Paras 5.22 to 5.24

⁴³ See Para 5.28

should be issued, the enforcing authorities should consider the following factors:

- the safety record of the company;
- the level of any harm that has been caused, and
- the seriousness of the breach.⁴⁴

PROSECUTION OF INDIVIDUALS

Para 30 Unchanged

PUBLICITY

Para 31 Unchanged

ENCOURAGING ACTION BY THE COURTS

Para 32 Unchanged

Para 33 Unchanged

Para 34 Unchanged

Para 35 In cases involving:

- a death or major injury; or
- a company whose profits/turnover are considered by the enforcing authority to be so high that a magistrate court will not have enough powers to impose a sentence with appropriate punitive and deterrent impact; or
- a serious breach of safety law

the enforcing authority should indicate to the Magistrates that they should consider referring the case to be heard or sentenced in the higher court where higher penalties can be imposed.⁴⁵

Para 35b Following Conviction, the enforcing authorities shall inform the court of all previous relevant enforcement action.⁴⁶

DEATH AT WORK

Para 36 Unchanged

Para 37 Unchanged

⁴⁴ See Paras 5.29 to 5.32

⁴⁵ See Paras 6 to 6.6

⁴⁶ See Para 6.6