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HEALTH AND SAFETY COMMISSION

REVIEW OF SECTION 3 OF THE HEALTH AND SAFETY AT WORK ETC ACT 1974 (HSWA)

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Issue

1. To seek a steer from the Commission on HSE's review of section 3, HSWA (s.3).

Timing

2. Routine – this discussion is part of an iterative process and it is intended that HSE will return to the Commission with further analysis of the issues.

Recommendation

3. The Commission is invited to discuss and consider whether:
 - existing s.3 policy is fit for purpose or needs revision;
 - further measures are necessary to deal with the pressures in this area;
 - we use our new relations with DWP to open up a debate on public safety regulation.

Background

4. The s.3 duty on employers and the self employed is to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment who may be affected are not exposed to risks to their health or safety. The s.3 duty is therefore very broad and, inevitably, overlaps with much other legislation. Section 18 HSWA places a duty on HSE to make adequate arrangements for the enforcement of the relevant statutory provisions (except to the extent that some other authority has been made responsible). Where health or safety cannot be adequately regulated by the enforcement of other more specific legislation, or another authority does not have the necessary enforcement powers, or there is no other relevant

authority, there may be a need to apply s.3 – in effect, enforcement by default.

5. Current s.3 policy is determined by:

- A 1975 letter from Michael Foot, then Secretary of State for Employment, to HSC stating that consumer safety and structural safety of buildings were not within HSC's remit.
- A 1989 HSC policy statement (copy attached at Annex 1) confirming that HSE should not generally attempt to enforce s.3 where public safety is adequately guaranteed by the enforcement of other legislation covering the risk in question.

6. To avoid duplication of enforcement, demarcation agreements have been reached with other enforcing authorities and are generally set out in Memorandums of Understanding (MoUs). However, even where there are MoUs, there can be uncertainty given new or unforeseen circumstances together with the broad application of s.3 on whether, and in what circumstances, HSE should apply and enforce health and safety legislation. This needs dealing with on a case by case basis to ensure the protection of the public and consumers. This is time consuming, can lead to demarcation disputes, and deflect resources away from addressing the more serious risks. And there is always the danger that, despite best efforts, these complexities will lead to gaps in the protection of people and of judicial review.

7. The review is not considering areas key to HSE's mission such as nuclear, major hazards and railways. In many of these cases, public safety is indivisible from worker safety. We would not wish to do anything that would diminish public protection.

8. Current pressures on HSE's enforcement of s.3 include:

- The potential for HSE to be drawn into areas increasingly close to "clinical judgement" issues in patient care because of the lack of enforcement powers by others eg the Commission for Health Improvement (CHI) - and its intended replacement – the Commission for Healthcare, Audit and Inspection.
- The need for HSE to intervene in circumstances where the workplace or work activity related element is rather tenuous or which we reactively enforce eg domestic electrical safety, risks to students from meningitis, falling trees, condition of fences and stiles, proposed siting of a drugs and alcohol unit next to a school, solid fuel/oil fires in domestic premises (because of our involvement in gas safety).
- An increasing public desire for HSE to get involved in areas that previously were regarded as "voluntary risk" eg hazardous leisure pursuits.
- An increasing public expectation that a regime will exist to punish individuals or bodies when things go wrong.
- Our "fit" with other regulatory regimes that have a different enforcement rationale in achieving their aims eg Prisons Inspectorate rely on influencing the Home Office, CHI operate on a no blame investigatory approach, the General Medical Council have limited powers in the action they can take.

9. Alongside HSE's review, we assisted DTLR/DfT in a study to assess the overlaps and gaps in the enforcement of health and safety concerning structural safety, consumer safety and patient care. The study focuses on what HSE's future role should be in "public safety" generally, and we will consider further and report to the Commission.

10. On resources, HSE's Field Operations Directorate estimate some 38 staff years annually (excluding work-related road transport) were spent dealing with "public safety" issues and a further 25 staff years for domestic gas safety. This is, however, likely to be an underestimate and includes a significant amount of non-priority reactive topics.
11. Work-related accident statistics concerning members of the public are sobering. For example, in 2000/01:
 - the total number of non-fatal injuries to members of the public was a little over 20,000.
 - There were 445 fatal injuries to members of the public – of which 333 relate to railways.
 - Virtually all (96%) reported fatal and non-fatal injuries to members of the public occur in the service sector.

Argument

12. HSE's mission is "To ensure that risks to people's health and safety from work activities are properly controlled". Whilst the targets for health and safety in "Revitalising Health and Safety" relate to risks to workers, this work (eg through the Priority Programmes) will contribute to reducing public injuries and ill health as will the target in Securing Health Together on reducing ill health to the public caused by work activity. There are also other specific targets on certain initiatives eg s.3 was used as the basis for an agreement with Transco on setting a target of zero incidents to members of the public in relation to gas transportation and supply and gas mains replacement.
13. In contrast to those areas where preventing risks to workers also contributes to preventing risks to the public, there are a number of areas where the measures to protect the public differs in many respects from those to protect the worker eg leisure activities, swimming pools, gas safety, fairgrounds, etc
14. It is at the edges eg where there is neither other specific legislation nor an appropriate enforcement body to bring protection where focus may be lacking. Government more generally is not addressing this; rather some parts of Government are seeking to limit their role by relying on HSE's enforcement powers (eg DTI and certain consumer safety issues such as the addition of radioactive substances to consumer goods). It is clear that HSE would have great difficulties in persuading other organisations that they should do some of the things we currently do under s.3 - the pressure is in the other direction.
15. HSE are currently considering:
 - What we can do in the immediate future to deal with the pressures on HSE in the enforcement of s.3. There is recognition that there is a need for greater prioritisation and the continued development of MoUs. However, greater prioritisation is leading HSE to state that we will only address matters of serious or imminent risk in certain areas – a position that can be difficult to explain and justify to members of the public.
 - What should we be aiming at for our future role in public safety? Public expectation of HSE is increasingly at odds with the fundamentals of our intended functions as

envisaged by Robens, which recommended that HSE should not have all embracing responsibility for public safety.

16. There is a need to find ways to manage the mechanisms for agreeing demarcation issues and alternatives that HSE are considering include the possibility that Ministers or the Commission may give “directions” to HSC/E not to get involved in certain areas, or in setting priorities, further MoUs, etc.

Consultation

17. Preliminary views were sought from HSE Board members and Solicitor’s Office.

Presentation

18. None at this stage.

Costs and Benefits

19. None at this stage.

Financial/Resource Implications for HSE

20. The broad scope of s.3 and uncertainties about our role mean that the demands on resources could become even greater particularly if HSE is seen as providing a stop-gap to fill either deficiencies in others’ legislation or the inability/failure of other authorities to address issues that we regard to be more properly their concern. In particular, there is a threat to Revitalising priorities, and/or of judicial review, if the current approach is unchanged.

Environmental Implications

21. None.

Other Implications

22. None.

Action

23. The Commission is invited to provide HSE with a steer on how it wants this work to be handled.

Extract from Health and Safety Commission Newsletter: February 1989

Health and Safety at Work Act: Sections 3 & 4

A statement from the Health and Safety Commission

In their February 1981 Newsletter, the Commission, having considered the problems associated with the application of Sections 3 and 4 of the HSW Act, issued a statement of policy for enforcement and development of standards of compliance indicating the priorities which would be followed. The Commission has recently looked again at this subject, and has issued a revised and up-dated statement, which follows below.

Policy for enforcement and development of standards of compliance in relation to Sections 3 and 4 of the Health and Safety at Work etc Act.

The HSW Act has as its objectives not only the health, safety and welfare of persons at work, but also the protection of persons other than direct employees from hazards arising in connection with the activities of persons at work. The Health and Safety Commission and the enforcing authorities therefore have responsibilities in policy-making and enforcement towards both these groups of people. Because of the range and variety of the situations covered by the Act, the Health and Safety Executive (HSE) has found it necessary to consider how best to deploy its resources. The purpose of this statement is to describe the policy of the Commission and the approach of enforcing authorities to the enforcement of the HSW Act in relation to the health and safety of members of the public and persons other than direct employees.

Relevant legal requirements

Section 1 of the Act makes it clear that it aims to protect persons other than direct employees against risks to health and safety arising out of or in connection with the activities of persons at work. Section 1(3) explains that these risks include risks attributable to the manner of conducting an undertaking, the plant or substances used for the purpose of an undertaking and the condition of the premises so used or any part of them.

Section 3 contains the general legal requirement imposing duties on employers and self-employed persons towards persons who are not in their employment.

Section 4 places a duty on persons in control of non-domestic premises towards non-employees to whom the premises have been made available either as a place or work or as a place where they may use the plant or substances provided for their use there. Examples include launderette premises where members of the public use the machines provided, or do-it-yourself garage premises. In the circumstances described, persons in control of the premises have a duty to take such measures as it is reasonable for a person in that position to take to ensure, as far as is reasonably practicable, that the premises and plant are safe and without risks to health.

Both Sections 3 and 4 impose duties on the person carrying on the undertaking: in the case of Section 3 this is the employer or a self-employed person, and in Section 4 the person in control of the premises. Because of this overlap there will be situations where both sections will apply.

It should be noted that neither Section 3 nor Section 4 covers matters of welfare (such as the provision of sanitary accommodation or first aid equipment for the use of persons other than employees). Neither do these sections apply to the control of nuisance which results only in damage to an amenity. (This is covered by Section 5 of the HSW Act and other legislation enforced by HM Inspectorate of Pollution, in the Department of the Environment, and by local authorities).

General policy on enforcement

As a general principle HSC and HSE wish to avoid duplication with other enforcing authorities. However, in deciding its approach to any hazardous area, the Executive's main concern will be the health and safety of employees, the self-employed and the public. It will want this to be achieved efficiently, effectively and economically, with fair and consistent policies responding to legitimate public concerns. This will sometimes mean an area being dealt with HSE alone, sometimes by another authority or authorities, occasionally by a mixture of the two. It will influence how many resources are devoted to particular areas, by whom, and how they are deployed.

Sometimes the general provisions of Sections 3 or 4 of the HSW Act overlap with other, more specific, legislation enforced by other authorities. The Executive will then seek to agree demarcation lines with those authorities, in the light of:

- a) health and safety expertise - which body knows most the risks concerned and the means for effective control?
- b) economy - is either body already inspecting / visiting the premises in question? (since there is no point in duplicating visits).
- c) efficiency - is HSE involvement a good use of its inspectors and other resources considered against the scale of risks/level of public concern?
- d) effectiveness - which legislation best enables the risk to be properly dealt with?
- e) suitability - generally, which authority is the more suitable to take on enforcement of the duty covering the risks in question?

In many areas of overlap agreement has been reached that the Executive should not generally attempt to enforce the requirements of sections 3 and 4 of the HSW Act because public safety will be adequately guaranteed by the enforcement of other legislation covering the risk in question. An example is the use of vehicles on the public highway, which is subject to the Road Traffic Acts and the Motor Vehicles (Construction and Use) Regulations. There is similar agreement over general fire precautions, which are the responsibility of fire authorities; over consumer safety, the structural safety of buildings and many other areas of potential risks to the public. In its demarcation discussions with other authorities the Executive seeks to avoid needless duplication of enforcement, while ensuring that no areas of risk remain uncovered.

Action by HSE Inspectors

Inspectors of HSE select the establishments they visit within the framework of a planned programme of inspection. This programme is based on a system of priorities intended to establish places where the risks are most serious. It takes into account the standards which have been found at previous visits, the assessment of the hazard (both to

employees and to other persons including members of the public) and the inspectors' judgement of management's ability and willingness to maintain or improve standards.

In most establishments it is the employees who are primarily at risk. During the course of inspection of any premises or work activity, inspectors take into account the effect of Sections 3 and 4 on the protection of members of the public and persons other than direct employees in the same way as they assess the efficiency of measures taken for the protection of employees. For example, in a visit to a construction site inspectors will not only consider the effect of the work activity on persons who are directly employed but also on the employees of sub-contractors or any self-employed persons working in the vicinity, and the way in which the safety of the general public might be affected. The degree of priority for future inspection will depend on their assessment of all these factors.

There are some work activities where the major risk is to members of the public rather than to employees. For example, there is a clearly foreseeable risk to the safety of the public in the possible failure of fairground rides. Here also HSE seeks to identify places where the risks are most serious, and allocates enforcement resources accordingly. Inspectors give priority to situations where there is a high degree of risk, and where no other authority has a responsibility to ensure public safety.

In contrast to HSE, local authority environmental health departments have as their principal function the enforcement of other legislation designed to protect the public. Local authority enforcement officers have powers under for example, the Food Act and the Public Health Acts, in addition to those conferred by sections 3 and 4 of the HSW Act.