ORR's health and safety compliance and enforcement policy statement 2016

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Purpose

This policy statement sets out how ORR will use its powers to carry out its regulatory enforcement responsibilities arising from health and safety and other relevant legislation.

Introduction

1. The Office of Rail and Road is the independent safety and economic regulator for Britain's railways and monitor of Highways England.

2. Our purpose is to ensure the network operates safely, reliably and provides value for taxpayers and customers. We safeguard the public and the workforce by regulating the rail industry's health and safety performance. We hold Network Rail to account – and we require it to provide passengers with a punctual, reliable service. We make sure that train and freight operating companies have fair access to the rail network, and that the market is competitive and fair.

3. As an independent regulator, ORR operates within the framework set by UK and EU legislation and is accountable through Parliament and the courts.

4. We are the health and safety enforcing authority for the mainline railway, High-Speed 1, light rail, heritage railways, tram networks and metro systems. Our vision of success for Britain's railways is: *Zero workforce and industry-caused passenger fatalities, with an ever-decreasing overall safety risk.*

5. The ORR board has duties under section 18 of the Health and Safety at Work etc. Act 1974 to make adequate arrangements for the enforcement of the relevant statutory provisions and work together with other enforcing authorities, such as The Health and Safety Executive, to establish best practice and consistency in the enforcement of the relevant statutory provisions, share information etc.

Scope

6. ORR's health and safety powers and enforcement responsibilities stem from a number of sources:

- the Health and Safety at Work etc Act 1974 and regulations made under the Act;
- specified powers allocated to ORR inspectors by other UK statutory requirements not associated with HSWA, for example REACH, the Employers Liability (Compulsory Insurance) Act 1969;
- railways industry specific legislation, for example The Railways and Other Guided Transport Systems (Safety) Regulations 2006 (ROGS); and
- 'relevant non-Health and Safety legislation' for which ORR is the enforcing authority which stem from European legislative requirements:
    - the Railways (Interoperability) Regulations 2011[1];

[1] Available at http://www.legislation.gov.uk/uksi/2011/3066/introduction/made

- the Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010[2]; and
- the Train Driving Licences and Certificates Regulations 2010[3].

7. This policy applies to all health and safety enforcement and compliance activities undertaken in all sectors of the railway industry for which we are the enforcing authority i.e. the mainline railway, light rail, heritage, tram networks and metro systems.

8. This policy does not deal with the enforcement of the obligations under operating licences granted to rail companies which are dealt with separately under ORR's economic enforcement policy and penalties statement[4] or our powers as the independent monitor of Highways England and its management of the strategic road network[5].

Aims/purpose of compliance and enforcement

9. ORR implements compliance and enforcement strategies in order to:

- ensure that duty holders comply with relevant health and safety legislation, or if they fail to comply, ensure they are held to account;
- ensure duty holders eliminate or properly control risks;
- take action to deal immediately with serious risks;
- promote and achieve sustained compliance with the law; and
- deter non-compliance and prevent work-related ill health and injury to workers, passengers and other members of the public who may be affected by the operation of Britain's railways

Our strategic objective for health and safety

10. In order to achieve our vision, we believe that all sectors of the industry must work together to continuously improve health and safety performance. Our contribution to moving the industry towards the vision is expressed in our current strategic objective:

Drive for a safer railway:
Enforce the law and ensure that the industry delivers continuous improvement in the health and safety of passengers, the workforce and public, by achieving excellence in health and safety culture, management and risk control.

11. This policy is supported by documents that give greater detail on how the policy is applied. These are available on our website[6].

12. Our compliance and enforcement strategies address those areas that we consider to be a priority for us and the industry. We design our work programmes around these risk topics and

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2 Available at http://www.opsi.gov.uk/si/si2010/uksi_20100432_en_1

3 Available at http://www.opsi.gov.uk/si/si2010/uksi_20100724_en_1

4 Available at http://www.rail-reg.gov.uk/upload/pdf/395.pdf

5 Available at http://orr.gov.uk/highways-monitor/enforcement-policy-for-highways-england

6 Available at http://orr.gov.uk/what-and-how-we-regulate/health-and-safety

enablers as published in *ORR's strategy for regulation of health and safety risks.* This can be found on our website[7].

Key principles

13. We believe in firm but fair enforcement of legislation. This is informed by the regulatory principles as set out in the Legislative and Regulatory Reform Act 2006: *proportionality* in applying the law and securing compliance; *consistency* of approach; *targeting* of enforcement action; *transparency* about how the regulator operates and what those regulated may expect; and *accountability* for the regulator's actions. These principles apply both to enforcement in particular cases and to management of enforcement activities as a whole.

Proportionality

14. Proportionality means relating enforcement action to the level of harm or risk of harm[8] arising from a breach and /or the seriousness of a failure to comply with a legal obligation. Action taken by ORR to achieve compliance or bring duty holders to account for non-compliance will be proportionate to any risks to health and safety, or to the seriousness of any breach.

Targeting

15. Targeting means making sure that actions are targeted primarily on those whose activities give rise to the most serious risks, where the hazards are least well controlled or where on-going compliance with the law needs to be verified; and that action is focused on those parties best placed to control it. We use the term "duty holder" to identify who has the duty to comply with a legal requirement. This may be employers in relation to workers or others exposed to risks; the self-employed; directors, managers and other similar company officers; owners of premises; contracting entities; suppliers of equipment; designers or clients of projects; or employees themselves. Where several duty holders have responsibilities in respect of one incident / breach, ORR may take action against more than one duty holder when it is appropriate to do so in accordance with this policy.

Consistency

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

Transparency

17. Transparency means helping duty holders to understand what is expected of them and what they should expect from ORR. It also means making clear to duty holders not only what they have

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[7] Available at http://orr.gov.uk/publications/corporate-publications/health-and-safety-strategy

[8] In this policy, 'risk' is defined broadly to include a source of possible harm, the likelihood of that harm occurring, and the severity of any harm. Harm is widely defined in this policy and includes both physical and economic damage caused to one person by the conduct of another.

to do but, where this is relevant, what they don't. That means distinguishing between statutory requirements and advice or guidance about what is desirable but not compulsory.

Accountability

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

Growth duty

19. ORR supports the principles of the “Growth Duty” contained in Section 108 of the Deregulation Act 2015 requiring those exercising non-economic regulatory functions to have regard to economic growth when making decisions.

20. We have designed our business processes and regulatory activities to take account of the growth duty. It is our policy to:

- understand the business environment that our duty holders operate in and the impact our regulatory activities may have on growth potential;
- influence and support businesses to be compliant through the provision of advice and guidance that is relevant to the sector;
- our strategic objective of achieving *excellence in health and safety risk control* encourages sensible risk management and not gold-plating;
- we engage with business groups for dialogue and consultation collectively to achieve a mutual understanding of the issues;
- we encourage the sharing of best practice between duty holders;
- we make optimal use of data gathered by the industry as a whole in order to minimise requests to individual businesses to supply information;
- we target our interventions on the basis of risk and evidence, and design them to take account of the size and nature of the business;
- we use our inspection and audit visits to provide advice and direct duty holders to published guidance. Where we find non-compliance, we will generally provide advice about how to achieve compliance and allow reasonable timescales for improvement;
- we aim to minimise the administrative burden of applying for authorisations and licenses by providing an online portal for applications, for example, train driver licensing, and publish guidance manuals on our intranet on how to submit an application.

Compliance and enforcement measures

21. We use a wide selection of compliance and enforcement strategies ranging from information, advice, persuasion, co-operation, inspection, audit, permissioning, verification and compulsion through to deterrence activities of formal enforcement. Our approach is generally to assist industry to comply with its occupational health and safety obligations through verbal and written advice, but to be prepared to adopt stricter methods where the duty holder fails to respond to our advice or where the seriousness of the non-compliance justifies it. However, in most circumstances, we can secure compliance without recourse to formal enforcement tools.

Formal enforcement tools

22. We have a range of stronger sanctions available to us where necessary to secure compliance or impose sanctions for the most serious breaches of the law:

- where we find an article or substance that we believe may be a cause of imminent danger, we can require it to be made harmless;
- seize plant equipment and substances;

- an improvement notice requiring compliance by a certain date;
- a prohibition notice that prohibits a practice or use of plant, equipment or a substance until it can be undertaken or used safely;
- revocation of a safety certificate or safety authorisation issued under ROGS. A transport undertaking cannot operate without the necessary certificate or authorisation;
- issue of a simple caution (out of court disposal) in England and Wales;
- prosecution in the courts in England and Wales; and
- report to the Crown Office and Procurator Fiscal Service in Scotland.

Enforcement criteria and decision-making

23. Most enforcement activity is undertaken by warrant holding inspectors and inspector's assistants who adopt a flexible and responsive approach with the provision of advice, education and assistance being recognised as important elements in achieving compliance. In making a decision whether or not to take more formal enforcement action, we use our Enforcement Management Model[9] (ORR EMM) as a steer to decision-making. This considers the extent of the risk, the seriousness of the breach and the actual or potential consequences, balanced with the culpability of the duty holder, compliance history and any other mitigating or aggravating factors. The inspector's assessment of these factors is recorded on a form EMM1 that is then reviewed by the line manager.

24. Where we identify non-compliance, our options range from verbal or written advice, to more formal enforcement such as an improvement notice, prohibition notice, simple caution or ultimately, prosecution.

25. Investigation reports are reviewed and signed off by the line manager.

26. As an independent regulator, our enforcement decisions are made free from departmental or ministerial influence.

Prosecution

27. The decision to prosecute a case is an objective exercise and made by a senior inspector of principal inspector level or above, who is independent from the investigation and who has had no prior dealings with the prospective defendant in respect of the matter.

28. In Scotland, decisions to prosecute are made by the Procurator Fiscal on the basis of a report and recommendation made by ORR health and safety inspectors.

29. Prosecutors will always act in the interests of justice and will not let any personal views about the prospective defendant, victim or witness influence their decisions.

30. The decision whether to prosecute is carried out in accordance with the Code for Crown Prosecutors and takes account of the evidential stage and relevant public interest factors. No

[9] Available at https://www.orr.gov.uk/media/10723

prosecution will go ahead unless the approval officer finds that there is sufficient evidence to provide a realistic prospect of conviction and that prosecution would be in the public interest.

31. The decision to prosecute is kept under continuous review, so that any new facts or circumstances which may support or undermine the prosecution's case are taken into account in the decision to continue or terminate the proceedings.

32. We will be more likely to prosecute, or recommend prosecution (in Scotland), where, following an investigation or other regulatory contact, one or more of the following circumstances apply:

(a) death was a result of a breach of the legislation[11];
(b) the gravity of an alleged health and safety offence, taken together with the seriousness of any actual or potential harm which warrants it;
(c) there has been reckless disregard of legal requirements;
(d) there has been a failure to adhere to statutory standards which has resulted in a significant financial benefit or competitive advantage to the offending duty holder (particularly where that failure was intentional);
(e) there have been repeated breaches of a similar nature which give rise to significant risk, or persistent and significant poor compliance in related areas;
(f) work has been carried out without, or in serious non-compliance with, a legal authorisation, order or certificate;
(g) a duty holder's standard of managing its legal responsibilities is found to be far below what is required, and to be giving rise to significant risk or other detrimental impact on others;
(h) there has been a failure to comply with an improvement or prohibition notice or there has been a repetition of a breach that was the subject of a simple caution;
(i) false information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives rise to significant risk; or
(j) inspectors have been intentionally or recklessly obstructed by the duty holder in a way that prevents them from carrying out their lawful duties.

33. In deciding our response to a breach of the law, we will also consider how the individual or company concerned has itself responded to a breach. Relevant factors could include:

a) the duty holder taking steps proactively to identify any breach, investigate the root causes and effectively address the failings;
b) the duty holder showing how lessons have been learned from their investigation that could improve compliance across the business;
c) fully cooperating with ORR with any inspection or investigation of the breach;
d) how any person who has suffered harm has been handled by the duty holder including, where appropriate offering restorative justice[12].

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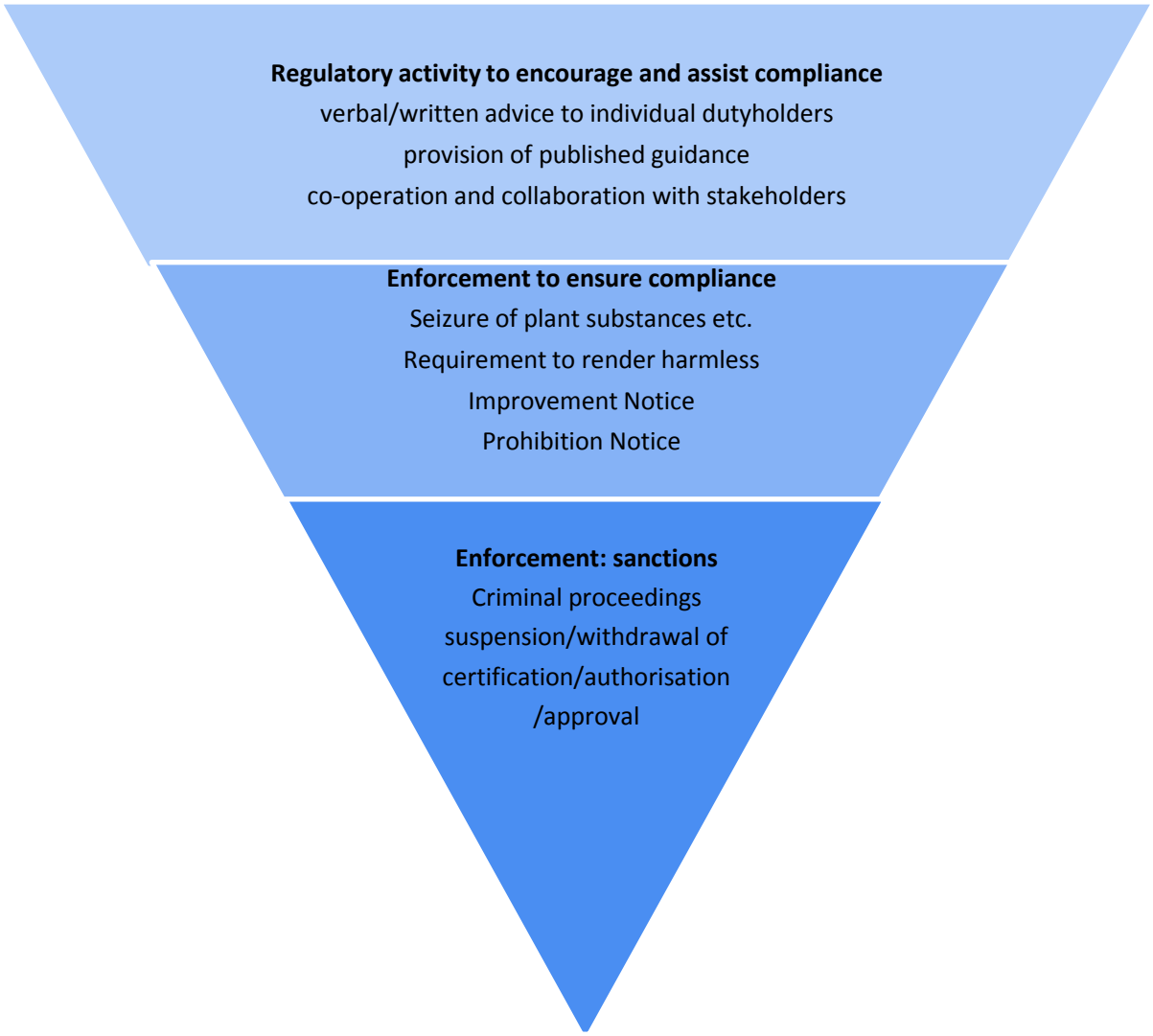
[11] Health and safety sentencing guidelines regard death resulting from a criminal act as an aggravating feature of the offence. If there is sufficient evidence that the breach caused the death, ORR considers that normally such cases should be brought before the court. However, there will be occasions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

[12] Information on restorative justice and how to find a service can be found on the Restorative Justice Council website https://www.restorativejustice.org.uk/

Figure 1 the regulatory action pyramid



Death at Work

34. In England and Wales, to ensure decisions on investigation and prosecution are closely co-ordinated following a work-related death, ORR, HSE, the British Transport Police (BTP), the Local Government Association, the Association of Chief Police Officers and the Crown Prosecution Service (CPS) have jointly agreed and published *Work-related deaths: A protocol for liaison*[13]. Other non-signatory organisations, including the Chief Fire Officers Association, have agreed that they will take account of the protocol when responding to work-related deaths. Rail Accident Investigation Branch (RAIB) is not a signatory to this protocol because it must remain independent of any criminal investigation.

35. In Scotland a separate work-related deaths protocol has been agreed between the Crown Office and Procurator Fiscal Service, the Association of Chief Police Officers in Scotland, the BTP and HSE[14]. ORR and Scottish local authorities support the protocol.

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13 Available on the ORR website at http://www.rail-reg.gov.uk/upload/pdf/WorkRelatedDeathsProtocol.pdf.

14 Available at http://www.hse.gov.uk/scotland/workreldeaths.pdf.

36. In England and Wales the police are responsible for deciding whether to pursue a manslaughter investigation and whether to refer a case to the CPS to consider possible manslaughter charges. ORR is responsible for investigating possible health and safety offences. If in the course of its health and safety investigation, ORR finds evidence suggesting that a manslaughter offence has been committed it will refer it to the police. If the police or the CPS decide not to pursue a manslaughter or corporate manslaughter case, ORR will normally bring a health and safety prosecution in accordance with this policy.

37. In Scotland, responsibility for investigating sudden or suspicious deaths rests with the Procurator Fiscal who will instruct the police. The police will lead the investigation of any potential offences related to culpable homicide or corporate homicide. ORR will investigate any possible health and safety offences. Under the Scottish work-related deaths protocol the investigations will be co-ordinated and evidence shared. Unless a prosecution takes place in the same circumstances, the Procurator Fiscal is required to hold a Fatal Accident Inquiry into the circumstances of a death resulting from a work-related[15] accident. An Inquiry may also be held where it appears to be in the public interest on the grounds that the death was sudden, suspicious or unexplained, or has occurred in circumstances such as to give rise to serious public concern.

38. ORR is also a signatory to both the Prosecutors' Convention and the Investigators' Convention setting out how enforcing authorities will work together when required.

Crown bodies

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

Review of regulatory decisions and actions

40. We have arrangements in place to review regulatory decisions when challenged by an affected party or another stakeholder.

41. For a dispute involving informal verbal and written advice given by an inspector or inspector's assistant, we advise the complainant to contact the line manager in the first instance. Where a dispute cannot be resolved by this means, we will escalate it up the line management chain to a Grade A or above.

42. Enforcement notices such as improvement and prohibition notices have a built-in appeals process which is heard through the Employment Tribunal Service.

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

43. We are an organisation which must provide certain services to victims of crime in accordance with the Ministry of Justice's Code of Practice for Victims of Crime (the Code) in England and Wales. We have a process in place for victims of crime to make a complaint in relation to their entitlements under the Code which is contained on the Ministry of Justice website.[16]

44. In Scotland, different arrangements are in place to support victims of crime. Information is provided on the Scottish Government website.[17]

45. Also in accordance with the Code, we have in place a process for victims of crime to request a review of a decision not to prosecute. Further, the details of making such a request are contained on our website.[18] These arrangements apply to victims in England, Scotland and Wales.

46. Our website also gives information on how to complain about the service given by ORR.[19]

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[16] Available at https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime

[17] Available at https://www.mygov.scot/victim-witness-support/

[18] Available at http://orr.gov.uk/what-and-how-we-regulate/health-and-safety/investigating-health-and-safety-incidents

[19] Available at http://orr.gov.uk/info-for-passengers/complaints/complaints-about-orr