



OFFICE OF **RAIL REGULATION**

ORR health and safety enforcement policy statement

April 2006

ORR health and safety enforcement policy statement

Introduction

The Office of Rail Regulation's (ORR) statutory functions under the Railways Act 2005 include: proposing new or updated laws and standards; conducting research; and providing information and advice regarding work activities that relate to the operation of guided transport systems¹.

ORR is also responsible, under the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (the Regulations), for making adequate arrangements regarding the enforcement of all health and safety law in relation to specified activities related to the operation of guided transport systems.

The Regulations define the scope of activities for which ORR is "enforcing authority" and, assisted by memoranda of understanding, clarity is provided on the interface between the scope of ORR's enforcement responsibilities and those of the Health and Safety Executive (HSE) and local authorities.

ORR's overall aim, as the rail health and safety regulator, is to protect the health, safety and welfare of people at work, and to safeguard others, mainly passengers and members of the public, who may be exposed to risks related to the operation of guided transport systems.

This policy statement sets out the general principles and the approach ORR, and particularly ORR's health and safety enforcement arm, Her Majesty's Railway Inspectorate (HMRI), will follow in exercising its enforcement duties.

ORR is the independent rail health and safety regulator and is not bound by any enforcement approach taken by the Health and Safety Commission (HSC), HSE or local authorities. Nevertheless, it is appropriate that a consistent approach is taken to enforcement across all industry sectors and ORR's enforcement policy is therefore consistent with that issued by the HSC to the HSE and local authorities.

The appropriate use of enforcement powers, including prosecution, is important, both to secure compliance with the law and to ensure that those who have duties under it may be held to account for failures to safeguard health, safety and welfare.

In allocating resources, ORR will have regard to the principles set out below, its Corporate Strategy² and the need to maintain a balance between enforcement and other activities, including inspection.

¹ "Guided transport systems" as defined in the Railways Act 2005.

² *ORR Corporate Strategy*, April 2006, available at <http://www.rail-reg.gov.uk/upload/pdf/280.pdf>.

ORR's Policy Statement on Enforcement of Health and Safety Law

The following is the full text of the statement.

The purpose and method of enforcement

1. The ultimate purpose of ORR's enforcement of health and safety law is to ensure that duty holders manage and control risks effectively, thus preventing harm. The term 'enforcement' has a wide meaning and applies, here, to all dealings between ORR and those on whom the law places health and safety duties (including employers, the self-employed, employees and others).

2. The purpose of enforcement is to:

- ensure that duty holders take action to deal immediately with serious risks;
- promote and achieve sustained compliance with the law; and
- ensure that duty holders who breach health and safety requirements, and directors or managers who fail in their responsibilities, may be held to account. This may include bringing alleged offenders before the courts in England and Wales, or recommending prosecution in Scotland, in the circumstances set out later in this policy.

Enforcement is distinct from civil claims for compensation. It is not therefore undertaken in all circumstances where civil claims may be pursued, or to assist such claims.

3. ORR inspectors have a range of tools at their disposal in seeking to secure compliance with the law and to ensure a proportionate response to criminal offences. Inspectors may offer duty holders information and advice, both face to face and in writing. This may include warning a duty holder that, in the opinion of the inspector, they are failing to comply with the law. Where appropriate, inspectors may also serve improvement and prohibition notices, vary exemption conditions, issue formal cautions³ (in England and Wales only), and prosecute (or report to the Procurator Fiscal with a view to prosecution in Scotland).

³ A formal caution is a statement by an inspector, accepted in writing by the duty holder, that the latter has committed an offence for which there is a realistic prospect of conviction. A formal caution may only be used where a prosecution could be properly brought. Formal cautions are entirely distinct from a caution given under the Police and Criminal Evidence Act 1984 by an inspector before questioning a suspect about an alleged offence. Inspectors should take account of current Home Office guidelines when considering whether to offer a formal caution.

4. Giving information and advice, and issuing improvement or prohibition notices, are the main means which inspectors use to achieve the broad aim of dealing with serious risks, securing compliance with health and safety law and preventing harm. A prohibition notice stops work in order to prevent serious personal injury. Information on improvement and prohibition notices should be made publicly available.

5. Every improvement notice contains a statement that, in the opinion of an inspector, an offence has been committed. Improvement and prohibition notices, and written advice, may be used in court proceedings.

6. Formal cautions and prosecution are important ways to bring duty holders to account for alleged breaches of the law. Where it is appropriate to do so in accordance with this policy, ORR inspectors should use one of these measures in addition to issuing an improvement or prohibition notice.

7. Investigating the circumstances encountered during inspections or following incidents or complaints is essential before taking any enforcement action. In deciding what resources to devote to these investigations, ORR will have regard to the principles of enforcement set out in this statement and its *Railways Health and Safety Strategy*. In particular, in allocating resources, ORR will strike a balance between investigations and mainly preventive activity.

8. Sometimes the law is prescriptive; spelling out in detail what must be done. However, much of modern health and safety law is goal setting; setting out what must be achieved, but not how it must be done. Advice on how to achieve the goals may be set out in Approved Codes of Practice (ACOPs). These give practical advice on compliance and have a special legal status. If someone is prosecuted for a breach of health and safety law and failed to follow the relevant provisions of an ACOP, then the onus is on them to show that they complied with the law in another way. Advice is also contained in other HSC, HSE⁴ and ORR guidance material describing good practice. Following this guidance is not compulsory, but doing so is normally enough to comply with the law. Neither ACOPs nor guidance material are written in terms which necessarily fit every case. In considering whether the law has been complied with, inspectors will take relevant ACOPs and guidance into account, using sensible judgement about the extent of the risks and the effort that has been applied to counter them. More is said about these matters in this statement.

9. ORR Inspectors will use discretion in deciding when to investigate or what enforcement action may be appropriate. ORR will set down in writing the

⁴ Immediately following the transfer of rail regulatory health and safety responsibility from HSC/E to ORR, ORR may continue to use HSE, or others', guidance publications until such time as arrangements are made to issue parallel documents in ORR's own terms.

decision-making process that inspectors will follow when deciding on enforcement action, and make this publicly available. ORR expects that such judgements will be made in accordance with the following principles. These are also in accordance with the *Enforcement Concordat* agreed between the Cabinet, the Home Office, the Scottish Executive and local authority associations.

The principles of enforcement

10. ORR believes in firm but fair enforcement of health and safety law. This is informed by the principles of: *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

11. **Proportionality means relating enforcement action to the risks⁵.**

Those whom the law protects and those on whom it places duties (duty holders) expect that action taken by ORR to achieve compliance or bring duty holders to account for non-compliance should be proportionate to any risks to health and safety or to the seriousness of any breach, which includes any actual or potential harm arising from a breach of the law.

12. In practice, applying the principle of proportionality means that ORR will take particular account of how far the duty holder has fallen short of what the law requires and the extent of the risks to people arising from the breach.

13 Some health and safety duties are specific and absolute. Others require action so far as is reasonably practicable. ORR will apply the principle of proportionality in relation to both kinds of duty.

14. Deciding what is reasonably practicable to control risks involves the exercise of judgement. Where duty holders must control risks so far as is reasonably practicable, ORR will, when considering the protective measures taken by duty holders, take account of the degree of risk on the one hand, and on the other the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk. Unless it can be shown that there is gross disproportion between these factors and that the risk is insignificant in relation to the cost, the duty holder must take measures and incur costs to reduce the risk.

⁵ In this policy, 'risk' (where the term is used alone) is defined broadly to include a source of possible harm, the likelihood of that harm occurring, and the severity of any harm.

15. ORR will expect relevant good practice to be followed. Where relevant good practice in particular cases is not clearly established, health and safety law effectively requires duty holders to establish explicitly the significance of the risks to determine what action needs to be taken. Ultimately, the courts determine what is reasonably practicable in particular cases.

16. Some irreducible risks may be so serious that they cannot be permitted, irrespective of the consequences.

Targeting

17. Targeting means making sure that contacts are targeted primarily on those whose activities give rise to the most serious risks or where the hazards are least well controlled and that action is focused on the duty holders who are responsible for the risk and who are best placed to control it, whether employers, manufacturers, suppliers or others.

18. ORR's intervention strategy assists in deciding which inspections, investigations or other regulatory contacts should take priority according to the nature and extent of risks posed by a duty holder's operations. The duty holder's management competence is important, because a relatively low hazard activity poorly managed can entail greater risk to workers or the public than a higher hazard activity where proper and adequate risk control measures are in place.

19. Any enforcement action will be directed against duty holders responsible for a breach. These may be: employers in relation to workers or others exposed to risks; the self-employed; owners of premises; suppliers of equipment; designers or clients of projects; or employees themselves. Where several duty holders have responsibilities, ORR may take action against more than one when it is appropriate to do so in accordance with this policy.

20. When inspectors issue improvement or prohibition notices, vary exemptions, issue formal cautions or prosecute, ORR will ensure that a senior officer of the duty holder concerned, at board level, is also notified.

Consistency

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

22. 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 incidents.

23 ORR recognises that in practice consistency is not a simple matter. ORR inspectors are faced with many variables, including the degree of risk, the attitude and competence of management, any history of incidents or breaches involving the duty holder, previous enforcement action and the seriousness of any breach, which includes any potential or actual harm arising from a breach of the law. Decisions on enforcement action are discretionary, involving the judgement of individual inspectors. ORR has arrangements in place to promote

consistency in the exercise of discretion, including effective arrangements for liaison with other enforcing authorities, namely HSE and local authorities.

Transparency

24. Transparency means helping duty holders to understand what is expected of them and what they should expect from the ORR. 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 requirements and advice or guidance about what is desirable but not compulsory.

25. Transparency also involves the enforcing authorities having arrangements for keeping employees, their representatives, and victims or their families informed. These arrangements must have regard to legal constraints and requirements.

26. This statement sets out the general policy framework within which ORR will operate. Duty holders, employees, their representatives and others also need to know what to expect when an inspector calls and what rights of complaint are open to them. It may be expected that:

- when inspectors offer duty holders information or advice, face to face or in writing, including any warning, they will explain what to do to comply with the law, and why. Inspectors will, if asked, write to confirm any advice and distinguish legal requirements from best practice advice;
- in the case of improvement notices, inspectors 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, and that in the inspector's opinion a breach of the law has been committed; and
- in the case of a prohibition notice, the notice will explain why the prohibition is necessary.

Accountability

27. 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.

28. ORR's procedures for dealing with comments and handling complaints are set out in its complaints procedure. In particular, it:

- describes a complaints procedure in the case of decisions by officials, or if procedures have not been followed; and
- explains about the right of appeal to an Employment Tribunal in the case of statutory notices.

Investigation

29. As with prosecution, ORR will use discretion in deciding whether incidents, cases of ill health or complaints should be investigated. Indicative levels of investigation by ORR will be specified in HMRI's operating plan.

30. ORR fully recognises the role and responsibility for accident investigation of the Rail Accident Investigation Board (RAIB). Working arrangements agreed between ORR and RAIB reflect both their respective statutory duties and the need to ensure efficient and effective liaison. RAIB is responsible for identifying the causes of accidents it investigates in order to improve safety, not to allocate blame. ORR will ensure a thorough consideration of any RAIB recommendations made to it for action by duty holders or others to reduce risks.

31. ORR will investigate in order to determine:

- whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law;
- lessons to be learnt and to influence the law and guidance;
- what response is appropriate to a breach of the law; and
- causes (where RAIB is not investigating).

To maintain a proportionate response, most resources available for investigation of incidents will be devoted to the more serious circumstances. ORR recognises that it is neither possible nor necessary for its statutory purposes to investigate all issues of noncompliance with the law that are uncovered in the course of preventive inspection, or in the investigation of reported events.

32. ORR will carry out a site investigation of a reportable work-related death, unless it is an instance of adult trespass or apparent suicide on the railway⁶ or if there are other specific reasons for not doing so, in which case those reasons will be recorded.

33. In selecting which complaints or reports of injury or occupational ill health to investigate and in deciding the level of resources to be used, ORR will take account of the following factors:

- the severity and scale of potential or actual harm;
- the seriousness of any potential breach of the law;
- knowledge of the duty holder's past health and safety performance;
- the enforcement priorities;
- the practicality of achieving results; and

⁶ In this circumstance the police will always investigate and advise ORR if railway operational matters are at issue.

- the wider relevance of the event, including where there is serious public concern.

Prosecution

England and Wales

34. In England and Wales the decision to proceed with a court case rests with ORR. ORR will use its discretion in deciding whether to bring a prosecution.

35. In England and Wales the decision whether to prosecute will take account of the full test set down by the Director of Public Prosecutions in the *Code for Crown Prosecutors*. No prosecution may go ahead unless the prosecutor finds there is sufficient evidence to provide a realistic prospect of conviction, and decides that prosecution would be in the public interest.

36. While the primary purpose of ORR enforcement is to ensure that duty holders manage and control risks effectively, thus preventing harm, prosecution is an essential part of enforcement. ORR will prosecute where, in the course of an investigation, it has collected sufficient evidence to provide a realistic prospect of conviction and has decided, in accordance with this policy and taking account of the *Code for Crown Prosecutors*, it is in the public interest to prosecute. Where the circumstances warrant it, and the evidence to support a case is available, ORR may prosecute without prior warning or recourse to alternative sanctions.

Scotland

37. In Scotland, the Procurator Fiscal decides whether to bring a prosecution. This may be on the basis of a recommendation by an enforcing authority, although the Procurator Fiscal may investigate the circumstances and institute proceedings independently of an enforcing authority. ORR will use discretion in deciding whether to report to the Procurator Fiscal with a view to prosecution. The Crown Office and the Procurator Fiscal Service endorse this *Policy Statement on Enforcement* by ORR, and acknowledge that action on reports of offences submitted to them by the enforcing authorities should reflect the approach set out here.

38. Before prosecutions can be instituted in Scotland, the Procurator Fiscal will need to be satisfied that there is sufficient evidence and that prosecution is in the public interest. In Scotland therefore the decision as to proceedings is one for the prosecutor rather than ORR, while its views will, however, be taken into account.

39. Subject to the above, ORR expects that, in the public interest it will normally prosecute, or recommend prosecution, where, following an investigation or other regulatory contact, one or more of the following circumstances apply. These are where:

- death was a result of a breach of the legislation⁷;
- 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 prosecution;
- there has been reckless disregard of health and safety requirements;
- there have been repeated breaches giving rise to significant risk, or persistent and significant poor compliance;
- work has been carried out without or in serious non-compliance with, a safety case;
- a duty holder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk;
- there has been a failure to comply with an improvement or prohibition notice; or there has been a repetition of a breach that was subject to a formal caution;
- false information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives rise to significant risk; or
- inspectors have been intentionally obstructed in the lawful course of their duties.

Where inspectors are assaulted, ORR will seek police assistance, with a view to seeking the prosecution of offenders.

40. ORR will in the public interest consider prosecution, or consider recommending prosecution, where, following an investigation or other regulatory contact, one or more of the following circumstances apply:

- it is appropriate in the circumstances as a way to draw general attention to the need for compliance with the law and the maintenance of standards required by law, and conviction may deter others from similar failures to comply; or
- a breach giving rise to significant risk has continued despite relevant warnings from employees, or their representatives, or from others affected by a work activity.

⁷ Health and safety sentencing guidelines regard death resulting from a criminal act as an aggravating feature of the offence. If there is sufficient evidence, 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.

Prosecution of individuals

41. Subject to the above, ORR will identify and prosecute, or recommend prosecution of, individuals if it considers that a prosecution is warranted. In particular, it should consider the management chain and the role played by individual directors and managers, and should take action against them where the inspection or investigation reveals that the offence was committed with their consent or connivance, or where it is attributable to neglect on their part, and where it would be appropriate to do so in accordance with this policy.

Where appropriate, ORR will seek the disqualification of directors under the Company Directors Disqualification Act 1986.

Publicity

42. ORR, for England and Wales, has arrangements for the annual publication of the names of all the companies and individuals who have been convicted in the previous twelve months of breaking health and safety law. ORR also has arrangements for making publicly available information on these convictions and on the improvement and prohibition notices that it has issued.

43. In England and Wales, ORR will consider in all cases drawing media attention to factual information about charges that have been laid before the courts, but great care will be taken to avoid any publicity which could prejudice a fair trial. ORR will also consider publicising any conviction which could serve to draw attention to the need to comply with health and safety requirements, or deter anyone tempted to disregard their duties under health and safety law. In Scotland, decisions in relation to publicity of prosecutions are a matter for the Crown Office.

Action by the courts

44. Health and safety law gives the courts considerable scope to punish offenders and to deter others, including imprisonment for some offences. Unlimited fines may be imposed by higher courts. ORR will support the HSC, which will continue to seek to raise the courts' awareness of the gravity of health and safety offences and the full extent of their sentencing powers, while recognising that it is for the courts to decide on guilt and what penalty, if any, to impose on conviction. A list of the sanctions presently available to the courts is attached to this statement.

45. In England and Wales, ORR will, when appropriate, draw to the court's attention all the factors that are relevant to a decision as to what sentence is appropriate on conviction. The Court of Appeal has given guidance on some of these factors that should inform the courts in health and safety cases (*R v F Howe and Son (Engineers) Ltd* [1999] 2 All ER, and subsequent judgments). ORR notes that the Lord Chancellor has said that someone injured by a breach of health and safety legislation is no less a victim than someone who is assaulted.

Representations to the courts

46. In cases of sufficient seriousness, and when given the opportunity, ORR in England and Wales will consider indicating to the magistrates that the offence is so serious that they may send it to be heard or sentenced in the higher court, where higher penalties can be imposed. In considering what representations to make, enforcing authorities should have regard to Court of Appeal guidance. The Court of Appeal has said: "In our judgment magistrates should always think carefully before accepting jurisdiction in health and safety at work cases, where it is arguable that the fine may exceed the limit of their jurisdiction or where death or serious injury has resulted from the offence."

47. In Scotland, it would fall to the Procurator Fiscal to draw the court's attention to the seriousness of any offence.

Death at work

48. Where there has been a breach of the law leading to a work-related death, ORR will consider whether the circumstances of the case might justify a charge of manslaughter (or culpable homicide in Scotland).

49. In England and Wales, to ensure decisions on investigation and prosecution are closely co-ordinated following a work-related death, ORR, the HSE, the British Transport Police (BTP), the Local Government Association (LGA), the Association of Chief Police Officers (ACPO) and the Crown Prosecution Service (CPS) have jointly agreed and published *Work-related deaths: A protocol for liaison*.

50. 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 investigation, ORR finds evidence suggesting manslaughter, it will pass this on to the police. If the police or the CPS decide not to pursue a manslaughter case, ORR will normally bring a health and safety prosecution in accordance with this policy.

51. In Scotland, responsibility for investigating sudden or suspicious deaths rests with the Procurator Fiscal. 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-related⁸ accident. An Inquiry may also be held where it appears to be in the public interest on the ground that the death was sudden, suspicious or unexplained, or has occurred in circumstances such as to give rise to serious public concern.

⁸ In this case, a work related accident is one occurring in the course of employment, if the deceased was an employee, or while a person engaged in their occupation, if the deceased was an employer or self-employed person.

Crown bodies

52. 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.

Penalties for Health and Safety Offences⁹

The Health and Safety at Work etc Act 1974 (the HSW Act), section 33 (as amended) sets out the offences and maximum penalties under health and safety legislation.

Failing to comply with an improvement or prohibition notice, or a court remedy order (issued under the HSW Act sections 21, 22 and 42 respectively):

- ***lower court maximum*** £20 000 fine and/or 6 months' imprisonment; and
- ***higher court maximum*** unlimited fine and/or 2 years' imprisonment.

Breach of sections 2 to 6 of the HSW Act, which set out the general duties of employers, self-employed persons, manufacturers and suppliers to safeguard the health and safety of workers and members of the public who may be affected by work activities:

- ***lower court maximum*** £20 000 fine; and
- ***higher court maximum*** unlimited fine.

Other breaches of the HSW Act, and breaches of 'relevant statutory provisions' under the Act, including all the health and safety regulations.

These impose both general and more specific requirements, such as requirements to carry out a suitable and sufficient risk assessment or to provide suitable personal protective equipment:

- ***lower court maximum*** £5000 fine; and
- ***higher court maximum*** unlimited fine.

⁹ As at January 2002. These penalties can change from time to time.

On conviction of directors for indictable offences in connection with the management of a company (all of the above, by virtue of the HSW Act sections 36 and 37), the courts may also make a disqualification order (Company Directors Disqualification Act 1986, sections 1 and 2). The courts have exercised this power following health and safety convictions. Health and safety inspectors draw this power to the court's attention whenever appropriate:

- ***lower court maximum*** 5 years' disqualification; and
- ***higher court maximum*** 15 years' disqualification.