

		<b>RSD Internal Guidance</b>		<b>RIG-2006-06</b>	
<b>PROSECUTING INDIVIDUALS AND DISQUALIFYING DIRECTORS in ENGLAND, SCOTLAND AND WALES</b>					
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<b>Keywords</b>		PROSECUTING INDIVIDUALS, DISQUALIFICATION, DIRECTORS, COMPANY			
<b>Summary</b>		This RIG introduces the policy, current instructions and guidance on prosecuting individuals and disqualifying directors. It is relevant for England, Wales and Scotland. It has been updated to refer to the new Code for Crown Prosecutors issued in January 2013.			
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1. HSE's guidance OC 130/8, [http://www.hse.gov.uk/foi/internalops/ocs/100-199/130\\_8.htm](http://www.hse.gov.uk/foi/internalops/ocs/100-199/130_8.htm) on prosecuting individuals has been adopted by ORR to represent our policy. This RGD introduces the policy, current instructions and guidance. It applies to all ORR prosecutors, including in Scotland. In Scotland, reference to this power and to ORR's approach, should be included in the papers submitted to the Procurator Fiscal's office.
2. ORR's policy on prosecuting individuals and disqualifying directors should be read in conjunction with a series of instructions:
  - [ORR's Health and Safety Compliance and Enforcement Policy Statement 2016](#) paragraph 15 on targeting;
  - The HSE Enforcement Manual [http://www.hse.gov.uk/enforce/enforcementguidesc/identifying/directors.htm#\\_Proceeding\\_against\\_director](http://www.hse.gov.uk/enforce/enforcementguidesc/identifying/directors.htm#_Proceeding_against_director);
  - [The Investigation Process](#) requires the review of investigations, including the lines of enquiry and;
  - [The Enforcement Management Model](#), which provides a framework to ensure consideration of the issues in the EPS. Operational line managers should continue to ensure consideration of the roles and actions of individuals, including directors, managers and other similar officers.
3. This guidance complies with the new Code for Crown Prosecutors issued in January 2013.

## **PROSECUTING INDIVIDUALS**

4. Enforcement action should be focused on those responsible for the risk and those best placed to control it and, in general, prosecution of an individual will only be warranted in cases where:
  - there have been personal acts or failings; and
  - where it would be proportionate to prosecute, bearing in mind the nature and extent of the breach and the risk to health and safety arising from it.
5. This would generally include, but will not be limited to, cases where there have been substantial failings by individuals (such as where they have shown reckless disregard to the health and safety requirements), or where there has been a deliberate act or omission that has given rise to significant risks to the health and safety of persons.
6. In the early stages of an investigation, if there is no indication that individuals have committed an offence that ought to be prosecuted, then you may decide not to follow that line of enquiry. Even if evidence would be

obtainable, but you judge that prosecution would not be warranted, resources can be put to better effect elsewhere. However, you need to keep an open mind and review your decisions (with your line manager) in the light of any additional information. In all instances, you must record your decisions.

7. The principles of the European Convention on Human Rights, and the Human Rights Act 1998, apply to all stages of a case. An investigation and prosecution must not be led with any personal views about the suspect, victim or any witness influencing their decision. Equally, all cases must be looked at fairly, independently and objectively to make sure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible.

8. When considering whether or not to prosecute an individual, the same principles apply as to companies:

(a) **The Evidential Test**

9. The evidential test for prosecuting individuals is the same as when prosecuting a company. The investigator must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the individual on any charge considered.

10. This must be an objective assessment, based upon the admissible evidence collected, including consideration of any potential defence and anything the individual has put forward.

(b) **The Public Interest Test**

11. Whilst the general public interest principles for prosecuting an individual remain the same as when prosecuting a company, there should be further consideration of the personal circumstances of the individual and his culpability in relation to any other potential defendants.

12. A prosecution will be in the public interest unless the public interest factors tending against prosecution outweigh those in favour: i.e. there is a presumption in favour of prosecuting. In some cases the prosecutor may be satisfied that the public interest test can be properly served by offering the offender the opportunity to have the matter dealt with by an out of court disposal e.g. a Simple Caution rather than prosecution.

13. In particular, prosecutors should ask themselves the following questions:

- I. How serious is the offence committed? – the more serious the incident, consequences, and/or potential consequences, the more likely that a prosecution is required;

## NOT PROTECTIVELY MARKED

- II. What is the individual's level of culpability? – The greater the person's individual culpability, the more likely it is that they should be prosecuted. However, if a defendant company which is more culpable for the offending is also implicated, then a prosecution might be less likely. Consideration should also be given to the individual's personal circumstances, such as his mental state at the time of the incident and whether or not they have any previous convictions or significant failings;
- III. What are the circumstances and harm caused to any victim/injured person? The circumstances of the victim are highly relevant. The greater the vulnerability of the victim, the more likely it is that a prosecution is required. In health and safety cases, harm caused to a member of the public or significant potential harm to the public is a highly significant, but not a determinative, factor for prosecution.
- IV. Consideration should also be given to the victim's/injured person's views about prosecution, the impact that the incident has had on them, and whether pursuing a prosecution would have an adverse impact upon their health.
- V. Was the suspect under the age of 18 at the time of the offence?
- VI. What is the impact on the wider workplace and community? – The greater the impact on the community, the more likely that a prosecution is required. This is an inclusive term and is not defined by location. In general, the higher the prevalence of the incident across the industry generally, and/or the higher the public element to an offence, the more likely that a prosecution is required.
- VII. Further, consideration should be given to the severity of the hazard and whether it is reasonably foreseeable that a repetition of the circumstances could result in a fatality, serious ill health or serious injury.
- VIII. Is prosecution a proportionate response to the failings of the individual? – The cost of bringing a prosecution, whilst not be a deciding factor on its own, should be considered against the likely penalty an individual will receive. Further, in a case involving multiple defendants, prosecution might be reserved for the main culpable participants in order to avoid excessively long and complex proceedings.

14. Note that this is not an exhaustive list of questions to ask and not all of the questions may be relevant to each case. The weight to be attached to each of the questions, and other factors identified, will also vary according to the facts and merits of each case.

15. On some occasions one public interest factor alone may outweigh a number of other factors, e.g. an instance when a member of public is seriously

injured or where there was no harm but a high degree of public danger is created.

## **LIABILITY OF DIRECTORS**

16. In addition to the above, further factors should be addressed when considering an offence under section 37 of HSWA in relation to directors or managers of a body corporate (“company”).

### **(a) The Evidential Test**

17. When dealing with a director, it should also be remembered that they might also be an employee and therefore prosecutable as an individual under section 7 of HSWA. To determine the most appropriate offence, consideration should be had to determining the role being fulfilled by the individual at the time. If they were acting as a director then section 37 should be used, if they were acting as an employee and carrying out the company’s procedures in the same way as other employees then section 7 may be more appropriate.

18. In order to determine this, an objective assessment of the circumstances of the case should be conducted. The conclusion should not be based upon which offence is easier or more convenient to prove.

19. Where a case involves a company with a sole director, who is also the principle owner of the company, consideration should be had as to whether the prosecution is more warranted against the company or the director as an individual. Prosecution of both in these instances should be avoided as it would have the effect of prosecuting the same individual twice.

### **(b) The Public Interest Test**

20. In addition to the above public interest factors the following questions should also be applied:

- I. Was the matter, in practice, clearly within the director/managers’ control? – this should include looking at the steps which could reasonably have been taken to avoid the offence and seeing if they fall properly and reasonably within their duties, responsibilities and scope of functions.
- II. Did the director/manager have personal awareness of the circumstances surrounding, or leading to, the offence?
- III. Did the director/manager fail to take obvious steps to prevent the offence?
- IV. Did the director/manager receive previous advice/warnings regarding matters relating to the offence? – When advice was given to the

company it will need to be shown that the director/manager knew about it, or ought reasonably to have known, about the advice/warning.

- V. Did the director/manager have personal responsibility for matters relating to the incident? – E.g. had they personally sanctioned, instructed or encouraged activities that significantly contributed to or led to the offence?
- VI. Would the prosecution be seen as fair, appropriate and warranted? – Prosecutions are intended to bring home to directors/managers the extent of their responsibilities and should be seen by others in the same role as being justified.
- VII. Whilst it is important to take enforcement action for the failings of directors/managers, consideration should be had for the need to prevent them from refusing explicit responsibility for oversight of health and safety, which could lead to policies and job descriptions being created defensively or to excessive delegation of responsibility.
- VIII. Had the director/manager knowingly compromised safety for personal gain, or for commercial gain of the company, without undue pressure from the company to do so?

21. As with individuals, whilst it might be possible to prove consent, connivance or neglect, each case must be considered on its own facts.

### **DISQUALIFICATION OF DIRECTORS**

22. Once a prosecution has commenced, inspectors will remind the Court that it has a power to make a disqualification order under section 2(1) of the Company Directors Disqualification Act 1986 in all cases where an individual is prosecuted for an indictable offence and that offence is in connection with the management of a company.