

**EXPLANATORY MEMORANDUM TO THE
HEALTH AND SAFETY (ENFORCING AUTHORITY FOR RAILWAYS AND OTHER
GUIDED TRANSPORT SYSTEMS) REGULATIONS 2006**

2006 No. 557

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Description

2.1. These Regulations make the Office of Rail Regulation (“ORR”) the enforcing authority for health and safety law in relation to the operation of railways, tramways and certain other systems of guided transport, (e.g. monorails or track-based with side guidance systems such as at Birmingham International Airport), in place of the Health and Safety Executive (“HSE”).

2.2 The HSE are made the enforcing authority for health and safety law in relation to the operation of guided buses, any other road based systems of guided transport, (other than tramways), and trolley vehicle systems.

2.3 The Regulations also amend various enactments to make consequential provision, and to substitute the ORR for the HSE, to such extent as appropriate, for the exercise of certain functions and for related purposes connected with health and safety on relevant systems of transport.

3. Matters of special interest to the Joint Committee on Statutory Instruments.

3.1 None

4. Legislative Background

4.1 The Regulations follow on from an aspect of the changes introduced to the railway industry by the Railways Act 2005 (the RA 2005). The Act gave effect to the proposals which required primary legislation in the White Paper “the Future of Rail”, published on 15th July 2004. The White Paper set out the conclusion of the rail review which the Secretary of State for Transport announced on 19th January 2004. The aim of the review was to develop proposals for a simplified structure and organisation for Britain’s railways.

4.2 Section 3 and Schedule 3 of the RA 2005 made provision for the transfer of various safety functions in relation to railways, tramways and certain other modes of transport, conferred by or under the Health and Safety at Work etc. Act 1974 (HSWA), from the Health and Safety Commission/Executive (HSC/E) to the ORR. The HSWA (as extended by s.117 of the Railways Act 1993) will continue to provide the statutory framework for health and safety on these modes of transport. However, the safety functions transferred by the RA 2005 did not include responsibility for the enforcement of health and safety law which is the statutory responsibility

of the HSE. Such provision was not included in the Act as the HSWA provides the powers to transfer the enforcement function by regulations and it was intended to use those powers to do so.

4.3 These Regulations transfer the enforcement function using the powers of the HSWA and other relevant powers.

4.4 The Regulations relate to the Railway Safety Levy Regulations 2006, which make provision for the funding of the ORR's functions in relation to health and safety, and which were laid in draft before Parliament under section 82(4) of the HSWA for the approval by resolution of each House of Parliament.

4.5 They also relate to the Railways Act 2005 (Amendment) Regulations 2006 which modify the remit of the ORR under Schedule 3 of the RA 2005 to exclude fairground equipment, guided bus systems and trolley vehicle systems.

5. Extent

5.1 This instrument applies:-

(a) in the case of paragraph 15 of the Schedule, to the United Kingdom, and

(b) in the case of the remainder of the instrument, to Great Britain.

6. European Convention on Human Rights

6.1 Derek Twigg, the Parliamentary Under Secretary of State for Transport, has made the following statement regarding Human Rights.

6.2 In my view the provisions of the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 are compatible with the Convention rights.

7. Policy background

7.1 Health and safety legislation on railways, tramways and certain other modes of transport is currently enforced by the HSE. The aim of transferring from the HSE to the ORR health and safety enforcement, (by these Regulations), and certain other health and safety functions, (by the RA 2005), with respect to the operation of railways, tramways and certain other systems of guided transport, is to simplify the regulatory structure of the industry and provide a fresh start to encourage cultural change across the industry. It will also enable the development of an independent regulator with specialist economic and safety rail expertise and enable decisions which touch on both economic and safety regulation to be brought together.

7.2 The health and safety law to be enforced by the ORR in relation to the relevant transport systems will be that set out firstly in Part 1 of the HSWA, (e.g. general duties of employers to their employees (section 2), general duties of employers and the self-employed to persons other than their employees (section 3) and the general duties of persons concerned with premises to

persons other than their employees (section 4)), secondly in regulations made under section 15 and thirdly in certain “existing statutory provisions” as defined in section 53, (all as extended by section 117 of the Railways Act 1993). The ORR will be able to appoint inspectors under the HSWA, (section 19), with relevant inspection, investigation and enforcement powers (section 20) and the powers to serve improvement and prohibition notices (sections 21 and 22).

7.3 The main instrument for the allocation of enforcing authority functions under the HSWA is the Health and Safety (Enforcing Authority) Regulations 1998 (SI 1998/494). This allocates enforcement responsibilities between the HSE and local authorities. For example local authorities are allocated responsibility for enforcement in relation to shops and offices. It also made the HSE responsible for enforcement in relation to the operation of railways, tramways and certain other modes of transport. The new Regulations amend the 1998 Regulations to re-allocate responsibility for enforcement, in relation to transport systems, between the ORR and the HSE. Local authorities’ health and safety enforcement responsibilities will not be affected.

7.4 HSE, ORR and the Department have worked together to ensure that agreement was reached on where the boundaries of enforcement responsibly between the ORR and the HSE should be.

7.5 The Department consulted the rail industry early on in the process. The industry had concerns particularly with regard to having to deal with more than one enforcing authority. These regulations address this as far as possible, in that ORR will be the first point of call where matters relate to health and safety for railways, (as well as for tramways and certain other systems of guided transport).

7.6 The Department carried out a consultation exercise on the draft regulations. Around 500 copies of a consultation document with a copy of the draft regulations were sent out and 49 responses received. The proposals were supported by Network Rail, the Association of Train Operating Companies (ATOC), the light rail sector and the heritage sector, although many respondents went on to raise points of detail. Many of the responses were from train operating companies saying that they were in support of the detailed comments submitted by ATOC. The trade unions TSSA and ASLEF said that they were opposed to the transfer of safety regulation to ORR, but ASLEF went on to describe the enforcement split as sensible. A copy of the consultation report is available on the Department’s website at www.dft.gov.uk.

7.7 There were no substantive changes on policy as a result of the consultation but various drafting changes were made following both the consultation and further discussions with HSE and ORR. The most significant changes are described in detail in the Regulatory Impact Assessment attached to this memorandum.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The impact on the public sector is that enforcement work and the staff involved will transfer from HSE to ORR. The costs and benefits of this change are set out in the Regulatory Impact Assessment.

9. Contact

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**Regulatory Impact Assessment
for enabling ORR to enforce railway (and other guided transport) safety
functions under the Health and Safety at Work etc Act 1974**

1. Title of Proposal

Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006.

2. Purpose and intended effect of measure

(i) The Objective

The key objective is to establish the Office of Rail Regulation (ORR) as the enforcing authority for all health and safety legislation in relation to railway activities.

(ii) The Background

Health and safety legislation on the railway is currently enforced by the Health and Safety Executive (HSE). HSE's job is to ensure that risks to people's health and safety from railway activities are properly controlled. This includes ensuring that health and safety legislation is complied with and good practice followed. The aim of transferring health and safety regulation (with respect to the operation of the railway) from the Health & Safety Commission (HSC) and Executive (HSE) to the ORR is to simplify the regulatory structure of the industry and provide a fresh start to encourage cultural change across the industry. It will also enable the development of an independent regulator with specialist economic and safety rail expertise and allow decisions which touch on both economic and safety regulation to be brought together. The White Paper, 'the Future of Rail', made it clear that this was not a reflection on HSC/E's work as rail safety regulator. Under HSC/E's regulation, the safety record of the industry has improved and HSE has already begun the process of change.

The Railways Act 2005 transfers essentially policy functions under the Health and Safety at Work etc Act 1974 (HSWA) to the ORR in respect of 'railway safety purposes'. The 2005 Act recognises that HSWA (as extended by s.117 of the Railways Act 1993) will continue to provide the statutory framework for health and safety on the railway. However, the railway safety functions transferred by the 2005 Act do not include enforcement functions. Secondary legislation is needed to make ORR the enforcing authority for health and safety legislation on the railways.

(iii) Risk Assessment

If responsibility for health and safety enforcement is not moved to ORR, this would jeopardise the Government's intention to streamline the regulatory system and its aim of ensuring that issues of safety, performance and cost are looked at as a whole and not in isolation from one another.

3. Options

Option 1 – Retain the status quo. HSE continues to enforce health and safety on railways.

Option 2 – Transfer of responsibility for enforcement. ORR is given the power to enforce health and safety on railways.

4. Benefits

Option 1 – Retain the status quo.

- **Economic**

Work begun on changing the industry culture would continue. This work could yield some economic benefits as the industry begins to adopt a more risk-based approach to safety management.

- **Social**

Work begun on changing the industry culture would continue. Existing arrangements aim to change cultural attitudes to move to a more risk-based approach to safety management for the rail industry.

- **Environmental**

None

Option 2 – Transfer of responsibility for enforcement

- **Economic**

This would enable the development of an independent regulator with combined specialist economic and safety rail expertise. This will yield benefits to the policy-making process where decisions involving economic and safety regulatory issues are better integrated and co-ordinated.

- **Social**

This option should assist in simplifying the regulatory structure of the industry and provide a fresh start to encourage cultural change across the rail industry.

- **Environmental**

None

5. Costs

Option 1 – Retain the status quo

- **Economic**

The Railways Act 2005 has already transferred responsibility for policy functions relating to railway health and safety to ORR. It would be anomalous and inefficient in these circumstances to leave enforcement powers with HSE. Economic disbenefits may also arise if issues of safety, performance and cost continue to be looked at by two separate organisations.

- **Social**

The regulatory structure of the industry would remain the same. This has the potential to raise social cost issues, where safety and economic regulatory issues are not as well integrated as they may otherwise be.

- **Environmental Costs**

None.

Option 2 – Transfer of enforcing authority

- **Economic**

Within ORR, the regulation of health and safety on the railway will continue under the Health and Safety at Work Act broadly as within HSE, though with staff (rail policy officials and members of Her Majesty's Railways Inspectorate) transferred from HSE Rail according to Cabinet Office best practice. Specialist resources not directly related to rail health and safety (for example, on construction) will continue to be provided by HSE via a Memorandum of Understanding. Similarly if post-transfer HSE need access to specific rail expertise they will obtain this from ORR.

Some costs arise as a result of the administrative work (including legal resource) to define the boundaries of responsibility between HSE and ORR and associated personnel and business continuity issues. There also administration costs involved in organising the transfer (in HSE, ORR and DfT).

For ORR, costs incurred by the transfer include consultant fees (IT and legal), contracts for leases, building fees etc. The costs for the first three years are estimated as follows:

Table 1: ORR transitional costs for years 1 - 3

	Year 1	Year 2	Year 3	Total
Resource	£1.8m	£0.6m	£0.6m	£3.00m
Capital	£3.5m	-	-	£3.50m

HSE's cost in preparing for the transfer primarily relate to staff time to: prepare for the delivery of the change (including IT services, human

resources, finance etc); assist ORR to become an effective health and safety regulator; and define the boundaries of responsibility in future. The following table sets out the costs to HSE:

Table 2: HSE transitional costs for years 1 - 3

	Year 1	Year 2	Year 3	Total
Resource	£0.22m	£1.0m	£0.25m	£1.47m
Capital	-	-	-	-

Year 1 is 2004/05, year 2 is 2005/06, and year 3 is 2006/07. The estimates are based on likely liaison arrangements to ensure that the two organisations cooperate effectively and that there is consistent enforcement of general health and safety law.

HSE will transfer to DfT the resources it had planned to deploy on rail health and safety. This amounts to some £18m per annum gross, £10 m per annum net. However, it will take time for HSE to adjust its costs in relation to unavoidable overheads (eg the costs of accommodation, contracted services for information services & technology and corporate support services). Thus the £10m net will not be available to be released to the extent that the HSE has inescapable costs. The precise value is subject to key dependencies, such as HSE's capacity to sub-let vacated space in its London building.

- **Social**

All staff in post with HSE Rail at the date of transfer will transfer to ORR, in accordance with Cabinet Office best practice. For London-based staff, this transfer includes moving to new accommodation to enable co-location with current ORR staff.

- **Environmental**

None

6. **Issues of Equity and Fairness**

ORR will be required to exercise its role as enforcer with respect to duty holders within the industry. This does not raise any issues of equity and fairness.

7. **Consultation with Small Business**

The transfer of enforcement responsibilities to the ORR will impact on all businesses equally and will not import disproportionate costs on small rail businesses.

8. **Competition Assessment**

The transfer of enforcement responsibilities should not raise any issues of competition, since the change will impact on all businesses equally.

9. Enforcement and Sanctions

Detailed administrative arrangements relating to the transfer and the way in which HSE, ORR and DfT will work together will be subject to agency agreements and memorandums of understandings.

10. Monitoring and Review

DfT will work with ORR and other industry partners to continue improving the regulation of safety, including through the new European framework set out within the European Rail Safety Directive. The Directive requires that rail safety be maintained at its present level and, where reasonably practicable, continuously improved.

11. Consultation

11.1 The proposals have been developed closely between DfT, HSE and ORR. Discussions have been held with key stakeholders to ensure that their needs were both understood and met. The main request from the industry was that there is clarity between where ORR will enforce health & safety legislation and where HSE will enforce such legislation.

11.2 The Department carried out a consultation exercise on the draft regulations. Around 500 copies of a formal consultation document with the draft regulations were circulated to those with an interest within the rail industry and the document was also placed on the DfT website. 49 responses were received, many of which were from individual train operating companies merely giving their support to the joint response from the Association of Train Operating Companies (ATOC). Network Rail and ATOC endorsed the proposals, whilst making specific technical points on the draft regulations. The light rail and heritage rail sectors accepted the changes. The rail trade unions, ASLEF and TSSA, both said they objected to the overall policy of transferring rail safety regulation to ORR; ASLEF (but not TSSA) went on to say that if the move to ORR went ahead the proposed split of enforcement responsibilities in the draft regulations appeared sensible. A copy of the consultation report is available on the Department's website at www.dft.gov.uk.

11.3 There were no substantive changes to the regulations as a result of the consultation but various drafting changes were made following both the consultation and further discussion with ORR and HSE officials. The most significant changes were to:-

(a) Provide for additional amendments to the Railways and Other Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994, amendments to the Railways (Safety Critical Work) Regulations 1994, and amendments to the Railways (Safety Case) Regulations 2000. This was because it had been expected they would all be revoked by the Railways and Other Guided Transport Systems (Safety) Regulations 2006 ("the ROGS" Regulations) at the beginning of April. In fact under the ROGS regulations they will remain in force till October and thus consequential provision needed to be added to the enforcement regulations.

(b) Provision to amend various Orders made under the Transport and Works Act in relation to specific systems (e.g. Docklands Light Railways Silvertown extension) have been removed. This is because, on further analysis, the powers available and used in the Regulations do not extend to permitting changes to these orders and it is no longer considered necessary to do so. The Regulations will nevertheless empower the ORR to enforce health and safety on these systems. This change was to some extent anticipated at consultation stage and the consultation document indicated they would be removed from the Regulations.

(c) Provision is included to effect consequential amendments to the Control of Noise at Work Regulations 2005 to empower the ORR to enforce those regulations on the relevant transport systems.

(d) Provision has been made to amend the Railways (Accident Investigation and Reporting) Regulations 2005 to substitute the ORR for the HSE as the "safety authority".

(e) Provisions in the consultation draft amending the Railways (Interoperability) Regulations 2006 and the ROGS Regulations have been deleted. This is because rather than amend these instruments, immediately on their coming into force, to make them compatible with the enforcing authority regulations the latter have both been amended as appropriate to make them compatible with the enforcing authority regulations from the start, (in essence to make them recognise that ORR are to be the enforcing authority in place of the HSE and, in the case of ROGS, to make definitions consistent where appropriate).

(f) To improve the definition of guided bus system.

12. Summary and Recommendations

It is considered that option 2 would help to simplify the regulatory structure of the industry and provide a fresh start to encourage cultural change across the rail industry. Such a move would enable the development of an independent enforcing authority with specialist economic and safety rail expertise and allow decisions which touch on both economic and safety to be brought together. Option 2 would enable the improvements in the current safety framework anticipated by the White Paper to be made more effectively. Under this option, the enforcement of health and safety on the railway will continue broadly as before - but within ORR rather than HSE. Additional costs to industry resulting from the transfer are likely to be those relating to understanding the new regulations and the implications of a change of enforcing authority.

13. Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed ...Derek Twigg.....

Date: 2nd March 2006

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