

# What happens when things go wrong

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# Health and Safety of Organisations

## Sentencing Council Guideline

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### Prosecutions

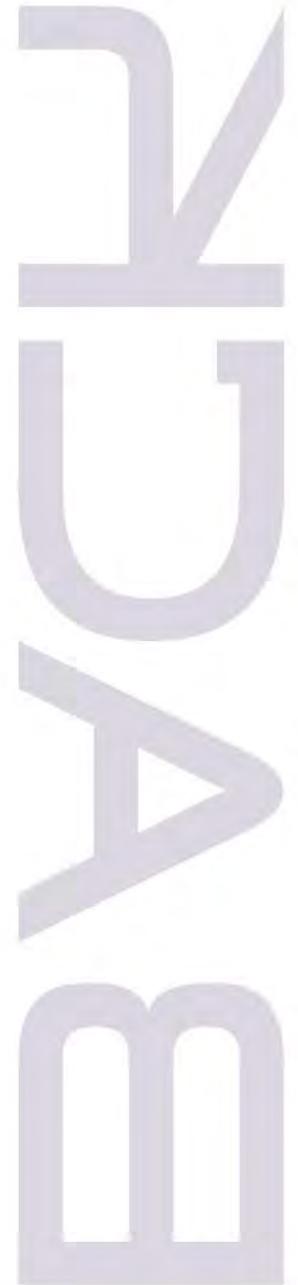
- Section 85 LASPO
- Sentencing Guidelines for health and safety offences, corporate manslaughter, food safety and hygiene offences

### What do the guidelines cover?

- Sentencing for:
  - All H&S offences
    - fatal and non-fatal
    - corporate and individual offenders
  - Corporate manslaughter
  - Food Safety and Hygiene

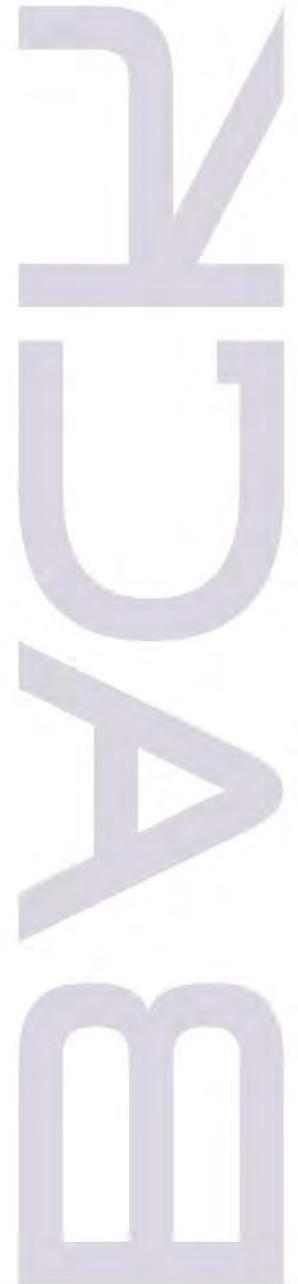
# The 9 steps to determining sentencing

1. Determine offence category: harm and culpability
2. Starting point and category range
3. Is proposed fine proportionate to the overall means of the offender?
4. Consider other factors that might require adjustment of the proposed fine
5. Consider any factors which indicate a reduction of the fine
6. Reduction for guilty pleas
7. Compensation and ancillary orders
8. Totality Principle
9. Reasons



# Step One – Determine offence category: harm and culpability

- **Categories of harm**
- Seriousness of harm risked + likelihood of harm = Harm Categories 1-4
  - (NB: Risk of harm – not actual harm)
- Seriousness of harm risked classified as:
  - **Level A**
    - Death
    - Physical or mental impairment resulting in lifelong dependency
    - Health condition resulting in reduced life expectancy
  - **Level B**
    - Physical or mental impairment not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day to day activities or on their ability to return to work
    - A progressive, permanent or irreversible condition
  - **Level C**
    - All others not in A or B



# Establishing the category of harm from the Matrix

	Seriousness of harm risked		
	<b>Level A</b> <ul style="list-style-type: none"> <li>• Death</li> <li>• Physical or mental impairment resulting in lifelong dependency on third party care for basic needs</li> <li>• Significantly reduced life expectancy</li> </ul>	<b>Level B</b> <ul style="list-style-type: none"> <li>• Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work</li> <li>• A progressive, permanent or irreversible condition</li> </ul>	<b>Level C</b> <ul style="list-style-type: none"> <li>• All other cases not falling within Level A or Level B</li> </ul>
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

# Defining culpability

## Level of culpability extremely important giving the consequences.

- Very High - Deliberate breach or flagrant disregard of the law
- High - Fell far short of the appropriate standard
- Medium - Fell short of standard in a manner that falls between descriptions in high and low culpability
- Low - Did not fall far short of appropriate standard

## Issues relevant to culpability

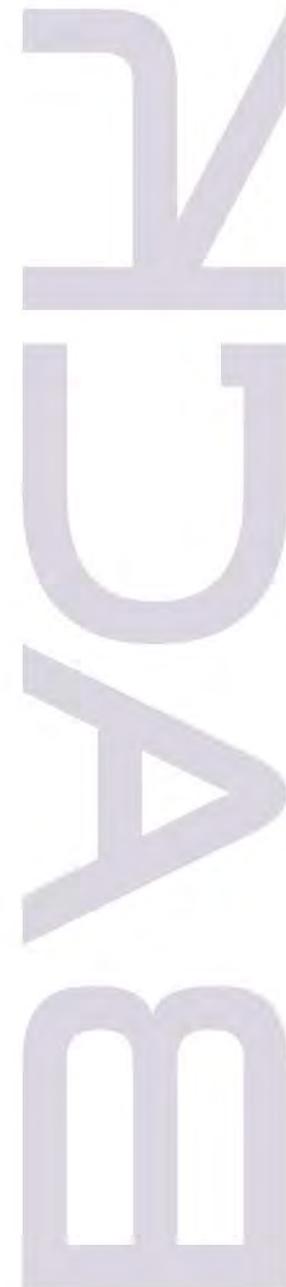
- **High**
  - Failing to put in place measures recognised as standards in the industry / sector
  - Ignoring concerns raised by employees or others
  - Failing to make changes after prior incidents
  - Allowing breaches to subsist over a long period of time
- **Low**
  - Significant efforts were made to address risk but inadequate on this occasion
  - No prior event or warning indicating a risk



# Step Two – Categories of organisation

Establish financial position of offender based on turnover:

- Micro
  - not more than £2m
- Small
  - Between £2m and £10m
- Medium
  - Between £10 and £50m
- Large
  - £50m and above
- Very large companies
  - turnover “very greatly exceeds” £50m
  - If the organisation’s turnover very greatly exceeds £50m, it may be necessary to move outside the suggested range to achieve a proportionate sentence



Apply Culpability and Harm Category from Step 1 to relevant Turnover category to see Starting Point fine and Category Range

Example used here is for a company with a large turn over

- The starting point figure is moved up or down to account for aggravating and mitigating feature
- The table is presented as the same for the other categories of businesses

<b>Large</b> Turnover or equivalent: £50 million and over		
	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
<b>High culpability</b>		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
<b>Medium culpability</b>		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
<b>Low culpability</b>		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

## Step Three – Proportionality

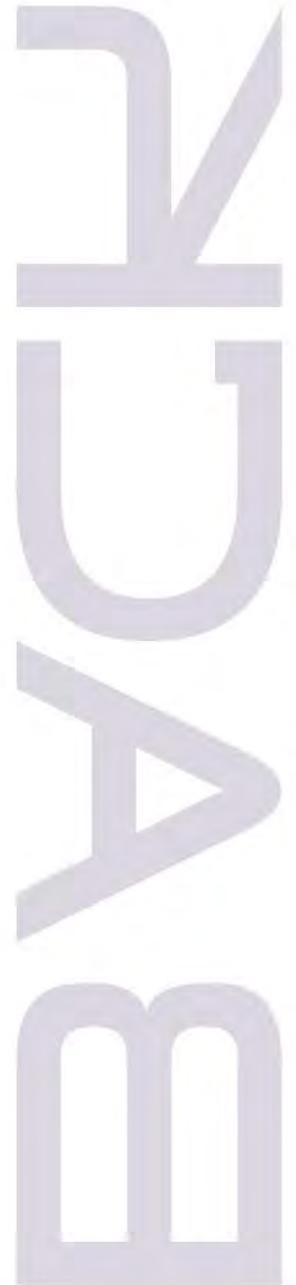
**Is proposed fine proportionate to the overall means of the offender?**

- Need to question if the fine will place the offender out of business, it should be just and proportionate

## Step Four

Other factors will be taken into consideration when determining the fine such as:

- Are they a charitable body?
- Impact of the fine on the service users
- Will employment be affected
- A guilty plea



Practical example of how the Prosecution will calculate a fine on a Hand, Arm Vibration Syndrome, Mr X has been diagnosed with HAVS:

**Culpability** - The prosecution's case is that the Defendant's culpability is **HIGH**

- Reason: The Defendant failed to implement basic health and safety measures to ensure their workers weren't exposed to vibration risks and ignored concerns raised by 'Mr. X', allowing breaches to subsist over a long period of time.

### Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

#### Very high

Deliberate breach of or flagrant disregard for the law

#### High

Offender fell far short of the appropriate standard; for example, by:

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- failing to make appropriate changes following prior incident(s) exposing risks to health and safety
- allowing breaches to subsist over a long period of time

Serious and/or systemic failure within the organisation to address risks to health and safety

#### Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories

Systems were in place but these were not sufficiently adhered to or implemented

#### Low

Offender did not fall far short of the appropriate standard; for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk to health and safety

Failings were minor and occurred as an isolated incident

# Harm

Seriousness of harm risked			
	Level A	Level B	Level C
	<ul style="list-style-type: none"> <li>• Death</li> <li>• Physical or mental impairment resulting in lifelong dependency on third party care for basic needs</li> <li>• Significantly reduced life expectancy</li> </ul>	<ul style="list-style-type: none"> <li>• Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work</li> <li>• A progressive, permanent or irreversible condition</li> </ul>	<ul style="list-style-type: none"> <li>• All other cases not falling within Level A or Level B</li> </ul>
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
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Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

- The prosecution's case is that the harm risked by the Defendant's offending falls into the medium (**Level B**) category of harm.
- The prosecution's case is therefore that the Defendant's offending falls into **HARM CATEGORY 2**

# Defining the category range

- The Defendant reported to Companies House a turn over figure of £200,000 million
- This falls into the category of a 'large organisation'
- Potential fine ranging from £550,000 - £2,900,000
- Starting point would be £1,100,000
- As the turnover significantly exceeds the £50million threshold for a large companies' guidelines, the Court may wish to consider it necessary to move outside the suggested range.

Large		
Turnover or equivalent: £50 million and over		
	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
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<b>Low culpability</b>		
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Harm category 3	£35,000	£10,000 – £140,000
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**Adjusting the starting point to account for aggravating and mitigating features**

**Factors increasing seriousness**

*Statutory aggravating factor:*

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

*Other aggravating factors include:*

Cost-cutting at the expense of safety

Deliberate concealment of illegal nature of activity

Breach of any court order

Obstruction of justice

Poor health and safety record

Falsification of documentation or licences

Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities

Targeting vulnerable victims

**Factors reducing seriousness or reflecting mitigation**

No previous convictions or no relevant/recent convictions

Evidence of steps taken voluntarily to remedy problem

High level of co-operation with the investigation, beyond that which will always be expected

Good health and safety record

Effective health and safety procedures in place

Self-reporting, co-operation and acceptance of responsibility

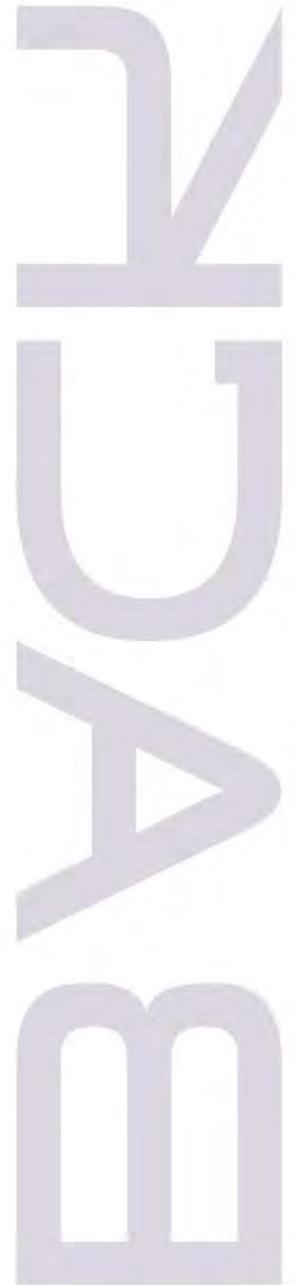
- What does the Court consider?
- Factors reflecting mitigation?
- In our example, the prosecution excepts:
  - The Defendant has no previous convictions
  - The Defendant took several steps to remedy the problem after Mr. X was diagnosed.

# Other Considerations & Guilty Plea

- The Court must consider whether the fine is sufficiently substantial to have a real economic impact, whilst remaining proportionate to the overall means of the Defendant.
- If the Defendant is convicted of the matters alleged it is invited to provide a written outline of any other considerations it may wish to present to the Court, which it believes may warrant a further adjustment to the fine to be imposed.

## **Reduction for a guilty plea**

- In this example there has been admission of a guilty plea.



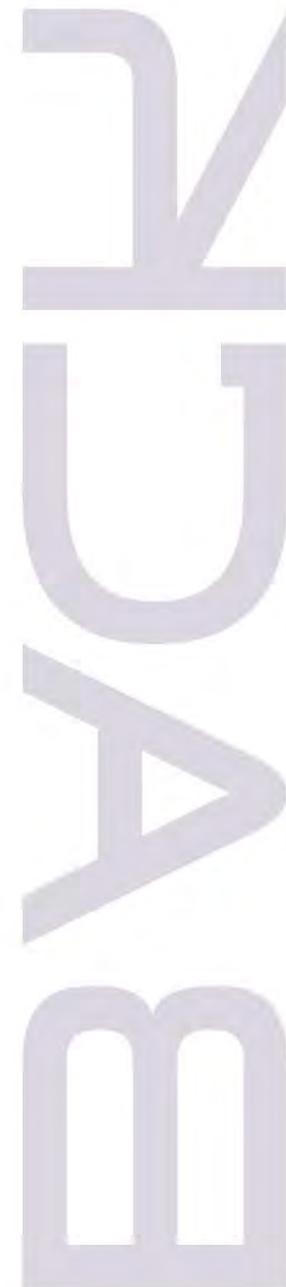
# Overall fine the prosecution believe is reasonable

- High culpability
- Harm category 2
- Starting point £1.1 million
- Range £500,000 - £2.9 million

# Health and Safety of Individuals

## Sentencing Guidelines

- **Section 7 of the Health and Safety at Work Act 1974 : Duty of Employees**
  - “Duty to take reasonable care of self and others affected by work”
- **Section 37 of the Health and Safety at Work Act 1974: Liability of directors and senior management**
  - *“Where an offence... has been committed with the consent, connivance, or...attributable to any neglect on the part of any director, manager ... or a person who purports to act in that capacity, he/she as well as the company shall be guilty of that offence”*



## Determine the offence category:

### Culpability

- Very high - Intentionally breached or flagrant disregard for the law
- High – actual foresight of or wilful blindness to risk, and risk taken
- Medium - an act or omission that a person exercising reasonable care would not do
- Low – little fault i.e. minor error of judgment

	Seriousness of harm risked		
	Level A • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy	Level B • Physical or mental impairment, not amounting to Level A, which has a substantial and long term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition	Level C • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
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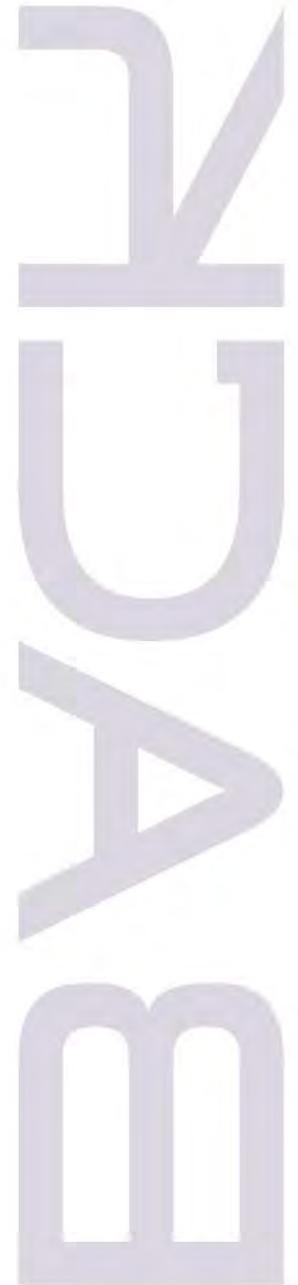
Looking at a common view to the above with a 9-step approach based on culpability & risk of harm

# The Category range is much more serious for the individual

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
<b>High culpability</b>		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
<b>Medium culpability</b>		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
<b>Low culpability</b>		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine

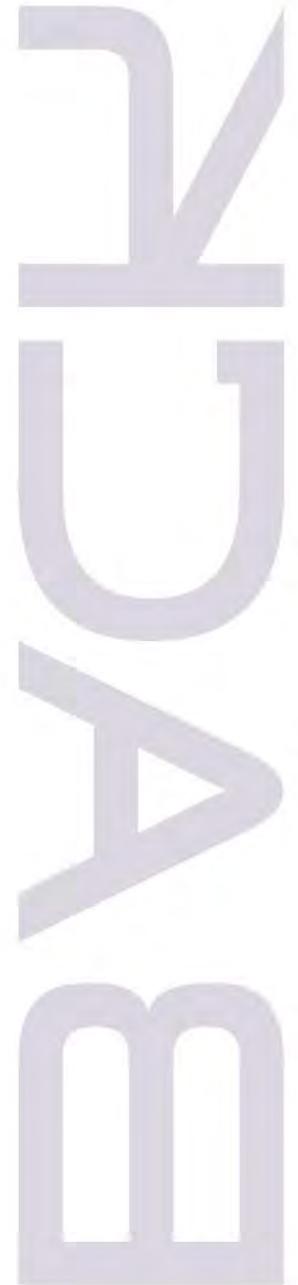
# HSE – Enforcement Policy Statement

- **Like any prosecuting agency the HSE have to publish a prosecution policy which is a guide for itself to follow when deciding when to prosecute a case.**
- **This document is also a public available document, as such this can be reviewed by you, to which you can then determine whether you the HSE should be taking the action the case you are involved in.**



# The HSE have a suite of actions at their disposal

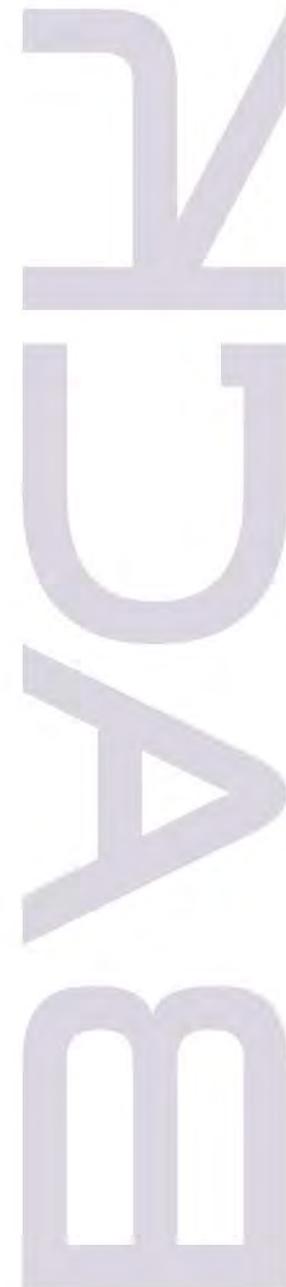
- written information
- advice regarding breaches of the law
- warning the duty holder they are failing to comply with the law
- serve improvement and prohibition notices
- withdraw approvals
- vary licence conditions or exemptions
- issue simple cautions (in England and Wales only)
- prosecute (or report to the COPFS with a view to prosecution in Scotland).



# Topic inspection pack – Hand Arm Vibration Syndrome (HAVS)

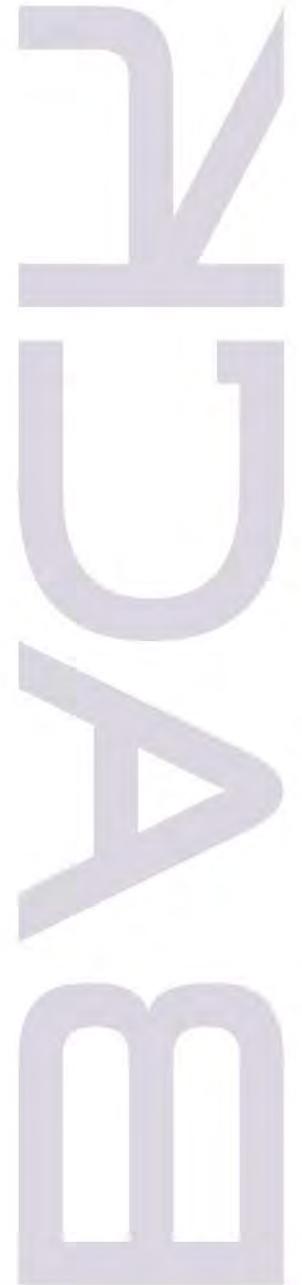
Table 4: Risk control indicator scale

<b>Risk Control Indicators – Assessment Scale:</b> each risk control indicator should be assessed against the following 1-6 scale.					
1	2	3	4	5	6
High standards with some aspects meeting best practice.	Good standards meeting minimum legal requirements.	One or more minor shortcomings are present. As these shortcomings are not serious, they can be dealt with informally with oral advice.	Standards are patchy. It is necessary to address one or more shortcomings by giving formal instructions for remedial action to be taken. Formal instructions may be implemented by, e.g., obtaining a verbal undertaking from the company to take specific action, sending a letter, or physical removal/ disposal of items.	Standards generally unsatisfactory. Typically, at least one contravention that gives rise to a discernible risk gap.	Standards unacceptable. Unless application of the EMM identifies duty holder factors that provide strong mitigation, the issuing of a notice and/or prosecution is likely to be appropriate.



# Guidance under the Topic Inspection Pack

Where there is 'NIL' or 'Negligible Risk' of serious health effects the enforcement expectation = improvement notice.



# Any Questions



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