

Submission by Health and Safety Executive in relation to the inquiry into residential care for older people by the National Assembly for Wales's Health and Social Care Committee

Introduction

1 The Health and Safety Executive, welcome the opportunity to contribute to this Inquiry and look forward to the prospect of greater clarity and coordination of the roles, responsibilities and powers of all bodies identified as having influence in the care of older people in Wales.

2 The Health and Safety Executive is the national independent regulator for health and safety in the workplace in Great Britain and was established by the Health and Safety at Work Etc Act 1974(HSWA). The Health and Safety Executive is a non-departmental public body with Crown status, sponsored by the Department of Work and Pensions (DWP) and is accountable to its ministers. Health and Safety at Work and the roles and responsibilities placed upon the Health and Safety Executive have not been devolved to Welsh Government.

Functions and roles of HSE as set out in HSWA

3 HSWA states that the primary function of HSE is to make arrangements to secure the health, safety and welfare of people at work and others, for example the public, in the way undertakings are conducted. Related functions and duties that HSE performs include:

- proposing and setting necessary standards;
- securing compliance with those standards;
- undertaking other forms of activity designed to stimulate or support necessary action on the part of people and organisations that create potential harm;
- submitting proposals for regulations to Ministers after consultation with appropriate Government Departments and other bodies;
- arranging for the provision of information and advice to Ministers amongst others,
- arranging for the operation of an information and advisory service;
- arranging for research to be carried out, the publication of the results and the provision of training and information in connection with these purposes;
- approving and issuing codes of practices with the consent of the relevant Secretary of State and subject to consultation with appropriate Government Departments and other bodies;
- making Agency Agreements and Memoranda of Understanding (MoU) with Government Departments or others; and
- giving guidance to Local Authorities on enforcement.

4 The regulatory concerns of HSE range very widely from health and safety in nuclear installations and mines through to factories, farms, fairgrounds, hospitals, care homes and schools. HSE also regulates offshore, gas and oil installations, the safety of the gas grid, the movement of dangerous goods and substances (principally by road), and other aspects of the protection both of workers and the public. This list is not inclusive of all regulated sectors, merely illustrative.

Powers under HSWA

5 The powers of inspectors are prescribed by the HSWA. These are extensive and include the power to prosecute and to issue improvement and prohibition notices. Further information relating to the HSE enforcement policy and examples of enforcement are given on our website <http://www.hse.gov.uk/enforce/index.htm>

Who enforces HSWA for care settings for older people in Wales?

6 HSWA and related legislation is enforced by the Health and Safety Executive or by the relevant Local Authority (LA) at individual workplaces according to the main activity carried out there. The Health and Safety (Enforcing Authority) Regulations 1998 allocate enforcement responsibility for health and safety between HSE and the Local Authorities, with the perceived lower risk premises, shops, offices etc being allocated to LAs.

7 There are a range of care settings that provide care for older people in Wales, these broadly fall into the categories of, hospital care, residential care, nursing home care, dual registered care and care at home.

8 It should be stated that HSWA applies equally to privately and publicly owned care settings in Wales.

9 Applying the Enforcing Authority Regulations to each of these settings we arrive with the following allocations;

10 Residential care settings are allocated to the Local Authority to enforce.

11 LA owned Residential care, Dual registered homes and Nursing homes are allocated to the Health and Safety Executive. The HSWA is also enforced by HSE in Hospitals.

12 Unfortunately determining the status of home care is less straightforward. Section 51 HSWA specifically disappplies HSWA to a person employing another person as a domestic servant in a private household. Traditionally 'domestic service' describes basic personal care, personal services and other domestic tasks.

13 In practical terms this means that an individual employing a home carer to help with washing, dressing and feeding at mealtimes would not be an employer under HSWA as the care would be described as domestic service.

14 However where specialist care is required then this goes beyond basic care then the definition of 'domestic service' does not apply. Again in practical terms care requiring the operation of life support or palliative care would not be considered domestic service. This definition has been applied as broadly as training in handling techniques and dealing with behavioural issues.

15 This situation is further complicated by who commissions the services. If an individual seeks a specialist carer and enters into an employment contract with them, then the individual is considered an employer and HSWA applies. However if the individual buys specialist services through a third party, a care agency or from a local authority then HSWA does not apply to the individual it applies to the direct employer, the local authority/care agency.

16 To this end, each domestic situation must be judged on its own merits and broad allocations/disapplication is not possible.

Working with other Regulators

17 In Wales the HSE endeavours to work in partnership with our co-regulators from Welsh Government and local authorities to inspect, investigate and where necessary take enforcement action. HSE Wales do not currently have any formal agreements with HIW or CSSIW. HSE is in the same position with CQC in England. HSE recognises that managing the health and safety at a care setting is only one

element of responsibilities placed upon care setting owners and managers. In the main the management responsibilities for care provision in care settings are regulated by CSSIW. HSE asserts that other bodies regulating in the care sector, have more specific powers and legislation than HSE and are therefore be in a better position to respond to patient or service user incidents or complaints.

18 The lack of Memorandum of Understanding/Concordats does not mean that the organisations can't or don't work constructively together. At a local level there are established channels of communication between HSE, CSSIW and HIW.

19 In the event of a death in a care setting that arises out of a work activity, for example where a service user has been scalded whilst bathing then the relevant regulator (HSE or LA) will undertake a joint investigation with the Police. HSE, Welsh Local Authorities and the Welsh Police Forces (amongst others) have an agreed Protocol for Liaison in relation to work related deaths. This protocol for liaison is freely available to download from our website <http://www.hse.gov.uk/pubns/wrdp1.pdf>

20 Between 2008-10 HSE and 22 Welsh LA's in partnership ran a series of Safety and Health Awareness days covering Manual handling, Bedrail Safety, Control of Legionella, Management of Asbestos, Slips and Trips, Violence and Glove use (addressing latex and dermatitis). The aim of this initiative was to raise health and safety standards in residential and nursing homes across Wales.

21 The main provisions of the Health and Safety at Work Etc Act 1974 are given in the Appendices to this document. In short, Section 2 states that employers have legal responsibilities to their employees. Section 3 describes an employers duty to other people, for example service users who may be affected by their undertaking and who may be exposed to risks as a result. Employees have a duty to take reasonable care for the health and safety of themselves and others, given in Section 7. Directors and managers 'as the controlling minds' of an organisation also have specific duties set out by Section 37.

22 HSE has a policy for dealing with the enforcement of HSWA Section 3 in care settings. HSE does not, in general, investigate matters of clinical judgement or matters related to the quality of care. HSE leads on employee health and safety and may also deal with non-clinical risks to patients such as trips and falls, scalding, electrical safety etc; and with some aspects of risks that apply to both staff and patients alike, such as manual handling.

23 There is a legal duty for certain incidents to be reported under the Reporting of Injuries Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR). HSE follows its published incident selection criteria when deciding whether to investigate.

24 The HSE has recently revised the guidance describing the application of Section 3. This new guidance includes 'situational examples' written to inform where an issue would tend towards or tend away from investigation. <http://www.hse.gov.uk/enforce/hswact/priorities.htm>

25 The website also provides information about managing the risks in health and social care that can affect employees and users of these services.

26 It will help those responsible for health and safety to manage the risks and provide regular updates on relevant issues. <http://www.hse.gov.uk/healthservices/>

27 Lastly, HSE are willing to clarify any matters contained in this submission or answer any questions the Committee may wish to raise regarding HSE's roles and responsibilities.

Scope and application of Section 2 HSWA

Section 2 of the HSWA sets out the general duties of employers to their employees.

Section 2 (1) states that it is the duty of every employer to ensure, so far as is reasonably practicable, the health safety and welfare of all his employees.

Section 2(2) lists the particular matters to which the general duty extends:

- provision and maintenance of plant and systems of work that are so far as is reasonably practicable, safe;
- arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health safety and welfare of his employees;
- so far as is reasonably practicable as regards any place of work under the employer's control the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without risks; and
- the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work.

Scope and application of Section 3 HSWA

The purposes of HSWA include protecting people other than those at work from risks to their health and safety arising out of or in connection with the activities of persons at work (Section 1(1)(b) of HSWA).

HSWA Section 3 places general duties on employers and the self-employed to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that persons other than themselves or their employees are not exposed to risks to their health or safety.

For section 3 to apply:

- there must be a duty-holder, either an employer or a self-employed person;
- there must be significant, not trivial risk to the health or safety of a person who is not the employee of the duty holder or the self-employed duty holder themselves; and
- that risk must arise from the conduct of the duty holder's undertaking. An 'undertaking' means 'enterprise' or 'business'.

HSWA section 3 does not apply to:

- welfare issues (such as the provision of toilets or washing facilities),
- nuisance or amenity issues that have no health or safety implications (such as unpleasant smells arising from work activities),
- poor workmanship, where trading standards or contractual remedies may exist, unless it has demonstrably compromised health and safety.