

A red lifebuoy with reflective silver stripes is mounted on a grey metal post. The post is situated on a sandy beach. In the background, there is a calm sea under a sky with soft, wispy clouds, suggesting a sunset or sunrise. The overall scene is serene and emphasizes safety.

# Review of the legal responsibility for beach safety

January 2019  
for the Maritime and Coastguard Agency

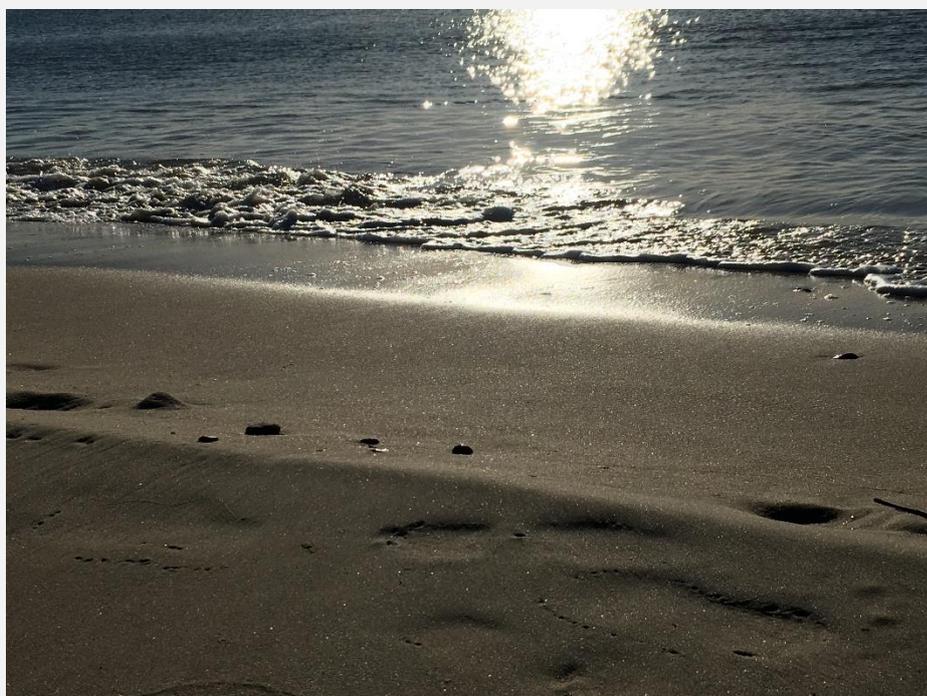
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# Executive Summary

In the UK there are, on average, almost two drowning deaths per week. When aggregated, drowning and water suicide on the coast and inland account for 600 deaths annually; in excess of twice the number attributed to fire.

It is accepted that those who undertake risky activities do so at their own risk. However, at present, the legal responsibility for safety at the foreshore is unclear with many competing duties. It also appears that there may be a lacuna in legal responsibility which leaves those with land or Councils adjacent to the foreshore acting out of largely moral and social responsibility rather than legal obligation.

This report considers the legal framework and responsibility for water safety at the beach and offers recommendations for change. As is often the case, this report has its genesis in tragedy and forms part of the actions agreed by the Secretary of State for Transport following the Inquest into the deaths of seven men at Camber Sands. While commissioned by the Maritime and Coastguard Agency ('MCA'), it is important to stress that this report and its findings are entirely independent from the MCA.

## 1. Introduction

1.1 In the summer of 2016, seven men drowned in 2 incidents in the sea at Camber Sands. As is usual, this was followed by an inquest in June 2017. At the end of the Inquest, the Coroner recommended that a review of responsibilities pertaining to beach safety in the current system should be carried out. The Secretary of State for Transport, in response to the Preventing Future Deaths Report produced by the Coroner, committed to commission an independent review to gain an understanding of the legal situation. This document is that independent review.

1.2 Swimming or engaging in water-based recreation has many laudable and important benefits to both physical and mental health, but also is something that carries substantial, and in many cases obvious, risk. The most recent WAtER Incident Database ('WAID') statistics show that there were 95 coastal drownings in 2018. The Royal National Lifeboat Institution ('RNLI') reports that it saved 84 lives and aided over 24,000 people in 15,558 incidents in 2017 and it is expected that it saved a similar number in 2018. Likewise, HM Coastguard responded to more than 24,000 incidents in 2018, many of these incidents would have been attended by both RNLI lifeboats and MCA Coastguard Rescue Teams. In addition to the RNLI there are beach lifeguarding activities undertaken by Surf Life Saving GB ('SLSGB') clubs. While the data is not available for the entirety of the UK, SLSGB clubs in Devon and Cornwall made 107 rescues in 2018. If this is extrapolated around the UK it is clear that in excess of 16,000 incidents and approximately 25,000 people are rescued annually – without the continued application of both Public Rescue Equipment ('PRE') and appropriate lifeguarding it is clear that the number of coastal drownings could have been very substantially higher.

1.3 It very quickly became apparent whilst carrying out this review that the legal framework in relation to beach safety is unclear and held together by a patchwork of legislative duties, most of which do not fully extend to, or operate in, the area of primary risk. Much turns to the geographical extent of the United Kingdom: it creates a literal line in the sand where on one side there are duties and on the other there are not. It is something which then has to be balanced against the expectation that those carrying out risky activities do so at their own risk.

1.4 The lack of clear regulation and protection raises the real policy question of whether people ought to be protected to some extent when undertaking leisure activities of this nature, and if so, then by whom and what level of protection is appropriate.

## 2. Issues

2.1 There is an almost universal view, amongst the stakeholders engaged, that greater clarity of the responsibilities for safety on the foreshore is desirable and such clarity would be welcomed.

2.2 The need for clarity starts from the basic question of what is a beach? This call for clarity, or at least recognition, that the situation is not straightforward, dates back to at least a Transport Select Committee in 2005 - and in all likelihood much earlier than that as similar topics were raised when the Royal Society for the Prevention of Accidents ('RoSPA') launched its Beach Safety Guide in 1993 - and it is clear that stakeholders have been 'muddling through' for many years acting out of quasi-moral, rather than legal, duty.

2.3 There are several interwoven issues that arise which underpin why clarity is necessary. To address them in the simplest way possible, this report is split into five sections, and this Executive Summary summarises the conclusions of each:

- (a) Part 1: Introduction - what is a beach?
- (b) Part 2: Who might owe a duty?
- (c) Part 3: What duty might be owed?
- (d) Part 4: Are the duties sufficient?
- (e) Part 5: Conclusions and recommendations

## 3. What is a beach?

3.1 The first issue is that there is no definition of a beach. This therefore makes attributing liability more difficult as it is not always entirely clear which areas of land are being discussed. Simply put, what is a beach to one may not be a beach to another, similarly a beach can occur in a range of different locations, though this report is only concerned with coastal beaches.

- 3.2 After reviewing the various available definitions, the most useful and widely used term for the land abutting the sea was the term 'Foreshore'. While also not subject to one consistent statutory definition, Foreshore is generally accepted to mean the land between the mean high water and mean low water mark. I have adopted that definition in this report.
- 3.3 Once one adopts the definition of the Foreshore it is necessary to consider labels for the land on either side, adopting the colloquial: the 'dry' bit to the land side and the 'wet' bit to the seaward side. The beach area can therefore be split into its constituent parts, namely the:
- (a) Shore: i.e. the 'dry' bit;
  - (b) Foreshore, which is the 'sometimes wet and sometimes dry bit', and together with the Shore is the area that most would usually consider to be the 'beach'; and
  - (c) Sea: the 'always wet' bit.
- 3.4 While not legally binding or originated, I have used the following definitions in this report:
- (a) **Shore:** land side of the mean high-water mark. This may be covered in sand, shingle, car parks or a variety of amenity type facilities. This is the almost<sup>1</sup> always 'dry' bit.
  - (b) **Foreshore:** land between the mean low water and mean high water marks which at some point during the day will be covered in water of varying depths depending on the tidal position and the topology of the beach.
  - (c) **Sea:** the area seaward of the mean low water line. This will almost always be covered in water, though the depth at any given point will vary dependent on the state of the tide. The Sea is the territory of the Crown up to 12 miles offshore: an area known as the Territorial Sea, but this area is technically outside of the UK. Inevitably this is the almost always 'wet' bit.
- 3.5 This report is concerned with the legal responsibility for drowning-type risk that arises as a consequence of a person travelling from the Shore to enter the water at the either the Foreshore or the Sea. No drowning risk arises on the Shore, it has no water, yet the Shore is the only location on which PRE or safety activities or personnel could realistically be based – you would not typically place PRE in an area that may be inaccessible by virtue of water coverage. This paragraph alone illustrates the complexity of the issue.
- 3.6 The significance of the delineation between the Sea and the Foreshore cannot be overstated. It quite literally sets out a line in the sand between the UK and what is outside of the UK. This is significant

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<sup>1</sup> I have used the term almost to reflect the fact that certain high tides will exceed the mean high-water mark and some retreat lower tides will retreat further than the mean low water mark. In addition to the mean high and low water marks there are a range of other tide measurements that are available in the literature.

as the vast majority of the legal duties only extend to the boundary of the UK or extend beyond the UK on a very limited and specific basis.

3.7 It is also necessary to apply a definition for the activity that is being considered. For the purposes of this report I have adopted Sea Based Recreation, which is defined below:

(a) **Sea Based Recreation** - means swimming, bathing or otherwise using the Foreshore or Sea for recreational activity that is not based in, or originating from, a vessel and is conducted within a distance of 200m of the mean low water mark.

3.8 This definition is significant as it recognises that the activity with which we are interested is primarily recreation and not work based. This distinguishes it from work activities that are traditionally covered by health and safety legislation, though of course there may be some overlap, for example by those employers who provide opportunities for Sea Based Recreation as a part of their undertaking. It is also significant as it recognises that it involves activities that may be seaward of the low water mark, i.e. outside of the jurisdiction<sup>2</sup> and it does not cover activities relating to vessels, which may be regulated under the Merchant Shipping regime. In addition to the geography point above, this explanation again gives an indication of how complicated this area is.

#### 4. Who might owe duties?

4.1 It is relatively easy to identify categories of duty holders that may owe duties on the beach. These include:

- (a) Landowners and occupiers;
- (b) Employers and those at work;
- (c) Statutory duty holders, including emergency services, local authorities and similar groups;
- (d) Central Government; and
- (e) Others, such as charities like the RNLI.

4.2 In practice, it is often far less easy to identify the identity of some of those duty holders as they tend to overlap and on most amenity beaches there are likely to be several different actual, and categories of, duty holder. For example, consider the ownership of the Foreshore; while around 55% is owned by the Crown Estate, the area is then often leased to other occupiers – as it was at Camber Sands where Rother District Council were responsible, or there are management agreements in place. This is particularly the case for popular amenity beaches. Blackpool is another example where the Council reports that the promenade and Foreshore are under its ownership and management.

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<sup>2</sup> Depending on the legislation in question this may be Great Britain, the UK or the constituent nations.

- 4.3 This relationship can be complicated further by a sequence of sub-agreements, such as Chichester District Council's agreement with West Sussex County Council to manage the Foreshore at Pagham which is now part of a RSPB's managed nature reserve. Further, at a more simplistic level, often the Shore and the Foreshore will have different owners, or occupiers, or both.
- 4.4 Various unhelpful Hansard answers, as recently as 2016, suggest that '*safety at public beaches is generally the responsibility of the local authority, who carry out risk assessments to determine appropriate safety measures.*' This may be partially true, in certain circumstances, but the position is not as black and white as this quote suggests. This is then complicated by the fact that for parts of the day the main drowning hazard only exists on land that those who occupy the Foreshore or Shore neither own or occupy: the Sea.
- 4.5 In short, there is no one legal person who is responsible. Even in emergency response, the duty is split based on geography between the Police and the HM Coastguard.

## 5. What are the duties?

- 5.1 There are no specific Foreshore/drowning related safety obligations set out in law. There are however a range of more general legal duties that might apply, but only in certain circumstances. These include:
  - (a) Health and Safety at Work etc Act 1974 ('HSWA');
  - (b) Occupiers' Liability Acts;
  - (c) Common law duty of care in negligence;
  - (d) Statutory duties; and
  - (e) Bye-laws.
- 5.2 In certain factual circumstances, there may be a duty under the HSWA or Occupiers' Liability Acts on the Foreshore. They duty under that legislation, particularly the Occupiers' Liability Acts, would only require the occupier to warn if a hidden danger that renders the beach area unsafe. Such hazards should be over and above the natural hazards associated with natural areas in order to potentially give rise to a breach of the duty under Occupiers' Liability.
- 5.3 In most normal amenity beaches, where there are no dangers beyond those expected at the Shore and that arise out of the mere existence of water, it is unlikely that there would be a duty arising and there is a sequence of case law establishing this.
- 5.4 While theoretically there could be a duty in common law negligence, in reality the leading cases have interpreted that duty in a near identical fashion to Occupiers' Liability, accordingly it is also unlikely to apply. It has also been considered in the context of the duty of the HM Coastguard in several cases and on each occasion, it was concluded that there was no duty to rescue.

- 5.5 For the HSWA to apply it would require there to be a risk to health and safety of those affected by the undertaking of an employer. While that duty may, at least theoretically, flow from the provision of amenities as a part of a commercial type enterprise, such as kayaking or lifeguarding, in most other situations it would be less obvious that it applies. This is a point illustrated in the Camber Sands Inquest when it was argued by Rother District Council that no duty under the HSWA arose at all. It therefore follows that, at best, the HSWA might arguably apply to the Foreshore.
- 5.6 In addition, there are a range of statutory and public health powers such as under the Bathing Water Regulations. This regime addresses the safety of the water itself and creates a regime to ensure that the sea water being used for bathing is risk assessed and checked to ensure that it is chemically safe. Ironically, there is no parallel regime ensuring that there is a risk assessment of the other risks presented by the water, such as the risk of drowning.
- 5.7 Under the public health legislation, local authorities also have duties that touch on this topic in a limited way. Section 234 Public Health Act 1936, for example, gives local authorities the general power to place such lifesaving equipment as they see fit. This is a discretionary, and therefore not a mandatory, obligation and does not require any form of risk assessment to determine what is appropriate. In Scotland the equivalent power goes further, and the local authority may:
- (a) on the seashore or in or on adjacent waters place notices or other indications advising the public as to any danger or health hazard connected with the seashore or those waters; and
  - (b) provide staff for life saving and any boats or equipment which are appropriate for life saving.
- 5.8 In addition, local authorities have the power to create byelaws on a range of connected topics, including under:
- (a) section 231(1) Public Health Act 1936 which provides the power to create byelaws which:
    - (i) require persons providing accommodation for bathing to provide and maintain PRE;
    - (ii) regulate the areas in which, and the hours during which, public bathing shall be permitted; and
    - (iii) regulate, for preventing danger to bathers, the navigation of vessels used for pleasure purposes within any area allotted for public bathing during the hours allowed for bathing;
  - (b) section 223 Public Health Act 1936 which allows the regulation of swimming baths under the Council's management;
  - (c) section 233 Public Health Act 1936 which allows the regulation of publicly accessible swimming pools which are not under the Council's management;

- (d) section 76 Public Health Act 1961 to prevent 'danger, obstruction or annoyance to persons bathing in the sea or using the seashore' through the regulation of the speed of pleasure boats and their use in a way which might be dangerous; and
  - (e) section 82 Public Health Acts Amendment Act 1907 to regulate a range of ways in which the seashore is used including for the preservation of good order and conduct amongst users.
- 5.9 None of these powers to create byelaws fully address this topic, nor do they specifically cure the regulatory gap at the Foreshore and for Sea Based Recreation, though the powers in the Public Health Act 1936 come closest.
- 5.10 It is also significant that even if there were directly applicable byelaws, there is no effective enforcement regime. The penalty for non-compliance is typically under £50<sup>3</sup>, and it would cost substantially more to investigate and prosecute the matter than the penalty. Further, a £50 fine is clearly not a deterrent or driver for change.
- 5.11 While on some beaches the topology allows water deep enough to swim on the Foreshore at some times of day, at others a substantial amount of Sea Based Recreation will take place seaward of the low water mark. This is demonstrated by, amongst other things, the fact that –nearly 40% of RNLI rescues take place more than 50m from the water's edge, which is likely to be in the Sea. Seaward of the low water mark there is no applicable legal duty, where the injured party is not on a vessel.
- 5.12 To the extent that there are legal duties in relevant legislation that extend beyond the low water mark into the sea, those duties do not apply to this situation. This means by extension that there is no duty to risk assess and no one is likely to be legally responsible for ensuring the safety of those in the sea – a situation described by a then MP in 2006 as '*a ridiculous anomaly*'.
- 5.13 By contrast, if this related to the safety of those who are using a commercial vessel on the same water, there is a significant body of regulation that is likely to apply. Similarly, the quality (and therefore by extension the safety of the water) is also regulated.
- 5.14 While clearly a beach user must accept the risk inherent in the activity they undertake, it is also the case that there should be at least a risk assessment of the hazards of the Sea and Foreshore. After all, if there is no risk assessment how do you know if there is a hidden hazard or not?
- 5.15 When one considers the wider regulatory regime, at present, there is:
- (a) Likely liability on the operator/owner of a vessel if a person fell from a vessel and there was not adequate life-saving equipment etc.
  - (b) Liability on the Secretary of State and to an extent local authorities for, and duties in relation to, the quality of water in the Sea at designated bathing beaches – so the water that you swim or engage in recreation in must be chemically safe;

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<sup>3</sup> There are some cases where it does reach £1000, but even at this level it would still be dwarfed by the cost of prosecuting.

- (c) The ability for local authorities to make byelaws which include, amongst other things, setting speed limits for vessels in the Sea to protect bathers and placing PRE on the Shore; and
  - (d) The potential application of the HSWA on employers and Occupiers' Liability regime on occupiers of the Foreshore and Shore, subject to the scope of the legislation.
- 5.16 There is however no regulation or requirement to risk assess Sea Based Recreation. That there is no regulation of this body of water is likely in part due to difficulties in determining which stakeholder is responsible, though this is not an acceptable excuse.
- 5.17 This is an area where stakeholders wish for clarity and to understand their legal obligations; that there are, in most circumstances, no legal obligations does not sit well and should be addressed.

#### **SAR/ Emergency response**

- 5.18 The only area of clarity is that the MCA is expected to be the primary body responsible for Search and Rescue ('SAR') 'seaward of the cliff edge', albeit in reality in many beach related cases the response may not involve HM Coastguard at all and is likely to involve a beach based lifeguard, usually provided by the RNLI or a SLSGB Club, or applying their methodologies and risk assessments.
- 5.19 While the RNLI has a Royal Charter to provide lifeboat services, which are declared to be used by the HM Coastguard, the RNLI has no legal duty to provide lifeguarding services at the coast – nor does any other body. The RNLI does this as a commercial enterprise, albeit one that is very heavily subsidised through its charitable status and at cost or below and therefore it is commercial in name only. Absent the existence of the RNLI and volunteers it is very likely that the majority of our beaches would not have lifeguards, which when a risk assessment has concluded they are necessary is an unacceptable state of affairs.
- 5.20 It is important to state that not all beaches require lifeguards. However, in my opinion it is necessary to conduct a risk assessment of all amenity beaches so that a proper and considered determination can be made.
- 5.21 Based on the Coastguard Act 1925 and the Hansard entry explaining it from 1992, it is clear that the HM Coastguard has a 'coast watching' duty but what that means is unclear, including whether it would include lifeguarding type coast watching as part of a passive monitoring programme. It is also unclear if it extends to proactive rather than just reactive activities. In the Hansard record from 1992 it is singularly expressed as being in response to an incident, and other Hansard and Transport Select Committee reports and minutes do not illuminate on this topic.
- 5.22 Compared to the other emergency services, the duties of the HM Coastguard are set out in almost no detail and in a way that offers little clarity. The Coastguard Act 1925 requires review to make the duties match what the HM Coastguard actually does and make it fit for the next 100 years.

## 6. Conclusions

6.1 Sea Based Recreation is an endeavour with inherent risk, and this will always be the case, particularly in a natural environment with tides, weather, and a range of hazards in the water. WAID data shows that there were 88 coastal fatalities (accident and natural cause outcomes). The choice to engage in Sea Based Recreation is usually made by the user, though there are a number of examples where those engaged in land-based recreation have found themselves in the Sea.

6.2 In terms of controls, a stark contrast can be drawn between the reality of a coastal environment which is largely unregulated and the HSE's expectations and guidance in relation to a relatively sterile and safe environment of a swimming pool, an area with clearly defined sides and generally a flat and hazard free bottom easily visible through clear water.

6.3 For drowning risks in the Sea there is a regulatory gap where the person who is at risk was not on a vessel, as neither the maritime nor the HSWA or Occupiers' Liability regimes respond. Sea Based Recreation is therefore not protected and those doing so are undertaking the activity entirely at their own risk. PRE and lifeguards are therefore being provided out of primarily a moral and social duty, rather than a legal one, though as described, the local authority has the power to install PRE. This may surprise most people, a point made in a debate in parliament 13 October 2006 when Julia Goldsworthy MP concluded:

*'That is a ridiculous anomaly: the place where people are most likely to drown is the one area where no risk assessment currently takes place.'*

6.4 Even for the periods of the day that part of the Foreshore might be covered by water, it does not automatically follow that either the HSWA or Occupiers' Liability regime would apply. It is more likely than not that absent some specific circumstances, they would not bite, the consequence of which is that there is no regulatory or other duty which is applicable to ensure the safety of those using the beach and they are therefore doing so at their own risk.

6.5 It is also important to consider the social utility that the beaches, particularly well-known amenity beaches such as Bournemouth, Blackpool or Brighton, play in the lives of many people. Taking Bournemouth as an example, statistics from the Bournemouth Borough Council website collated in 2017 suggest that there are 6.88m visitors to Bournemouth every year with some 3,000 deck chairs alone hired out and about 30,000 ice creams purchased on a busy weekend. This is worth in excess of £500m to the local economy. While not all of those visitors will go to the beach or into the Sea, it gives an indication of scale and risk. It is right to say that against that level of visitors at Bournemouth alone, the percentage of those who come to harm is very low. However, if harm eventuates, it could be very serious. When one considers the number of people rescued by the RNLI and HM Coastguard as opposed to those who lost their life it suggests that the risk here is significant, but given there is not an accurate number of those who use the Sea, it is impossible to quantify.

6.6 In my opinion, it is inappropriate to rely on the goodwill of the RNLI and other volunteer lifesaving clubs to subsidise lifeguarding services or for them to be provided by volunteers. Similarly, it is not appropriate for those responsible for attracting people to the coast to have no duty to consider if

safety control measures are necessary. This is not an effective way to ensure that everyone can enjoy the beach and coast safely.

- 6.7 In my opinion, it is necessary to carefully consider changing the legislative regime to close this gap and make what is now voluntary, mandatory. There appear to be five options to be considered, these are:
- (a) No change;
  - (b) New Best Practice Guidelines to drive best practice;
  - (c) Extending or amending existing legislation;
  - (d) Application of byelaws; and
  - (e) New primary legislation to create duties in relation to the beach environment and clarify the HM Coastguard's duties.

#### No change

- 6.8 Clearly, no change and no action is the easiest solution. As demonstrated earlier, identifying the persons responsible is not always easy and failing to tackle this and provide for a legislative solution is the line of least resistance. I would advise against this, in my opinion there is a need to answer the call for clarity. Accordingly, as a bare minimum new guidance is necessary, but preferably legislative change to give a backstop to those requirements.

#### New Best Practice Guidance

- 6.9 The RNLI produces a range of robust guidance for the beach, though much of it is over 10 years old. While the RNLI also provides free risk assessment and guidance services to owners and occupiers of beaches there is a call for a comprehensive guide to beach safety to be produced.
- 6.10 Any guidance produced must explain the legal obligations that arise. It is key to ensure that this leads to proper, appropriate and informed conversations about risk and appropriate control measures being implemented – not a situation where a man-made lake not designed for recreational or any other usage has PRE every 50m whereas the coastline, less than 100m from that lake, has none. Nor should there be a situation where defensive measures are put in place to take the beach out of use. Instead, it must lead to a proper, risk-based approach with proportionate measures being adopted.
- 6.11 A number of respondents have suggested that the approach taken in 'Managing Visitor Safety in the Countryside principles and practice' would be a proportionate and helpful addition, or at worst a good

starting reference point. In reality, I suspect a model taking the best aspects of that guidance and the RNLI guidance would be a very welcome document.

- 6.12 It would also be of great assistance to provide guidance which explains the duties of various parties, including the HM Coastguard.
- 6.13 In my opinion, as a minimum this should be presented as best practice guidance, though I fear that absent of a specific statutory duty behind the guidance, it may lack the necessary force and may not drive any meaningful change.
- 6.14 In addition to this guidance, as mentioned, there is also the HSE swimming pool guidance<sup>4</sup>, which is unfortunate in its description of scope. While in general it does not apply to the Sea/ Foreshore, the HSE swimming pool guidance includes the unhelpful and opaque reference to applying to segregated areas of open water. It then fails to define what segregated means and this could very easily mean by floating markers and rope that very commonly segregate swimming and bathing areas from areas for boats and jet skis. While the HSE suggests that there is little in the guidance that would apply to a beach, the fact that this is not clear is unhelpful.

#### Byelaws

- 6.15 Whilst the byelaw regime currently includes the measures closest to covering this topic, such as the power to install PRE and restrict access or control behaviour in certain areas, and has previously addressed the extra-territorial issue by permitting the power to extend up to 1,000m offshore, it would be an undesirable option. I say this for several reasons. The first and primary reason is that it is a local solution and requires local resources and local legislature to pass in the way that it sees fit. Even if a byelaw was created, and applied with a template to drive consistency, it would result in a piecemeal and sporadic regime. This is demonstrated by the incomplete coverage which can be seen in the various byelaw powers under the Public Health Acts. Further, there is no central repository of these laws.
- 6.16 I have understood that byelaws are not attractive to local authorities and my consultation supports that view. Part of the reason that they are unpopular is that there is no effective enforcement regime as the penalties involved are often under £50 and in some cases £5. Even if the penalty were ten times greater, it would still typically cost thousands of pounds to investigate and prosecute a case. By contrast, fines under the HSWA regime are substantially greater and are regularly in excess of £1million, in appropriate cases. Clearly larger fines act as a greater driver for action and deterrent for non-compliance.

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<sup>4</sup> HSG 179

Extending existing laws

- 6.17 The HSWA already applies, geographically at least, to the Foreshore and, in some limited circumstances, to offshore under the Health and Safety at Work etc Act 1974 (Application outside Great Britain) Order 2013. It would therefore be relatively easy, quick and cheap to insert a new article into the Health and Safety at Work etc Act 1974 (Application outside Great Britain) Order 2013 to cover drowning risk arising out of those entering the Sea from the Foreshore.
- 6.18 This would have the advantage of being a known and developed regime with a clear enforcement model and well-established regulators. A simple amendment could make clear that the duty applies and that there is a duty placed on those operating undertakings on the Shore to at least conduct a risk assessment.
- 6.19 While creating the duty would be relatively easy, from a geographical perspective, this would not address the more difficult issue of to whom the duty applies. The practical difficulty is that any duty that covers the hazards associated with Sea Based Recreation would necessarily need to apply to whoever owned or occupied the Shore. This is because it is the only area that would not be covered in water, at least for part of the time. It is also somewhere that anyone wishing to enter the Foreshore or Sea must cross. It is therefore the logical location for control measures.
- 6.20 The consequence of this is that the occupiers of the Shore would, where they do not also own the Foreshore, owe a duty in relation to a risk that occurred on a neighbour's land, and only then, under the HSWA, if it can be shown that it is within the scope of the conduct of the duty holder's undertaking as opposed to being by the mere existence of the duty holder or land. The extended duty would for this reason be near unique in the safety regime. Case law suggests that it would be at best unclear if this would apply other than in very limited circumstances and to try to extend this would be to try and force something that really does not fit into the regime.
- 6.21 To avoid this situation, a solution would be to specifically legislate to define when it was within the conduct of the undertaking to obviate the issue.
- 6.22 The other analogous regime that might be of assistance is that of the Civil Contingencies. Like safety this has principles of risk assessment and planning at its core and deals with situations where emergencies that may endanger life arise. While superficially this regime appears helpful, on balance I concluded that given it does not offer enforcement and is more about the response to an incident rather than preventing it, it is at best something that complements a solution rather than being that solution.

A new duty

- 6.23 Given the practical issues with the HSWA, a more desirable option would be the creation of a bespoke new regime that specifically addresses the specific issues that arise at the coast rather than trying to push a round peg into a square hole. This legislation would clearly set out who the duty holder is in relation to the drowning risk on the Foreshore and at Sea. That regime could either:

- (a) Mirror the approach taken in relation to Bathing Water and create a duty on central and local government to ensure safety; or
  - (b) Create a regime based on the HSWA concept and principles but without the limitations of the existing case law and definitions.
- 6.24 In my opinion, the Bathing Water model would not work in this area, though the list of registered bathing waters would be a logical place to start for defining the minimum geographical scope for this duty as it is clearly foreseeable that at those circa 400 beaches, people will enter the water to swim. It therefore is illogical that the legislative regime sees fit to protect the quality and safety of the water that they are swimming in but not to protect them from the risk of drowning.
- 6.25 My recommendation would therefore be new specific primary legislation for this regime which would allow a bespoke solution for a bespoke problem, rather than trying to adjust an existing regime as that is not attractive.
- 6.26 I would therefore recommend that legislation is created which places a duty on the owner or occupier of the Shore to ensure that those using the Shore for access to the Foreshore or Sea, both of which should be clearly defined terms, are protected from foreseeable risks to their health and safety. This would include a specific duty to risk assess.
- 6.27 It is critical that this would not be an unfettered and unending duty, instead it must be carefully defined and set out in order to try and strike an appropriate balance between the acceptance of risk by swimmers and the inherent risk associated with natural locations, and the duty incumbent on those encouraging people to the coast and water to ensure that they are protected.
- 6.28 The exact wording of this duty should be subject to consultation and would need careful consideration but would fill a clear and unacceptable regulatory gap. I have suggested some potential wording in this report.
- 6.29 In order for this to be a success, new legislation would need to be supplemented by new specific guidance addressing, in particular, the duty to risk assess and explaining that if a proper risk assessment is carried out and no control measures are necessary then no further action is required. To repeat, this is intended to be a proportionate and sensible response to the real risk that exists.

#### **Role of the HM Coastguard**

- 6.30 The statutory duty of the Coastguard is set out in very basic terms in the Coastguard Act 1925 and as the name of the Act suggests dates back to 1925. The HM Coastguard is described as 'a coast watching force'. While clearly the HM Coastguard is the emergency service that has adopted responsibility for SAR in the Sea, the duties of the HM Coastguard are unclear and not particularised well. They are set out in a single operative section of the Coastguard Act. For this reason alone, the duty requires updating and to be made fit for purpose as well as more closely reflecting what the HM Coastguard actually does. Contrast the single operative section to the rich legislative tapestry that

deals with the legal duty of the Police or Fire and Rescue Service and the lack of clarity becomes at best unhelpful.

- 6.31 The section states that HM Coastguard may be given '*such other duties as may be determined by the Board [of Trade]*'. This is set out in the Hansard where the Secretary of State determines that the HM Coastguard has a responsibility for '*initiation and co-ordination of civil maritime and aeronautical SAR. This includes the mobilisation, organisation and tasking of adequate resources to respond to persons in distress in the air, at sea, in tidal waters or at risk of injury or death on the sea cliffs and shoreline of the UK*'.
- 6.32 Hansard appears to make clear that the primary responsibility of the HM Coastguard is SAR, or at least responding to an incident. However, these duties are then further expanded upon by MCA documentation, which in reality extend far beyond what the 1925 Act states.
- 6.33 It is necessary to update the statutory basis for the HM Coastguard given that the 1925 Act is both very basic and now approaching 100 years old and is out of keeping with the way in which the duties of other emergency services like the Police and Fire and Rescue Service are expressed. In particular, the regime regulating the Fire and Rescue Service shows how clear duties could be drafted.
- 6.34 We understand that there is an intention to update the Merchant Shipping Act in the next five years and if it has not already been undertaken updated duties for the HM Coastguard should be included within that review, though in my opinion there is a need for this sooner rather than later.
- 6.35 Another reason for this is found in the potential ambiguity of the coast watching duty, set out in in the 1925 Act, which gives rise to a cogent argument for the HM Coastguard to have responsibility for lifeguarding activity at the coast. While those steeped in the history of the organisation would no doubt argue that this is not what is meant by the term – something supported by the existence of the National Coastwatch Institution - for most people coast watching and the watching of the coast by lifeguards would be synonymous. It is however fully acknowledged that the HM Coastguard has not provided a visual watch since the 1970s and has been found by the Courts to be under no duty to provide a visual watch. Given the budgetary constraints of the RNLI and other volunteer lifeguards, we can see force in this being reviewed as a part of the review of the 1925 Act and close consideration being given to who is responsible for the provision and/or funding of lifeguarding.
- 6.36 In terms of both the duties of the HM Coastguard and beach safety generally the ambiguity does not help anyone. Again, quoting the Parliamentary debate in October 2006, it is clear that:
- 'Unclear statutory responsibility means that there is no funding, and many local authorities with a significant coastline find that a great burden. There are also complications about beach ownership. I appreciate that that cannot be cleared up immediately or quickly, but progress needs to be made.'*
- 6.37 Sentiments that over 12 years on I wholeheartedly echo. Progress is necessary and the law requires review.

### Recommendations

6.38 As a result, in this report I make seven recommendations:

6.39 In the short term:

- (a) Update and consolidate guidance for managing beach safety
- (b) Engage in multi-party management of this topic to drive solutions

6.40 In the medium term:

- (a) Create a new legal duty to ensure beach safety
- (b) Update the duties of the HM Coastguard to make them fit for the next 100 years

6.41 And other recommendations:

- (a) Clarify that HSG 179 does not apply to the Sea
- (b) Consider if and how the Civil Contingencies regime could apply
- (c) Consider centralisation of the funding, delivery, or both of beach lifeguarding.

6.42 I believe these steps are necessary to ensure safety on our beaches and transform what is undertaken largely on a voluntary basis into a mandatory requirement.

**Dominic Watkins**

**January 2019**



**Part 1:**

**Introduction - what is a beach  
and what are the risks?**

# Introduction

## 1. Introduction

- 1.1 The UK coastline is one of our great natural wonders. It is an area that attracts domestic and international tourism alike, attracting millions of visitors to many parts of the UK every year. The attraction of the coastline is a substantial driver for the coastal economy.
- 1.2 When at the coast, as a nation, we love spending time at the beach and in the sea. Those who swim understand that there is a risk associated with it. For the purposes of this report, this is considered accepted. Notwithstanding this, in 2017 there were 68 fatalities at the coast/ shore or beach, a further 11 in harbours, marinas, docks and ports and 14 at sea. Together that equates to almost two drowning deaths a week.
- 1.3 According to the Water Incident Database ('WAID') data, when aggregated the inland and coastal drowning and water-related suicide in the UK account for, on average, 600 deaths annually. Of these cases, accidental drowning deaths number, on average, 400 per year – approximately one fatal drowning every 22 hours. By contrast, there were 247 deaths by fire in the year ending June 2018<sup>5</sup>.
- 1.4 In 2017 the RNLI saved 84 lives, it attended 15,558 incidents and aided 24,044 people, the majority of whom (61.6%) were within 50m of the water's edge and 43.3% were within 50m of the lifeguarded flags on the beach. This demonstrates that but for the superlative work of the RNLI and lifeguards of other organisations, the number of fatalities and injuries would be substantially higher.
- 1.5 In the summer of 2016, seven men drowned in the sea at Camber Sands. As is usual, this was followed by an inquest in June 2017 when the Coroner recommended that a review of responsibilities pertaining to beach safety in the current system should be carried out. The MCA in its response to the Coroner have committed to commissioning an independent review to gain an understanding of the legal situation. This document is that response.
- 1.6 Drowning at the coast is a very substantial risk that requires a clear cogent legal framework to support the UK Drowning Prevention Strategy. With this in mind there is an almost universal view amongst the stakeholders engaged that greater clarity for safety on the foreshore would be welcome. This has been the position for well over 14 years since the Transport Select Committee considered the issue<sup>6</sup>.
- 1.7 There is much ambiguity in terms of who has responsibility for managing water safety risks. This ambiguity has existed for a substantial period of time. The current prevention arrangements, particularly at a local level, are at best difficult to understand and interpret. This lack of clarity can

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<sup>5</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/754457/fire-and-rescue-incident-june-2018-hosb2518.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754457/fire-and-rescue-incident-june-2018-hosb2518.pdf)

<sup>6</sup> <https://publications.parliament.uk/pa/cm200405/cmselect/cmtran/322/32202.htm>

inhibit possible duty holders from taking action to reduce risk. This is not least because people's natural assumption does not, and some statements emanating from government do not, naturally correlate with the legal position. For example, in response to a question from Clive Efford MP on 2 September 2016 asking a Minister 'whether his Department plans to review safety arrangements on English beaches; and if he will make a statement', the then Parliamentary Under-Secretary for Local Government said that local authorities were responsible:

*'Safety at public beaches is generally the responsibility of the local authority, who carry out risk assessments to determine appropriate safety measures.'*<sup>7</sup>

- 1.8 In response to a more direct question on 14 September 2016 regarding which authority is responsible for the safety of beach users and swimmers at beaches in Gwynedd, the then Minister of State for Transport provided an almost identical answer<sup>8</sup>:

*'Safety at public beaches is generally the responsibility of the local authority, who carry out risk assessments to determine appropriate safety measures.'*

*Gwynedd Council have information guides about beach and harbour safety on their website.'*

- 1.9 With the greatest of respect to both answers, I am not convinced that they are entirely accurate or that it is as simple as this suggests. However, the fact that two Ministers have provided this view underlines the need for clarity, a point that had been made in a debate in Parliament on this topic a decade earlier<sup>9</sup>.

- 1.10 A decade earlier, a debate included the following exchange highlighting the fact that it is far from clear who has a duty once people are in the water:

**Alison Seabeck (Plymouth, Devonport) (Lab):** As the hon. Lady knows, I was a lifeguard in a previous life. When a public pool becomes overcrowded, the lifeguards can close it and get people out of the water in safety. I have corresponded with the Health and Safety Commission and the position on a beach is incredibly ambiguous. Once people are in the water, who has the duty of care? I am pleased that the hon. Lady has called the debate and I await the Minister's response with interest.

**Julia Goldsworthy:** I thank the hon. Lady for intervening. I was about to refer to some correspondence that she had with the RNLI and the Health and Safety Commission. She asked about statutory responsibility for safety and whether risk assessments should be made on the beach. The HSC response made it clear:

<sup>7</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-02/44806/>

<sup>8</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-14/46397/>

<sup>9</sup> <https://publications.parliament.uk/pa/cm200506/cmhansrd/vo061017/debtext/61017-0021.htm#0610183000039>

“Where a beach is being actively maintained as a leisure amenity on which members of the public are encouraged to use services... the operator... will need to conduct a risk assessment.”

That sounds straightforward, but the second paragraph states:

“However, while the duty of care would include the beach down to the low water mark, the sea itself would not be part of the undertaking, so there is no obligation under health and safety law to assess the risks of swimming or provide control measures such as lifeguards.”

That is a ridiculous anomaly: the place where people are most likely to drown is the one area where no risk assessment currently takes place.

The issue is complex and becomes increasingly so when there is more than one owner of a beach.

1.11 This exchange underlines the central interwoven issues that underpin why clarity is necessary. To address them this report is split into five principal sections:

- (a) Part 1: Introduction, Scope and what is a beach?;
- (b) Part 2: Who might owe a duty?;
- (c) Part 3: What duty might be owed?;
- (d) Part 4: Are the current duties sufficient?; and
- (e) Part 5: Conclusions and recommendations.



# Scope

2. This report follows a Preventing Future Deaths Report ('PFD') issued by the Coroner following the Camber Sands Inquest. The PFD raised concerns about the organization of safety on the beaches in the UK.

2.1 The MCA has therefore commissioned this report, which will:

- (a) identify who has legal responsibility for beach safety. This may include landowners, local authorities, or other duty holders;
- (b) help understand how beach safety management is currently arranged and who, if anyone, is legally responsible for the management of water safety risks on UK beaches; and
- (c) identify current practice and drivers in the UK to provide a comparison on the approach to selected risk themes in the UK and any useful reference to abroad.

2.2 The report does not consider sea-based rescue, it only considers the duty (insofar as one exists) for protecting those engaged in Sea Based Recreation.

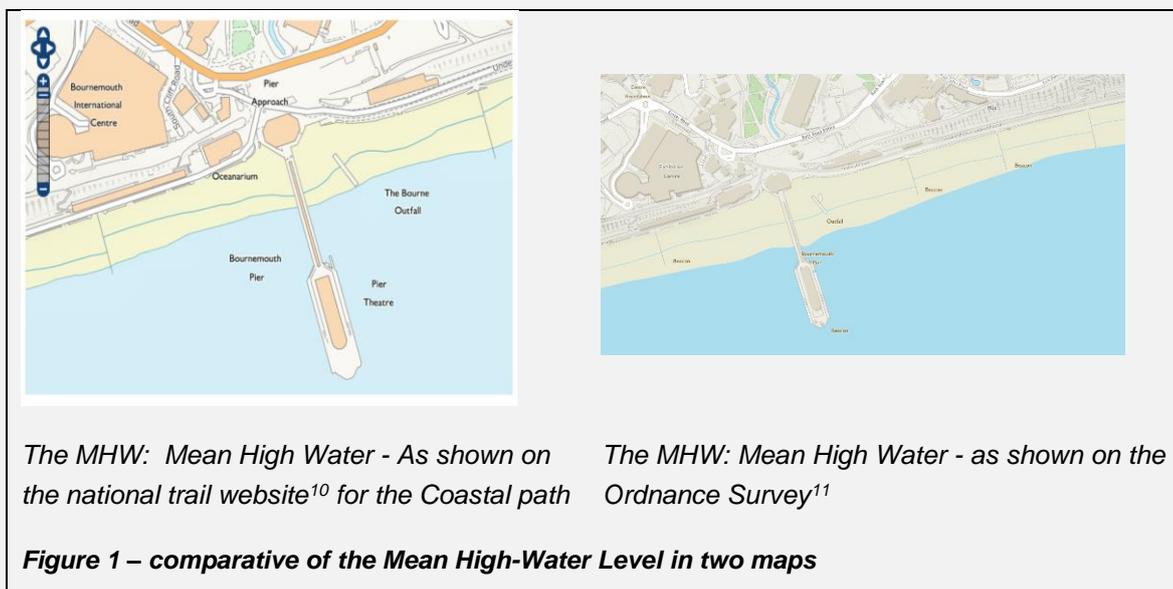
2.3 The report will not consider the general arrangements for UK Search and Rescue responsibilities. As these are documented in an existing system, this is out of scope, however I will consider the scope of the statutory duties placed on the HM Coastguard.



# What is a beach?

## 3. Introduction

- 3.1 Much like the old adage in relation to an elephant, most people would know a beach if they saw one. To most people, the first part of the Oxford Dictionary definition of a *pebbly or sandy shore, especially between high and low water marks* would resonate.
- 3.2 However, the second part of that definition: the geographical reference to a location *between high and low water marks*, makes the position more complex in both practice and in law. This is not least because the mean low water mark is, as is described later in this report, the geographical extent of the UK and by extension the application of most law. Yet, many people would, naturally, bathe or swim in deeper water beyond that point.
- 3.3 Even the high and low water descriptions are not consistently applied, and different maps appear to position the mean water lines differently. Compare for example the two maps of Bournemouth pier area and there is a stark difference in the location and trajectory of the high water line, which is the light blue line that appears to have been drawn 'freehand' above the sea on the yellow sand.



- 3.4 Using the Ordnance Survey guide to map abbreviations<sup>12</sup>, it is fair to assume that these are showing the same location, the Mean High-Water mark.
- 3.5 It has been drawn to my attention that there are a range of other measurements of the tide, these include the Highest and Lowest Astronomical Tide, the Mean Low (and High) Water Springs and the

<sup>10</sup> <https://www.nationaltrail.co.uk/south-west-coast-path/plan>

<sup>11</sup> <https://osmaps.ordnancesurvey.co.uk/50.71490,-1.87551,17>

<sup>12</sup> <https://www.ordnancesurvey.co.uk/resources/maps-and-geographic-resources/map-abbreviations.html>

Mean Low (and High) Water Neaps. I have been directed to the definitions for these terms set out on the National Tidal and Sea Level Facility website<sup>13</sup>, which are set out below:

- (a) HAT - Highest astronomical tide and LAT - Lowest astronomical tide - Highest astronomical tide (HAT) is the highest level, and Lowest astronomical tide (LAT) the lowest level that can be expected to occur under average meteorological conditions and under any combination of astronomical conditions.
- (b) MHWS - mean high water springs and MLWS - mean low water springs - the height of mean high water springs is the average throughout the year (when the average maximum declination of the moon is 23.5°) of two successive high waters during those periods of 24 hours when the range of the tide is at its greatest. The height of the mean low water springs is the average height obtained by the two successive low waters during the same period.
- (c) MHWN - mean high water neaps and MLWN - mean low water neaps - the height of mean high water neaps is the average throughout the year (when the average maximum declination of the moon is 23.5°) of two successive high waters during those periods of 24 hours when the range of the tide is at its least. The height of the mean low water neaps is the average height obtained by the two successive low waters during the same period.

3.6 While these other measurements of tide levels undoubtedly have a role to play in determining the likely depth of water or water coverage, I am not convinced that they assist me with determining legal duties. This is because, most publicly available maps and the most relevant legal references are to the mean low water level, and for that reason alone I will adopt that measure in this report.

**Legal definition**

3.7 There is no universally agreed definition of a beach in law. This is likely because it is a complex and moving natural environment.

3.8 In the same way, there is no agreed definition of foreshore or shore. The closest are the definitions of "seashore" which appears variously, including in the Civic Government (Scotland) Act 1982 and in the Marine and Coastal Access Act 2009, in which the definition includes the word Foreshore.

3.9 Even these are different, but cover broadly the same area:

*"seashore"<sup>14</sup> means the shore of the sea, that is to say, the land between the low water mark and the high water mark of ordinary spring tides and every cliff, bank, barrier, dune, beach, flat, esplanade or other land above the said high water mark adjacent to the shore, and to which the public have right of access;*

*"seashore"<sup>15</sup> means—*

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<sup>13</sup> <https://www.ntsfl.org/tqi/definitions>

<sup>14</sup> Civic Government (Scotland) Act 1982

<sup>15</sup> Marine and Coastal Access Act 2009

*(a) the Foreshore, that is to say, land which is covered and uncovered by the ordinary movement of the tide, and*

*(b) any land, whether or not covered intermittently by water, which is in apparent continuity (determined by reference to the physical characteristics of that land) with the Foreshore, as far landward as any natural or artificial break in that continuity;<sup>16</sup>*

- 3.10 In England and Wales the Supreme Court<sup>17</sup> has adopted a similar definition, albeit without citing either source:

*The Foreshore around England and Wales, by which is meant the area between the high water and low water mark, is owned by the Crown, although it is open to the Crown to alienate it, either permanently by conveying or transferring it, or temporarily by granting leases over it*

- 3.11 It is a similar definition to this that is adopted by the Crown Estate for the purposes of determining the extent of the circa 50% of the UK Foreshore that it owns.

#### **The extent of the UK**

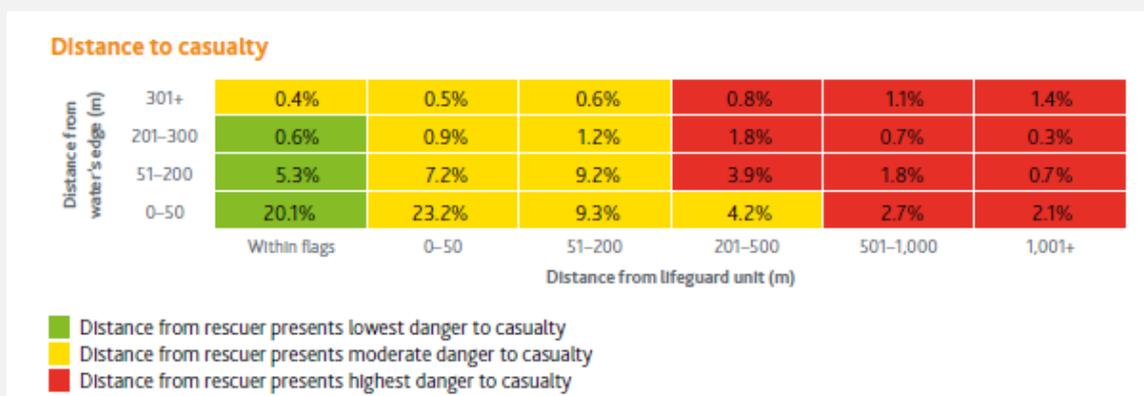
- 3.12 One of the difficulties with establishing responsibility for beach safety is that there is a line in the sand where the UK ends, and the territorial sea starts. This is significant as most of the relevant legislation only applies to the geographical extent of the UK, or constituent country.
- 3.13 Under the Territorial Sea Act 1987 and subordinate legislation, the Territorial Sea is found 'adjacent to' the United Kingdom. The Territorial Sea (Baselines) Order 2014/1353 stipulates that the baseline for calculating the landside starting point for the territorial sea is the mean low water mark. It therefore follows that everything landside of the low water mark is in Great Britain (and by extension the UK) and the HSWA applies. Everything to the seaside is part of the Territorial Sea and subject to limited exceptions the HSWA does not apply. There is in this case, quite literally, a line in the sand delineating the application of the law.
- 3.14 This is important, as a substantial percentage of emergency responses are to an area likely to be outside of the UK. The RNLI Annual Operational Statistics Report 2017 provides details of incidents by distance from the water's edge. If you make the reasonable assumption that anything over 50m from the water's edge is likely to be in the Sea<sup>18</sup> then based on the 2017 statistics, shown in the table below extracted from the RNLI report, 38.4% of the incidents their lifeguards respond to took place in the Sea. There will also be parts of the day when the water's edge is the low water mark and any rescue would be in the Sea, i.e. a proportion of the rescues in the 0-50m category may also be in the Sea at certain times of the day.

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<sup>16</sup> Section 147 Marine and Coastal Access Act 2009

<sup>17</sup> R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another [2015] UKSC 7

<sup>18</sup> Defined in section 4.1 below.



**Figure 2. Percentage of incidents responded to by RNLI lifeguards by distance to casualty. Source: RNLI 2017 Annual Operational Statistics Report.**

#### 4. Terms used in this report

4.1 For the purposes of this report I am asked to consider who has legal responsibility for the risk of drowning after entering the water from a beach. Accordingly, rather than apply one overarching label, it is more appropriate to recognize that the beach is in fact made up of several elements and the responsibility may differ depending on which part you happen to be concerned with. To avoid this issue, I will use the following terms in this report:

- (a) **Beach** to cover both the **Shore** and the **Foreshore**;
- (b) **Shore**: the landward side of the high-water mark, this may be covered in sand, vegetation or pebbles/ rocks depending on location;
- (c) **Foreshore**: the area between the mean high and mean low water marks. This area will be covered by water at some points of the day and when exposed may be covered in sand, vegetation or pebbles/ rocks depending on location; and
- (d) **Sea**: The area seaward of the mean low water mark, this is usually the Territorial Sea.

4.2 In colloquial terms, as shown in the image of Bournemouth below, the

- (a) the Shore is the 'dry' area.
- (b) the Foreshore is the area which is 'sometimes wet' and parts of the Foreshore will be covered in at least some water each day; the amount of which will depend on the topology of the particular beach and the tide cycle.
- (c) The Sea is always all 'wet'.



4.3 It of course should be recognized that at certain times of year the tide might be higher or lower than the mean marks and this is therefore not an exact science.

4.4 In addition, in terms of scope, it is important to have in mind the types of activity that take place on a beach and are therefore subject to risk. In essence, we are concerned with Sea and Foreshore based recreation activity. This will primarily be swimming, wading, and similar activity but would cover all other activities that do not originate in a vessel, as the vessel will be covered by the maritime safety regime<sup>19</sup>. As a consequence, I have adopted the term "Sea Based Recreation":

**Sea Based Recreation** means swimming, bathing or otherwise using the Foreshore or Sea for recreational activity that is not based in, or originating from, a vessel and is conducted within a distance of 200m of the mean low water mark.

4.5 While Sea Based Recreation is expected to be a recreational activity, it is possible also that there will be those at work conducting activities that impact on those conducting Sea Based Recreation.

4.6 Given the RNLI's statistics regarding the location of incidents, it is clear that there needs to be a consideration of the responsibility not only for Sea Based Recreation taking place on the Foreshore, but also in the Sea.

<sup>19</sup> The Merchant Shipping Act, amongst other legislation

# What is the risk?

## 5. The beach environment

- 5.1 The beach is a complex environment. Most people will understand that by entering water there is a risk of drowning. In addition to this, there are a range of other environmental factors that may impact that risk. These risks include tidal flow, rip currents, submerged hidden objects and cold-water shock.
- 5.2 These diagrams from the RNLI concisely demonstrate how the simple geography of a beach makes a substantial impact to the risk that it poses.

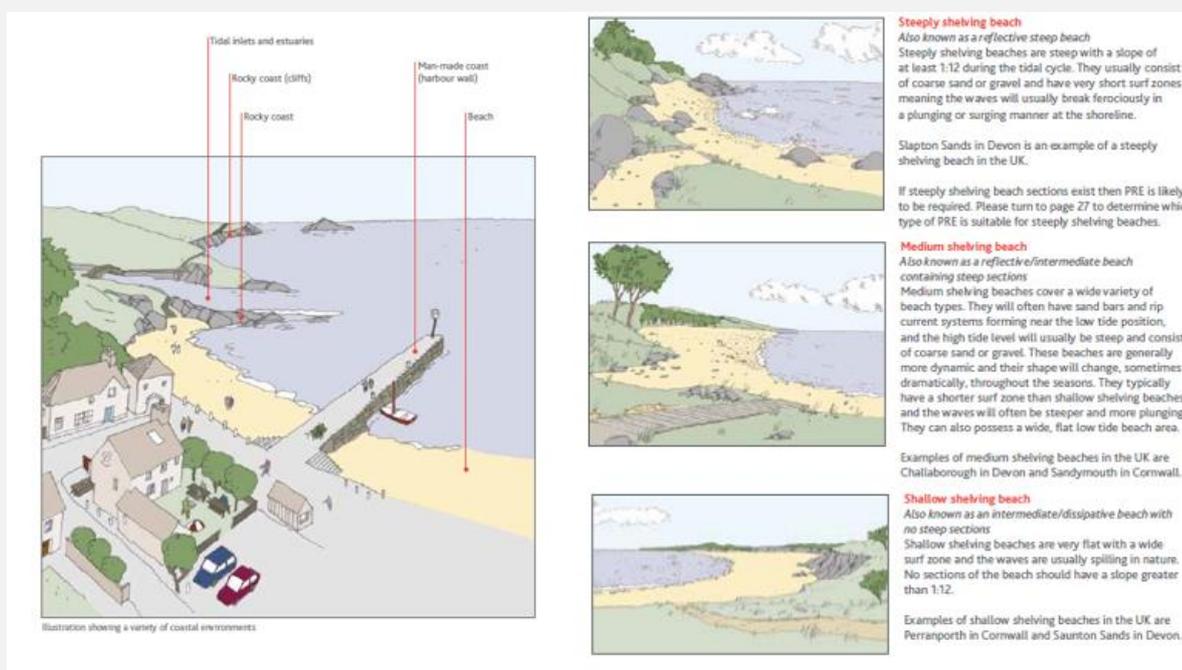


Figure 3. Beach hazards. Source: *A Guide to Coastal Public Rescue Equipment, RNLI, 2007*

- 5.3 In addition to the angle or pitch of the Foreshore into the Sea, many beaches will also have a combination of hidden submerged hazards, such as rocks or partially submerged hazards such as groynes and buoys, navigation aids, and other similar objects. These aspects, together with the moving, dynamic nature of the tide make beaches a much more difficult area to risk assess, though the RNLI has an excellent template.
- 5.4 This point is reinforced by the World Health Organization in its *Guidelines for safe recreational water environments, Volume 1: Coastal and fresh waters* ('WHO Guidelines'). It advises that the assessment of a beach or water should take into account several key considerations, including:
  - (a) the presence and nature of natural or artificial hazards;

- (b) *the severity of the hazard as related to health outcomes;*
- (c) *the availability and applicability of remedial actions;*
- (d) *the frequency and density of use; and*
- (e) *the level of development.*

*Health risks that might be tolerated for an infrequently used and undeveloped recreational area, for example, may justify immediate remedial measures at other areas that are more widely used or highly developed.*

5.5 The WHO Guidelines summarize hazards and suggested measures for reducing risks. These principal hazards are summarized in the table below for incidental contact with water. A similar table exists for more substantial contact with water<sup>20</sup>:

TABLE 1.4. HAZARDS AND MEASURES FOR REDUCING RISKS IN INCIDENTAL CONTACT RECREATION

Examples of incidental contact recreational activities <sup>a</sup>	Principal hazards	Potential risk reduction measures
Rowing, sailing, canoe touring (1, 2, 3, 5, 6) Wading (1–8) Fishing (1–8) Paddling, adults (1–8) (for paddling by young children, see Table 1.5)	1. Falling in, drowning	1. Where appropriate: safety rails, lifebelts/lifejackets, warning notices, broadcast gale warnings, education, legislation regarding use of lifejackets while boating, supervision and availability of rescue services. Personal care.
	2. Leptospirosis (fresh water)	2. Bankside management to control rodents, litter collection. Treating and covering cuts and abrasions prior to exposure. Seeking medical advice if influenza-like symptoms are noticed a few days after recreation.
	3. Cyanobacterial toxicoses (fresh water)	3. Control of eutrophication, monitoring and reporting of cyanobacterial populations, curtailing recreation during blooms. Local publicity. Personal awareness: reporting blooms, avoiding contact, washing down body and equipment after recreation.
	4. Injury; treading on broken glass or jagged metal waste	4. Litter control, cleansing recreational area. Putting rubbish in bins or taking it away. Prohibiting use of glass on beach.
	5. Sunburn, sunstroke, skin cancer	5. General and local publicity. Use of sunscreen or sunblock, limit exposure. Wearing protective clothing.
	6. Bites from mosquitoes and other insect vectors of disease	6. Health warnings to travellers, anti-malarial therapy, avoidance of infested regions, application of appropriate insect repellants.
	7. Fish stings	7. Local awareness raising where problem occurs.
	8. Swimmers' itch and schistosomiasis (freshwater)	8. Control weeds and aquatic snails. Avoiding warm, snail-infested ponds. Personal awareness raising. Information on occurrence of schistosomiasis.

<sup>a</sup> Numbers in parentheses refer to principal hazards (column 2) and potential risk reduction measures (column 3).

**Figure 4. Principal hazards connected with Sea Based Recreation. Source: WHO Guidelines.**

5.6 There will also often be hazards that transfer from the Shore to the Foreshore as a result of the pursuit undertaken. These hazards may include simple wading or bathing activity, through to pursuits such as kayaking or more daring activities such as zipwires over the water from Bournemouth Pier to the beach.

The breadth of the pursuits being undertaken is demonstrated by the RNLI's *RNLI Annual Operational Statistics Report 2017*, which clearly shows the broad range of activities that they have to respond to, from walking and bodyboarding, to swimming, surfing, kayaking and inflatables. WAID data shows there were 26 fatalities where walking/running was listed as the activity, 4 were involved in manual paddle sports and 14 where the individual was swimming.

**6. The level of intervention necessary**

6.1 Statistics from the WAID shows that there were 88 coastal drownings in 2017 and that the RNLI saved the lives of a further 84 people in 2017.

6.2 The RNLI Operational Statistics record the top six environmental causes of incidents. Amongst these, rip and other currents account for 1,340 of the incidents, approximately twice the level of cause two and three: tidal cut off (672) and wind (612).

6.3 The RNLI and WAID statistics provide a clear insight into the scale of risk and how the organization is effectively managing it:

WAID Figures	Fatalities
Coast/ shore/ beach	68
Harbors	11
At sea	14
Lake/loch/Lough	4
	<b>97</b>
Plus RNLI lives saved	84
	<b>181</b>

RNLI Figures	Number
Lives saved	84
People aided	24,044
Incidents	15,558
Preventative Actions	3,323,464

**Figure 5. RNLI statistics illustrating scale of risk connected to Sea Based Recreation.**

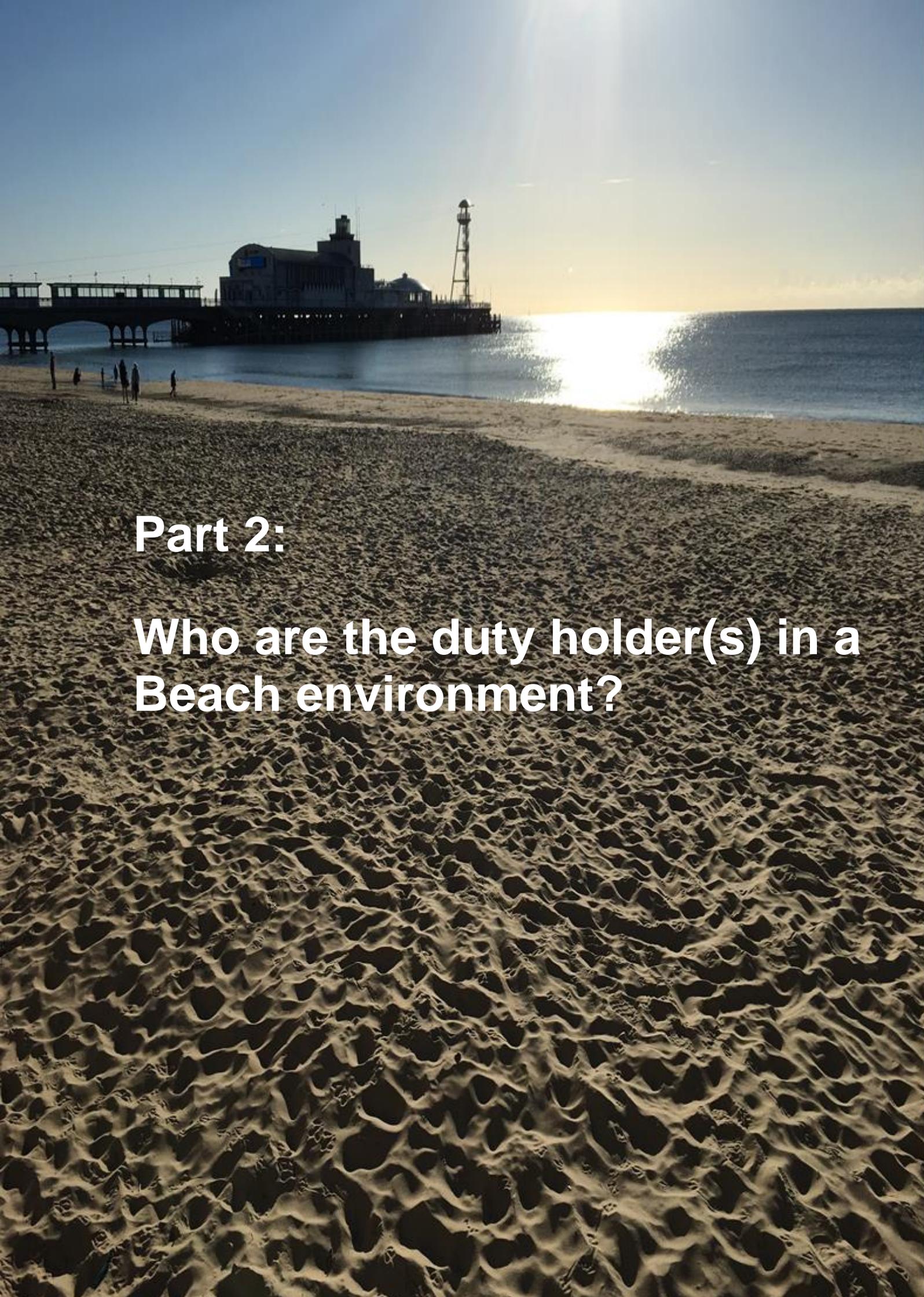
6.4 In every year between 2013 and 2017 the RNLI has responded to at least 15,500 incidents and has aided at least 18,000 people. Similarly, in the same period HM Coastguard has responded to over 20,000 incidents with the volunteer Coastguard Rescue Service being called out on average 13,000 times. A number of these incidents would have also been attended by RNLI assets. SLSGB statistics cover a much smaller area but tell a similar story.

6.5 Of the lifesaving interventions, it is clear that without lifeguards, those requiring lifeguarding intervention in the Sea are unlikely to have survived.

Medical Condition	Number	%
Unconscious and breathing	41	2.8
Unconscious and not breathing	11	0.8
Choking	8	0.5
Life threatening bleed	2	0.1

*Figure 6. Results of lifesaving interventions conducted by RNLI lifeguards. Source: RNLI*

6.6 Figure 6 clearly demonstrates that without the superlative work of the RNLI, Coastguard Rescue Service and other lifeguards, the number of fatalities and serious injury resulting from risks connected with Sea Based Recreation would be substantially higher. This is not an issue that can be ignored.



**Part 2:**

**Who are the duty holder(s) in a Beach environment?**

# Who are the duty holder(s) in a Beach environment?

## 7. Introduction

7.1 There are a wide range of different duty holders who may have some responsibility for water safety in a beach environment.

7.2 The World Health Organization summarises it well:

*Owners or service providers and their personnel are key players in the control of hazards to human health and in some jurisdictions may have a legal obligation to execute continued “due diligence” relative to the safety of water or beaches. Rural or undeveloped recreational water areas often have different management arrangements and priorities. In all cases, considerable capacity to limit health risks is in the hands of the user, who should assume a degree of responsibility when engaged in recreational activities. Non-governmental organizations and special interest groups also have an important role to play.<sup>21</sup>*

7.3 Different legal obligations apply depending upon the role and responsibility that the legal person in question has in relation to the land concerned. This is complicated by a range of factors, including the often different ownership of the Shore and the Foreshore; that it is necessary to pass over the Shore to reach the Foreshore and the Sea; and that as the Shore is the only almost always dry part, it is the only place where PRE could be placed.

7.4 Further, in addition to duties that are linked specifically to the land, there are also duties that are placed on organs of the state, whether local or Central Government or through regulators/ quasi regulators such as the MCA.

7.5 In order to make this analysis simpler, I have grouped the duty holders into five general groups:

- (a) Landowners and occupiers;
- (b) Duties placed on employers and those at work;
- (c) Statutory duty holders, including emergency services, local authorities and similar groups;
- (d) Central Government; and
- (e) Other, such as charities.

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<sup>21</sup> Page 1, Guidelines for safe recreational water environments VOLUME 1 COASTAL AND FRESH WATERS

- 7.6 In some cases, the duty holders may move across different categories, but this division is helpful for the assessment of the potential applicable law.

## Owners or occupiers of land

- 7.7 Many legal duties flow from, or can be attributed to, ownership or occupation of land. In order to determine duties in relation to land, it is key to understand who owns it and who occupies it. This is often not as simple as it seems.

- 7.8 For the purposes of this section I have grouped together owners and occupiers and refer to them collectively as occupiers. By occupiers I mean those with a legal right granted by the owner to be on the land.

### **The Shore**

- 7.9 As set out in Part 1, the Shore and the Foreshore typically make up the area that is collectively known as the beach. In terms of landownership there tend to be different owners for these two areas and consequentially they take different responsibilities for safety. As a general rule the Shore has limited amounts of water on it and therefore gives rise to a very limited risk of drowning – it is however clear that in order to access the Foreshore, it is necessary to cross the Shore, therefore the Shore plays a critical role in the wider amenity of the Foreshore.

- 7.10 A range of landowners are responsible for the Shore adjacent to the Sea. They include:

- (a) the Crown;
- (b) Central Government;
- (c) local government at county, unitary, or district level;
- (d) trusts (such as the National Trust); and
- (e) a range of private landowners.

- 7.11 While the specific identity of the ultimate landowner may not always be easy to identify, we understand it is at least relatively straightforward to identify which of these general groups is responsible. Evidence from the RNLI indicates that they have been relatively successful in identifying who may legally give them consent to be on the land.

- 7.12 On the whole, these groups all owe duties to ensure that those using the land can do so safely under the scope of the Occupiers' Liability Acts. These duties will be discussed in greater detail later in this document. This group will owe duties to anyone visiting or trespassing on their land. The extent of the duty owed to trespassers by private landowners cannot place an undue burden on the occupier.

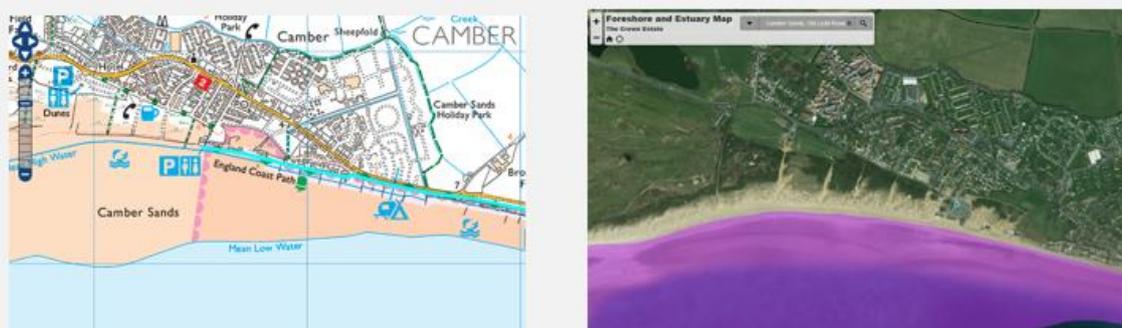
7.13 If the landowner is conducting business on the beach (e.g. running a private beach with an entry fee or a swimming school), it will owe duties under the health and safety at work regime (see below) to the extent that their activity on the Beach forms part of the landowner's undertaking.

7.14 The Shore is on the whole the less contentious aspect, but it is the location from which any PRE or access to the Foreshore and Sea will take place and therefore it is vital to understand ownership.

**The Foreshore**

7.15 There is often a difference between who owns the Shore and who owns the Foreshore/seabed. As indicated in Part 1, the Foreshore is a term that is not defined in law however is generally accepted in case law dating back to at least 1903 as being *the area of the shore between the high and low water marks of ordinary spring tides*. Accordingly, given that this area is much more likely to have water on it, a greater risk of drowning would exist.

7.16 As I understand it, the Crown Estate owns approximately half of the Foreshore in the UK, including inland water. The area owned by the Crown Estate can be determined by virtue of the maps on the Crown Estate Website. In short, the area shown in purple below is owned by the Crown Estate.



**Figure 7. Camber Sands beach. Purple highlighting shows areas owned by the Crown at Camber Sands. Source: Crown Estate Ownership online map.**

7.17 Where the Foreshore is not owned by the Crown Estate, it will be owned by a private landowner. There can be additional complexity where the Foreshore area may be leased to a tenant such as a local authority or is managed or operated under a licence. This was the case in Camber Sands in the example above and is the case at Blackpool, where the local Council has reported that it owns and manages both the promenade and beach areas down to the mean low water mark.

### The Sea

- 7.18 The land beyond the low water mark, shown as where the 'blue' sea starts in the left hand map in Figure 7, is the baseline for the calculation of the territorial sea, which extends to 12 miles from that mark<sup>22</sup>. The territorial sea is the responsibility of the Crown.

## Employers

- 7.19 There may be a wide range of businesses on a beach. These will range from the employers of those conducting incidental amenity services on a beach, such as coffee shop employees, through to those with a direct relationship with water safety, such as those employed as lifeguards. There are also those with indirect links such as local authority employed beach wardens or those whose undertaking involves water-based activities – kayak rental companies for instance.
- 7.20 Where an employer operates within Great Britain, they owe duties under legislation such as the HSWA, though the scope of their undertaking defines the limit of their duty.

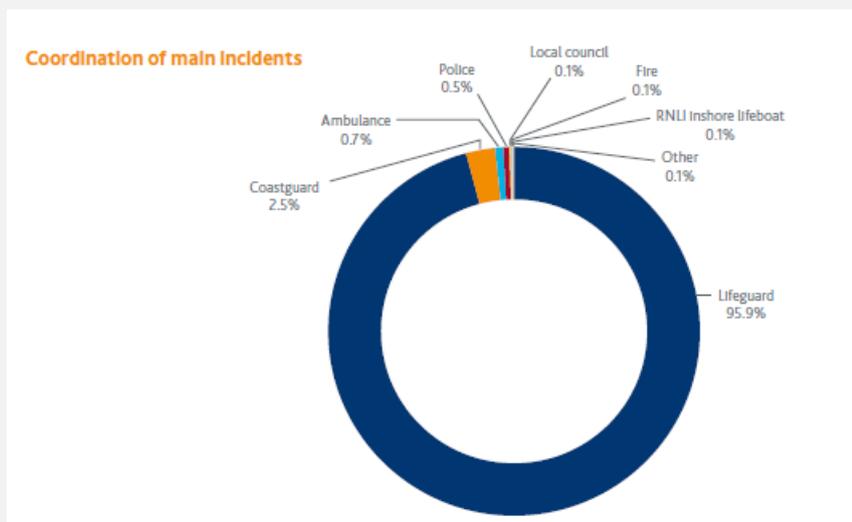
## Emergency services and regulators

- 7.21 When something goes wrong, the emergency services act. Depending on the location the rescue may be coordinated by either:
- (a) HM Coastguard; or the
  - (b) Police; with assistance from the
  - (c) Fire and Rescue Services.
- 7.22 The duties of each emergency service are set out in Acts of Parliament. While some emergency services, such as the Fire and Rescue Service, have duties that include the duty to educate, this is not true of all. The duties of the HM Coastguard are particularly poorly articulated, and I return to this later in the report.

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<sup>22</sup> Territorial Sea (Baselines) Order 2014/1353

- 7.23 Some local councils enter into agreements with local police services, whereby a few police officers monitor local beaches in the high season, assisting lifeguards and council employees with keeping order and with roles such as looking for lost children.
- 7.24 The RNLI's statistics show the vitally important role that lifeguards play in emergency response on the beach. The graph in Figure 8 speaks for itself.



**Figure 8. Division of responsibility for coordination of response to main incidents. Source: RNLI's Operational Report 2017**

- 7.25 It is worth noting that the emergency services will respond to a much wider range of emergencies at the wider coastal area than those relating directly to a drowning risk. Examples include cliff falls and more unusual examples such as the Birling Gap incident in 2017 where the DEFRA report recorded a visible cloud or haze drifted from the sea onto the Sussex coast at Birling Gap, near Beachy Head. As it reached the busy beach, people started to complain of burning eyes, sore throats and skin irritation, with some people reporting vomiting. These wider issues, while rightly part of the mix of things that should be considered by the emergency services, are outside of the scope of this report.

Regulators

- 7.26 The position with regulators equally turns on a line in the sand. Health and safety legislation is enforced by either the Health and Safety Executive ('HSE') or the local authority Environmental Health Officers, depending upon the division of labour between the two bodies set out in the Health and Safety (Enforcing Authority) Regulations 1998 and the associated Guide to Allocation<sup>23</sup>. This concludes that the local authority is the usual enforcing authority for "beach activities" and states:

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<sup>23</sup> LAC 23/15 Rev 1



Beach activities	Local Authority ("LA")	<i>For the practice or presentation of the arts, sports, games, entertainment or other cultural recreational activities except where the main activity is the exhibition of a cave to the public. (Sch 1 para 9). Catering services, consumer services or other Schedule 1 activities. Note LA boundary extends to low water mark.</i>
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- 7.27 It clearly states that the regulatory boundary is the low water mark, and generally the HSE does not regulate beyond this point.
- 7.28 There is a Memorandum of Understanding ('MOU') between the HSE, the MCA and the Marine Accident Investigation Branch to *ensure collaborative working where their duties overlap for health and safety enforcement*. In essence, the MOU concludes that the HSE is responsible for offshore works covered by its specific offshore regulations; otherwise the MCA is responsible for safety arising out of merchant shipping including work activities for those on board.
- 7.29 The relative jurisdictions, as summarised in the Operational Working Agreement that sits alongside that document, are reproduced in the table below:

Scope of jurisdiction		
HSE	MCA	Marine Accident Investigation Branch (MAIB)
Work activities covered by the HSWA and its relevant statutory provisions (e.g. docks, jetties, loading/cargo operations, ship repair, offshore installations, energy structures etc.).	UK ships and those working on them anywhere in the world.  Foreign flag ships and those working on them in UK waters (including inland areas such as ports).  Search and rescue coordination in UK SAR area.	All marine incidents/accidents in the territorial sea and inland waterways.  Incidents / accidents involving UK ships anywhere in the world.  Investigating foreign vessels outside the territorial sea when no UK flagged vessel is involved if directed to do so by the Secretary of State.

- 7.30 For the purposes of this report, where the activity is covered by the HSWA then the HSE (and therefore the local authority) would be responsible. Where it is not, the MCA is expected under the

Operational Working Agreement to take the lead, though the document does not consider an analogous situation to the one considered in this report.

## Local or Central Government

### *Local Government*

- 7.31 In addition to being landowners or occupiers and service providers, local authorities owe a range of statutory duties that touch on water or beach safety. These will be considered further in Part 3.
- 7.32 It is also noteworthy that the Government has repeatedly in Hansard stated that local authorities are responsible for beach safety.

### *Central Government and bodies*

- 7.33 At Central Government level, there is no single obvious department that is responsible for beach safety. Insofar as it is covered by maritime issues, the Secretary of State for Transport is responsible, and it is the Secretary of State that is listed as being responsible for maritime issues under the Civil Contingencies Act. Though it is noteworthy that the HSE is a non-departmental body sponsored by the Department for Work and Pensions.

## Other bodies

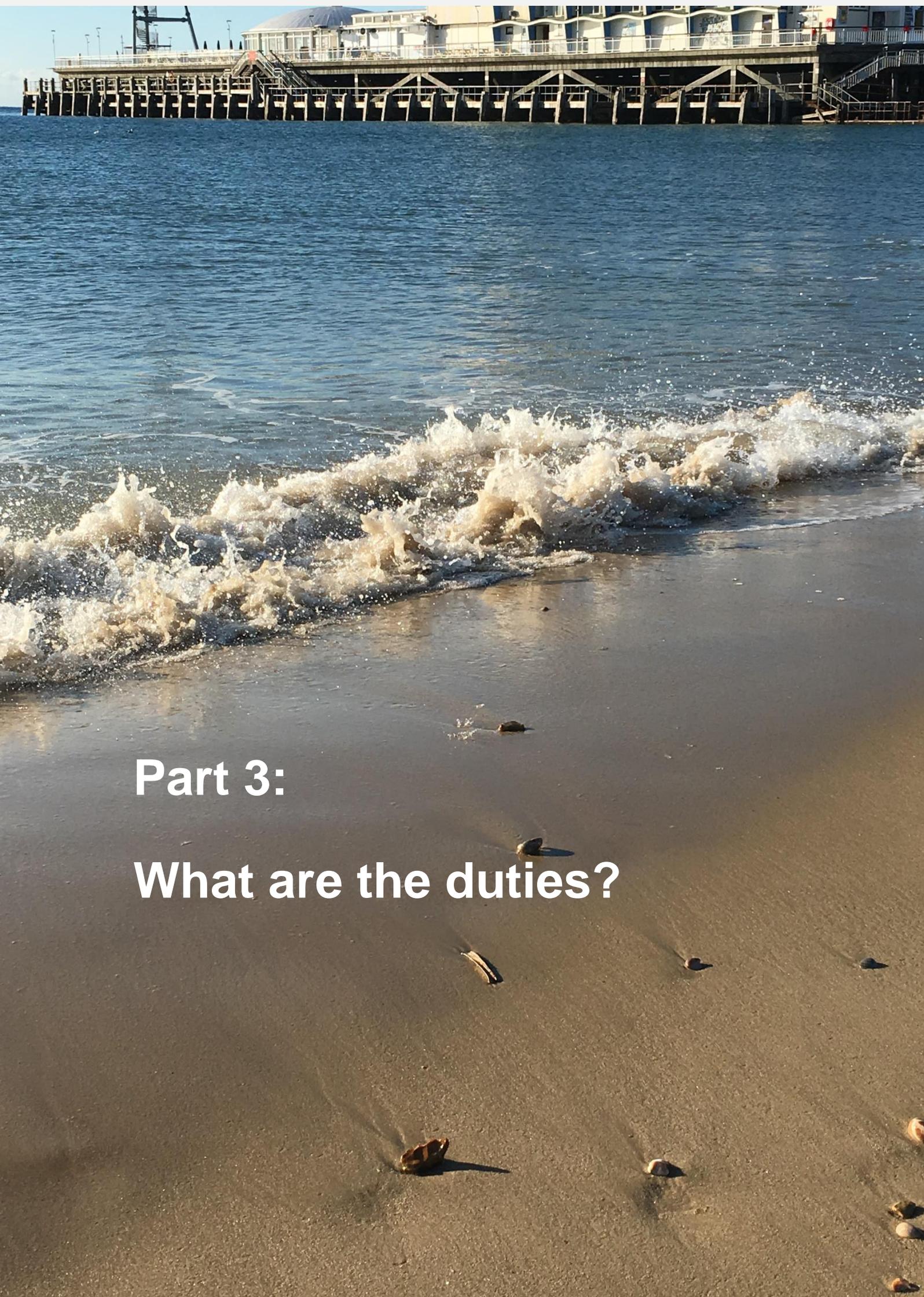
- 7.34 There are a number of other bodies that are involved in discharging contractual or moral obligations in relation to water safety. These include charities such as the RNLI and volunteer bodies such as SLSGB.
- 7.35 HM Coastguard coordinate incidents in relation to water-based Search and Rescue, the RNLI has a Royal Charter through its on call 24-hour lifeboat search and rescue service which are tasked by HM Coastguard to coordinate incidents as appropriate. It conducts water safety activities beyond this on a commercial basis; it has no legal duty to do so. The RNLI lifeguards patrol almost 250 beaches between May and September under arrangements made with the landowners/occupiers of the Shore or Foreshore.

- 7.36 The RNLI is a charity independent of the government, HM Coastguard and any local authorities. In addition to its employees, it relies on volunteers and supporters to run.
- 7.37 This service is mostly financed by voluntary contributions (from the public and sponsors), but the RNLI does receive a contribution from appropriate local authorities and some beach owners as a part of a commercial arrangement for the provision of lifeguarding services. This contribution is a tiny percentage of the actual cost. It is largely due to the charitable status subsidising the cost of lifeguarding that there are lifeguards on British beaches.
- 7.38 The RNLI also provides a free of charge service at the beginning of the season where, if requested by a local authority, it assesses the specific risks on a beach to advise whether the beach should have a lifeguard service during the season. Local authorities can then sign up for the level of service they want and are asked to contribute to some of the costs of this service. The RNLI produces a wide range of guidance material which is of high quality, including but not limited to the *Beach Lifeguard Service Implementation Guide*.
- 7.39 The Royal Life Saving Society ('RLSS') is a drowning prevention charity. It focusses on providing water safety education and qualifications, but it also has Volunteer Lifeguard Units and provides ad hoc lifeguard support for water and beach events.
- 7.40 Similarly, SLSGB is a charity that promotes water safety education. It provides volunteer lifeguards on UK beaches through 57 clubs that stretch from Aberdeen to St Ives. As with the RNLI, it has a range of documents, procedures and risk assessment for operating lifeguarding services including its Patrol Framework.<sup>24</sup>
- 7.41 Stepping away from the beach, RoSPA works to prevent drownings by advising, campaigning and driving change. It cooperates with a range of actors to effectively combat the problem of drowning in the UK, collecting statistics about water-related accidents, supporting the efforts for a UK-wide drowning prevention strategy and educating members of the public on water safety. It is also a co-author of some relevant material on water safety, including in relation to inland water.
- 7.42 Finally, constituted from a number of the bodies mentioned above, the National Water Safety Forum is a stakeholder in its capacity as a policy influencer and advisory body in relation to water safety. Like RoSPA, it is not a beach service provider but was formed in 2005 as a voluntary organisation funded by its members and a MCA grant. It was formed in response to a government enquiry into water safety. It does not have any enforcement powers but assists with coordination of stakeholders and collects and analyses data around water safety to better understand the shortcomings of the current system. It produced a strategy document (*The UK Drowning Prevention Strategy 2016-2026*) outlining the steps that need to be taken to reduce the number of drownings by 50% by 2026 and has sought to undertake a coordinating role. It is however reliant on the membership volunteering their time and has no legal or statutory basis for action.

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<sup>24</sup> <http://www.slsqb.org.uk/wp-content/uploads/2018/04/SLSGB-Patrol-Framework.pdf>





**Part 3:**

**What are the duties?**

# What are the duties?

## 8. Introduction to legal duties

- 8.1 In this section, I will outline the regulatory regime as it applies to beach safety. While for ease of explanation, I have sought to create groupings of legislation, in reality the regime is not that straightforward. There is a complex web of overlapping legislative requirements that could affect the management of safety on beaches.
- 8.2 Before addressing those duties in some detail, it must be noted that there is no specific or single regulatory regime that applies specifically to safety at a beach. While it is not necessarily essential that there be a specific beach regime, in my opinion it is appropriate that there is a regime that does not require substantial mental and legal dexterity to work effectively.
- 8.3 Consequently, there is a clear opportunity to simplify the situation and provide the clarity that most stakeholders seek on the obligations faced by various duty holders.
- 8.4 By contrast, a few other jurisdictions mandate a minimum level of lifeguard coverage on a beach. For example, in Quebec, Canada<sup>25</sup> where a beach is open to the public there is a requirement for a prescribed number of lifeguards referable to the length of the beach:

<b><i>Length of beach (m)</i></b>	<b><i>Minimum number of</i></b>	
	<b><i>Lifeguards</i></b>	<b><i>Assistant lifeguards</i></b>
<b><i>Less than 125</i></b>	<b><i>1</i></b>	<b><i>0</i></b>
<b><i>125 - 250</i></b>	<b><i>2</i></b>	<b><i>1</i></b>
<b><i>250 – 375</i></b>	<b><i>2</i></b>	<b><i>2</i></b>
<b><i>375 – 500</i></b>	<b><i>3</i></b>	<b><i>2</i></b>
<b><i>500 - 625</i></b>	<b><i>3</i></b>	<b><i>3</i></b>

*For every unit or fraction of a unit of 125 linear metres of beach over 625 metres, an additional safety supervisor shall be added.*

<sup>25</sup><http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/B-1.1.%20r.%2011>

- 8.5 The Quebec laws prescribe a minimum age of a lifeguard being 17 and that they hold either a Professional Lifeguard Service Certificate or a Professional Lifeguarding Certificate.
- 8.6 They also set out when a beach must be prohibited, and a prescriptive list of what equipment must be available. This includes:
- (a) one non-motorized rescue boat containing the equipment prescribed in section 56 for each unit or fraction thereof of 250 linear metres of beach;
  - (b) one lifeguard tower of a minimum height of 2.4 m for each unit or fraction of a unit of 125 linear metres of beach;
  - (c) a line of white buoy markers to delimit the supervised bathing area, except in the case of an ocean beach. The water depth of the area thus delimited may not exceed 1.6 m;
  - (d) for each lifeguard tower, a lifesaving buoy that may be:
    - (i) of a ring type, of an inside diameter comprised between 275 and 380 mm, attached to a cable having a minimum length of 15 m and placed on a support; or
    - (ii) of a “torpedo” type with a buckle for shoulders and at least with 2 m of cable.
  - (e) a first aid kit;
  - (f) a blanket;
  - (g) a means of communication at the disposal of the safety supervisor in order to call emergency services. The means of communication must be within a 100-metre radius of the control station. The emergency procedure must be posted; and
  - (h) a buoy marking, at the deepest point of the supervised area and for each unit, or fraction thereof of 125 linear metres of beach, the water depth in metres with characters at least 150 mm high of a contrasting colour that are legible from the beach.
- 8.7 In addition, it specifies that signs with at least 100 mm lettering shall be placed at each end of the beach and on the border of adjacent land at maximum 60-metre intervals in order to indicate:  
(a) supervised hours; and (b) the area under supervision.
- 8.8 It is interesting that other Canadian provinces do not appear to have implemented such rules.
- 8.9 There are no similar rules in the UK. The closest that we have in the UK is the HSE's guidance HSG 179 which sets standards for swimming pools and which, as I discuss later, potentially has some application to the beach environment.

# The UK legal framework

8.10 The legal framework was summarised by the Parliamentary Under-Secretary of State, Office of the Deputy Prime Minister in a parliamentary question on 2 November 2004<sup>26</sup>:

*'Beach safety and management is generally at the discretion of the owner of the beach, whether it be a private owner or a local authority. The owner or occupier may have certain responsibilities under the common law such as laws of negligence, or under statute, such as laws concerning occupier's liability or health and safety at work. A local authority also has a power to make byelaws under the public health legislation relating to public bathing and to the use of pleasure boats. The Health and Safety executive or a local authority is the enforcing authority for certain Health and Safety matters in relation to some beach activities.'*

8.11 Accordingly, the legal framework includes but is not limited to:

- (a) health and safety at work legislation;
- (b) Occupiers' Liability and interfacing duties providing access to land;
- (c) SAR duties;
- (d) Statutory and public health obligations; and
- (e) Other analogous obligations.

8.12 The consequence of which is that there is ambiguity in terms of who has responsibility for managing water safety risks. The current prevention arrangements, particularly at a local level, are at best difficult to understand and interpret. This lack of clarity can inhibit possible duty holders from taking action to reduce risk.

## Health and Safety

### 9. Duties under the Health and Safety at Work etc. Act 1974

9.1 The HSWA sets the standards for safety compliance in the UK ensuring the health, safety and welfare of those at work<sup>27</sup> and the protection of those not at work exposed to risks arising out of the

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<sup>26</sup> <https://publications.parliament.uk/pa/cm200304/cmhansrd/vo041102/text/41102w10.htm>

<sup>27</sup> Section 2 HSWA

employer's undertaking<sup>28</sup> (collectively 'the General Duty'). In addition to the HSWA there are a substantial number of topic specific regulations.

- 9.2 In relation to health and safety liability in a beach environment, there are two very significant issues to be determined:
- (a) Does the HSWA apply to the Foreshore or the Sea? and, assuming yes,
  - (b) Does the duty under section 3 HSWA apply to Sea Based Recreation at the Foreshore or in the Sea?

### Application of the HSWA to either the Foreshore or the Sea

- 9.3 In order to determine this, we need to consider the geographical extent of the HSWA.
- 9.4 The HSWA only applies in Great Britain<sup>29</sup>. There are some exceptions to this rule<sup>30</sup> which allow ss 1-59 and ss 80-82 of the HSWA to apply in the Territorial Sea. These exceptions only apply in certain circumstances, none of which appear relevant to the scope of this report. There is considerable detail on this on the HSE website: <http://www.hse.gov.uk/offshore/law.htm>
- 9.5 The only other point of note is that the offshore regime unhelpfully includes the term Foreshore within the definition of 'offshore installations'<sup>31</sup>. This definition includes a structure which is or has been used while standing or stationed in water, or *on the Foreshore or other land intermittently covered by water* that is for use in one of the specified purposes. It is unhelpful that legislation that exists solely to set out how health and safety is regulated outside of Great Britain, includes as part of a definition an area that is within Great Britain. This is indicative of how much confusion there is in this area.
- 9.6 The Foreshore is within the geographical extent of the HSWA and the Sea is not. The end result is that whether the HSWA could apply to a real drowning risk on a beach would be determined by the geography of the beach. On some beaches, Sea Based Recreation may be possible between the mean high and mean low water mark, i.e. on the Foreshore. On others, this would not be possible and the RNLI statistics demonstrate that a significant percentage of rescues take place in an area likely to be below the low water mark (and therefore outside of the scope of the HSWA).
- 9.7 You will therefore have a high likelihood that for a substantial amount of Sea Based Recreation<sup>32</sup> there would be no potential to apply the HSWA.
- 9.8 This position, while clear, is to be contrasted to other areas such as manslaughter, which has been applied in circumstances where deaths occurred in the Sea<sup>33</sup>, or areas such as the climate change

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<sup>28</sup> Section 3 HSWA

<sup>29</sup> Section 84. Similar legislation applies in Northern Ireland.

<sup>30</sup> Health and Safety at Work etc Act 1974 (Application outside Great Britain) Order 2013

<sup>31</sup> Ibid, Article 4.

<sup>32</sup> RNLI statistics show that 38.4% of all rescues are more than 50m from the water's edge. It is likely therefore that a substantial proportion if not all of them were in the Sea.

<sup>33</sup> See the Lyme Bay Canoeing disaster: R v Kite and OLL, unreported

levy where Great Britain is defined to include adjacent territorial waters<sup>34</sup>. This does leave a potential regulatory gap.

### Duty under Section 3 HSWA and associated legislation

9.9 Even if the HSWA geographically applies, because the duty is limited to duties arising from an undertaking, it does not follow that there is a relevant duty given the way in which the HSWA is drafted.

9.10 Section 3 HSWA places a duty on all employers to ensure the safety of non-employees affected by their undertaking. It states, insofar as is relevant:

3.—

*(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.*

...

*(3) In such cases as may be prescribed, it shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety.*

9.11 The General Duty sets a very high standard. For example, the risk does not need to eventuate or cause harm, the risk just needs to exist for there to be a breach subject to it not being reasonably practicable to have done more than was in fact done. While it may not sound it, this standard is so high that the duty is only discharged if the cost or effort of doing something is grossly disproportionate to the benefit that would be achieved, or if the same safe outcome can be achieved in an equally effective alternative manner.

9.12 In addition to the HSWA, there is a significant body of secondary legislation, typically organised by topic, which also sets more specific obligations expanding upon the General Duty. These obligations include the duty to, amongst other things:

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<sup>34</sup> Finance Act 2000, Schedule 6, section 147.

- (a) **Risk Assess:** Make a suitable and sufficient risk assessment of risks to which employees and non-employees are exposed by virtue of their business. This includes a duty to review risk assessments;
- (b) **Have systems in place:** Make and give effect to arrangements as are appropriate for the effective planning, organisation, control, monitoring, and review of preventative and protective measures;
- (c) **Communicate with employees:** Provide employees with comprehensible and relevant information on the risks to their health and safety and the preventative and protective measures in place;
- (d) **Train employees:** Provide employees with adequate health and safety training; and
- (e) **Monitor and review:** Appoint a competent person to assist with undertaking these requirements.

9.13 Of these requirements, the duty to risk assess plays a critical role in the prevention of risk. Regulation 3 of the Management of Health and Safety at Work Regulations 1999 requires that:

**3.— (1) Every employer shall make a suitable and sufficient assessment of**

*(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and*

*(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.*

9.14 In both the application of section 3 HSWA and the duty to risk assess, the duties only apply to employers and activities that are within the scope or conduct of the employer's undertaking. This is significant in a beach environment as for the HSWA to apply there would need to be activity that took place landside of the low water mark that resulted in the risk of drowning.

9.15 Whether an activity results in the exposure to risk as a result of the conduct of an undertaking is a question of fact that the courts have decided should be usually left to a jury: *R v Associated Octel Co Ltd*<sup>35</sup> ('Octel'). This is a topic which continues to be the subject of a substantial amount of litigation turning on whether a particular activity was part of a defendant's undertaking.

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<sup>35</sup> [1996] All ER 846

- 9.16 In *R v Porter*<sup>36</sup>, the court endorsed this line of logic and the approach adopted by the Court of Appeal decision in *R v Chargot Ltd (trading as Contract Services) and Others*<sup>37</sup> and concluded that the risk that arose must be real as opposed to fanciful or theoretical. This was a tragic case where a child died as a result of complications that arose from injuries suffered after falling downstairs between two levels of a playground in a school. The jury were asked to decide if this was an unacceptable risk and not an everyday risk of life. It was concluded that unless it was able to be shown that the child was exposed to risk by virtue of the conduct of the school, then there was no breach. It was not enough to just show that the stairs existed:

*Where the risk can truly be said to be part of the incidence of everyday life, it is less likely that the injured person could be said to have been exposed to risk by the conduct of the operations in question.*

- 9.17 The parallel with the natural environment of the beach is obvious.
- 9.18 In *Hampstead Heath Winter Swimming Club and another v the Corporation of London and another*<sup>38</sup> ('Hampstead Heath') the court found that a local authority erred in their interpretation of the law when they refused a permit for the club to swim in a designated pond on Hampstead Heath during the winter season. It did so on the basis that permitting the club to use local ponds for swimming in winter could expose the local authority to prosecution under s.3 HSWA.
- 9.19 The court did not agree with the decision of the local authority. The court accepted that the local authority's undertaking included the control and management of the ponds, including regulating access to them, but concluded that persons were not exposed to a risk as a result. The court considered section 1(1) HSWA in the context of subsection 3 which states:

*(3) For the purposes of this Part risks **arising out of or in connection with the activities of persons at work** shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking **and the condition of premises so used or any part of them.***

- 9.20 As a result, the court concluded: '*the distinction between dangers arising from the static condition of premises and activities carried out on them is of dubious validity*'. There is a difference between the risk arising out of their mere existence rather than the undertaking of the Corporation of London ('the Corporation').

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<sup>36</sup> [2008] EWCA Crim 1271

<sup>37</sup> [2007] EWCA Crim 3032

<sup>38</sup> [2005] All ER (D) 353

- 9.21 The court considered if swimmers would be exposed to risk *by the undertaking* of the Corporation if the Corporation were to permit swimmers to swim in the winter season. It was accepted that there would clearly be risk from swimming at such time, but there would also be risk as they travelled to or from the ponds and:

*No one would suggest that the Corporation should be responsible for an accident resulting from the risks of a traffic accident, or a heart attack while walking or running to or from the Pond. Risk is inherent in life, and some risk is unavoidable.*

- 9.22 In determining whether or not the swimmers were exposed to risk as a result of the Corporation's undertaking, the court carefully considered the judgment in *Tomlinson v Congleton BC and others* ('Congleton')<sup>39</sup> and found assistance from the clear judgment that *Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous condition.*

- 9.23 Applying Congleton to the Hampstead Heath case, the court concluded that:

*If an adult swimmer is given permission to swim unsupervised in a pond that has no hidden dangers, and the swimmer decides to swim in it, the risks he incurs in doing so are in a sense the result of both the permission and his decision. But if the law is to protect individual freedom of action, and to avoid imposing “a grey and dull safety regime on everyone”, it must discriminate between these causes. In my judgment, for the purposes of section 3 of the 1974 Act, if an adult swimmer with knowledge of the risks of swimming chooses to swim unsupervised, the risks he incurs are the result of his decision and not of the permission given to him to swim. And it follows that those risks are not the result of the conduct by the employer of his undertaking, and the employer is not liable to be convicted of an offence under that provision.*

- 9.24 It would appear that this logic is easily transferrable to the beach environment. It seems clear that merely making the beach available, permitting, or not prohibiting access, is unlikely to be sufficient for the HSWA to apply. However, where it could be shown to be part of the undertaking, liability could flow from the state of the premises which could be said to be as a result of 'hidden dangers' or some other similar issue arising out of the condition of the premises. In most cases, this is unlikely to be the case.

- 9.25 It is likely that warning signs about less obvious hazards may be sufficient to avoid there being a 'hidden risk'. In the words of the HSE:

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<sup>39</sup> [2003] UKHL 47

*even on busy beaches it would not normally be necessary to warn about the dangers associated with getting into the sea, unless there were unusual features and hidden dangers that the duty holder was aware of.*

9.26 This decision should be contrasted with that in *R v Upper Bay Ltd*<sup>40</sup>. This case arose out of the tragic near fatal drowning of a seven-year-old boy at a swimming pool known as Splashlands in Porthcawl. In this case, the injured party was at the pool with his father and younger brother. His father was with his brother in the shallow end of the pool. For reasons that are unclear, the injured party, a non-swimmer, was able to make his way unsupervised to the bubble lounge area at the deep end of the pool. Despite there being lifeguards on duty and signage about the need to supervise those under 8, tragically the injured party was discovered unconscious with his head underwater. He was resuscitated but suffered substantial brain damage.

9.27 In this case it was argued that there was no breach as the risk did not arise out of the conduct of the defendant's undertaking, but instead arose out of the conduct of the injured party and lack of parental supervision. The Appeal Court was not persuaded by this argument. It reverted to the position in *Octel* and concluded both that the HSWA should apply and the specific facts should be left to the jury:

*All that said, these factors could not exonerate the applicant from potential liability under the 1974 Act. The duty imposed on it by the Act was not delegable. The duties owed by the applicant and Chad's father to Chad were different duties, but they were concurrent duties. The breaches of parental duty, which we have outlined, did not begin to constitute a defence for the applicant to the allegation of contravention of the duty imposed on them by the Act. The single question, therefore, was whether or not there was a prima facie case to answer that the applicant was in breach of the duty imposed upon it. We recognise that that duty was not an absolute duty. We accept that Chad's safety was not and could not be guaranteed by the applicant. What was required of it was that, so far as reasonably practicable, Chad should not be exposed to risk to his safety or health arising from failings in the way in which the applicant conducted its undertaking -- in other words, in the present context, in the running and management of the swimming pool and the safety of all those who used it. In that context it was, we accept, a feature in the arrangements for the management of the pool that the applicant could reasonably expect that young children would be properly supervised by a responsible adult -- properly in the context of the child's competence and experience as a swimmer. That is because the responsibility of the parent or adult is also non-delegable -*

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<sup>40</sup> [2010] EWCA Crim 495

*- at least not delegable to the applicant which was responsible for running the pool. At the same time, however, making all these allowances, the applicant had to recognise and anticipate -- and appears to have recognised and anticipated in its policy -- the reality that on occasions small children do escape not only when parental supervision is lax, but even when parental supervision is very close. That is what children do. That fact is underlined by the acknowledgement in the applicant's policy about how an unaccompanied child under the age of 8, if seen unaccompanied, should be treated by the staff. In short, swimming pools are dangerous places for young children. Those who take them to the pool, and those who manage the pool and are responsible for the way in which the pool is organised and conducted, must do everything they reasonably can to avoid the risk that a child or children may be drowned. All these considerations must be addressed with a clear eye on the practical realities. As it seems to us, if the issue is contested, it is for the jury to assess whether, notwithstanding whatever criticisms might reasonably be made of the supervision extended to Chad by his father, there was a case that the applicant was in breach of the duty that it, too, owed to him. Indeed, our view of the submissions made to the judge below, and those advanced with his customary felicity by Mr Purchas on behalf of the applicant, is that, however one looks at this, this case was plainly one for the consideration of a jury. If the judge had withdrawn the case from the jury, he would wrongly, in our judgment, have been usurping its proper function.*

- 9.28 On one reading, this decision appears to be inconsistent with that of Hampstead Heath, but while the court has not expressly addressed the point, it is likely that the justification is that as a result of the inadequate supervision by lifeguards there is a risk and exposure to that risk which is sufficient to constitute a breach.
- 9.29 Accordingly, in relation to the HSWA we can conclude:
- (a) It will never apply to Sea Based Recreation in the Sea;
  - (b) It may apply on the Shore and Foreshore; but only if
  - (c) It can be shown that the risk arose out of the undertaking being conducted on the Shore or Foreshore, and
  - (d) Not just as a result of the mere existence of the Shore or Foreshore.
- 9.30 At best this results in a position where the HSWA may, in very limited circumstances, apply. In practice, in most locations and most situations it is unlikely to apply.

# Occupiers' liability

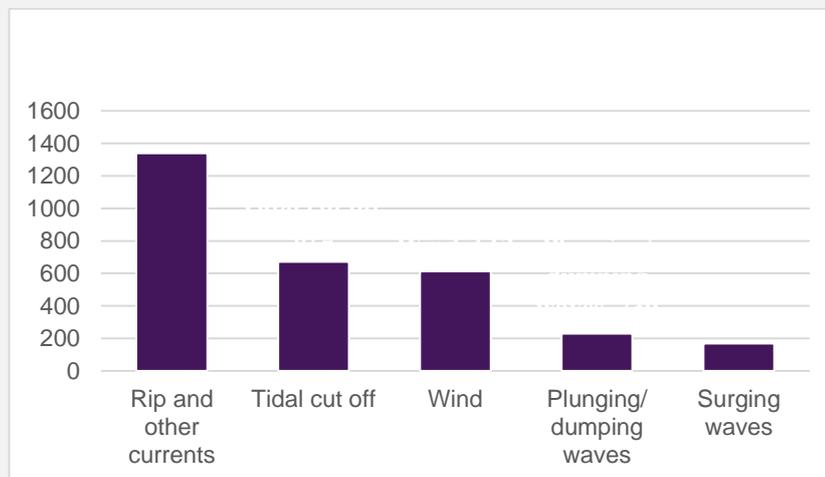
## 10. Duties as an occupier of land

10.1 The duty of an occupier to the visitors on their land stems from the Occupiers' Liability Act 1957 ('the 1957 Act') in England and Wales<sup>41</sup>. The occupier of land (including a beach) owes a duty of care to all his visitors. This duty is to:

*take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there<sup>42</sup>.*

10.2 The degree of care required is dictated by the circumstances, e.g. the occupier must take into account that children will be less careful than adults. The occupier is not however expected to guard visitors against risks willingly accepted by them.

10.3 The RNLI's statistics from its Annual Operational Report 2017 of the most common environmental causes for incidents show that the majority are not likely to be obvious to a beach user. These have been reproduced in the table below:



**Figure 9. Environmental causes of incidents during Sea Based Recreation. Source: RNLI Operational Report 2017**

10.4 There are number of cases that consider the liability flowing from people suffering injury in a body of water. They do not place a heavy burden on occupiers, in particular as there is typically no duty in

<sup>41</sup> In Scotland and Northern Ireland different law applies but achieves the same core result. The Occupiers' Liability (Scotland) Act 1960 does not distinguish between duties owed to trespassers and visitors, imposing a duty to take such care as is reasonable in all the circumstances towards all people (s.2.1). The Occupiers' Liability (Northern Ireland) Act 1957 and the Occupiers' Liability (Northern Ireland) Act 1987 impose a regime similar to England and Wales, where a different duty is owed to visitors under the 1957 Act and to trespassers under the 1987 Act.

<sup>42</sup> section 2, Occupiers' Liability Act 1957

respect of an obvious or natural hazard, such as the Sea. The hazards set out in Figure 9 above are potentially in a greyer area because they could be hidden and therefore action to warn visitors of them may be necessary.

- 10.5 One of the leading cases on this is *Darby v The National Trust*<sup>43</sup>. In this case, a visitor drowned in a pond on land owned by the National Trust. An action was brought even though signs were displayed to say that bathing was prohibited in that pond. The claimant relied on the fact that the Trust was aware that people swam in that pond regularly. The pond in question was some 60 to 70 feet across, the water was described as "murky" and the level was uneven, unclear and relatively deep at the centre. The court described it in the following way:

*The water is shallow at the edges but towards the centre its depth is at least such that an average swimmer could not stand on the bottom. It may in places be as deep as 10 feet. In the summer when it is warm visitors have used the pond for paddling and swimming.*

- 10.6 The deceased was a competent swimmer and was playing a game he called 'hide-e-boo' where he would dip under the water for a short period and then pop up smiling. After about five minutes he reappeared in distress with his arms straight up, sank beneath the water and drowned. He was recovered from the water but never regained consciousness.
- 10.7 It was found that the National Trust was aware that visitors swam or paddled and did not discourage it. The trust did not have warning signs, save for a small sign which said "bathing not allowed" at the car park. There was no lifesaving equipment nor any systematic patrol of the area, though from time to time wardens would try to discourage swimming through warnings of Weil's disease.
- 10.8 The court found that although the occupier had a duty to warn against known risks, that duty did not extend to protecting visitors against obvious risks:

*the risks to competent swimmers of swimming in this pond from which Mr Darby so unfortunately succumbed were perfectly obvious. There was no relevantly causative special risk of which the National Trust would or should have been aware which was not obvious. One or more notices saying "Danger No Swimming" would have told Mr Darby no more than he already knew*

- 10.9 The judgement concluded:

*In my judgment there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased. That, in my view, applies as much to the risk that a swimmer might get into difficulties from the temperature of the water as to the risk that he might get into difficulties from mud or sludge on the bottom of the pond*

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<sup>43</sup> [2001] EWCA Civ 189

10.10 The same logic applies in respect of visitors swimming in the Sea. Where this might change is where there is a hidden or non-obvious hazard, such as those described at the beginning of this section. A submerged hazard or rip-currents are examples that fall into this category. When there are warnings of such hazards, a competent adult accepts that inherent risk when they continue with the activity. There will be no breach of duty.

10.11 In the words of the Judge:

*It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious.*

10.12 Like the HSWA, the 1957 Act only applies to England and Wales, though a similar regime applies in Scotland and Northern Ireland.

#### Duty owed to trespassers on land

10.13 On many beaches, there are signs that either prohibit swimming entirely in certain areas or prohibit a certain type of behaviour, for example diving. In those circumstances, people who enter the Sea and/or undertake those behaviours do so without permission or licence and fall outside of the category of "lawful visitor" addressed in the 1957 Act.

10.14 Under the Occupiers' Liability Act 1984 ('the 1984 Act') occupiers of land also owe duties to trespassers, i.e. those who are not using the land for an authorised purpose. While the term trespasser may appear unduly pejorative, it is not meant to have such a meaning in law. The 1984 Act prescribes that:

*(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—*

*(a) he is aware of the danger or has reasonable grounds to believe that it exists;*

*(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether he has lawful authority for being in that vicinity or not); and*

*(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.*

*(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.*

*(5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.*

*(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).*

- 10.15 Occupiers have a duty to ensure that a trespasser does not suffer injury on premises due to the state of the premises, by things done or omitted to be done to them under the 1984 Act. This duty is owed if the occupier knows or should have known that: i) a danger exists; ii) a trespasser may come into the vicinity of the danger; and iii) the risk is one against which the occupier would be expected to offer protection<sup>44</sup>. The occupier discharges this duty when they take reasonable steps to warn of the danger or discourage those on his land from taking this risk.
- 10.16 The occupier does not owe duties in respect of risks willingly accepted by the risk taker. They are not expected to provide protection from dangers resulting from physical features of the coastline<sup>45</sup>.
- 10.17 The case law on the 1984 Act aligns with the case law on the 1957 Act, displaying the same pragmatic attitude to risk. In *Donoghue v Folkestone Properties*<sup>46</sup> ('Donoghue'), the court held that whether a duty of care existed in relation to a trespasser will depend on the circumstances around when a duty was allegedly breached. While a more robust duty was owed to trespassers to a pool in the summer, the same duty was not owed in the winter. The risk in this case was held to have arisen from the trespasser's actions, not the condition of the land:

*There are some features of land that are not inherently dangerous, but which may tempt a person on the land to indulge in an activity which carries a risk of injury. Such activities include cliff-climbing, mountaineering, skiing, and hang-gliding by way of example. It does not seem to me that a person carrying on such an activity can ascribe to the 'state of the premises' an injury sustained as a result of a mishap in the course of carrying on the activity — provided of course that the mishap is not caused by an unusual or latent feature of the landscape. I do not consider that the 1984 Act imposes any duty on an occupier to protect a trespasser from making use of a particular feature of the premises in order to carry out an activity simply because that activity carries with it an inherent risk of injury.*

- 10.18 The Judge continued:

*36. This brings me to swimming and diving. An expanse of water, be it a lake, pond, river or the sea, does not normally pose any danger to a person on land. If a trespasser deliberately enters the water to swim, then the trespasser chooses to indulge in an activity which carries a degree of inherent risk. If the trespasser gets cramp or becomes exhausted and drowns,*

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<sup>44</sup> s.1(3) of the 1984 Act

<sup>45</sup> s.6AA of the 1984 Act

<sup>46</sup> [2003] All ER (D) 382

*it cannot properly be said that this tragedy is attributable to the 'state of the premises'. Where a trespasser suffers injury as a result of diving onto the bottom, or onto an obstruction that stands proud of the bottom, the position is less simple.*

*37. If a trespasser jumps down a bank and injures himself by contact with the ground, his injury cannot properly be said to be attributable to the 'state of the premises'. If the bank is on the edge of a lake, and the ground is beneath the water, I still have difficulty in seeing how his injury can be said to be attributable to the 'state of the premises'. If, however, there is a concealed obstruction beneath what appears to be deep water, it then becomes arguable that an injury suffered by a trespasser who dives upon it is attributable, in part, to the 'state of the premises'. It will not, of course, necessarily follow that the occupier will be liable under the 1984 Act. This will depend upon the application of the other criteria laid down by the Act.*

10.19 This rationale applies equally to the beach.

10.20 The leading case in this area is *The Congleton Case*<sup>47</sup>. It concerned a tragic drowning accident in a lake created from an old sand quarry. It was a feature in land owned by Congleton Borough Council in Brereton Health Country Park, operated as an amenity location. The lake had sandy beaches, a car park and many people went there in warm weather in order to use the lake. The injured party in this case had been doing so since he was a child.

10.21 On the day in question the injured party dived to the bottom of the quarry and misjudged its depth. His head hit the sandy bottom of the lake and he broke his neck. As a consequence, he became tetraplegic and unable to walk. The case ended up in the House of Lords, where it was determined that there was no breach of duty owed to either a visitor or trespasser.

10.22 Tragically, this sort of case is not uncommon, as illustrated by Lord Hoffman in this case, giving the leading judgment:

*It is a terrible tragedy to suffer such dreadful injury in consequence of a relatively minor act of carelessness. It came nowhere near the stupidity of Luke Ratcliff, a student who climbed a fence at 2.30 am on a December morning to take a running dive into the shallow end of a swimming pool (see *Ratcliff v McConnell* [1999] 1 WLR 670) or John Donoghue, who dived into Folkestone Harbour from a slipway at midnight on 27 December after an evening in the pub (*Donoghue v Folkestone Properties Ltd* [2003] 2 WLR 1138).*

10.23 While the Congleton Case is about inland water, it shares many characteristics that arise in relation to a beach environment. The first is determining who is responsible as occupier as the park belonged to the Borough Council but was managed on their behalf by the Countryside Management Service of the County Council. While the Borough Council provides the funds to enable the Countryside Management Service to maintain the park, it is the County which employs the rangers who look after

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<sup>47</sup> [2003] UKHL 47

it. As described earlier, this overlapping and intersecting responsibility is a feature of most UK Beach environments.

- 10.24 While the Councils did not take the point and agreed that one or both would be an occupier, the court recognised that *if one had to decide which of the two councils were the occupier, it might not be easy.*
- 10.25 The Congleton Case carefully considered the line between the duty arising out of the 1957 Act owed to a visitor and a duty owed to a trespasser under the 1984 Act. As the Council had a no swimming policy as well as a policy of banning inflatable dinghies or mattresses, together with signage saying '*Dangerous water. No swimming*', it was concluded that the injured party's choice to ignore the signs and swim rendered him a trespasser and not a visitor. – This would be significant in a beach environment, where a similar distinction could be made between amenity beaches that encourage swimming and other water-based activity and those that prohibit it for various reasons and the grey area in the middle.
- 10.26 This does however create a paradox where the lawful visitor transfers from being such to being a trespasser and that is, ironically, part of any breach of duty – for example, the duty to warn which occurs at a point when the injured party was a lawful visitor and not a trespasser. This was something that troubled the Court of Appeal in the Congleton Case, which considered when the claimant became a trespasser – only at the point of swimming? So, wading, walking and splashing in the shallows would all be the acts of a visitor? This situation occurs in many other work-based cases where an employee strays into an unauthorised area and in so doing becomes a trespasser. While the court saw force in the curious paradox, it ultimately concluded that a duty was owed.
- 10.27 Another interesting feature of the facts of this case is that there had been a long history of drowning related safety issues at the site and the evidence was that the Council had been taking measures to try to discourage swimming generally across its bailiwick. In 1992 it suffered three near drownings over one weekend and increased measures including "unattractive planting", creating muddy bottoms and signage warning of Weil's disease, which were all implemented without success.

#### **Natural or state of the premises and acceptance of risk**

- 10.28 Lord Hoffman observed that:

*The judge found that there was "nothing about the mere at Brereton Heath which made it any more dangerous than any other ordinary stretch of open water in England". There was nothing special about its configuration; there were no hidden dangers. It was shallow in some places and deep in others, but that is the nature of lakes. Nor was the Council doing or permitting anything to be done which created a danger to persons who came to the lake. No power boats or jet skis threatened the safety of either lawful windsurfers or unlawful swimmers.*

- 10.29 This was a view that was shared by the court in Donoghue where Lord Phillips of Worth Matravers MR concluded:

*It seems to me that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state*

10.30 Lord Phillips continued:

*An expanse of water, be it a lake, pond, river or the sea, does not normally pose any danger to a person on land. If a trespasser deliberately enters the water to swim, then the trespasser chooses to indulge in an activity which carries a degree of inherent risk. If the trespasser gets cramped or becomes exhausted and drowns, it cannot properly be said that this tragedy is attributable to the 'state of the premises'.*

10.31 The House of Lords in Congleton approved this principle and Lord Hoffman concluded:

*Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case, Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises.*

10.32 He continued this line of thinking when considering the free will exercised by the injured party in exercising the choice to swim:

*I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course, the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.<sup>48</sup>*

10.33 These passages send a clear message that the mere existence of water in the Sea or on the Foreshore does not give rise to a duty. This logic was underlined by the court:

*'It is a mere circularity to say that a failure to stop people getting into the water was an omission which gave rise to a duty to take steps to stop people from getting into the water.'*

10.34 The court was particularly concerned that the *harmless recreation of responsible parents and children with buckets and spades on the beaches* should not be prohibited simply to comply with a duty that

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<sup>48</sup> Para 45

is *considered* to exist. The court is particularly concerned in these cases to ensure that risk is properly, not defensively, managed.

10.35 A duty to protect against obvious risk, such as that of drowning, does not arise unless there is no genuine and informed choice in relation to this risk, or incapacity. In the words of Lord Hoffman in the context of the destruction of beaches by the Council to discourage swimming and similar activity: *local authorities and other occupiers of land are ordinarily under no duty to incur such social and financial costs to protect a minority (or even a majority) against obvious dangers.*

10.36 So, on a beach there would be no duty to protect against the obvious danger of drowning, but if the risk is not obvious, for example rip tides, then it may be necessary to warn.

10.37 The logic was continued further by Lord Hutton, who observed:

*... it is contrary to common sense, and therefore not sound law, to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a lake or a cliff and to impose a duty on him to do so. In my opinion this principle, although not always explicitly stated, underlies the cases relied on by the appellants where it has been held that the occupier is not liable where a person has injured himself or drowned in an inland lake or pool or in the sea or on some natural feature.*

10.38 The Congleton Case was applied in another case relating to a diving accident in *Grimes v Hawkins & Frimley Park Hospital NHS Foundation Trust*<sup>49</sup>. This, slightly unusual, case involved an injury from diving at a private residence's swimming pool. Again, the court found that there is always risk in swimming and diving, in any pool:

'... It is well known that diving always carries with it a risk of injury (particularly to the head or neck) if the dive is badly executed or carried out in water that is too shallow to accommodate it. None of this is specialist knowledge. Every adult of normal intelligence knows it.'

10.39 The court determined that adults exercising free will, albeit intoxicated free will, were not owed a duty under the Occupiers' Liability legislation. Again, the court highlighted that had there been some hidden or unexpected hazard then things might be different, but this was not the case.

10.40 Ultimately it is the distinction between undertaking an inherently dangerous activity (swimming) and there being an inherent danger in the property. Deciding which option is applicable is key to determining the application of the law to the beach environment. What is it about the location that is inherently dangerous and about which the public should be warned? This is why we see different signage at different types of beach, as these three examples show:

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<sup>49</sup> [2011] EWHC 2004 (QB)



10.41 In each case, the public are being warned about hazards that are not immediately obvious to them, such as the presence of deep water close to shore, soft mud, underwater currents and underwater objects. In two of the examples, located on the same stretch of water adjacent to a popular yachting area, the signage clearly also prohibits swimming, which would make those who enter the Foreshore when it is covered by water trespassers.

10.42 It is also the case that signage is often ignored by people who choose to take their own risks. This is the case of the image below. A person entering the Sea (in winter) to swim near to a sign warning of submerged hazards. The swimmer had to pass the sign before entering the Sea at that point.



10.43 There are relatively few cases that arise out of a beach environment, but to put this into context two of the more relevant cases are considered below.

### Examples at the beach

- 10.44 In *Baldacchino v West Wittering Estate Plc*<sup>50</sup> ('Baldacchino'), a school age child climbed on a navigation beacon and dove into the sea. His claim for damages failed as the court determined that there was no breach of duty and there was no need for the landowner to provide supervision and warn of the risk of injury.
- 10.45 It is noteworthy that the defendant in this case was not the Crown Estate but an estate owner. That the estate owner owned the premises on which the navigation beacon stood was not disputed – it is not clear from the facts if it was on the Foreshore or not.
- 10.46 Like many amenity beaches, West Wittering has many thousands of visitors. It was estimated that 11,000 visited the beach on the day in question. It has attracted Blue Flag Status. The Estate had employed lifeguards and installed PRE. It was common between the parties in this case that the Estate operated the beach:
- as a family amenity for activities, including swimming and windsurfing, and admits that the defendant provided lifeguards for the areas in which swimming was permitted and that a charge was made for car parking.*
- 10.47 The difference between the parties was on the topic of supervision, how much supervision was necessary. The court recognised that the beach was a natural habitat and while there was some supervision in the sense that there were lifeguards or beach patrollers and even a lifeguard on a jet ski in the sea, there was no duty to provide supervision.
- 10.48 It was the Claimant's case that in the hours leading up to the tragic accident, several other children had jumped off the beacon and no one from the Estate's staff had told them to stop. It was suggested that this was a failure of supervision. There was a conflict of evidence on this point, as evidence for the Estate suggested that two lifeguards did in fact go to the group.

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<sup>50</sup> [2008] EWHC 3386 (QB)

10.49 While the case was originally pleaded under the provisions of the 1957 Act on the basis of the injured party being a lawful visitor, the Court concluded that this was not the case as in jumping he had done something that he was not permitted to do. The Court continued that:

*The fact that an owner of land does not specifically tell a person to keep off part of the property, or may indeed not even be aware that the person is on that part of his property, does not, in my judgment, equate to an invitation or permission to use that part of the property and in particular to use it in a way which the property owner does not approve of.*

10.50 The Court decided that it was not the case that the premises were inherently dangerous, it was the Claimant's action that was dangerous and that exposed him to risk.

10.51 It found that it was not reasonable for the Estate to provide for constant monitoring for all of the 11,000 people on the beach in order to ensure that they did not do something hazardous.

10.52 Significantly, following the decision in the Congleton Case, the Court found that the risk posed by diving from this beacon was entirely obvious and the law does not require warnings for dangers which are perfectly obvious.

10.53 While there does not appear to have been any debate of whether or not the Estate was legally responsible for the land on which the beacon stood, in cases such as *B (A Minor) v Thanet DC*<sup>51</sup>, this was a central determinative factor. It was conceded that if the accident had occurred on the Foreshore, Thanet DC would not be liable – similarly, given the geographical extent of the 1957 Act and 1984 Act it would not be liable in the Sea either. It follows that it would only be liable if the accident had occurred on the Shore. The facts of this case relate to a serious laceration from stepping on a sharp object on the sand. Notwithstanding the finding that the accident took place on an area that the Council was not responsible for, the court concluded that any person visiting the beach assumed some risk from dangerous objects which may lie on the sand and it would be unrealistic to keep beaches clear of all such objects.

10.54 It is therefore clear that where the risk of drowning or injury on the Foreshore arises from:

- (a) The act of the injured party rather than the land; or
- (b) A natural hazard on the land; or
- (c) A hazard that is obvious to all;



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<sup>51</sup> [1999] C.L.Y. 3965

then the duty will not apply.

- 10.55 As a result, while it is theoretically possible to conceive situations where the duty might apply, these are relatively few and far between and in most circumstances it would not apply.

## Duty of care

### 11. Negligence and duty of care

- 11.1 In addition to statutory duties such as those in the 1957 Act, there is also the duty of care at common law. The duty of care can be imposed on a person by statute or, in the absence of that, a claimant needs to show that harm to them was foreseeable, that there was a proximity between the parties and that it is fair just and reasonable to impose a duty on the person who allegedly breached it (the three part test)<sup>52</sup>. A failure to discharge that duty of care results in liability in negligence.
- 11.2 In the context of local authorities and beachgoers, it is impossible to say that a local authority will always owe a duty of care to anyone who goes to the beach within its bailiwick – whether the elements of the three part test are met will depend on the facts.
- 11.3 There is no specific statutory provision that imposes on a local authority a duty of care towards beachgoers. Through powers in byelaws and other statutory duties a local authority can act in directly or indirectly related ways. In addition, through the Localism Act 2011 local authorities have power to *do anything that individuals generally may do*<sup>53</sup>. This is referred to as a "general power of competence" and allows a local authority to exercise a broad range of powers to introduce measures that are beneficial to it and/or its residents and visitors. Before the Localism Act came into force in 2011, local authorities enjoyed a similar general competence power under their power to promote social, economic, financial etc. wellbeing (which is still in force in Wales<sup>54</sup>). Local authorities are also caught by the requirements of the Public Services (Social Value) Act 2012 that requires local procurement to be undertaken with social value in mind, for example through approaches that encourage wellbeing.
- 11.4 The general power has been used by local authorities to introduce wide ranging initiatives that confer varying benefits on their residents and visitors and improve governance. Examples of incentives introduced by 2015 included promoting recycling by charging residents for residual bins (but not recycling bins), investing beyond limits imposed by the Local Government Act 1972 and creating educational programmes for disadvantaged children<sup>55</sup>. As long as the measure being introduced is permitted by the law (i.e. is something that individuals generally may do), a local authority has the

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<sup>52</sup> Caparo Industries plc v Dickman [1990] 2 AC 605

<sup>53</sup> Section 1, Localism Act 2011

<sup>54</sup> Local Government Act 2000

<sup>55</sup> Local Government Association report, The General Power of Competence: Empowering councils to make a difference

power to introduce it under the Localism Act 2011. Clearly, this power could also be used by coastal local authorities to introduce measures safeguarding beachgoers, including assessing risks connected with recreational activities at the beach and providing signage and/or lifeguarding services at the busiest beaches. Local authorities, subject to other legal restrictions, could go even further and, for example, charge beachgoers for parking nearby the beach, using the money collected from visitors to invest in measures that would further promote safe enjoyment of the beach.

- 11.5 The existence of this general power to introduce a wide range of measures is not synonymous to the existence of a parallel duty of care at common law. The fact that a local authority has the option to introduce a measure that would potentially benefit and/or safeguard members of the public does not translate into an obligation on the local authority to do so. The leading authority on this, *Stovin v Wise*<sup>56</sup>, establishes that even if it would have been irrational of the local authority not to have exercised their power to introduce a measure that benefits the public, a duty of care towards those who suffered harm will still not arise. A duty will only arise in exceptional circumstances:

*[...] the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done, at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised*<sup>57</sup>.

- 11.6 Failure to act on a power cannot be the sole ground on which a common law duty arises, however irrational<sup>58</sup>; it is not unlawful of a local authority to choose not to introduce extra measures, even if it can be argued the action should have been taken for moral or reputational reasons. This was confirmed by *Gorringe v Calderdale MBC*<sup>59</sup>, which stipulates that a special relationship would be required between the local authority who failed to exercise the power and those who suffered harm for any compensation at common law to be due. A special relationship is contingent on the local authority's assumption of responsibility for a particular individual or individuals. No such special relationship can exist if it is a mere relationship between the local authority and anyone in a wider, undefined group of people, e.g. a local authority and all beachgoers, a local authority and all road users. A local authority does not have a special relationship with the wider public simply by virtue of being a public body.
- 11.7 As a result, a coastal local authority, by virtue of its position as a local authority rather than as a landowner/ occupier, does not have a duty to protect beachgoers from or warn them of dangers arising from bathing at a beach, even if they are aware of trends like currents or topography that have historically affected safety of bathers. Irrational actions of a public body do not automatically become unlawful.

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<sup>56</sup> 1996 AC 923

<sup>57</sup> *Stovin v Wise* 1996 AC 923, at 953

<sup>58</sup> *Larner v Solihull MBC* 2001 RTR 469

<sup>59</sup> 2004 1 WLR 1057

- 11.8 Additionally, there is no liability in negligence on any actor (whether a local authority or not) for pure omissions<sup>60</sup>. This in itself can be controversial, especially in the context of public bodies, given that carelessness or incompetence – both of which do attract liability in negligence, especially in context of professionals providing their services to others – can be described as omissions. Doing something wrong can also be expressed in the language of failing to do something. This manoeuvre is distinguished at common law as an omission rather than a *pure* omission. At common law, pure omissions tend to be instances of failure to warn and/or rescue. For almost all rescue bodies, there is no common law duty to answer calls for help or attempt rescue, except for ambulances<sup>61</sup>.
- 11.9 Common law recognises that once a public body initiates a rescue attempt, a duty of care is formed, but then caveats that recognition by specifying that the rescuer will not be liable unless they have worsened the condition of the person being rescued<sup>62</sup>. Even specialist units like the coastguard<sup>63</sup> or the fire brigade<sup>64</sup> are not liable in negligence for their failure to respond or their negligent response, unless their negligent response was a positive act that caused the injured greater injury than would have been suffered if they did not attempt to help. These cases have found that the HM Coastguard does not owe a duty to maintain a visual watch of the coast and has not done so since 1978<sup>65</sup>. As far as it is known, no action has ever succeeded against the HM Coastguard in this respect. An extension of this logic could apply to lifeguarding.
- 11.10 In the context of beach safety, even if a local authority out of its own incentive puts in place lifeguards to watch over the safety of beachgoers, the lifeguards and local authority will not owe a duty to rescue a bather in distress until they start the rescue attempt.
- 11.11 The doctrine of no liability for pure omissions can be displaced if a special relationship or assumption of responsibility exist. As explained above, this is difficult to show where the local authority cannot be said to have assumed responsibility for a section of the wider public who conduct ordinary activities like driving on local authority highways or bathing on local authority beaches. Case law makes it clear that a general failure on a local authority's behalf to rescue or warn the wider public cannot be translated into a duty towards a specific member of that public who suffered injury as a result. A special relationship through assumption of responsibility for that particular injured member of the public must be established before a duty is imposed.
- 11.12 It is difficult to imagine a scenario where such a special relationship (which cannot be mirrored by a relationship with another member of the public on that beach) forms between a local authority and a particular beachgoer in the context of bathing.

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<sup>60</sup> *Smith v Littlewoods* 1987 AC 241

<sup>61</sup> *Kent v Griffiths* 2001 QB 36

<sup>62</sup> *Day v High Performance Sports Ltd (t/a Castle Climbing Centre)* 2003 EWHC 197 (QB)

<sup>63</sup> *OLL Ltd v Secretary of State for Transport* 1997 All ER 897

<sup>64</sup> *Capital & Counties plc v Hampshire County Council* 1997 QB 1007

<sup>65</sup> *Skinner and another v SoS for Transport*, *The Times* 3 January 21994.

11.13 In general terms, the position of negligence can be summarised from the classic decisions in *Donoghue v Stevenson*<sup>66</sup>, where it is concluded that it

*... cannot have mean[t] that a person is liable in negligence if he fails to warn a person nearby whom he sees about to step off the pavement into the path of an incoming vehicle or if he fails to attempt to rescue a child in difficulties in a pond.*

11.14 As a result, in most circumstances, it is unlikely that the law of negligence would bite at the beach. It is important to conclude that there have been several cases involving beach-style swimming pool environments where the court has found a duty to exist. These cases appear to turn on their specific facts, but typically involve situations like in *O'Shea v Royal Borough Of Kingston-Upon-Thames*<sup>67</sup> where the injured party failed to execute a headfirst dive with his arms by his side and suffered a fracture of vertebra in his spine and as a consequence is tetraplegic.

11.15 While it is not entirely clear why *O'Shea* was decided in this way, it is likely to be because the landowner had failed to apply its own rules and measures to protect the safety of those in the premises and that failure gave rise to a breach of duty.

11.16 The same logic could apply in a beach environment, though the natural counterbalance to it is the *Baldacchino* case in which the court concluded that the allegations of negligence did not advance the case any further beyond Occupiers' Liability principles. It found that the state of the premises, in essence shallow water, did not present an undisclosed trap or hazard, nor was it incumbent to create more warning signs as the hazard was one that was entirely obvious to all. Finally, the court concluded that the level of supervision was *of a sufficient amount and of an appropriate nature* to discharge the duty.

## Statutory duty on the MCA and HM Coastguard

11.17 The MCA is an executive, independently accountable agency overseen by the Department for Transport. On the [www.gov.uk](http://www.gov.uk) website<sup>68</sup>, the MCA describes itself as conducting

*Work to prevent the loss of life on the coast and at sea. We produce legislation and guidance on maritime matters and provide certification to seafarers.*

11.18 Common with many other jurisdictions, the MCA also provides a 24-hour maritime search and rescue service around the UK coast, and international search and rescue through the HM Coastguard. The

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<sup>66</sup> *Donoghue v Stevenson* [1932] AC 562

<sup>67</sup> [1995] P.I.Q.R. P208

<sup>68</sup> <https://www.gov.uk/government/organisations/maritime-and-coastguard-agency/about>

MCA's Annual Reports and Accounts for 2017-18 state that during 2017 HM Coastguard SAR coordination network responded to over 22,000 incidents, dealing with distress and 999 calls, tasking lifeboats, helicopters, other ships in the vicinity, other emergency authorities and volunteer coastguard rescue teams. The MCA has been responsible for the HM Coastguard since 1994, though the HM Coastguard itself has historical origins in the 17<sup>th</sup> Century<sup>69</sup>.

11.19 One of the stated corporate objectives for the MCA is to *'use our influence to improve the expertise of volunteer organisations that work on our behalf and do all we can to support the UK's Drowning Prevention Strategy'*, which demonstrates how seriously drowning risk is taken. Notwithstanding this, it does not appear that the MCA actually has a direct responsibility in this area. The [www.gov.uk](http://www.gov.uk) website<sup>70</sup> sets out the MCA's responsibilities as:

- (a) the safety of everybody in a vessel in UK waters;
- (b) the safety of all seafarers on UK flagged vessels;
- (c) making sure all equipment on UK vessels is fit for purpose;
- (d) making sure all seafarers on UK vessels have correct documentation;
- (e) the environmental safety of UK coast and waters;
- (f) the accuracy of hydrographic data on UK charts; and
- (g) overseeing coastal rescue volunteers, hydrographics, seafarer certification and the port state control inspection regime.

11.20 The MCA has a range of volunteers to supplement its operations in the form of The HM Coastguard Rescue Service, which according to their Annual Reports and Accounts for 2017-18 comprises on average of 3,500 volunteers in approximately 350 teams dispersed around the coast of the UK. They are trained in the specialist skills of search, flood, mud and cliff rescue and in 2017-18 were deployed on operational tasking for over 260,000 hours. MCA also benefits from a range of 'declared' facilities in the form of Lifeboats for its use,- from the RNLI and other independent Lifeboats.

11.21 While the MCA clearly describes its role in relation to seafaring, it does not on this webpage clearly set out its responsibility in relation to SAR, and specifically coast-watching, though this deficiency is, to some extent, remedied in the MCA's 2018-19 business plan which is available to download via the website<sup>71</sup>.

<sup>69</sup> <http://researchbriefings.files.parliament.uk/documents/SN00186/SN00186.pdf>

<sup>70</sup> <https://www.gov.uk/government/organisations/maritime-and-coastguard-agency/about>

<sup>71</sup> That document includes the following amongst other things as MCA 'core responsibilities': (a) co-ordinating a 24-hour search and rescue service by Her Majesty's Coastguard and all search and rescue helicopter operations throughout the UK; and (b) acting as lead authority and Category 1 responder for maritime emergencies under the Civil Contingencies Act 2004 – though it is noted that the MCA or HM Coastguard is not actually listed in this legislation.

- 11.22 The 2018-2019 business plan also makes a clear statement of support for the National Water Safety Forum Strategy:

*We continue to support the National Water Safety Forum (NWSF) strategy to halve accidental drowning fatalities in the UK by 2026. Coastal Operations will work with water safety partners at a local level, to engage with their communities, by sharing resources and providing consistent messaging to raise the public’s awareness of risks in, on and around the water.*

- 11.23 This is significant given that it sits outside the powers of the MCA and is of growing importance given that the MCA's 2018-19 business plan<sup>72</sup> reflects that SAR helicopters do a lot of work to provide support for other government departments and that support can be up to 50% of rescues. In 2018 the MCA SAR helicopters were tasked over 500 times and rescued 377 people, according to the [search and rescue helicopter statistics on GOV.UK](#). Nearly a third of these taskings were to incidents on the coast.



- 11.24 In 2017, the HM Coastguard, responded to more than 22,500 incidents. Notwithstanding this, the duties of the HM Coastguard are poorly defined. The only location where the duty is set out in law is in section 1 Coastguard Act 1925, the single operative section of the Coastguard Act. This section enacts the transfer of the power for the Coastguard to the Board of Trade, it describes the HM Coastguard as:

*a coast-watching force for the performance of the duties hitherto performed by the coastguard on behalf of the Board [of Trade], and of such other duties as may be determined by the Board [of Trade]*

- 11.25 While the Coastguard Act has been updated since 1925<sup>73</sup>, the reference to the Board of Trade remains<sup>74</sup> and the Coastguard Act still contains the barest level of detail. It is in stark contrast to the level of detail in the legislation covering the Police or the Fire and Rescue Services which have far more clearly defined duties over several substantial Acts of Parliament running to hundreds of sections.

<sup>72</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/694386/MCA\\_Business\\_Plan\\_18-19\\_final\\_version\\_2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694386/MCA_Business_Plan_18-19_final_version_2.pdf)

<sup>73</sup> The amendments are all minor and the fundamental duty remains as drafted nearly 100 years ago. The changes can be traced through: <https://www.legislation.gov.uk/ukpga/Geo5/15-16/88?view=plain>

<sup>74</sup> Though there is a note that the references to the Board of Trade are to be construed as references to the Secretary of State under the Secretary of State for Trade and Industry Order 1970.

- 11.26 What is meant by 'coast-watching' and what powers have been given to the HM Coastguard by the Board are unclear. I am led to believe that this means that it has never been legally defined and I have not identified any obvious authority doing so.
- 11.27 While the term coast-watching itself suggests a passive monitoring role, the reality of the HM Coastguard is very different. I understand that the role includes little actual 'watching' and monitoring in a physical sense, though technology largely has taken over that function. The National Coastwatch Institution<sup>75</sup> also provides this function on a voluntary basis for, primarily, shipping related issues.
- 11.28 HM Coastguard's true service is closer to a specialist emergency service and the monitoring being conducted by RNLI and SLSGB lifeguards. However, in some cases, this may be as a declared facility.
- 11.29 The MCA has provided me with an extract from Hansard of a Parliamentary Determination from 1992 which provides further details of its duties. That Determination, made by the Secretary of State for Transport, expands on the HM Coastguards duties, it states:

*... HM Coastguard fulfils its responsibility for the initiation and co-ordination of civil maritime and aeronautical SAR. This includes the mobilisation, organisation and tasking of adequate resources to respond to persons in distress in the air, at sea, in tidal waters or at risk of injury or death on the sea cliffs and shoreline of the UK.<sup>76</sup>*

- 11.30 It is, therefore, clear that the HM Coastguard's role is one of SAR, both in initiation and coordination. While there is no greater clarity available, I would expect the reference to the mobilisation of adequate resources to include coordination of its own and third-party assets.
- 11.31 Speaking to the Transport Select Committee, the former Chief Executive of the MCA summarised the position as:

*From the coastguard perspective, our statutory role is as the initiator and co-ordinator of search and rescue efforts at sea. We draw on the assets made available to us from the Royal National Lifeboat Institution and other sources, plus our own coastguard rescue teams, who tend to stay on land or in very shallow water, or helicopters that we operate and have control of. Effectively, any organisation that wants to put up an asset for our use will declare it as a facility for our use. We inspect it and measure it against what we expect in terms of*

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<sup>75</sup> According to its website: <https://nci.org.uk/content/our-work> - 'The National Coastwatch Institution (NCI) is a voluntary organisation set up in 1994 to restore a visual watch along UK shores after many small Coastguard stations closed. NCI is a registered charity managed by a board of Trustees with a Constitution agreed by the Charities Commission. Each station is manned by a team of fully trained and dedicated volunteers who keep a daylight watch up to 365 days a year. Stations are equipped with telescopes, radar, telephone and weather instrumentation as well as up to date charts... Close contact with the Maritime Coastguard Agency (MCA) aims to promote stations to Declared Facility Status in order to become an integral part of the National Search and Rescue Structure.'

<sup>76</sup> HM Coastguard is part of the MCA which in turn is an executive arm of the Secretary of State for Transport. Section 1 of the Coastguard Act 1925 gives the HM Coastguard the duties set out in that section and 'such other duties as may be determined by the Board'. On 9 March 1992 the then Secretary of State announced his Determination to Parliament which gave rise to this provision.

*capability, and then it becomes one of our many assets available for deployment. The Royal National Lifeboat Institution as a whole is a declared facility for us<sup>77</sup>*

- 11.32 Applying the short Hansard extract to this situation, we can extrapolate that 'shoreline' would cover the Foreshore wherever it exists and therefore would give the HM Coastguard a duty in this area.
- 11.33 While the Coastguard Act defines the HM Coastguard as a coast-watching force and it is arguable that this includes activity before a rescue, it is clear from Hansard that it only has a legal duty to *respond* to an incident, rather than acting to prevent it occurring in the first place. Given that the RNLi 2017 Annual Report states that the RNLi carried out 3.32m preventative actions arising out of monitoring the beaches, ranging from face-to-face communication to positioning flags, this preventative aspect is clearly a very significant part of the role and naturally something that should be part of a 'coast-watching' force, but it is unclear if it legally is.
- 11.34 While there is no statutory duty to act beyond pure SAR, in reality HM Coastguard does provide safety talks and demonstrations regarding aspects of maritime safety on request, and from time to time also publishes beach and coastal safety advice, this tends to be aimed at beach users.
- 11.35 It is clear that there is a dividing line between when the Police and the HM Coastguard will respond to an incident. The same extract of Hansard reinforces this by going on to explain that there should be a collaboration with Police in order to consider the coordination of SAR and set up local committees to ensure that this occurs:

*Given the importance of the cliff and shoreline task that the chief coastguard is to liaise with the police authorities to set up local SAR committees to provide a consultative body to consider the coordination problems on the shoreline, improve liaison between the interested authorities concerned and to assess the availability and readiness of rescue resources. Additionally, coastguard officers are to be formally tasked to establish regular meetings with local community representatives to ensure that matters of concern involving marine or shoreline search and rescue are fully aired and brought to the attention of the search and rescue committee<sup>78</sup>*

- 11.36 In the Strategic Overview of Search and Rescue in the UK, it expands on this by stating in relation to the Coastal area:

*To avoid duplication of effort between HM Coastguard and the Police Services, which are the two civilian SAR co-ordinating authorities in the UK, it has been agreed that a coastal incident is defined as an incident which develops on the seaward side of the coastline below the level of Mean High Water Spring tides (MHWS) but including sea cliffs, shoreline and other littoral areas. Such incidents will be coordinated by HM Coastguard and those above MHWS will be coordinated by the Police Services. Incidents which develop inland and*

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<sup>77</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/transport-committee/national-drowning-prevention-strategy/oral/44211.html>

<sup>78</sup> Hansard: 9 March 1992

*progress towards the shoreline will be the responsibility of the Police Services and, if requested, HM Coastguard will provide resources to assist. Where appropriate, the coordination of an incident can be handed over from one coordinating authority to the other.*<sup>79</sup>

- 11.37 It is noteworthy that the threshold here is the high water rather than low water mark and this is presumably because of the potential for water to be present in this area. While this clearly gives the expectation of cooperation and to some extent collaboration, it is interesting that the HM Coastguard is not included within the statutory duty found in the Police and Crime Act 2017<sup>80</sup> in respect of emergency services collaborating in the discharge of their duties.
- 11.38 It is therefore clear that the HM Coastguard is the body with responsibility for rescue on the Foreshore and in the Sea, however whether its duties are also proactive is unclear.
- 11.39 Finally, for completeness, the Coastguard Act does permit further duties or powers being given to the HM Coastguard if so delegated by the Secretary of State. In the short term, doing so in a clear fashion might be a solution, but it is not sustainable long term.

### **Comparison with the Fire and Rescue Service governance**

- 11.40 The inadequacy of the Coastguard Act is stark when considered alongside the other regulators' regimes. For example, the Fire and Rescue Services Act 2004 ('FRSA 2004') has over 60 operative sections setting out its duties compared to one for the HM Coastguard.
- 11.41 The powers of fire and rescue authorities are described in section 5A as:
  - (1) A relevant fire and rescue authority may do—
    - (a) anything it considers appropriate for the purposes of the carrying out of any of its functions (its “functional purposes”),
    - (b) anything it considers appropriate for purposes incidental to its functional purposes,
    - (c) anything it considers appropriate for purposes indirectly incidental to its functional purposes through any number of removes,
    - (d) anything it considers to be connected with—
      - (i) any of its functions, or
      - (ii) anything it may do under paragraph (a), (b) or (c), and

<sup>79</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/593127/mca\\_uksar.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593127/mca_uksar.pdf)

<sup>80</sup> See section 1-5 of the Act.

(e) for a commercial purpose anything which it may do under any of paragraphs (a) to (d) otherwise than for a commercial purpose.

(2) A relevant fire and rescue authority's power under subsection (1) is in addition to, and is not limited by, the other powers of the authority.

11.42 FRSA 2004 sets out clearly its core functions and other functions with a separate section for each of the seven functions listed:

(a) Core functions

- (i) Fire safety.
- (ii) Fire-fighting.
- (iii) Road traffic accidents.
- (iv) Emergencies.

(b) Other functions

- (i) Directions relating to particular fires and emergencies.
- (ii) Power to respond to other eventualities.
- (iii) Other services

11.43 The sections clearly set out what the Fire and Rescue Service is to do, for example in relation to fire safety it states:

**6 Fire safety**

(1) A fire and rescue authority must make provision for the purpose of promoting fire safety in its area.

(2) In making provision under subsection (1) a fire and rescue authority must in particular, to the extent that it considers it reasonable to do so, make arrangements for—

(a) the provision of information, publicity and encouragement in respect of the steps to be taken to prevent fires and death or injury by fire;

(b) the giving of advice, on request, about—

(i) how to prevent fires and restrict their spread in buildings and other property;

(ii) the means of escape.

11.44 The FRSA 2004 also provide for powers in relation to things that are beyond fire. This includes a general duty in relation to other eventualities in section 11 and the power for the Secretary of State to confer further powers in relation to emergencies:

**9. Emergencies**

(1) The Secretary of State may by order confer on a fire and rescue authority functions relating to emergencies, other than fires and road traffic accidents in relation to which the authority has functions under section 7 or 8.

(2) An order under this section may require functions conferred on a fire and rescue authority under this section to be discharged outside the authority’s area.

...

**11. Power to respond to other eventualities**

(1) A fire and rescue authority may take any action it considers appropriate—

- (a) in response to an event or situation of a kind mentioned in subsection (2);
- (b) for the purpose of enabling action to be taken in response to such an event or situation.

(2) The event or situation is one that causes or is likely to cause—

- (a) one or more individuals to die, be injured or become ill;
- (b) harm to the environment (including the life and health of plants and animals).

...

(4) The power conferred by subsection (1) may be exercised by an authority outside as well as within the authority’s area.

11.45 The Welsh Assembly has used the power under section 9 to create a duty<sup>81</sup> in respect of flooding and rescuing people in the event of an emergency in inland water.<sup>82</sup>

11.46 The Scottish regime goes further in its own Act, the Fire Scotland Act 2005. The Fire Scotland Act 2005 covers broadly the same areas as the FRSA 2004, but materially it includes powers in relation to rescue at sea, for example:

**16A Exercise of powers at sea: further provision**

- (1) Subsection (2) applies where [SFRS]<sup>2</sup> has power to act, or is required to act, at sea.
- (2) The power may be exercised or the duty carried out—
  - (a) at sea in that part of the territorial sea of the United Kingdom which is not adjacent to Scotland; and

<sup>81</sup> Article 3A, Fire and Rescue Services (Emergencies) (Wales) Order 2007/3193

<sup>82</sup> Defined as rivers, streams and canals and lakes, reservoirs and water-filled quarries.

(b) at sea beyond the territorial sea of the United Kingdom.

11.47 In addition, the Scottish Fire Services also have the power to charge to recover costs when conducting a rescue at sea.

11.48 While in comparison to the Coastguard Act, the duties of the Fire and Rescue Services are clearly set out, section 21 of the FRSA 2004 takes it even further and requires the Secretary of State to prepare a Fire and Rescue National Framework for England ('the Framework')<sup>83</sup>. The purpose of which is summarised at paragraphs 1.1 and 1.2 of the Framework<sup>84</sup>, which state:

1.1 The Framework:

a) must set out priorities and objectives for fire and rescue authorities in connection with the discharge of their functions;

b) may contain guidance to fire and rescue authorities in connection with the discharge of any of their functions; and

c) may contain any other matter relating to fire and rescue authorities or their functions that the Secretary of State considers appropriate.

1.2 In setting out priorities and objectives for fire and rescue authorities in England, the requirements are best calculated to promote public safety and the economy, efficiency and effectiveness of fire and rescue authorities. The Framework sets out high level expectations; it does not prescribe operational matters which are best determined locally by fire and rescue authorities and their staff.

11.49 The Framework clearly sets out what is expected of Fire and Rescue Services and where they should focus resources. This includes guidance on the Integrated Risk Management Plan that is required to be produced in each area. There is nothing similar in existence for HM Coastguard.

11.50 In my opinion, the lack of clarity of the duties of the HM Coastguard requires addressing. The Coastguard Act is nearly 100 years old and is unfortunately vague: it is unclear if the HM Coastguard has any proactive non-SAR based duties, for instance. By comparison to other emergency services, the Coastguard Act fails to describe the duties of the HM Coastguard and I recommend that it should be reviewed, and updated, to ensure that it reflects the HM Coastguard's current roles and responsibilities, particularly as they relate to the beach aspect of the coast. It would also be an opportunity to consider how coast based 'coast-watching' or lifeguarding should be managed and whether it is appropriate that this and other non-SAR duties falls to the HM Coastguard. I shall return to this topic later in the report.

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<sup>83</sup> A similar framework exists for Scotland

<sup>84</sup> May 2018 edition

# Planning for emergencies

## 12. Planning for emergencies

- 12.1 The Civil Contingencies Act 2004 ('CCA 2004') imposes obligations in relation to emergencies. An emergency is defined, amongst other things, as:

*'an event which threatens serious damage to Human welfare in a place in the United Kingdom. An event or situation threatening damage to human welfare includes a wide range of circumstances, including those that involve, cause or may cause loss of human life or human injury'.<sup>85</sup>*

- 12.2 The scope of the CCA 2004 includes the territorial sea of the United Kingdom<sup>86</sup> within its definition of the UK. Accordingly, unlike the other regimes considered, it does not have a geographical issue to overcome and Sea Based Recreation is, geographically at least, within the scope of the regime.

- 12.3 While I have been told that this regime is intended to cover emergency situations of substantial scale, there is no apparent reason why it could not cover topics like drowning risk from amenity beaches such as Bournemouth, Brighton or Blackpool which attract millions of visitors each year, as an event threatening death rather than specifically a catastrophic event. Such a drowning risk clearly would arise out of an event and would cause, or may cause, loss of life or injury as was seen at Camber Sands.

- 12.4 I am, however, conscious that the ministerial supervisory powers that enable a Minister to require a responder to exercise a particular power, disclose particular information and so on, suggest that the CCA 2004 is designed to tackle and help with preparation for sudden crises rather than dealing with *predictable* dangers, however serious. While a Minister could potentially ask a local authority to adopt measures to prevent and tackle accidents on UK beaches through an order or additional regulation given the broad definition of emergency, it is unlikely to happen in the context of the whole CCA 2004.

- 12.5 Part 1 of the CCA 2004 requires local authorities<sup>87</sup>, emergency services, select NHS trusts<sup>88</sup> and select Secretaries of State<sup>89</sup> (collectively referred to as Category 1 responders – please note that this group differs slightly in Scotland and Wales<sup>90</sup>) to discharge a range of duties that aim to prepare them and the public for emergencies. The overarching duty imposed by the statute is for Category 1 respondents to assess risks of emergency occurring and prepare plans for how they will be run during

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<sup>85</sup> Section 1 of the CCA 2004

<sup>86</sup> Section 18(2), CCA 2004.

<sup>87</sup> Including county, district, London Borough councils, Common Council of the City of London, Council of the Isles of Scilly and the Greater London Authority.

<sup>88</sup> Those which provide ambulance services and emergency response – see Schedule 1, Part 1, CCA 2004.

<sup>89</sup> Those whose functions include responding to emergencies by virtue of listed Acts and those whose functions include responding to maritime and coastal emergencies – see Schedule 1, Part 1, CCA 2004.

<sup>90</sup> Scottish Category 1 respondents are listed in Part 2, CCA 2004, Welsh in Part 2A of the same.

an emergency<sup>91</sup>. Which respondent should concern themselves with which emergencies is not explicitly stated, but a common sense approach suggests that the kind of emergency will dictate who will play the leading role in planning for and responding to it. These assessments and plans must be published if their publication is desirable to prevent or mitigate the effects of an emergency, but without unnecessarily alarming the public<sup>92</sup>. To avoid duplication, the publication may be done jointly with other respondents (e.g. local authority and the Police).

- 12.6 When planning for an emergency, a Category 1 respondent must take into account any relevant risk assessments, activities of voluntary organisations where they are relevant to the emergency and any arrangements it has already made to warn or inform the public of the emergency<sup>93</sup>. Plans must include exercises and training to ensure that the plan is effective and a procedure for determining whether the responder can take action without changing or acquiring resources<sup>94</sup>. Respondents must also consider if it would be more appropriate to collaborate and prepare a joint plan with other respondents who have functions exercisable in a local police area<sup>95</sup>. If such a joint effort is attempted, one of the respondents should adopt the role of lead respondent to ensure the response is effective.
- 12.7 Category 1 respondents must warn and provide guidance to the public if an emergency is likely to occur or has occurred<sup>96</sup> unless that advice is likely to be provided by other bodies who are performing the same duties under the CCA 2004.
- 12.8 Additionally, local authorities are under an obligation to provide advice to the public on how to carry on in the event of an emergency<sup>97</sup>. If specific action is required of a local authority, a Minister may require it to perform one of its functions to prevent occurrence of an emergency, handle an emergency that has already occurred or take other appropriate action<sup>98</sup>. Ministers may also require information from respondents, direct respondents to disclose information as a matter of urgency and issue guidance to which respondents must have regard. Category 1 and 2 responders may also bring proceedings against other responders for failure to comply with the emergency planning legislation<sup>99</sup>.
- 12.9 CCA 2004 also forms the basis for a number of measures that increase the flow of information between respondents and encourage cooperation between public bodies, regardless of whether they are category 1 or 2 respondents. Bodies classified as category 2 respondents – utility companies, transport agencies, airport and harbour authorities, the Health and Safety Executive and the Office of Nuclear Regulation<sup>100</sup> - are under an obligation to share information and cooperate with category 1 respondents for the purpose of preventing or addressing emergencies.

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<sup>91</sup> Section 2(1), CCA 2004

<sup>92</sup> Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005, SI 2005/2042, reg. 27

<sup>93</sup> Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005, SI 2005/2042, reg. 3

<sup>94</sup> Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005, SI 2005/2042, reg. 25

<sup>95</sup> Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005, SI 2005/2042, reg. 22

<sup>96</sup> Section 2(1)(g), CCA 2004

<sup>97</sup> Section 4, CCA 2004

<sup>98</sup> Sections 5 and 7, CCA 2004

<sup>99</sup> Section 10, CCA 2004

<sup>100</sup> Schedule 1, Part 3, CCA 2004. Again there is a slight difference between what bodies form Category 2 responders in Scotland and Wales – these are specified in Parts 4 and 5 respectively.

- 12.10 The framework generated by the CCA 2004 is robust. As stated above, the definition of emergency as created by the statute can cover the risk of drowning and other dangers associated with bathing in the Sea. In practice however, local authorities and other Category 1 respondents do not rely on this framework to manage the risk of drowning on UK beaches. When read with the Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005, SI 2005/2042, the CCA 2004 clearly creates the impression that its provisions are directed towards ad hoc emergencies like flooding, fire or disease outbreaks rather than dangers that are constantly present, like the risk of drowning. This is best exemplified by some of the risk registers for the Local Resilience Forum<sup>101</sup>, the Dorset Public Community Risk Register, which identifies influenza, poor air quality, and maritime pollution as emergencies. Significantly however it also identifies, 'Rapid accidental sinking of a passenger vessel in or close to UK waters'<sup>102</sup> which, while perhaps focussed on a substantial vessel sinking, clearly incorporates drowning risk. The document does not apparently consider the hazard associated with the millions of people using the beach that annually enter the water in their areas, presumably because it is a constant and predictable hazard.
- 12.11 In Hampshire and the Isle of Wight the same position exists.<sup>103</sup> Its risk matrix also recognises 'Fire, flooding, stranding or collision involving a passenger vessel in or close to UK waters leading to the ship's evacuation or partial evacuation at sea', though not the risk of sinking or drowning. It also recognises a local accident on motorways and major trunk roads and the risk of, particularly coastal, flooding but does not recognise the risk of drowning from those on the coast. The same approach is taken in Devon and Cornwall<sup>104</sup>, though only its top 10 risks are visible online and at national level<sup>105</sup>.
- 12.12 Given the requirement to consider risk assessment and risk mitigation, the CCA 2004 framework does lend itself to the management of coastal risk. Its mechanisms promoting information sharing, involvement of voluntary organisations and collaboration between multiple public bodies provide a good foundation for addressing the problem effectively. If a CCA 2004-based model was adopted for this purpose, it would need to clearly state that drowning prevention is the issue being addressed and specify a hierarchy of respondents to tackle the problem to ensure that one of the specified actors takes the lead, without responsibility floating freely amongst a group of respondents. This is especially important given that there is no specific public body responsible for beach safety at present – this vacuum of power has not attracted a solution to the problem of drowning yet.
- 12.13 It is however correct that local authorities whose territories encompass beaches do often provide beach safety guidance and safety tips (Torbay<sup>106</sup>, Cornwall<sup>107</sup>, Blackpool<sup>108</sup>, Southend-on-Sea<sup>109</sup>), but in these areas the Local Resilience Forum do not consider it a factor for the risk register.

<sup>101</sup> <https://www.gov.uk/guidance/local-resilience-forums-contact-details>

<sup>102</sup> <https://www.dorsetprepared.org.uk/media/57231/dorset-lrf-public-risk-register-3-october-2018.pdf>

<sup>103</sup> <http://documents.hants.gov.uk/emergencyplanning/RiskMatrix2018.pdf>

<sup>104</sup> <https://www.dcisprepared.org.uk/media/2238/public-facing-crr-print-lrf-dcios-20180713-v1.pdf>

<sup>105</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61934/national\\_risk\\_register.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61934/national_risk_register.pdf)

<sup>106</sup> <https://www.torbay.gov.uk/leisure-sports-and-community/beaches/beach-safety/>

<sup>107</sup> <https://www.cornwall.gov.uk/leisure-and-culture/beaches-in-cornwall/beach-safety/>

<sup>108</sup> <https://www.blackpool.gov.uk/Residents/Planning-environment-and-community/Crime-and-safety/A-guide-to-beach-safety.aspx>

<sup>109</sup> [https://www.southend.gov.uk/info/200307/beaches/89/beach\\_safety](https://www.southend.gov.uk/info/200307/beaches/89/beach_safety)

# Public Health Duties

## 13. Public health and water safety duties

- 13.1 There are multiple public health duties that touch on the Beach environment, or that relate to bathing in general. There are however not any statutory duties on a local authority to supply lifeguards, as was described by the then Under-Secretary of State, Office of the Deputy Prime Minister, in evidence to the Transport Select Committee on 23 March 2005:

Local authorities have no statutory requirement to supply lifeguards, and it is at the discretion of the local authority, on the assessment of their own needs in their own areas, that they will decide whether or not to do that. I have to say, where the local authorities are owners of the beach then they do provide them; that is what happens on the ground. They do that kind of provision mainly in close liaison with RNLI or whatever other group would be the appropriate group to provide that kind of safety, but it is not a statutory requirement.

- 13.2 Public health duties can be split into two categories: the discretionary power to act, and the power to create local byelaws controlling how others act. The position in relation to byelaws is discussed in the section below.
- 13.3 Under section 234 Public Health Act 1936, local authorities in England and Wales are given a general power to place life-saving equipment at such places as it thinks fit. This power is not expressed in terms that make it mandatory for the local authority, rather it is expressed that the local authority *may* provide life-saving appliances at such places, whether places used for bathing or not, *as they think fit*. While this power may be intended to give the local authority the ability to protect the public through the provision and siting of PRE at locations of which it is not the owner, it is a missed opportunity to create a regime based on properly conducted risk assessment and to ensure that duty holders have implemented and paid for such PRE themselves.
- 13.4 This power is no doubt anticipated to be read in conjunction with the power under ss.231(1)(e) Public Health Act which provides the power to create byelaws requiring persons providing accommodation for bathing to provide and maintain PRE. Together this could result in a local authority legislating for PRE or implementing a regime itself, which is a good start, but this is not the best approach.
- 13.5 The local authority also has powers which permit it to create such recreational facilities as it thinks fit<sup>110</sup>. This power includes, but is not limited to, the creation of outdoor facilities including swimming pools and facilities for boating and water skiing on inland and coastal waters and for fishing in such

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<sup>110</sup> Section 19 Local Government (Miscellaneous Provisions) Act 1976

waters. While it may create such facilities, it does not have a corresponding duty in relation to safety while those activities are being undertaken.

- 13.6 In Scotland, the duties on local authorities are also not mandatory, but extend beyond that described for England and Wales above. In Scotland there is the power to both provide warning signage and provide staff and equipment appropriate for lifesaving<sup>111</sup>:
- (a) *A local authority may on the seashore or in or on adjacent waters place notices or other indications advising the public as to any danger or health hazard connected with the seashore or those waters.*
  - (b) *A local authority may provide staff for life saving and any boats or equipment which are appropriate for life saving.*
  - (c) *A local authority, when exercising their powers under this section, shall have regard to the need to protect and maintain any public rights under the guardianship of the Crown to use the foreshore, and adjacent waters.*
- 13.7 In addition, local authorities may on any part of the Seashore, or in or on adjacent waters or the bed thereof, execute any works for the purpose of preserving, improving or restoring amenity.
- 13.8 Significantly, these sections in Scotland give local authorities the power to take action to protect safety in the Sea. In addition to the Foreshore, this section also expressly applies to waters within a distance of the low water mark of ordinary spring tides not exceeding 1,000 meters.<sup>112</sup>
- 13.9 The same section makes clear that these sections of the act apply to Crown land, that is to say land which belongs to Her Majesty or belongs to a government department or is held in trust for Her Majesty for the purposes of a government department.
- 13.10 These sections are unusual in that they clearly give the local authority the power to regulate aspects of safety on the seaward side of the low water mark. They clearly set a precedent that could be replicated elsewhere in the UK.
- 13.11 In Ireland there are also similar duties to those set out in the Public Health Act within Part V of the Local Government Act 1994. Section 31(2) of that Act enables local authorities to provide facilities and services related to the promotion of water safety. Usually, the services provided by local authorities include the provision of lifeguards, water safety equipment (such as ring buoys and other equipment/appliances), swimming and bathing places for the public and the arranging of instruction in swimming and lifesaving (or assisting in this).

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<sup>111</sup> Sections 121(9)-(11) Civic Government (Scotland) Act 1982

<sup>112</sup> Section 123 Civic Government (Scotland) Act 1982

### ***Bathing Water***

- 13.12 While there is no overtly applicable regime for ensuring the safety of those using bathing waters from a drowning prevention perspective, the Bathing Water Regulations 2013<sup>113</sup> (the 'BWR') regulate the quality of the inland water<sup>114</sup> that those people are bathing in.
- 13.13 Under the BWR, there is a positive duty on the Secretary of State to publish annually a complete list of all bathing water. This is recorded in Schedule 2 of the BWR and changes year to year. The list captures locations where the Secretary of State expects a large number of people to bathe, having regard in particular to past trends and any infrastructure or facilities provided, or other measures taken, to promote bathing at those waters.<sup>115</sup> Theoretically, at least, these circa 400 locations should be the places where a drowning incident is most likely, however we are aware that there are some areas where bathing takes place but for local reasons a decision has been taken not to register them. For instance, the RNLI reports that it is providing lifeguarding at a number of these locations. It has also been suggested that if a connection is made between bathing waters and the need for safety assessments then this is likely to have the unintended consequence of causing fewer bathing waters to be registered.
- 13.14 In addition to the creation of the list, and the list of locations where the water quality is not good enough for bathing, the BWR create a number of duties which revolve around improving water quality. For example, by the end of the 2015 bathing season all bathing waters classified as at least 'sufficient' are to take such realistic and proportionate measures to increase the number of bathing waters that are categorised as good or excellent. It is then the duty of the local authority to disseminate the bathing water classification to the public and to display warnings, particularly where the water is poor.
- 13.15 In stark contrast with safety, under the BWR a local authority legally controls a bathing water if the relevant land relating to that bathing water is *located* within its area. Relevant land is defined as land: (a) normally used to access bathing water from the landward side, and that is (b) immediately adjacent to that bathing water or, where the bathing water is tidal, immediately above the high water mark. Accordingly, provided that you can access the bathing water from land in the local authority's area, it is responsible. This is very clear and unambiguous.
- 13.16 The BWR impose an active duty on local authorities to display information and warnings relating to water quality. A similar obligation could be placed on them in relation to other safety aspects at beaches and in other water environments, e.g. to display warnings of common risks at beaches.
- 13.17 There is therefore a clear duty to ensure that the water in the Sea at bathing locations is safe from a chemical perspective.

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<sup>113</sup>These Regulations implement the Bathing Waters Directive 2006/7/EC (OJ No L 64, 4.3.2006, p 37) and therefore are not of UK origin.

<sup>114</sup> Inland water is defined as: all standing or flowing water on the surface of the land, and all groundwater on the landward side of the baseline from which the breadth of territorial waters is measured.

<sup>115</sup> Regulation 3(1)

# Byelaws

## 14. Local authority byelaws

- 14.1 A byelaw is a law made locally by a local authority<sup>116</sup>, rather than by Central Government, 'for the good rule and government of and for the prevention and suppression of nuisances in the whole or any part of the local council's area'<sup>117</sup>. Byelaws generally require that something is done or regulated in the particular area that the local authority is responsible for.
- 14.2 In addition to the general power to create a byelaw, there are a number of specific Acts which create specific powers for the creation of byelaws. Byelaws are designed to supplement but not replace the national law and are only valid within the geographical bailiwick of the authority making them. The byelaw must then be approved by the Secretary of State<sup>118</sup>. There are powers under section 236 Local Government Act 1972 which sets out the tests that have to be met in order for a byelaw to be valid.
- 14.3 The Public Health Acts of 1907 and 1936 make provisions to govern public bathing and the seashore, and therefore could apply to the to the risk of drowning at the Foreshore<sup>119</sup>.
- 14.4 Section 231 Public Health Act 1936 gives local authorities the power to make byelaws regulating a range of activities in relation to bathing<sup>120</sup>. This includes the times bathing may occur, areas for bathing, even bathing suit requirements! Of particular significance is that it includes the ability to create laws which prohibit or restrict bathing at times when warnings are given that it is dangerous, and more generally 'for preventing danger to bathers'. The powers of this section are set out below.

*231.— Byelaws with respect to public bathing.*

*(1) A local authority may make byelaws with respect to public bathing, and may by such byelaws—*

*(a) regulate the areas in which, and the hours during which, public bathing shall be permitted;*

<sup>116</sup> Powers are also vested in a range of other bodies, including statutory water undertakers. —The Water Industry Act 1991 allows water undertakers to make byelaws regulating water-based recreation, including bathing, in water owned or managed by these undertakers.

<sup>117</sup> Section 235 Local Government Act 1972

<sup>118</sup> In Scotland the position is slightly different. 1.1 In Scotland, LAs are able to make byelaws for good rule and government of the whole or any part of their area as per s.201 of the Local Government (Scotland) Act 1973.

<sup>119</sup> Substantially similar powers exist in Scotland in section 121 Civic Government (Scotland) Act 1982

<sup>120</sup> See for instance: <http://www.chichester.gov.uk/article/24068/Coastal-recreation-byelaws-and-slipways>; <https://www2.canterbury.gov.uk/media/66762/public-bathing.pdf>

*(aa) prohibit or restrict public bathing at times when and places as respects which warning is given, by the display of flags or by other means specified in the byelaws, that bathing is dangerous]*

*b) fix the places at which [...]2 bathing huts or tents may be erected;*

*(c) regulate the manner in which [...]3 huts or tents may be used, and the charges which may be made for the use thereof;*

...

*(e) require persons providing accommodation for bathing to provide and maintain life-saving appliances, or other means of protecting bathers from danger; and*

*f) regulate, for preventing danger to bathers, the navigation of vessels used for pleasure purposes within any area allotted for public bathing during the hours allowed for bathing.*

*(2) If and so far as a byelaw made under the preceding subsection is inconsistent with a byelaw made by dock undertakers, the latter shall prevail.*

- 14.5 It is significant that this section gives the local authority the power to require certain types of businesses to provide and maintain life-saving appliances, or other means of protecting bathers from danger. While this power is currently limited in application to those providing 'bathing accommodation', which is undefined, there is no reason why this principle could not be extended to include Sea Based Recreation.
- 14.6 While not set out in section 231, the local authority was permitted to exercise its powers to make byelaws under section 231 in respect of *any area of the sea which is outside the area of the authority and within 1,000 metres to seaward of any place where that mark is within or on the boundary of the area of the authority*.<sup>121</sup> This power is subject to being curtailed by the Secretary of State at his discretion.
- 14.7 The local authority is also given powers to make byelaws with respect to publicly accessible swimming pools which are not under their management<sup>122</sup>. These byelaws may cover:
- (a) Water purity;
  - (b) The adequacy and cleanliness of the swimming pool accommodation;
  - (c) Regulation of the people resorting thereto; and
  - (d) The prevention of accidents.

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<sup>121</sup> s.17 of the Local Government (Misc. Provisions) Act 1976

<sup>122</sup> Section 233 Public Health Act 1936

- 14.8 A Google search suggests that a limited number of local authorities have taken up the opportunity to make byelaws regulating swimming pools though many of the byelaws reviewed only have limited direct application to safety<sup>123</sup>.
- 14.9 A similar power to create byelaws for swimming baths under a council's management also exists under section 223 Public Health Act 1936. Section 223 is a very general provision and unlike section 231 does not set out specific obligations or create specific requirements, it merely provides the power to make byelaws for the regulation of these areas including the power to expel 'undesirable' people.
- 14.10 Significantly, while the power in relation to non-council facilities is clearly limited to swimming pools, the power relating to those under a council's control extends beyond baths, wash houses and swimming pools to include bathing places under their management. This, together with the fact that the scope is just to 'regulate' makes this section arguably broad enough for all local authorities to create byelaws which regulate Sea Based Recreation at the Foreshore.
- 14.11 Though not directly applicable to Sea Based Recreation, it is significant that the local authority is also given power under the Public Health Act 1961 ('PHA61') to create further byelaws in respect of 'pleasure boats' at the coast. The PHA61 confirms that a local authority may 'for the prevention of danger, obstruction or annoyance to persons bathing in the sea or using the seashore'<sup>124</sup> make byelaws regulating the speed of pleasure boats and their use in a way which might be dangerous.
- 14.12 The powers in the PHA61 are significant as the PHA61 gives the local authority to have the power to regulate for the protection of those bathing in the Sea from a hazard in a geographical area over which it has no legal or actual control.
- 14.13 A number of local authorities, including Blackpool for its iconic beach, have produced byelaws covering this topic extending in some cases to several hundred meters beyond the low water mark into the Sea<sup>125</sup>. Again, this clearly demonstrates the potential for regulation of activity in the Sea, though any newly made byelaws will not benefit from the extension of power beyond the geographical boundary.<sup>126</sup>
- 14.14 The Public Health Acts Amendment Act 1907 enables local authorities to produce byelaws that provide for the prevention of danger of those using the seashore:

*82 Byelaws as to sea-shore.*

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<sup>123</sup> See for instance: [https://www.oxford.gov.uk/downloads/file/756/byelaws\\_swimming\\_pools](https://www.oxford.gov.uk/downloads/file/756/byelaws_swimming_pools) ; <https://www.cityoflondon.gov.uk/things-to-do/green-spaces/epping-forest/visitor-information/Pages/byelaws.aspx> and [https://www.kettering.gov.uk/downloads/file/17626/bylaw - swimming baths non\\_kbc](https://www.kettering.gov.uk/downloads/file/17626/bylaw_-_swimming_baths_non_kbc) as three examples.

<sup>124</sup> Section 76 Public Health Act 1961

<sup>125</sup> See for instance: <http://www.conwy.gov.uk/cy/Council/Legal-Services/Assets/documents/Byelaw-Seaside-Boats.pdf>; <http://www.rother.gov.uk/CHttpHandler.ashx?id=27378&p=0> ; <https://www.iow.gov.uk/Council/OtherServices/Commercial-Services-Allotments/BYELAW-EXTRACTS-PLEASURE-BOATS>

<sup>126</sup> Section 17(5) Local Government (Miscellaneous Provisions) Act 1976 removes the power to create new byelaws extending into the sea under this section.

*The local authority for the prevention of danger, obstruction, or annoyance to persons using the sea-shore may make and enforce byelaws to—*

*(1) Regulate the erection or placing on the sea-shore, or on such part or parts thereof as may be prescribed by such byelaws, of any booths, tents, sheds, stands, and stalls (whether fixed or movable), or vehicles for the sale or exposure of any article or thing, or any shows, exhibitions, performances, swings, roundabouts, or other erections, vans, photographic carts, or other vehicles, whether drawn or propelled by animals, persons or any mechanical power, and the playing of any games on the seashore, and generally regulate the user of the seashore for such purposes as shall be prescribed by such byelaws;*

*(2) Regulate the user of the seashore for riding and driving;*

*(3) Regulate the selling and hawking of any article, commodity, or thing on the seashore;*

*(4) Provide for the preservation of order and good conduct among persons using the seashore. Provided that in the case of byelaws made by a local authority in England, no byelaws affecting the foreshore below high-water mark shall come into operation until the consent of the Board of Trade has been obtained.*

14.15 For example, in Hastings<sup>127</sup>, and East Riding<sup>128</sup>, the Councils have used this power to make a byelaw which prohibits the interference with life-saving appliances provided by the local authority in order to protect the PRE provided at the Foreshore. In Conwy<sup>129</sup> the power is used to protect the lifeboat slipway from usage other than in an emergency.

14.16 In all of these cases, the regime creates a power which the local authority can choose to exercise but does not impose a duty to always act. There is no active and unambiguous duty or obligation placed on a local authority to act. There is no duty to conduct a risk assessment of a hazard posed by coastal bathing and no positive obligation to create local byelaws to regulate this area.

### Issues with byelaws

14.17 While on the face of it there are a broad range of byelaws that are permitted to be created to regulate this area, it is far from a perfect solution. Byelaws create a regulatory regime whereby the penalty for non-compliance is negligible. While there is the power to create penalties to the maximum level set out by the enactment giving the power to create the byelaw, if no fine level is stated then it defaults to £50. My research indicates that many byelaws have fines at that level which makes them

<sup>127</sup> [https://www.hastings.gov.uk/content/coastline\\_beaches/pdfs/Hastings\\_Borough\\_Council\\_-\\_Seashores\\_Byelaws.pdf](https://www.hastings.gov.uk/content/coastline_beaches/pdfs/Hastings_Borough_Council_-_Seashores_Byelaws.pdf)

<sup>128</sup> <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=20&ved=2ahUKEwjf16K15vTeAhWMOsAKHTZoCOQ4ChAWMAI6BAgCEAI&url=https%3A%2F%2Fwww.eastriding.gov.uk%2FEasySiteWeb%2FGatewayLink.aspx%3Fallid%3D99337&usg=AOvVaw2rYAEYmgSCJ30Qk3TPVEdC>

<sup>129</sup> <http://www.conwy.gov.uk/en/Council/Legal-Services/Assets/documents/Byelaw-North-Shore.pdf>

ineffective deterrents or agents for change and where the cost of enforcement grossly outweighs the possible sanction.

- 14.18 There is no central repository of byelaws which means that it is very difficult to be able to effectively determine what laws apply without a slow or methodical review of the in excess of 400 local authorities. Again, this makes these powers an ineffective choice for regulating this area and, despite standardisation, creates inconsistency.
- 14.19 Finally, there is no power or ability to deliver cost recovery for the local authority stepping in to provide protection.

## Right to Roam & Specific Acts

- 14.20 While this does not provide any greater clarity on what legal duties exist, these rights are significant in the sense that they extend the category of lawful visitor. In Scotland, the public have the right to roam over land, specifically including inland waters and the Foreshore, 'that is to say the land between the high and low water marks of ordinary spring tides'.<sup>130</sup>

- 14.21 In England and Wales, there is also a right to roam. This however only grants the public a right to roam over the countryside<sup>131</sup>, which expressly includes the 'coastal margin' as from time to time designed by the Secretary of State (s.1(1)(da)). This has occurred in a number of areas, however, as a general principle the right of access is to land that is landward of the mean high-water line, as is demonstrated by the extract of the National Trail website for Camber<sup>132</sup>. This clearly shows that the right to roam – the blue line - applies only to the Shore and not the Foreshore.



- 14.22 Consequently, this gives rise to the question of what, if any, rights of access exist for the public in England and Wales to the Foreshore on non-amenity beaches.

### ***Specific duties for specific areas***

<sup>130</sup> Section 32 Land Reform (Scotland) Act 2003

<sup>131</sup> Countryside and Rights of Way Act 2000

<sup>132</sup> This is designated by the Access to the Countryside (Coastal Margin) (Camber to Ramsgate) Order 2016/669. The National Trail website is where the [www.gov.uk](http://www.gov.uk) website directs traffic for information on the path of the Coastal Margin.

- 14.23 The complexity of ownership and access rights to the Foreshore is illustrated by a recent Supreme Court case. In *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another*<sup>133</sup>, the Supreme Court was to decide whether it is wrong in law for East Sussex County Council to register West beach at New Haven as a village green. While on the face of it this case does not directly touch on the issues for this report, the points of principle that it raises, such as the nature of the public's rights over coastal beaches and whether byelaws can give rise to an implied consent to the public to use land, are relevant to considering the extent of protection.
- 14.24 This beach is interesting because it is substantially covered by the Sea for considerable periods of time. The judgment considers that on average the beach is wholly covered by water for some 42% of the time and for the remaining time it is uncovered to some extent and is only ever fully uncovered for a few minutes at a time. The beach had historically been publicly accessible but was closed off in 2006.
- 14.25 This case clearly summarises how complicated discerning the duties relating to coastal areas can be. Paragraphs 5-8 of the judgment sets out the legal framework for responsibility for that particular beach:

2. ...*The Newhaven Harbour and Ouse Lower Navigation Act 1847 (“the 1847 Newhaven Act”) repealed the earlier legislation, and established harbour trustees (“the trustees”), to whom it gave powers to maintain and support the harbour and associated works.*

3. *Section 49 of the 1847 Newhaven Act is in these terms:*

*“[T]he Trustees shall maintain, and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith, and also maintain and support the open navigation of the River Ouse between Newhaven Bridge and Lewes Bridge ...”*

4. *The Newhaven Harbour and Ouse Lower Navigation Act 1863 (“the 1863 Newhaven Act”) gave the trustees powers to construct and maintain and support the Harbour and associated works*

5. *The Newhaven Harbour Improvement Act 1878 (“the 1878 Newhaven Act”) established the Newhaven Harbour Company to which were transferred the rights, powers and duties of the trustees. Under section 57 of the 1878 Newhaven Act it is provided that:*

*“the Company may hire or purchase and use any dredging machine for the purpose of deepening and cleansing the harbour ...”*

*Section 2 of the 1878 Newhaven Act applied to the port section 33 of the Harbours, Docks and Piers Clauses Act 1847 (“the 1847 Clauses Act”), which provides that:*

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<sup>133</sup> [2015] UKSC 7

*“Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers.”*

*6. By virtue of the Southern Railway Act 1926, the Harbour Company was vested in the Southern Railway Company. Pursuant to the Transport Act 1947, the Southern Railway Company was nationalised, and the Harbour was vested in the British Transport Commission. As a result of subsequent statutory and contractual arrangements, the Harbour subsequently vested in British Railways Board (1962), Sealink (UK) Limited (1979), Sea Containers Limited (1984), and, most recently, in 1991, Newhaven Port and Properties Limited (“NPP”), pursuant to the Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991 (SI 1991/1257) (“the 1991 Newhaven Order”).*

*7. Paras 10 and 11 of the 1991 Newhaven Order provide:*

*“10 (1) The Company, subject to obtaining the necessary rights in or over land, may execute, place, maintain and operate in and over the transferred harbour such works and equipments as are required for or in connection with the exercise by it of any of its functions and may alter, renew or extend any works so constructed or placed. ...*

*11 (1) The Company may deepen, widen, dredge, scour and improve the bed and Foreshore of the transferred harbour and may blast any rock within the transferred harbour or in such approaches. ...”*

14.26 In terms of access and usage of this land, the Judgment recognises that:

*28. The state of the law relating to public rights over the Foreshore of England and Wales is more controversial than one might have expected. It appears clear that there is, at least normally, “a public right of navigation and of fishing in the sea and rights ancillary to it” – Halsbury *op cit*, para 243. However, the question in this case is the existence and nature of any further or greater rights, and in particular the right to use the Foreshore for the purpose of bathing and the sort of familiar activities which people indulge in on a beach – at least in good weather.*

*29. At least where there is no express permission from the owner of the Foreshore, there are in principle at least three possible conclusions in relation to the issue of the public’s right to use the Foreshore for bathing, by which we mean using the Foreshore as access to the sea at low tide, or bathing in the sea over the Foreshore at high tide (or a combination of the two), plus associated recreational activities.*

14.27 The three possible conclusions set out in the judgment are that:

- (a) members of the public have, as a matter of general law and irrespective of the wishes of the owner of the Foreshore, the right to use the Foreshore for the purpose of bathing, as a matter of general common law;

- (b) the owner of the Foreshore is presumed to permit members of the public to use of the Foreshore for the purpose of bathing, unless and until the owner communicates a revocation of its implied permission;
  - (c) members of the public have no right to use the Foreshore for bathing, in which case they are trespassers.
- 14.28 The court explored in considerable depth the legality for accessing this area and the limited previous decisions in this area. The court ultimately concluded that it would be uncomfortable determining which of the three possibilities applied, particularly as each is fraught with issues.
- 14.29 In so doing, the court looked back to a decision in *Blundell v Catterall* (1821) 5 B & Ald 268 which set the standard in this area and established that there is no common law right of passage over the seashore and no common law right to bathe. This logic was continued in the 1904 case of *Brinckman v Matley*.<sup>134</sup> In this case, the court followed *Blundell* and concluded that the public has no common law right to use the Foreshore or to pass over the Foreshore in order to bathe in the sea. In this case it did not matter whether the owner of the Foreshore was the Crown or a private owner. This was contrasted to the common law duty which arose over the land when it was covered by the Sea as the people have common law duties in relation to passage by Sea.
- 14.30 Interestingly, across both cases, there was reference to there being a highway along the Shore. Depending on its extent, this might give rise to further access rights, but in practical terms it appears to be broadly what is now covered by the rights to roam.

## Other analogous standards

### 15. The Blue Flag, the WHO and International Lifesaving Standards

#### The Blue Flag scheme

- 15.1 The Blue Flag scheme certifies that a beach or a marina meets the standards of the Foundation for Environmental Education ("FEE"). The requirements focus largely on water quality and environmental management, but safety and services available at the beach are an element of the certification. A beach certified under the programme must display the Blue Flag symbol during the bathing season, which in the UK runs from May to September.
- 15.2 The safety requirements of the Blue Flag programme are limited to compliance with national legislation relating to beach safety.

- 15.3 However, it stipulates that beaches with a high number of visitors must be patrolled by an adequate number of lifeguards placed at intervals recommended by a previously conducted risk assessment, and the number of lifeguards must increase according to peak usage. While the FEE does not define what is meant by a high number of visitors, it does define 'few users' as an average use of less than 50 beach users per day over a period of 4 weeks during the high season. For beaches where no risk assessment was conducted, the FEE establishes a minimum of two lifeguards every 200m, bathing areas patrolled by lifeguards must be clearly marked out, defined on a map and/or physically marked on the each.
- 15.4 It requires that lifeguards must:
- (a) Have appropriate national or international qualifications;
  - (b) Be easily recognisable; and
  - (c) Be provided with appropriate lifesaving equipment.
- 15.5 On beaches with few users (as defined above) PRE can replace lifeguards unless the risk assessment says otherwise. The equipment must be regularly inspected, visible, located at regular intervals, with the recommended distance being 100m between the equipment if no risk assessment was conducted. Instructions for use must be provided. Its location must be indicated on an information board or map.
- 15.6 In addition to the above requirements, the FEE recommends that a safety risk assessment for each bathing area is conducted by either the appropriate national authority or a full member organisation of the International Life Saving Federation (ILS).
- 15.7 The Blue Flag regime is one of the few areas in which standards are actually prescribed for beach safety.

#### **WHO Guidance**

- 15.8 As described earlier in this report, there is guidance from the World Health Organization ('WHO') on the Safe Use of Recreational Water Environments. This comes in two parts with the first part applying to coastal waters, providing a holistic approach to risk at the beach covering all topics from drowning to water quality.
- 15.9 While clearly not a legal requirement, this document provides the WHO's international position on risk management on the beach and is predicated on the basis of risk management. It recognises that:

The assessment of hazards in a beach or water environment is critical to ensuring safety. The assessment should take into account several key considerations, including:

- (A) the presence and nature of natural or artificial hazards;

- (B) the severity of the hazard characteristic as related to health outcomes;
- (C) the ease of access to the recreational water area;
- (D) the availability and applicability of remedial actions;
- (E) the frequency and density of use; and
- (F) the level of development for recreational use.

15.10 The WHO sets out a range of recommendations, which include:

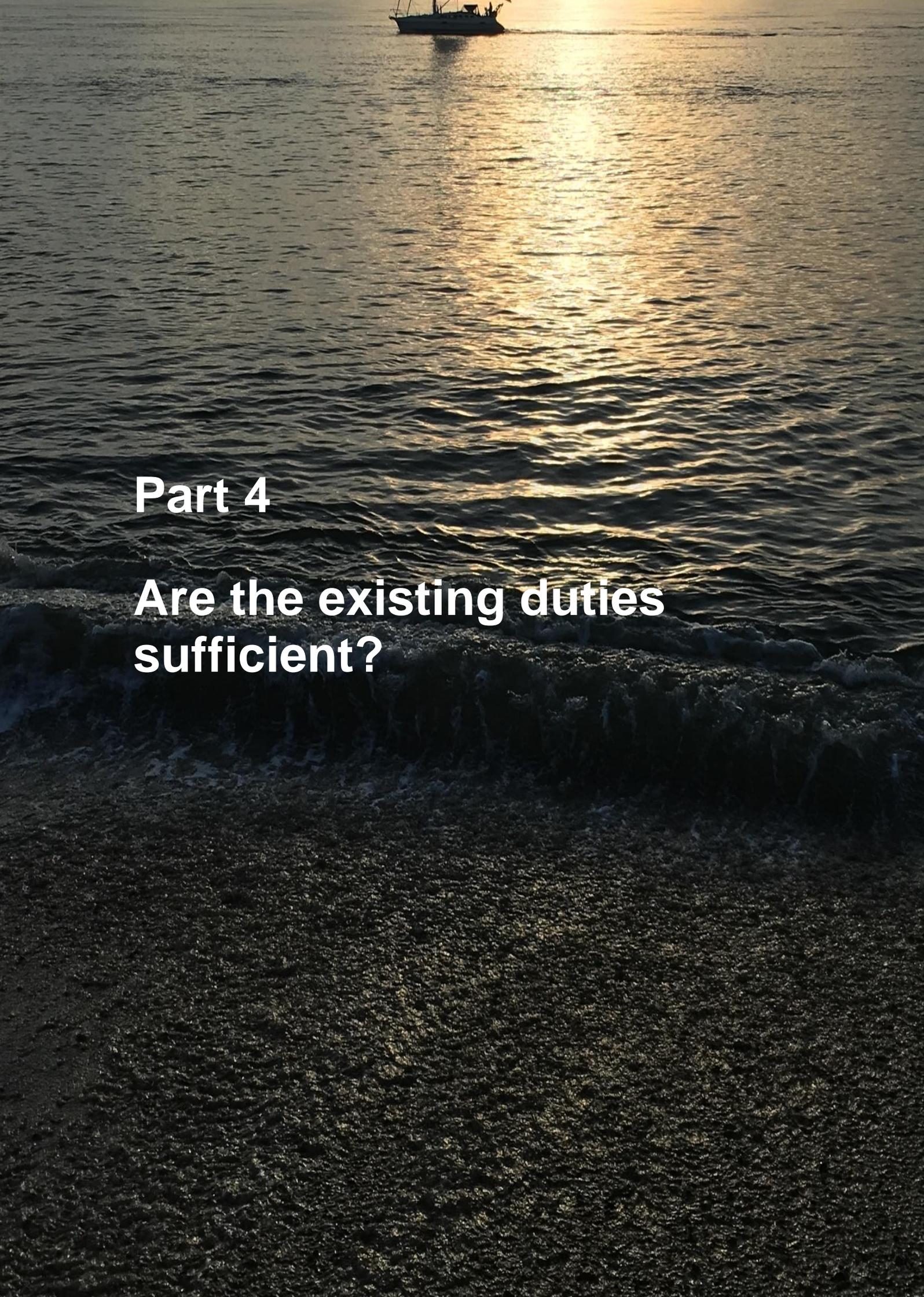
- (a) Regulations that discourage unsafe behaviours;
- (b) Continual adult supervision (infants);
- (c) Restriction of alcohol provision;
- (d) Provision of properly trained and equipped lifeguards;
- (e) Provision of rescue services;
- (f) Access to emergency response (e.g., telephones with emergency numbers);
- (g) Local hazard warning notices;
- (h) Availability of resuscitation skills/facilities;
- (i) Development of rescue and resuscitation skills among general public and user group;
- (j) Coordination with user group associations concerning hazard awareness and safe behaviours;
- (k) Wearing of adequate lifejackets when boating; and
- (l) Monitoring and restricting beach capacity.

15.11 It recommends that as a result of the risk assessment, a recreational water safety plan is implemented.

15.12 The WHO Guide also includes a section which specifically covers lifeguarding. It is significant that it does not set a mandated level, rather determining that the level should be 'appropriate to the area of responsibility and provide for public safety in a manner consistent to ensure safety.'

### **International Life Saving Federation**

- 15.13 International Life Saving Federation ("ILSF") provides useful reference points for the minimum skill sets and competencies for a beach lifeguard. They must be able to:
- (a) Demonstrate a level of fitness to meet the operational requirement;
  - (b) Describe appropriate techniques for identifying potential casualties in the water;
  - (c) Describe the basic principles of managing aquatic (surf) and beach related emergencies;
  - (d) Demonstrate rescues with and without equipment; and
  - (e) Demonstrate appropriate casualty care for common beach related injuries or illnesses.
- 15.14 In 2015, the ILSF also published a drowning prevention framework that provides a useful reference point.

A photograph of a sunset over the ocean. The sun is low on the horizon, creating a bright, shimmering path of light across the water's surface. A small boat is visible on the horizon line. The foreground shows dark, textured waves.

## Part 4

**Are the existing duties  
sufficient?**



## 16. The issue

16.1 In 2017, in the UK, 600 people lost their life from accidental drowning, both inland and on the coast. This is a greater number than by fire. In 2017, 97 deaths happened at the coast. The RNLI report that in 2017 they saved the lives of a further 84 people from drowning and responded to some 15,558 incidents.

16.2 The RNLI statistics are stark. Below is a table using data from its 2017 Annual Operations Statistics Report setting out the actions taken by category over the last five years.

Action taken	2013	2014	2015	2016	2017
Lives Saved	100	92	94	127	84
Rescues	1567	1769	1790	2082	1783
Assistance	2472	2266	2752	2876	2884
Casualty care	1041	1083	1080	1210	1200
Minor first aid	14297	11884	10592	10966	9490
Search	193	182	160	197	213
Missing/ found	1547	1299	1103	1777	1440
Mass rescue					6898
Non-aquatic – including from sandbanks					6085
Near miss	284	400	301	978	517
False alarm					98
Animals					182
Other	437	378	309	325	734

16.3 In addition to this, SLSGB has also now begun collating statistics. In 2018 at 20 beaches in Devon and Cornwall its clubs undertook 107 interventions made up of:

- (a) 37 rescues;
- (b) 64 assists where lifesavers entered the water to remove people from danger; and
- (c) 6 major first aid incidents.



- 16.4 Accordingly, there is clearly a substantial amount of additional rescue activity that is undertaken.
- 16.5 Without the work of the RNLI, SLSGB, HM Coastguard, Coastguard Rescue Teams and other volunteers on those beaches, given the number of interventions it is almost inevitable that more lives would have been lost and without appropriate funding for lifeguards continuing it is inevitable that the number of deaths on our beaches will increase.
- 16.6 At present, there is a great deal of confusion who, if anyone, has responsibility for ensuring safety at the beach and who has responsibility for regulating safety at the beach. While people, including those local authorities asked, will often point to duties in health and safety legislation or Occupiers' Liability, when properly analysed, in most cases those duties are unlikely to respond or will only do so in a limited fashion.
- 16.7 It is right that in many cases the beach user is responsible for the risks that they take. This is a clear theme that comes through the cases that have been decided, particularly in the context of Occupiers' Liability.
- 16.8 This is in stark contrast to the WHO's expectation that *'Mutually supportive actions should take place, coherently, at the local, national and international level in order to reduce risks encountered during recreational water use.'* In the UK, the effective coordination expected by the WHO and the risk assessment of beaches appears to be largely driven by the RNLI.
- 16.9 As a consequence, the simple answer is that in many situations there may in fact be no-one who is legally responsible for the risks encountered during recreational water use beyond the beach user once they enter the Sea. While regulation for regulation's sake is unhelpful, there does appear to be an unacceptable gap and we must ask ourselves: should there be a clear regulatory duty here and if so, on whom does it sit?
- 16.10 To put that into proper context, at present, there is:
- (a) Liability on the operator/owner of a vessel if a person fell from a vessel and there was not adequate life saving equipment etc.;
  - (b) Liability on the Secretary of State and to an extent local authorities for, and duties in relation to, the quality of water in the Sea at designated Bathing beaches – so the water that you swim in must be chemically safe;
  - (c) The ability for local authorities to make byelaws which protect bathers by, amongst other things, setting speed limits for vessels in the Sea and by placing PRE on the Shore; and
  - (d) The potential application of the HSWA on employers and the Occupiers' Liability regime on occupiers of the Foreshore and Shore subject to the scope of the legislation.

16.11 However, there is no duty that requires you to protect or consider the safety of those who are swimming or engaged in water-based recreation.

16.12 While it is correct that those engaging in inherently risky activities should take responsibility for their actions, in the context of the other duties and protections, this does appear to be an illogical oversight, particularly where the beach is an amenity beach used as a tourist attraction to drive



people into the local area, particularly children and young people. However, it is consistent with the approach taken for other hazardous activities such as rock climbing, provided that they are not undertaken as a part of a business – in which case it is likely that the safety regime would apply.

16.13 As has been explored in depth earlier in this report, it is correct that there are potential legal duties that apply to certain activities on the Shore and Foreshore. For example there is:

- (a) Limited liability under Occupiers' Liability legislation on the Shore and Foreshore subject to the obvious hazards associated with nature. This would not capture swimming unless there was a hazard that was hidden; and
- (b) Liability for safety of employees and non-employees arising out of work activity that is within the control of an undertaking taking place on the Shore and Foreshore. Again, this is unlikely to apply to swimming activities in most cases.

16.14 In my opinion, neither case would necessarily give rise to the necessary protection for Sea Based Recreation.

16.15 The question 'why' is primarily answered by the geography of the beach environment. The geography or topology of the beach gives rise to legal complexity because, while there may be times of day when people are able to engage in Sea Based Recreation on the Foreshore if the topology allows water of sufficient depth, in many places or for much of the day, many will only swim in the Sea.

16.16 To put it another way, the hazard of drowning only occurs on the wet part, which is either partially or wholly outside of the UK. Further, almost all practical control measures are only possible on the dry part which, notwithstanding that users access the Sea and Foreshore via the Shore, is often owned or occupied by a separate legal person. It is also highly unusual for duties to be placed on the owner of land A for the risk that a person is exposed to on land B, particularly where land B is owned by someone different.

- 16.17 At present, it is clear that many local authorities have voluntarily put in place measures to control the risks, despite there not being a clear legal duty to do so. This has been undertaken on the basis of a moral duty or it being the right thing to do according to the majority of the local authorities that I received correspondence from.
- 16.18 While it is clear what legal duties might arise on the Shore or the Foreshore, this is far less clear in relation to the use of the Foreshore primarily as a means of access to the Sea.
- 16.19 This entire area is unnecessarily and prohibitively complex and the fact that many, often local authorities, have from a sense of social responsibility installed lifeguards or PRE potentially adds to the confusion. There is no single person who is apparently responsible for safety in a beach environment. Every step of the way confusion reigns. While this may be the case, persons throughout the system have made do and done the best that they can in the circumstances. For example, the RNLI has stretched itself very thinly indeed in the application of lifeguarding, because it corporately wishes to do the right thing and is fortunate enough to have charitable donations to rely upon. If it were relying solely on the commercial payments it receives for lifeguarding services, then far fewer beaches would be guarded.

## Overview of options

### 17. What are the options?

- 17.1 In my opinion there are five broad options:
- (a) Do nothing and rely on diligence and good will;
  - (b) Introduce clearer guidance;
  - (c) Extend byelaws to address this area;
  - (d) Extend existing legislation, for example HSWA or water safety; or
  - (e) Introduce new specific legislation addressing the specific topic.
- 17.2 Whichever option is considered for the future, greater coordination is required. I will consider the merits of each of these options below.

# No change

## 18. Do nothing and rely on diligence and good will

18.1 Local authorities already have limited duties under the public health legislation that might apply to this topic. Section 234 Public Health Act 1936, for example, gives local authorities the general power to place such lifesaving equipment as they see fit in addition to the Localism Act power. Therefore, some argue that they already have the necessary power in this area.

18.2 In Scotland, the equivalent power goes further and the local authority may:

- (a) on the seashore or in or on adjacent waters place notices or other indications advising the public as to any danger or health hazard connected with the seashore or those waters; and
- (b) provide staff for life saving and any boats or equipment which are appropriate for life saving.

18.3 Both powers are discretionary, not mandatory, powers and do not require any form of risk assessment to determine what is appropriate. This therefore results in very different behaviour around the UK.

18.4 Most of the local authorities who responded to my request for information confirmed that the PRE and other safety activities that are undertaken on the beach are undertaken out of a moral, rather than legal obligation to do. While many are using the RNLI templates, risk assessments and signage, there is little consistency. When the data shows there are more deaths from drowning than from fire, it does not seem a cogent argument to say that the risk does not justify further action. It is also right to say that the local authorities were concerned by the cost of doing more than they were currently doing.



18.5 While it is good that the local authorities have taken a positive stance, it is unlikely to be replicated universally and the RNLI Lifeguarding team tell stories of landowners choosing to make beach environments difficult to access rather than putting in place basic risk assessment processes and any control measures that flow therefrom. This is something that has been commonplace even in the public sector as I have described earlier.



- 18.6 There is an argument that what is in place at present is proportionate. Swimming is, after all, inherently dangerous and this is the case in any environment. This is a fact that is understood by all who swim and there is no hidden danger associated with it, albeit there may be dangers that are hidden in the wider environment. While there are clear policy reasons why swimming pools or other similar environments should be subject to regulation and there are clear expectations for them, the same is not true of the natural environment. Where the beach is a purely natural environment and has not been embellished with inflatables or hidden hazards, there is a very real question as to whether it is right and appropriate to impose a duty.
- 18.7 It is clear to me that there are stakeholders from all sides who would welcome clarity on the applicable legal duty, which tends to suggest that the current position is unclear to most. This point was further underlined to me by the fact that those who said that the position was clear often did so for different reasons.

#### **Should there be regulation in this area?**

- 18.8 This is a difficult question to answer, primarily because the hazard of drowning arises from the very existence of the Sea, rather than because of anything particularly unsafe about the Sea such as hidden hazards etc.: though clearly those hazards can exacerbate the risk. The comparison is fairly drawn with other hazardous activities that are not, generally, subject to any safety regime.
- 18.9 The difficulty is increased by virtue of the geography of a beach and specifically because the Sea is not within the UK. Therefore, for a duty to apply it would need to apply to the person responsible for the Shore in relation to a risk which eventuates in the Sea.
- 18.10 There is then a further issue because the activity does not take place, on the whole, at work. It is typically an activity that relates solely to recreational activity. Typically, recreational activity, absent an aspect of work, would be outside of the scope of regulation.
- 18.11 People argue against further regulation on the basis that it would have the unintended consequence of causing beaches to be unavailable for use, whilst others make the point that any change may also impact other hazardous activities. This is of course a possibility, but the risk seems low given that it is only as a result of a legal nuance that this area is treated any differently from any other area that might attract visitors.
- 18.12 In my opinion, while it is not an easy area to consider, it does not appear appropriate that there is only regulation of safety for those using the Sea which arises out of the use of vessels. There is regulation of the chemical quality of the water on the Foreshore (and therefore by extension the Sea), and there is, in certain very limited circumstances, regulation of safety arising out of the activity of an undertaking on the

Foreshore. While in certain limited circumstances, in certain limited locations, there might be Occupiers' Liability or HSWA liability on the Foreshore, there is no regulation at all covering the area where the majority of swimming/ bathing/ water-based activity takes place.

18.13 This is an inexplicable gap and, in my opinion, doing nothing is not an attractive option.

## New Best Practice Guidance

### 19. New guidance: increased prominence and governmental support

19.1 At present, the National Water Safety Forum does a good job of hosting some of the core guidance on its website.<sup>135</sup> The majority of that substantive guidance has been produced by the RNLI and much of it is over 10 years old.<sup>136</sup> It may be that the guidance still represents best practice, but the fact that it apparently has not been reviewed for so long suggests that it is not -important/ worthy of update.

19.2 The topics that the RNLI produces guidance on include general beach safety and the signage to be applied in this environment. It also produces tools for conducting the risk assessment of the beach environment. These documents provide the best available information on the approach to be taken for managing risk on the coast. While these documents often have the MCA logo on them, as far as I can see there are no government produced documents available for those who might be duty holders that give the same level of detail and information. Similarly, the Royal Life Saving Society ('RLSS') have also produced guidance for its members. By contrast there is limited if any guidance produced by government.

19.3 I have also been shown the even older RoSPA Beach Safety document, which again addresses similar topics but is no longer actively in circulation.

19.4 When one searches the internet for Beach safety guidance, a 2016 gov.uk webpage is returned. This page is, however, headed as advice on Beach, sea and river safety for British Nationals abroad.<sup>137</sup> From that page there is a link to some MCA documents, which contain basic guidance, last updated in 2014, for those using the beach to help them do so safely.<sup>138</sup> There does not however appear to be any guidance for duty holders, beyond that produced by the RNLI. There is room for more domestic beach user guidance to be produced, though I accept that the guidance is likely to fall into the

<sup>135</sup> <https://nationalwatersafety.org.uk/advice-and-information/>

<sup>136</sup> For example: A guide to coastal public rescue equipment and A guide to beach safety signs, flags and symbols were both last published in 2007

<sup>137</sup> <https://www.gov.uk/guidance/beach-sea-and-river-travel-safety>

<sup>138</sup> <https://www.gov.uk/government/publications/keeping-safe-at-the-coast-watersports-and-coastal-activities> and here: <https://www.gov.uk/government/publications/keeping-safe-at-the-coast-beach-safety-advice>



category of the obvious. We appear, therefore, to be principally reliant on the RNLI and volunteers such as the RLSS for information on beach safety practice.

- 19.5 Given the importance of this topic, it would be advisable for the 2007 RNLI guidance to be reviewed and if appropriate updated, and ideally given the force of being a government document. The same could be said of the older RoSPA Beach Safety document. In my opinion, there must be an opportunity, distinct from any legislative solution to update and consolidate the existing guidance into a document that is an easy to use single manual that is structured similarly to 'Managing Visitor Safety in the Countryside principles and practice'. This would benefit from case studies and case law references to provide a clear balance on what is appropriate, necessary and legally required. Regardless of any other action, this would represent a significant step forward and be the easiest and cheapest approach to providing clarity on this issue.
- 19.6 Further, in view of the critical importance the ability to swim plays in ensuring water safety, there would be a clear opportunity for greater or more effective education from school age upwards in relation to these issues. It is understood that swimming and water safety has been a statutory element of the national curriculum for physical education in England since 1994. All primary schools must provide swimming and water safety lessons in either Key Stage 1 or 2. However, research shows that only half of pupils meet the required standards. There is clearly an opportunity to <sup>139</sup>increase water safety education and swimming skills as part of both a safety and health agenda.
- 19.7 In my opinion, whatever other actions are taken, it is vital to have clear, authoritative, government led guidance on this topic.

#### **Application of HSG 179**

- 19.8 HSG 179 is the HSE's swimming pool guidance. Given the similarity of the underlying hazard, it would be easy to suggest that this document should be considered in relation to beach safety.
- 19.9 This logic appears to have some force as while it is accepted that this does not apply to open water where swimming is not encouraged, it does apply to 'non-standard facilities' and the HSE's FAQs raise the spectre that it applies to the Sea:

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<sup>139</sup> <https://www.swimming.org/schools/swimming-national-curriculum/>;  
<https://www.gov.uk/government/publications/national-curriculum-in-england-physical-education-programmes-of-study/national-curriculum-in-england-physical-education-programmes-of-study>

*The guidance is aimed primarily at swimming pools but also covers segregated areas of rivers, lakes, the sea, and other non-standard facilities where swimming is encouraged.*

*The relevance of the guidance depends on the particular circumstances at each non-standard swimming facility. While much of the guidance may not be relevant, the following sections should be read carefully:*

- *General management of health and safety*
- *The practicalities of managing health and safety*

*Please note, this guidance does not apply to areas where swimming is not encouraged, which are not maintained as swimming facilities. If people choose to swim in places like ponds or lakes then it is normally reasonable to expect them to take responsibility for their own safety.<sup>140</sup>*

- 19.10 HSG 179 itself is actually even vaguer on its application. At paragraph 9, it states that 'It has limited application to pools which consist of segregated areas of rivers, lakes or the sea.' While it may be intended that segregated areas only apply to substantial man-made divisions and not areas separated by floats for example, it would be preferable to make clear that it does not apply to the Sea. However, I am informed that this is a deliberate choice.
- 19.11 In my opinion, it is unfortunate that there is even a suggestion that HSG 179 might apply. While the HSE has confirmed to me that HSG 179 was not written with open water in mind, and I agree that it not appropriate for HSG 179 to apply to a beach environment, it would be helpful to provide clarity that this is not the case.

### **Conclusion**

- 19.12 In the absence of the MCA providing guidance, in my opinion, it would make sense for the HSE to provide guidance that gives clarity on what safety standards would be expected on a beach. The HSE is the body that most would turn to in order to locate safety information and it is noteworthy that the guidance that does exist is only hosted by the RNLI and RoSPA. It would make sense for that guidance to be updated and hosted on the HSE website and also on the MCA part of the [www.gov.uk](http://www.gov.uk) site in order to ensure that it has maximum availability.

### Clarity on the application of the Civil Contingencies regime

- 19.13 While it is clear that the Local Resilience Forum have chosen not to enter the risk of drowning in the community risk register, it would be possible to adjust the guidance for the Civil Contingencies regime to make clear that drowning risk events on large-scale amenity beaches could fall within the regime.
- 19.14 Given that this primarily deals with the response to an incident rather than preventative measures, it is perhaps of less applicability and would not be the primary mechanic for resolving this topic. It does, however, have the advantage of being a regime that encourages multi-party working.

## Byelaws

### 20. Byelaws

- 20.1 The byelaw regime currently includes the measures closest to covering this topic in any meaningful way.
- 20.2 Local authorities have the power to create byelaws on a range of connected topics, including under:
- (a) section 231(1) Public Health Act 1936 which provides the power to create byelaws which:
    - (i) require persons providing accommodation for bathing to provide and maintain PRE;
    - (ii) regulate the areas in which, and the hours during which, public bathing shall be permitted; and
    - (iii) regulate, for preventing danger to bathers, the navigation of vessels used for pleasure purposes within any area allotted for public bathing during the hours allowed for bathing
  - (b) section 223 Public Health Act 1936 which allows the regulation of swimming baths under the Council's management.
  - (c) section 233 Public Health Act 1936 which allows the regulation of publicly accessible swimming pools which are not under the Council's management.
  - (d) section 76 Public Health Act 1961 to prevent 'danger, obstruction or annoyance to persons bathing in the sea or using the seashore' through the regulation of the speed of pleasure boats and their use in a way which might be dangerous.



- (e) section 82 Public Health Acts Amendment Act 1907 to regulate to a range of ways in which the Seashore is used including for the preservation of good order and conduct amongst users.
- 20.3 While these powers at least give the local authority the ability to regulate this topic to an extent, it is recognised that byelaws are not effective regulatory tools.
- 20.4 In theory, it would at least be relatively easy to draft new byelaws<sup>141</sup> under one of these powers to cover aspects of beach safety, it would be an imperfect solution. This is because the majority of these powers are of considerable age and none completely address the issue. The number and extent of potential byelaw powers that exist lends weight to the argument that they do not work effectively and would not be an effective solution.
- 20.5 In my opinion, the existing powers do not adequately cover the topic. Therefore, extension of the primary legislation giving the power to create the byelaws would be necessary. Only then would the passing of local byelaws, to achieve the policy objective, be possible. This two-stage process is unduly onerous and is unlikely to have the desired national impact.
- 20.6 Even if a byelaw were to be created to extend the obligations and requirements, and was created using a template to drive consistency, it would result in a piecemeal and sporadic regime both in terms of obligations and enforcement. This is demonstrated by the incomplete coverage which can be seen in the various byelaw powers under the Public Health Acts and with no central repository of these laws it adds a regulatory burden on both those who are enforced by the law and those enforcing it. This is a national issue and therefore should have a consistent national approach, not in hundreds of different ways around the country.
- 20.7 Part of the reason that byelaws are unpopular is that there is no effective enforcement regime as the penalties involved are usually under £50 and in some cases £5. By contrast, fines under the HSWA regime are substantially greater and are regularly in excess of £1m, in appropriate cases. Clearly, larger fines act as a greater driver for action and deterrent for non-compliance.
- 20.8 My consultation with local authorities found almost no support for the idea of the extension of the byelaw regime in this area. I would therefore not recommend it as an option.

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<sup>141</sup> This assumes that the byelaw in question could be made under the existing regime in which case there is a relatively straightforward process of notification to the Secretary of State, summarised here: <https://www.gov.uk/guidance/local-government-legislation-byelaws>

# Extending or amending existing laws

## 21. Extending the existing law

- 21.1 At first blush, the HSWA is the most logical choice for legislation to be extended to cover this situation. There was some support from those I engaged with for it to cover this topic and some who thought it already did. It is a logical choice as it is already based on risk management with the intention to ensure that risk is managed with a positive duty to carry out risk assessments. This type of assessment is central to the management of risk and it is this approach to risk that is needed on the beach, and it comes with a ready-made enforcement regime. This would have the advantage of being a known and developed regime with a clear enforcement model, well-established regulators and a well-established sentencing regime. By contrast, the Occupiers' Liability regime relies on the civil courts and therefore is less easily applicable.
- 21.2 Unfortunately, as described earlier in this review, there are at least three challenges with extending the application of the HSWA to cover this topic which represent the legal equivalent of trying to push a square peg through a round hole:
- (a) the geographical extent of the HSWA;
  - (b) how the duty under the HSWA would apply, addressing the 'work' and 'undertaking' issues; and
  - (c) to whom this duty would apply.

### ***Addressing the extent of the law issue***

- 21.3 As the HSWA itself does not apply beyond the mean low water mark, save for in very limited circumstances which do not apply to the activities in question, it would not apply to the Sea. This dramatically limits its effectiveness as a solution as it would not apply to a significant proportion of those exposed to risk. In order to be effective, the legislation would need to apply below the mean low water mark.
- 21.4 The easiest solution to this issue would be to insert a new article into the Health and Safety at Work etc Act 1974 (Application outside Great Britain) Order 2013, which in certain use cases extends the HSWA beyond the scope of Great Britain, to cover Sea Based Recreation and for it to sit alongside activities like diving.
- 21.5 While it is easy to say that this would be the solution, it would need to be given careful thought as it only provides a partial solution. For example, while recreational diving is

caught under this regime, it is only caught where that recreational diving takes place with a diving instructor who is at work; so absent the clear work aspect there would be no duty. It is difficult to see how this could easily apply to Sea Based Recreation given that there is no obvious work activity. This is explored further below.

***How would the duty apply and to whom?***

- 21.6 The HSWA is predicated on the activity giving rise to the hazard being a work activity or arising out of work. By way of reminder, the HSWA duty to non-employees requires:
- (a) An employer to
  - (b) Conduct his undertaking in such a way to ensure
  - (c) That persons
    - (i) not in his employment
    - (ii) who may be affected thereby
  - (d) Are not exposed to risks to their health and safety.
- 21.7 Against that backdrop, as in the picture to the right, how would the HSWA respond where a child is at the Foreshore with her family? There is no obvious work activity or undertaking connected with entering the Sea or Foreshore.
- 21.8 The last two challenges interlink and therefore I will discuss them together. While not insurmountable, they are far more challenging than the geography point, and in considering who is responsible, it necessarily gives rise to one further point of geography.
- 21.9 By far the greatest challenge with applying the HSWA would be; how does one show that someone could be affected by the conduct of the undertaking of an employer to such an extent that it gives rise to a drowning risk? The short answer is that it is not immediately obvious how this would occur.
- 21.10 I understand that this essential proposition was put to the Coroner in the Camber Sands Inquest. The argument being that preventing persons from entering the Sea or remaining in the Sea did not form part of the Council's undertaking, nor did rescuing persons from the Sea who were drowning or were in difficulty. This logic could be extended to most other undertakings that could be found on the Shore, with perhaps the exception of employed lifeguards, to the extent of their duty.



- 21.11 This argument is relatively straightforward in a situation where the beach is not presented as an amenity beach. In circumstances where there is just a natural environment, –it seems unlikely that the HSWA would respond as there is no undertaking creating risk. The logic here is similar to the logic that applies to adventure activities licensing and the arguments advanced in the Hampstead Heath case.
- 21.12 Where the beach is an amenity beach and marketed as a tourist attraction, such as Bournemouth, Brighton, or Blackpool, then there is perhaps an argument that such marketing results in the council conducting its undertaking in attracting people to the beach and encouraging them into the water.
- 21.13 Consider in this regard, the homepage for Bournemouth tourism site which states:<sup>142</sup>

*It's the start of a new year in the UK's most colourful seaside resort and there's so much to look forward to!*

*Our seven-mile stretch of unspoilt coastline is the perfect backdrop for brisk winter walks or gearing up for springtime sports.*

*Known as the 'coast with the most', there are acres of space to enjoy outdoor pursuits or mess about on the water. Walk, run or cycle on sandy beaches, through Victorian gardens or along our majestic clifftops. Surf, paddle-board or jet ski alongside panoramic sea views and picture-perfect sunsets.*

- 21.14 The 'Beaches' page of the site<sup>143</sup> goes further to encourage activity on the Beach and in the Sea including statements like:

*Nestled beneath a magnificent cliff line, the bay enjoys its own micro-climate, some of the warmest sea temperatures in the UK and stunning views of the Isle of Wight and the Purbecks. Whatever you want from a day at the beach, you'll find it all here.*

*Whether it's chilling on a deckchair, strolling along traditional seaside piers, relaxing in a hired beach hut, enjoying tasty food or just admiring miles of breath-taking coast line – Bournemouth beach is the ideal location whatever the weather or time of year. Every section of Bournemouth's beach offers a different experience, so why not try out one of many superb water sports or enjoy plenty of family attractions at Pier Approach? There is a bit of the beach with your name on it!*

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<sup>142</sup> <https://www.bournemouth.co.uk/>

<sup>143</sup> <https://www.bournemouth.co.uk/things-to-do/beaches>



*Bournemouth Beach is also one of the safest beaches in the UK with RNLI Lifeguards based all the way along our seven mile stretch of beach – full season cover runs from 30 April to 30 September.*

- 21.15 It must be underlined that there is no criticism of Bournemouth or any other amenity location with similar advertising, any location would naturally wish to make the most of its assets. The inclusion is merely meant to illustrate that there is at least an argument that it is part of the undertaking of those promoting Bournemouth, including the council and those other operators undertaking water-based activities in the vicinity, to attract people to use the beach and venture into the Sea. Similarly, there may be undertakings present on the beach who would be responsible for people entering or undertaking activities on or in the Sea.
- 21.16 In either case, this is going to be fact based, and in my opinion a difficult, though perhaps not impossible, hurdle to overcome. It illustrates why this regime is not the most natural place for any duty. It is the case of trying to push a square peg into a round hole and, while you can potentially make this fit, inevitably it will not be perfect and would be subject to substantial legal challenge which benefits no-one.
- 21.17 Once this is overcome, the next practical difficulty is that the undertaking of any potential duty holder is likely to be located on the Shore, as it is the only area that, for the vast majority of time, would not be covered with water. It also follows that the Shore is the only realistic location for PRE and other control measures.
- 21.18 The consequence of this is that the occupiers of the Shore would, where they do not also own the Foreshore, owe a duty in relation to a risk that occurred on a neighbour's land. The extended duty would be a unique obligation and while practically it would be no more than many are already doing voluntarily, it is likely to be met with concern regarding the cost of being obligated to act rather than choosing voluntarily to act.
- 21.19 For these reasons, it would be difficult to see how the HWSA would respond effectively and any extension of the duty would be difficult to make operationally effective.

#### **Extending the water quality regime**

- 21.20 The other existing regime that, at least superficially, might lend itself to extension is the water safety/ quality regime. This however suffers from similar issues as apply to the HSWA.
- 21.21 Like the HSWA, the BWR only apply to the waters of the Foreshore and do not apply at all to the Sea. Accordingly, for them to be of use in addressing this issue they would need substantive geographical extension.
- 21.22 While the BWR include the duty to test water for safety and warn in relation to it, they do not go any further than this and do not create any duties on non-public bodies. As a consequence, this regime would need substantial adjustment in order to potentially be of assistance.

- 21.23 Further, there is no attendant enforcement regime that could be applied, the consequence again is that substantial structural change would be necessary. Consequently, I believe that this is not the right starting point for creating any duties that are appropriate.
- 21.24 There are, however, two ways in which the definitions of the BWR regime are of assistance. The first is in how it deals with the issue of the location of the water that is covered by the BWR. Under the BWR, it adopts the term 'relevant land' in order to address the scope of the legislation and this is defined as land (a) normally used to access a bathing water from the landward side, and that is (b) immediately adjacent to that bathing water or, where the bathing water is tidal, immediately above the high water mark. This same mechanic could be applied if specific legislation were to be developed.
- 21.25 The second area where it is of assistance is in the obligations to designate bathing waters. This, theoretically at least, provides a list of higher risk areas where people are likely to be in the water and therefore where risk assessment could be focussed.

## New Bespoke Legislation

### **22. New legislation**

- 22.1 Given the very real practical issues with stretching the scope of the HSWA regime and the lack of any other domestic legislation, a more desirable option would be the creation of a bespoke new regime that specifically addresses the very particular issues that arise at the coast.
- 22.2 For this to work, any future legislation must clearly set out who the duty holder is in relation to the drowning risk on the Foreshore and Sea and it must be provided in such a way that it does not dramatically increase the regulatory burden. The exact wording of this duty should be subject to consultation and would need careful consideration but would fill a clear and unacceptable regulatory gap.
- 22.3 In my opinion, any legislation should place a duty on the owner or occupier of those areas of Shore used for access to the Foreshore or Sea, both of which should be clearly defined terms, to ensure that those accessing the Sea for Sea Based Recreation are protected from foreseeable risks to their health and safety. This would be based on the overt duty to risk assess and would be limited to the scope of their activity on the Shore, Foreshore and Sea.
- 22.4 This would not be an unfettered and unending duty, but would be carefully defined and set out in order to try and strike an appropriate balance between the acceptance of risk by swimmers from both water and the inherent risk associated with natural locations,

and the duty incumbent on those encouraging people to the coast, and specifically into the water, to ensure that they are protected. Specific guidance on this distinction would need to be produced.

- 22.5 In addition, it would be possible to keep the duty more focussed by targeting it to just those areas designated as bathing waters under the BWR.
- 22.6 Any new legislation would need to ensure that it covers the Sea as well as the Foreshore. This could either be achieved by taking the same approach as in the Outside GB Order to apply within the UK territorial waters, up to 12 miles off shore, or alternatively, a specific geographical distance off shore could be included, for example 1,000m was used for the extension of certain public health duties.
- 22.7 In practice, the RNLI say that they are able to rescue up to 300m off shore within 3.5 minutes and the RNLI Annual Operational Statistics Report 2017 shows that fewer than 5% of rescues took place at a distance greater than 300m from the water's edge. Given such a small percentage of rescues took place further than 300m from shore, a distance of 300-500m from shore for a new duty would be more than sufficient and proportionate.
- 22.8 As before, the issues around the geographical extent of the law would be the easiest to solve, the greater challenge arises out of how a duty should be expressed and on whom it should fall.
- 22.9 In summary, to avoid the issues set out above, any new legislation must:
- (a) Create sensible sustainable definitions, particularly of the areas of land;
  - (b) Be risk based, the primary duty being to risk assess and to act upon the risk assessment;
  - (c) Apply both to the Foreshore and the Sea;
  - (d) Be clear about to whom it applies and what they are required to do;
  - (e) Not create disproportionate and unsustainable duties – basing it on risk assessment processes is likely to be the most proportionate approach;
  - (f) Create an enforcement regime; and
  - (g) Be supported by clear and effective guidance.

22.10 I have tried to set out how these issues can be address below:

**How could these issues be addressed?**

22.11 In my opinion, there are two potential reference points for a regime. These are a regime that could either:

- (a) Mirror the approach taken in relation to Bathing Water and create a duty on central and local government to ensure safety; or
- (b) Create a hybrid regime based on the HSWA concept and principles but without the limitations of the existing case law and definitions. This model could also pick up the safety aspects of the public health powers vested in local authorities.

22.12 Of course, with a blank piece of paper, we have the flexibility to design any new legislation specifically to address the issues that the existing regime faces.

***Duty on central and local government***

22.13 Making government responsible is the 'easy' option. In the Bathing Water model, a combination of central and local government are responsible. Here, it would be possible to take some of the discretionary duties in the Public Health legislation and make them mandatory.

22.14 Based on the BWR model it would be easy to say that the local government is responsible where the relevant land falls within its area. Relevant land is defined as land (a) normally used to access a bathing water from the landward side, and that is (b) immediately adjacent to that bathing water or, where the bathing water is tidal, immediately above the high water mark. As with the BWR model this duty could be focussed on the bathing waters as defined in the BWR.

22.15 It is also arguably consistent with public health duties to place a duty on the local authority, though the challenge is that the hazard may eventuate on land over which it does not have control. For this reason it would be better to focus on the land adjacent to the Sea and place duties on those owning or occupying the land.

22.16 I have touched on this earlier in this report, but one area in which new legislation covering the duty of government would be beneficial is in the duties, powers and role of the HM Coastguard. As described earlier, it would be desirable to provide greater clarity.

22.17 As a part of this, or separately, one area in which consideration could be given to central responsibility is in relation to the funding for lifeguarding during the summer season. In the 2017 season, the RNLI provided lifeguards to 249 beaches in the UK. That number is substantially fewer than the c.400 registered bathing waters, which suggests that there are a substantial number of registered bathing waters that may not have coverage. It may be that, following a risk assessment, not all of those locations required physical lifeguards, though equally it may be that those without lifeguards would be found to require them or some other PRE that is not currently provided. Again, in this space the RNLI and other beach lifeguard services have undertaken exceptional work,

having in the RNLI's case risk assessed 447 non-RNLI covered beaches and provided signage reports at a total of 245 beaches and 137 beaches in terms of PRE<sup>144</sup>.

- 22.18 There is no legal duty on the RNLI to provide lifeguards. The RNLI does this as a quasi-commercial enterprise, though in reality it only recovers 50% of the cost. If the RNLI ceases to get the right level of funding, it is inevitable that it will have to pull back subsidising the service and this would expose bathers to substantial risk.
- 22.19 There is an argument that a large part of what a beach-based lifeguard does sits naturally within the scope of 'coast watching', a duty of the HM Coastguard. Therefore, a more radical solution to ensure longer term lifeguard coverage would be to consider moving lifeguarding away from the RNLI to HM Coastguard as part of a new clarity on the duty of the HM Coastguard to ensure coverage at all bathing waters as a starting point. This is particularly important when one considers that in 2017 it is estimated that the 249 RNLI covered beaches had in excess of 17 million visitors. Consideration could then be given to the recovery of that cost via local taxation or other appropriate means.
- 22.20 Irrespective of whether or not lifeguarding would be moved to the HM Coastguard, it would be appropriate to update the Coastguard Act and provide clarity on what responsibility the HM Coastguard has for preventative measures such as lifeguarding.

#### ***Duty on those owning or occupying land***

- 22.21 A good reference point for creating a HSWA-like regime can be seen through the inclusion in the Diving at Work Regulations 1997 ('Diving Regulations') of recreational diving.
- 22.22 While the Diving Regulations require at least one diver involved in the recreational diving to be at work, it does provide a useful reference point on how scope could be addressed. In terms of scope, the Diving Regulations, carefully define the terms '*dive*,' '*dives*' and '*diving project*':

*a person “dives” if—*

*(a) he enters—*

*(i) water or any other liquid; or*

*(ii) a chamber in which he is subject to pressure greater than 100 millibars above atmospheric pressure; and*

*(b) in order to survive in such an environment he breathes in air or other gas at a pressure greater than atmospheric pressure;*

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<sup>144</sup> All figures from RNLI 2017 Lifeguards Report.

*“diving project” means any activity, made up of one or more diving operations, in which at least one person takes part or will take part as a diver and extends from the time when that person, or the first such person, commences to prepare to dive until that person, or the last such person, has left the water, chamber or other environment in which the dive, or any part of the dive, took place and has completed any requisite decompression procedures, including, where it may be reasonably anticipated that this will be needed, any therapeutic recompression.*

- 22.23 It is therefore very clearly defined as to exactly what activities the Diving Regulations apply. Similar could be achieved for offshore swimming, bathing or recreation. For example, with minimal changes from the diving definition it would be possible to create a definition for 'Sea Based Recreation', as I did earlier in this report:

**Sea Based Recreation** means swimming, bathing or otherwise using the foreshore or territorial sea for recreational activity that is not based in, or originating from, a vessel and is conducted within a distance of [500m] of the mean low water mark.

- 22.24 While the definition requires finessing, it provides a starting point for discussion and would avoid those who are caught by the merchant shipping regime and, in light of my earlier findings, there would only be minimal overlap with the HSWA or Occupiers' Liability regimes. It would also need to be clear that 'vessel' does not include inflatables or other beach toys.
- 22.25 In terms of the actual duty, Regulation 4 of the Diving Regulations also provides a good starting point. It deals with it in this way:

*Every person who to any extent is responsible for, has control over or is engaged in a diving project or whose acts or omissions could adversely affect the health and safety of persons engaged in such a project, shall take such measures as it is reasonable for a person in his position to take to ensure that these Regulations are complied with.*

- 22.26 This is a deliberately broad duty as is recognised by the Approved Code of Practice, which acknowledges that:

*There are a number of people whose activities can have an involvement with or impact on the conduct of a diving project and who therefore have responsibilities for ensuring that the Regulations are complied with in relation to matters under their control. These people include the owners of dive sites, the operators of vessels being used as part of the diving project, and a client for whom the work is being carried out.*

- 22.27 Another useful reference point is the definition of 'Relevant Land' from the BWR. This is defined as land (a) normally used to access a bathing water from the landward side,



and that is (b) immediately adjacent to that bathing water or, where the bathing water is tidal, immediately above the high water mark. In other words, it places a duty on the local authority where the Shore is in its area.

22.28 Combining the thrust of the Regulation 4 of the Diving Regulations definition with the BWR duty it is possible, for the purposes of illustration, to capture a general but proportionate duty which provides a good starting point for future discussion:

### **1. General Duty**

(1) Every person who to any extent: -

(A) is responsible for Sea Based Recreation;

(B) has control over those engaged in Sea Based Recreation;

(C) is responsible for land used for accessing the Sea for Sea Based Recreation; or

(D) whose acts or omissions could adversely affect the health and safety of persons engaged in Sea Based Recreation,

shall take such measures as it is reasonable for a person in his position to take to ensure the health and safety of those undertaking Sea Based Recreation.

(2) This duty applies to those who own, occupy or in any way operate an undertaking from either the Foreshore or from land that is adjacent to either the Foreshore or Territorial Sea.

(3) Where there are multiple duty holders, duty holders must collaborate in order to discharge their respective duties under this legislation.

(4) The land used for accessing Sea Based Recreation means the Foreshore and the Shore where it is the access point to the Sea.

(5) Shore means the land above the mean high-water mark. Foreshore means the land between the mean low water and mean high water marks. Sea means seaward of the mean low water mark.

### **2. Duty to Risk assess**

(1) All persons to whom the General Duty applies must carry out a suitable and sufficient risk assessment of Sea Based Recreation, this includes, but is not limited to, the risks associated with rip currents, wind, hidden and submerged obstruction, cold water shock and the interaction with vessels.

(2) The risk assessment will include the control measures to be implemented to mitigate the hazards identified by the risk assessment.



(3) Such a risk assessment must be reviewed regularly and at least every three years.

### 3. Offences

(1) It shall be an offence for any person to fail to comply with any of the duties in this legislation.

(2) The offence in section 3(1) shall be punishable by a fine.

(3) It shall be a defence to show that

(i) a person took all reasonable precautions and exercised all due diligence to avoid the commission of any offence; and/or

(ii) the measures taken were those that it was reasonable for a person in that situation to undertake based on a suitable and sufficient risk assessment of the hazards associated with Sea Based Recreation.

22.29 This is just wording for discussion, as in my opinion it is always easier to show how a duty could look in order for an informed discussion to take place. It would then be possible to consider how much detail it is appropriate to include. For example, it would be possible to create a much more prescriptive duty in the same way as has been done in Quebec which sets out specific lifeguarding measures to be implemented. I do not believe that this is necessarily required as the requirement to risk assess and associated guidance would be sufficient to drive such behaviour as is proportionate. However, I can see the advantage of setting out what sort of control measures should be considered in order to create a clear framework.

22.30 The key aspect of approaching it in this way is that this general duty would then avoid the issues caused by the requirements under the HSWA regime and in particular the requirement to show an undertaking acting as found in the HSWA.

22.31 It also has the advantage of creating a duty that has a sliding scale of responsibility, proportionate to the level of involvement in Sea Based Recreation.

22.32 There remains the difficulty with to whom the duty should apply. As described earlier in this document and as shown in the diagram below, it is only practicably possible for risk control measures to be located on the Shore. Similarly, it is only possible to reach the Foreshore and Sea by crossing from the Shore. I have therefore suggested that any duty is created on this basis that those providing access are in part responsible to the limit of their control.

22.33 It is accepted that it would be unusual in terms of regulatory duty for it to apply to land or areas beyond that

which the duty holder immediately controls, but there is not another solution for this. If any form of regulation is considered, then it would necessarily have to operate in this way.



22.34 This general duty would then sit alongside the duty to risk assess the hazards associated with foreseeable Sea Based Recreation. I have drafted the duty as a middle ground, with some indication of what needs to be assessed, but it would be just as easy to mirror the approach in the Management Regulations or an even more prescriptive regime found in some other legislation including the adoption of a methodology such as the RNLI template.

22.35 It would also be necessary to create an enforcement regime which would most naturally result in fines similar to the HSWA regime for breaches. As described above, this should not be a vague general duty that applies to all, rather a focussed duty with clear limits and a clear method for it to be discharged. I would propose that this regime would be enforced in the same way as health and safety, with an enforcement regime that includes prosecution and financial penalties.

22.36 In terms of who is responsible for enforcement, it will be a matter for determination but most naturally the enforcement duty would sit with the MCA. It is suggested that it should operate in a similar way to the HSWA regime.

22.37 Alongside any legislation, as described above, it would be absolutely critical to produce guidance, which could be a statutory Code of Practice that explains the scope of the duty. In particular, this guidance would make clear what an appropriate risk assessment looks like and make clear that it would not be appropriate to put in place control measures for circumstances that are entirely obvious and natural, save for where they are hidden.

### 23. Unintended consequences of reduced access through legislative change

23.1 With any regulatory change, careful consideration would need to be given to the unintended consequence of creating a regime that puts beaches out of use. Conversations with the RNLI highlighted that certain landowners would prefer to put up barbed wire and fast-growing vegetation rather than address or accept liability for water safety.

23.2 This is also recognised by the Local Government Association which concludes in its feedback to me that:

*'An outcome may be that access to beaches are significantly reduced in the future as those with statutory responsibilities for safety seek to limit the costs and liabilities they are exposed to by preventing the public from using beaches.'*

23.3 This is a real and present danger and this can be seen from the Congleton Case where part of the claimant's case was put on the basis of Council memos which showed the steps it had taken to reduce the prospects of swimming including larger notice boards, and recommendations such as: "Suggest cutting down on beach area by increasing reed zones" and "Signs should indicate the nature of the hazard e.g. 'Danger - Water 5m deep'".

23.4 This was then determined to not be effective and therefore the Council concluded that it should put in place a scheme of landscaping to make "the water's edge to be far less accessible, desirable and inviting than it currently is for children's beach/water's edge type of play activities". The solution called for was to remove or cover over the beaches and replace them by muddy reed beds. Part of the reasoning was that with attractive beaches "accidents become inevitable" and "we must therefore do everything that is reasonably possible to deter, discourage and prevent people from swimming or paddling in the lake or diving into the lake."

23.5 The House of Lords continues to explain the Council's thinking. It justifies the capital expenditure request on the basis of the "*public's disregard of the embargo on bathing in the lake*" and states that "*we have on average three or four near drownings every year and it is only a matter of time before someone dies*". Also: "*If nothing is done about [the landscaping] and someone dies the Borough Council is to be held liable and would have to accept responsibility.*" This was the nub of the claimant's case. The situation was dangerous. The defendants realised that they should do something about it - remove the beaches and make the water's edge unattractive and not so easily accessible.

23.6 The House of Lords did not accept that logic. The Judgment could not have been clearer:

*"Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots*

*to be lined with warning notices? Does the law require that attractive water side picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no. <sup>145</sup>"*

- 23.7 The fact that councils or other landowners may think this is necessary does not show that there was a legal duty and removal of access is not necessary.
- 23.8 It therefore follows that to mitigate this risk, whichever option is progressed, it is vital that clear guidance is produced that ensures that potential duty holders can fully and properly understand their obligations and do not overreact in the erroneous belief that risk should be expunged. This is not the case; the duty would be to assess the risk and take whatever steps are proportionate as control measures.

## Co-ordinated approach required

- 23.9 As there are a substantial number of stakeholders involved in beach safety, a coordinated approach is necessary. This is the approach advocated in the WHO Guidelines, in particular the following passage:

*Mutually supportive actions should take place, coherently, at the local, national and international level in order to reduce risks encountered during recreational water use. Multiple stakeholders intervene in the assessment, use and protection of recreational waters. Their roles and responsibilities should be defined, and their efforts harnessed through an integrated planning framework.*

- 23.10 I have repeated below the diagram from the WHO document, alongside Unit 4 of the RNLI's Lifeguard Service Implementation guide, which summarise the range of stakeholders.

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<sup>145</sup> Lord Hobhouse, Tomlinson at Paragraph 81

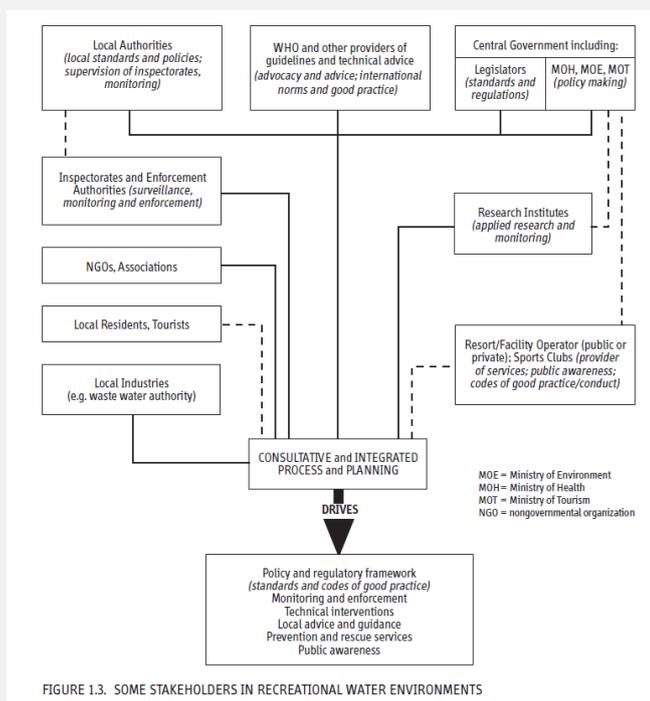
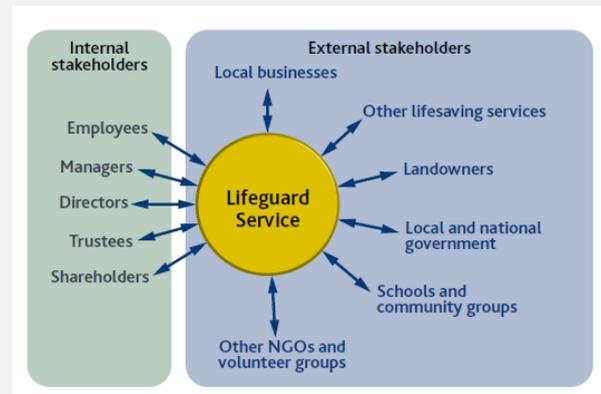


FIGURE 13. SOME STAKEHOLDERS IN RECREATIONAL WATER ENVIRONMENTS



23.11 While it does not necessary follow that the WHO system can be entirely mapped onto the UK system, it is useful to consider how far it could be through a consistent grouping of bodies and by designating one national body to take the lead.

23.12 Coordinated working does occur in some places, for example driven by the Fire and Rescue Services in certain areas. As the Chief Fire Officer, Dawn Whittaker explained to the Transport Select Committee:

*"particularly inland, fire and rescue services have a statutory duty under the Fire and Rescue Services Act 2004 to complete what is known as an integrated risk management plan—a community assessment—and work with local authorities, other agencies and statutory partners to assess risk that exists in localities. More proactively, in some areas there have been some very good assessments of risk posed by quarries, rivers, canals and the like."*

23.13 It is also correct that certain emergency services are under a duty to consider collaboration agreements under the Policing and Crime Act 2017.

23.14 It appears, however, that this work is less advanced at the coast even though ample opportunity exists through a range of forums. In addition to the approach driven by the statutory duties of the Fire and Rescue Service and the HM Coastguard, there are also:

- (a) District Marine Safety Committees;
- (b) the Local Reliance Forum;
- (c) Regional Resilience Forum;

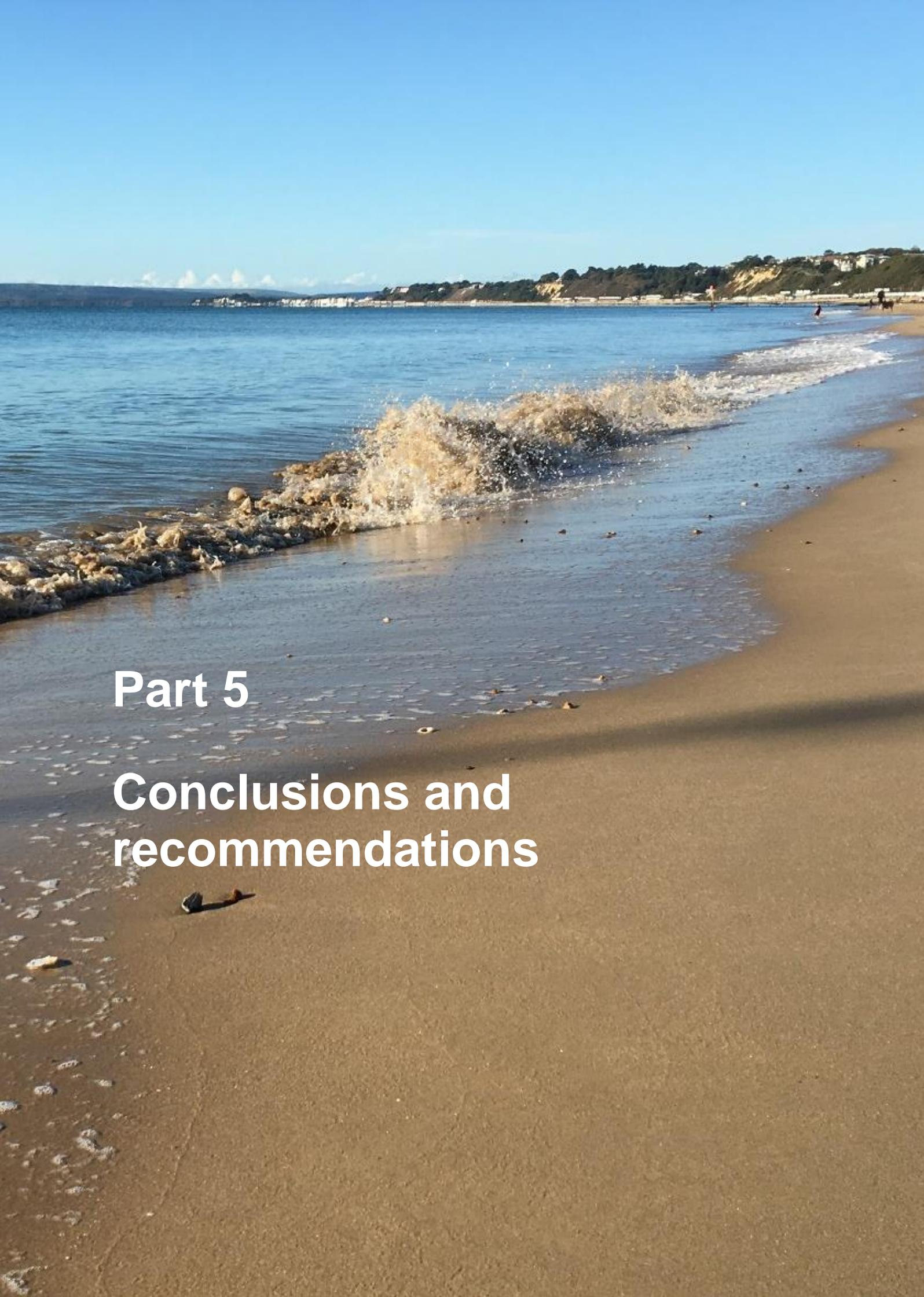


- (d) Local SAR Committees and the National SAR Committee;
- (e) the National Water Safety Forum; and
- (f) Local Government Association Special Interest Group.

23.15 There are probably other stakeholders that are not on this list but given the broad number of stakeholders, there is ample opportunity for simplification and to ensure that there is one clear consistent voice on this topic.

23.16 It is however right that, other than the National Water Safety Forum, none have beach safety at their heart. There is, however, an opportunity here to task a single body with the responsibility for consolidation of this policy area. It is currently spread too thinly across a wide range of stakeholders.

23.17 A number of local authorities recognise that more can be done in this area and while this is in part something for a national body like the National Water Safety Forum, it requires a combination of both national coordination and local, consistent, implementation.



## Part 5

# Conclusions and recommendations

## **24. Conclusions and recommendations**

24.1 This report intended to answer four essential questions in order to assess who was legally responsible for drowning risk at the beach:

- (a) What is a beach?
- (b) Who are the duty holders in relation to the drowning risk at the beach?
- (c) What are the duties that those duty holders might owe?
- (d) Are they sufficient?

### **What is a beach?**

24.2 In order to be able to determine responsibility it is necessary to determine what specific land is in question. It is therefore necessary to have clear definitions covering the area in question.

24.3 There is no legal definition of a beach. The term beach does not really appear in law. There are a range of other similar but different terms that do appear in law, such as foreshore and seashore, but neither are consistently defined/ have a single definition.

24.4 In order to determine the appropriate approach, I have built from the definition of foreshore that is generally adopted by the Crown Estate for its ownership of the Foreshore: between the mean high and low water marks. This is the 'sometimes wet' part of the beach.

24.5 It is noted and accepted that there are a number of ways of measuring the high and low water marks. It may be that others are more appropriate, but I have focussed on the variant that appears on the OS maps most commonly used.

24.6 Once one settles on that definition and appreciates that the area below the mean low water line is usually considered the Territorial Sea, and the mean low water line is usually considered the geographical extent of the UK, then it is easy to define that area as the Sea. The Sea is the almost always wet part of the beach area.

24.7 Moving landward of the mean high-water line you find the almost always dry part. This may have any number of landowners or occupiers adjacent to each other. I have called this land the Shore.

24.8 Collectively the land that is the Foreshore and the Shore is usually referred to as the beach. Often the beach is only of interest to those attending because it offers easy access to the Sea.

24.9 In determining legal responsibility for a beach, its geography is a crucial consideration. Often the Shore and Foreshore will have different owners (and in a short distance there may be several different owners or occupiers of both). Further, it is only possible to have PRE on the Shore (as it is the only almost always dry location), though the risk

only exists on adjacent or possibly two lots of land away (Shore to the Sea). The importance of geography is exacerbated because the topology of the beach will influence how deep the water on the Foreshore is at high tide and during the day. This highlights the practical challenges the beach environment provides that become legal challenges.

### **Who are the duty holders in relation to a beach?**

24.10 Despite at least two Ministers providing answers to the House of Commons that definitively state that local authorities are responsible for beach safety,<sup>146</sup> the real answer is far more complex and nuanced.

24.11 There are a wide range of potential duty holders. These include:

- (a) Landowners and occupiers of all parts of the beach;
- (b) Duties placed on employers and those at work;
- (c) Statutory duty holders, including emergency services (including the HM Coastguard), local authorities and similar groups;
- (d) Central Government; and
- (e) Other, such as charities.

24.12 Each of these groups potentially owes an overlapping duty in respect of the beach environment and the precise duty holder's identity will vary depending up on the issue in question and the activity in question.

### **What are the existing duties?**

24.13 There are a range of legislative duties that might apply in relation to the water safety at a beach, including:

- (a) Health and Safety at Work etc Act 1974 ('HSWA');
- (b) Occupiers' Liability Acts;
- (c) Common law duty of care in negligence;
- (d) Statutory duties; and

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<sup>146</sup> <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-02/44806/> and <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-14/46397/>

(e) Byelaws.

24.14 Of this legislation, both the HSWA and byelaws expressly or impliedly operate on the basis of risk assessment and could touch on certain aspects of beach safety. However, in my opinion none of the existing legislative regimes fully or properly covers the risk of drowning.

24.15 The fact that the Foreshore marks the geographical extent of the UK is in part the reason for this regulatory challenge. But, even if that issue were cured, the majority of the regimes would only respond in a very limited way. This cannot be correct. It cannot be correct that the relatively sterile and safe environment of the swimming pool, an area with clearly defined sides and clear water to allow hazards to be seen, can be required to have substantial levels of lifeguarding and other PRE measures, whilst amenity beaches have no requirement or duty to be risk assessed, let alone in relation to control measures.

**Are the existing duties sufficient?**

24.16 The existing duties do not adequately address the risk. It cannot be right that there is regulation of the safety of:

- (a) those using vessels on the Sea;
- (b) the quality of the water in the Foreshore;
- (c) the speed of boats in or near the shore to protect bathers; and
- (d) those exposed to risks to their health and safety by undertakings on the Foreshore and Shore,

but there is no legal duty in relation to Sea Based Recreation.

24.17 In my opinion, this is a substantial oversight and should be addressed. For instance: the RNLI statistics show, 38.4% of rescues take place greater than 50m from the water's edge, an area where it is very likely that no legal regime applies and there is no legal or public duty for anyone to risk assess or provide lifeguards.

24.18 In light of the fact that the RNLI and other lifesaving organisations assisted over 24,000 people in over 15,000 incidents this feels like an oversight and something that could, with a change of budgeting decision by the RNLI, result in a substantial increase in the number of deaths. Even if the number of deaths were to increase to 1% of the volume of incidents, it would be a nearly 4x increase in fatalities.

24.19 It would assist everyone to have clear and unambiguous duties so that services can be designed around them, and all parties can carry out effective risk management.

24.20 The WHO expects that:

*Mutually supportive actions should take place, coherently, at the local, national and international level in order to reduce risks encountered during recreational water use. Multiple stakeholders intervene in the assessment, use and protection of recreational waters. Their roles and responsibilities should be defined and their efforts harnessed through an integrated planning framework.*

- 24.21 In my opinion, this does not happen coherently in the UK. At best, this can be said to have been most comprehensively undertaken by the RNLI through its beach Management work, though, and this is no criticism of the RNLI as it has no duty to do so, it has assessed under a third of the UK's beaches.<sup>147</sup>
- 24.22 Whilst not overtly, the RNLI, and to a lesser extent SLSGB and other similar organisations, appear to have been left taking on a specialist risk assessment role without the funding or scale to effectively do this. This must not be interpreted as a criticism of the RNLI, it is not. It is simply a recognition that the UK is relying on a handful of people at a charitable organisation to deliver, at least, the initial risk assessment of the nation's beaches. This is a task for which it has no legal obligation to undertake. This cannot be right.
- 24.23 In my opinion, this should be changed to ensure that either risk assessment of Sea Based Recreation at the beach is mandated either to be undertaken through Central Government funding, or by placing a duty on those providing access points to Sea Based Recreation.
- 24.24 While I fully recognise that swimming, particularly swimming in the Sea, is something that carries an inherent and unavoidable risk, and that risk is positively accepted by the user, there is also a balance that must be struck.

## Recommendations

- 24.25 In the words of the then MP Julia Goldsworthy in a debate in Parliament on 17 October 2006

*Unclear statutory responsibility means that there is no funding, and many local authorities with a significant coastline find that a great burden. There are also complications about beach ownership. I appreciate that that cannot be cleared up immediately or quickly, but progress needs to be made.<sup>148</sup>*

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<sup>147</sup> The RNLI's 2017 statistics suggests that it has assessed 447 beaches. I have not found a definitive number of UK beaches, but most estimates place the number over 1500.

<sup>148</sup> <https://publications.parliament.uk/pa/cm200506/cmhansrd/vo061017/debtext/61017-0021.htm#0610183000039>



- 24.26 I wholeheartedly support that opinion and it is a source of great disappointment that over 12 years later the position is as unclear as it was then.
- 24.27 In order to improve the situation for the future I make the following short, medium- and longer-term recommendations.
- 24.28 In the short term:
- (a) The guidance for managing beach safety must be updated, consolidated and ideally made governmental.
  - (b) Engage in multi-party management and collaboration to drive solutions for drowning risk management.
- 24.29 In the medium term:
- (a) Create a new legal duty to give clarity to all on their duties in respect of beach safety.
  - (b) The duties of the HM Coastguard should be updated in order to make them fit for the next 100 years.
- 24.30 And, other recommendations:
- (a) HSG 179 should have the references to the Sea removed or make clearer that it does not apply to the Sea.
  - (b) Consideration should be given to if and how the Civil Contingencies regime could apply.
  - (c) The centralisation of the funding, delivery or both of beach lifeguarding should be considered.
- 24.31 I believe these steps are necessary to ensure safety on our beaches and transform what is undertaken largely on a voluntary basis into a mandatory requirement.
- 24.32 These recommendations fall into three broad categories: legal duties; coast and lifeguarding; and broader engagement.

### **Legal duties**

- 24.33 I do not support or advocate a level of regulation akin to that found in the HSE guidance for swimming pools (HSG 179), this would be grossly disproportionate. I do, however, recommend a two stage, risk-based approach. Firstly, I believe that there is a need for legislation that specifically addresses the specific issues posed by the coastline. I have proposed a model for how this could be done earlier in this report but would recommend further work on perfecting the definitions and that a full consultation is undertaken.
- 24.34 The intention of this legislation is not to create additional regulatory burdens, rather it is intended to provide clarity. It is anticipated that for many duty holders it will be a

question of making sure that an existing risk assessment is suitable and sufficient, and then provided that they are implementing the control measures in that risk assessment, no further action would be required.

- 24.35 Regardless of whether or not a legislative solution is adopted, I believe that further Central Government owned guidance is required. This guidance is vital to provide clear instruction on how a good risk assessment should be undertaken in this area and provide clarity on what is expected of stakeholders at the beach. In particular, it could offer clarity on duties, responsibilities and the best way to maintain safety.
- 24.36 I believe that the guidance produced by the RNLI should be updated and would provide an excellent starting point for a consolidated guide to provide a one-stop-shop for beach safety best practice, in a similar way to the countryside guidance.
- 24.37 The beach guidance should be adopted by the government as the correct approach for risk assessment and safety management of beaches. In the event that legislation is implemented, this document could eventually become an Approved Code of Practice to any new legislation, in a similar way to those which are found in a range of safety areas and it would be vital to explain the new statutory obligations. To repeat, even if my recommendation for new legislation is not implemented, updated central guidance would offer substantial value. This guidance could appear on both the HSE and the MCA website as these are the most likely source locations for people to consider.
- 24.38 Given that there is clearly a risk of death from drowning at highly trafficked amenity beaches, this is something that would fall within the definition of an emergency for the Civil Contingencies regime. While there may be good reason why it is not utilised as part of the suite of responses available, I recommend further consideration is given to this in the future.

### **Coast and Lifeguarding**

- 24.39 The statutory duty governing the HM Coastguard requires review as the Coastguard Act 1925 is woefully vague. While undoubtedly those operating under it are excellent and have been making do with the duties as they know it, it is unclear of the legal basis for those duties. One explanation may be that they are approved by the Secretary of State; therefore, this is sufficient.
- 24.40 It flows from this that it is also unclear what, if any, responsibility HM Coastguard has in relation to lifeguarding. It is clear that the HM Coastguard has a duty as a coast watching force and as a consequence, based on that phrase it is quite possible that HM Coastguard could owe this duty. It is at least arguable that it at present owes a duty in relation to lifeguarding given that lifeguarding is concerned with coast watching.
- 24.41 This inadequacy is highlighted when a side by side comparison is made with the regimes for other emergency services, in particular that for the Fire and Rescue



Service. In my opinion, the way in which the statutory duties are set out for the Fire and Rescue Service makes an excellent reference point for reviewing the HM Coastguard's duties.

24.42 I therefore recommend that the statutory duties of the Coastguard are reviewed, at the very least as a part of a review of the Merchant Shipping Act, which I understand is expected to take place in the next five years. Ideally, it should not take that long and would warrant attention sooner.

24.43 Further, it is concerning that lifeguarding in the UK largely relies on the charity of the RNLI and the SLSGB volunteers. The RNLI is under no legal duty to provide lifeguards and does so as a part social, part commercial enterprise and therefore could at any time withdraw the service, if it chose to. This has been the case for a substantial period of time; a Transport Select Committee Report in 2005 noted:

*Local authorities make a contribution to the RNLI where the Institution provides this service, but it costs the RNLI £3m per year to run a service which employs 300 lifeguards.[28] Mr Freemantle told us that some local authorities were reluctant to continue to make a contribution to the RNLI when the time came to renew their service level agreements:*

*"[T]hey try to back away and leave us holding the can, which is something that we are not very happy with and is stopping us doing it elsewhere."*

*20. Mr Freemantle suggested that, even if the RNLI provided the lifesaving service, the local authority should retain overall responsibility for lifesaving on a beach because they made money out of car parking and other franchises there. We have sympathy with his view, but we also understand that local authorities may not want to bind themselves to service level agreements which supply a service they are not legally obliged to provide. Mr Phil Hope MP, Parliamentary Under-Secretary of State at the Office of the Deputy Prime Minister (ODPM), agreed to look into the matter further, but explained that while local authorities might take into account the need for lifesaving services, there was no statutory requirement for local authorities to supply lifeguards.<sup>149</sup>*

24.44 Though there is no evidence that the RNLI is minded to reduce funding, this is a potential risk, particularly as I understand that the RNLI often gets a contribution of only 50% of the actual cost from the beneficiary of the service. A similar point could be made of the work of the RLSS. This does not seem sustainable or appropriate.

24.45 One solution would be for beach lifeguarding to be subsumed within the duties of the HM Coastguard, or at least subject to provision of Central Government funding as the primary activity squarely is 'coast watching', a duty placed on HM Coastguard.

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<sup>149</sup> <https://publications.parliament.uk/pa/cm200405/cmselect/cmtran/322/32205.htm#a4>



**Broader engagement**

- 24.46 There is opportunity in multi-party cooperation to deliver change and there is the desire to do so. The Fire Service, for example, has a duty in respect of education which could then be applied in this area with greater cross body cooperation.
- 24.47 In addition to this, the HSE's guidance for swimming pools, HSG 179, should be updated in order to make clear that its principles do not apply to the beach environment, at all. The same should occur in relation to its online guidance.
- 24.48 In conclusion, the statistics show that more people die of drowning in the UK than die from fire. This underlines that it is an area that requires careful consideration. While people understand that there is risk associated with using the Foreshore and Sea, there is currently an unacceptable regulatory gap which results in people acting out of moral compunction rather than from any consistent legal obligation. This creates a confused and confusing regime and is capable of resolution.

**Dominic Watkins**

**London**

**January 2019**



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