

## ANNEX A

### **General Arrangements for Inspection, Investigation and Enforcement by HSE Inspectors**

#### **Introduction**

1. This annex details the arrangements that HSE will normally follow in carrying out inspections, investigations or enforcement at Defence units, establishments and activities under the terms of the Health and Safety at Work etc Act 1974 (HSWA) and associated relevant statutory provisions (RSPs). HSE's expectations of cooperation from MOD are outlined where appropriate. These arrangements recognise the statutory right of HSE Inspectors to conduct inspections, investigations or enforcement and its commitment to do so in such a way as not to compromise national security and Defence operations.

#### **Powers of Inspectors**

2. HSE Inspectors have a range of practices and powers to enable them to conduct inspections and investigations and to take enforcement action. The powers are granted in legislation and include:

- a. Under HSWA: powers of entry; powers to require information; powers to take measurements, photographs, samples, possession of articles and substances etc. NB: HSWA Section 25 (Powers to Deal with Cause of Imminent Danger) does not apply to the Crown.
- b. Under the Criminal Procedures and Investigation Act 1996 as amended by Criminal Justice Act 2003 (England & Wales only: similar principles apply in Scotland); duty to pursue all reasonable lines of enquiry.
- c. Under the Police and Criminal Evidence Act 1984 (England & Wales only); the interviewing of suspects.
- d. Under the Criminal Justice Act 1967 (England & Wales only); the taking of voluntary witness statements.

#### **Procedures**

3. HSE Inspectors will apply and consider the following in guiding their interventions with MOD:

- a. HSE's Selection Criteria for the Investigation of Injuries<sup>1</sup>;
- b. HSE's Enforcement Policy Statement<sup>2</sup>;
- c. HSE's Enforcement Management Model<sup>3</sup>;
- d. Work Related Deaths Protocols (WRDP and WRDP Scotland)<sup>4,5</sup>;
- e. The Agreement between ACPO and the MOD / Service Police Forces<sup>6</sup>;
- f. The Co-ordinated Policing Protocol between the MOD Police and Scottish Police Forces<sup>7</sup>;

<sup>1</sup> [HSE Incident Selection Criteria 2010.pdf](#)

<sup>2</sup> [HSE Enforcement Policy Statement.pdf](#)

<sup>3</sup> [HSE Enforcement Management Model.pdf](#)

<sup>4</sup> [Work-Related Deaths Protocol \(England and Wales\)](#)

<sup>5</sup> [Work Related Deaths Protocol \(Scotland\).pdf](#)

<sup>6</sup> [ACPO MOD Protocol.pdf](#)

<sup>7</sup> [MOD Police and Scottish Police Forces \(Circular 13 2002\).pdf](#)

- g. Code for Crown Prosecutors (England and Wales)<sup>8</sup>;
- h. The Crown Office and Procurator Fiscal Service Prosecution Code (Scotland)<sup>9</sup>;
- i. Cabinet Office PIN 45: Procedures for enforcing health and safety requirements in Crown bodies (Censure and Crown enforcement notices)<sup>10</sup>.

## **INSPECTIONS**

### **Inspection Planning**

4. MOD establishments may be inspected as part of HSE's annual inspection programme. Inspections can vary from a half day visit by a single Inspector to a team inspection over a number of days.
5. Any substantial initiatives planned by HSE will be brought to the attention of the DSA (Defence Safety Authority) - CPA (Corporate Policy and Assurance) by HSE's Public Services Sector – MOD lead (HSE-PSS) during routine liaison meetings so that any overlaps with MOD's own inspection programmes can be discussed.

### **Inspection Arrangements**

6. Whilst HSE Inspectors have the authority to visit premises without prior notification, they will normally liaise with the Commanding Officer (CO) or Head of Establishment (HoE) in order to make an appointment, to obtain the name of an individual nominated to deal with the visit and to make arrangements for the inspection. HSE Inspectors may inspect military training areas, establishments and units when training is being undertaken.
7. HSE Inspectors will expect the CO / HoE to provide information and, as necessary, escort to minimise personal risks during the inspection; where appropriate the CO / HoE may task a relevant contractor to provide this. HSE Inspectors will expect the CO / HoE to indicate any information, or areas or activities requiring specific security clearances.

## **INCIDENTS AND INVESTIGATIONS**

### **Incident Notification**

8. RIDDOR<sup>11</sup>-defined injuries to civilian personnel, and 'off duty' members of the armed forces in Great Britain are reportable under the regulations' arrangements. Equivalent injuries and diseases to armed forces' personnel on duty are not reportable under RIDDOR, but MOD has undertaken to notify any work-related death or major injury, resulting from health and safety management failings, to HSE as if it were RIDDOR-reportable. In the case of a fatality, HSE expects the CO / HoE or other responsible person within the relevant component body (command etc.) to notify the appropriate police force.

### **Purpose of Investigation**

9. HSE will investigate incidents in accordance with the Incident Selection Criteria<sup>1</sup>. HSE's primary focus will be to determine whether there have been organisational or

<sup>8</sup> [Code for Crown Prosecutors.pdf](#)

<sup>9</sup> [Crown Office and Procurator Fiscal Prosecution Code.pdf](#)

<sup>10</sup> [Civil Service PIN 45.rtf](#)

<sup>11</sup> [The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013](#)

systemic failures, although the duties of individuals will also be considered where appropriate. The investigation will endeavour to determine:

- a. The cause or causes of the incident or complaint.
- b. If there has been a breach of the law.
- c. Whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law.
- d. What response is appropriate to the relevant breach.
- e. What lessons can be learnt from the incident and how these can be used to influence the law and guidance.

### **Initial Action**

10. On receipt of information concerning an incident that meets HSE's investigation criteria, a nominated HSE Inspector will contact the CO / HoE to make arrangements for an investigation. If there has been a fatality or if significant publicity is possible or if enforcement may be likely, the nominated Inspector will also inform HSE's Public Services Sector (MOD lead).
11. During the early stages of an investigation, the HSE Inspector may require the incident scene to be left undisturbed to preserve evidence for further examination if necessary by specialist Inspectors. The Inspector may also need to consider prohibiting activities with a Crown Prohibition Notice (see para 34 below).
12. HSE expects the CO / HoE to inform the Chief Environment & Safety Officer (CESO) of MOD's component bodies (command etc.) about the HSE investigation.

### **Assistance from MOD**

13. The HSE Inspector(s) may need to examine the incident scene for relevant evidence and to identify witnesses. The CO / HoE and/or the CESO (or any other MOD officer) is expected to facilitate this process, making witnesses available for interview and providing office accommodation. HSE will initially seek to obtain voluntary witness statements without recourse to the use of powers under HSWA. If evidence emerges that an individual or individuals may have committed an offence (see Main Agreement para 14), they will be invited to an interview under caution in accordance with the normal procedure. HSE recognises that individuals in such circumstances have the right to legal advice and/or Trades Union support and expects that the CESO may assist in obtaining such advice.
14. The CO / HoE and/or the CESO will assist the Inspector with questions about the chain of command or management responsibilities relating to the circumstances of the incident. If the line of enquiry leads to another chain of command or management within MOD the Inspector may need to liaise with the other CESOs to facilitate access to that chain of command.
15. The CESO or other MOD investigatory body is expected to share the emerging findings of any internal investigation where these may be relevant to the HSE investigation. The arrangements for achieving this whilst protecting an individual's rights must be carefully established.

16. Any issues that cannot be resolved should wherever possible be referred by the Inspector to HSE-PSS who will notify the CESO and/or DSA-CPA to seek resolution centrally.

17. If the activity being investigated is within or close to a domain in which a relevant Defence regulator has competence and authority, the CESO or DSA-CPA (working with HSE-PSS) should identify this to the Inspector and arrange introductions so that the Inspector and Defence regulator can determine any collaborative arrangements.

### **Service Inquiry and Investigation**

18. HSE recognises that, depending on circumstances, a Service Inquiry (SI) may be held under the Armed Forces (Service Inquiries) Regulations 2008. HSE expects the CESO to advise whether a Service Inquiry is to be held and to provide any requested SI reports including copies of Part 1 and the Schedule of Proceedings is provided to the investigating Inspector. A full copy of the report with operational and security sensitive information redacted as necessary will be provided if requested, on the understanding that it is disclosed in confidence and not to be quoted from or admitted into evidence without further reference to the MOD. Evidence provided by individuals to the Service Inquiry cannot be used against them by HSE in any subsequent prosecution, but may be used to identify further lines of enquiry.

19. HSE recognises that an investigation may be conducted by the relevant Service Police Force (SPF) into possible offences under military law. Where the HSE investigation identifies offences under HSWA or RSPs may have been committed by an individual, the Inspector will liaise with the SPF to exchange information. Officers of the SPF will cooperate with Inspectors in providing access to service personnel for interview where necessary.

### **Liaison with Other Investigators**

20. In the case of a work-related fatality, HSE will follow the procedure set out in a relevant Work Related Death Protocol (WRDP) in support of the police<sup>12,13</sup>. Normally there will be a joint police / HSE investigation with the police having the initial primacy. Where relevant, HSE will take account of the agreement between The Association of Chief Police Officers and the MOD / Service Police Forces and the Co-ordinated Policing Protocol between the MOD Police and Scottish Police Forces. Where the police or prosecution authority decide not to pursue a corporate manslaughter or homicide investigation, then the lead will pass to HSE. The same principles for liaison with other investigators as described in WRDP or other related MOUs / Agency Agreements may be applied in cases where information suggests that death is likely to occur as a result of a work related incident.

21. HSE Inspectors may need to liaise with investigators from other regulators or statutory bodies in a manner described in memorandums or agreements with those organisations.

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<sup>12</sup> In Scotland the Procurator Fiscal formally leads such investigations.

<sup>13</sup> This may include MOD or Armed Forces police services

## **Disclosure of Information and Learning of Lessons**

22. During the course of the investigation, and in order to ensure risks are properly controlled, HSE Inspectors will seek to ensure that, subject to any legal constraints, safety critical information is communicated to MOD locally and centrally whenever necessary.

## **CROWN ENFORCEMENT**

23. A Crown Enforcement Notice (CEN) is the equivalent of Improvement or Prohibition Notices issued under HSWA. The circumstances in which these statutory notices can be used are set out in sections 21 and 22 of HSWA and the application of the criteria to CENs is explained at paragraphs 28 to 33 of this annex. A CEN is not legally binding and the Crown body cannot be prosecuted for a breach of the Notice, although it may be censured (see below). A CEN will normally be served on the Department via the responsible CO or HoE. In addition to the information in this annex Inspectors will need to take account of Cabinet Office Personnel Information Note 45.

24. After serving a CEN, the HSE Inspector will inform the relevant CESO and HSE-PSS. The CESO or equivalent informs DSA-CPA.

25. Information about CENs is published in the HSE's Public Register of Enforcement Notices database. HSE normally publish information from the front page of the Notice in question, but the whole Notice may be subject to release under FOI. HSE will consider any representations from the recipient (who should ensure that wider Defence issues are incorporated) that would facilitate release of the whole Notice without redaction under FOI exemptions.

26. If the recipient of the CEN or his command / management chain considers that there are grounds to challenge it, appeal is made in the first instance to the HSE Inspector's line manager escalating as necessary and appropriate up to HSE's Chief Executive.

27. The recipient may request an extension of time in which to comply with the Notice by contacting the HSE Inspector.

## **Crown Improvement Notice**

28. Where an HSE Inspector is of the opinion that a Crown-controlled defence activity is contravening (or has contravened) one or more RSPs in circumstances that make it likely that the contravention will continue or be repeated, a Crown Improvement Notice (CIN) may be served.

29. If an HSE Inspector intends to issue a CIN, the Inspector will discuss the notice with the CO / HoE and, if possible, resolve points of difference before serving it.

30. The CIN should:

- a. Specify the statute / provision(s) in question.
- b. State that the Inspector is of the opinion that there is a contravention (para 8).
- c. Give particulars of the reasons why the Inspector is of that opinion.
- d. Require the commanding officer or manager to remedy the contravention or the matters occasioning it.

- e. Specify the period for compliance, which should be not less than 21 days from the date of service of the notice.

### **Crown Prohibition Notice**

31. Where an HSE Inspector is of the opinion that a Crown-controlled defence activity, to which relevant RSPs apply, is being (or is likely to be) carried on and should be stopped because it involves (or will involve) a risk of serious personal injury, a Crown Prohibition Notice (CPN) may be served.

32. The CPN should:

- a. State that the Inspector is of the opinion that there is a relevant risk.
- b. Specify the matters which, in the Inspector's opinion give, or will give, rise to the risk.
- c. Where applicable specify the contravention of any RSPs that in the Inspector's opinion have taken place and give reasons for that opinion.
- d. Direct that the activity should not be carried on by or under the control of the person on whom the notice is served until the matters giving rise to the Inspector's opinion have been remedied.

33. The requirement in the CPN that an activity should cease until specified matters have been remedied may either take effect immediately or be deferred until the end of a specified period. However, such a deferment would not occur in circumstances where immediate action is required to control the risk of serious personal injury. A deferred CPN would only be given where stopping the activity immediately would introduce additional risks (e.g. where it would be dangerous to interrupt a particular process in mid-cycle).

### **CROWN CENSURE**

34. A Crown Censure (CC) is the term given to the formal recording of a decision by HSE that, but for Crown Immunity, there would have been sufficient evidence of breaches HSWA and/or RSPs to provide a realistic prospect of conviction in the courts (in line with the Code of Crown Prosecutors).

35. After an HSE intervention any breaches identified which may lead to a possible CC are discussed between the HSE Inspector and the CO / HoE with the relevant CESO. HSE give advance information in the setting out of its 'case' in the same way as it does in prosecuting a non-Crown body. It provides a summary of the facts of the case and the alleged breaches of legislation to be considered prior to the discussion which will be facilitated by the HSE Inspector.

36. The CESO or equivalent informs DSA-CPA of the outcome of the discussions and advises the senior staff in the organisation (up to and including the Commander or Chief Executive). The CESO or equivalent normally responds to HSE, on behalf of the organisation, with representations which are generally in writing, rather than being made during an interview held under caution as there will be no criminal prosecution and the protection provided by a cautioned interview is redundant, due to Crown Immunity.

37. If senior staff wish to dispute some or all of the HSE's allegations or the facts, then the CESO and the HSE's Inspector attempt to resolve them – which may require a further meeting. This procedure is slightly different to that in Cabinet Office Procedure PIN 45, but

both HSE and the Department have agreed that it is desirable to resolve any censure evidence or censure process prior to any actual censure proceedings commencing as this is an efficient and effective way of working.

## **Appeal**

38. In circumstances where senior staff decline to accept the censure, written representations will be made to the relevant HSE Head of Division after consultation with D DSA. If HSE remains confident that a decision to prosecute would have been justified, HSE's Chief Executive will write to PUS seeking agreement to record the censure.

## **Censure Meeting**

39. Once the censure has been agreed with senior staff and formally approved within HSE, the Inspector will send a letter<sup>14</sup> along with a copy of the information and a summary of the evidence to the relevant CESO. The Inspector's written presentation on the facts of the case, photographs etc. is also provided at this stage.

40. It is expected that the Commander or Chief Executive will receive the censure personally<sup>15</sup>. The CESO, along with relevant safety representatives, is asked to confirm a mutually convenient time for the censure meeting and provides, for prior agreement with the Inspector, the text of any mitigating remarks to be made by the person receiving the censure. The aim is that there should be no material disagreements at the censure meeting itself.

41. HSE is responsible for inviting the relevant trade union or other safety representative(s) to observe the meeting and may do so directly or agree that the person receiving the censure should extend the invitation.

42. Where public discussion of any aspects of the CC would harm national security or defence operation or refer to information that relates to an individual (unless the individual has explicitly consented to such information being disclosed) or any other circumstances where there is a prohibition on the disclosure of the information (e.g. enactment, rule of law or non-statutory code), it should be established that all present have security clearances appropriate to the information being discussed. Subject to these same provisos, a copy of the information provided by HSE is also given to observers.

43. Attendance of other persons or relatives is agreed between the person receiving the censure and HSE as necessary. It is not possible for a censure meeting to have all the checks and balances of a court and wider public attendance is not generally appropriate. No witnesses are called and no legal representation is required. Under HSAW Section 28 the HSE may, depending on the facts of a particular case, release information to advise the public of risks and to reassure them about health and safety measures.

44. The censure meeting is normally held at the HSE office closest to the location of the incident. The censure meeting is generally chaired by the relevant HSE Divisional Director or someone nominated by him/her. Other HSE attendees include an official to minute the censure, the investigating Inspector(s) who presents the agreed facts, and a representative of the HSE-PSS. The person receiving the censure attends (see footnote

<sup>14</sup> This would be a version of a PIN 45 Annex D letter

<sup>15</sup> Only in exceptional circumstances, and with the agreement of D DSA, should the censure be taken below this level.

3) with supporting staff as appropriate. DSA-CPA will be invited to attend all censures to determine any impact on Departmental policy. The aim of the meeting is to seek acknowledgement of the problem and to obtain an undertaking to improve standards of health and safety.

45. At the censure meeting, the chairman introduces the background and purpose, reads the information and invites the investigating Inspector to present the facts. This presentation includes appropriate reference to any victim's personal statement. The chairman might outline why the CC was warranted in the particular case.

46. On completion of this presentation, the chairman invites the person receiving the censure to make mitigating remarks. These include action that has been taken to remedy the circumstances that led to the offence and an acknowledgement that were it not for Crown immunity the matter would provide a realistic prospect of conviction in the courts.

47. The chairman then concludes the censure by formally recording that were it not for Crown Immunity the matter would provide a realistic prospect of conviction in the courts.

48. HSE provides an agreed note of the CC. The person receiving the censure advises SofS, having consulted HSE on the submission. A record of the CC is then entered onto HSE's enforcement database.

49. HSE releases a press notice outlining the circumstances of the case and that a formal CC has been recorded.

50. The CESO ensures that any lessons learnt from the investigation are appropriately communicated throughout Defence.

## **FEES FOR INTERVENTION (FFI)**

51. Any HSE interventions which result in the Inspector identifying material breaches of legislation, including a CEN being issued, are likely to attract costs under the Health and Safety (Fees) Regulations 2012 (but note para 53b below). The time that the HSE spends on a matter, including anything from visiting premises to drafting letters, making phone calls or engaging experts to assist with investigations, is chargeable at an hourly rate.

52. The invoice for the work under FFI is sent out centrally by HSE to the CO / HoE where the material breach was identified, and it is for the CO / HoE to determine who pays the invoice to HSE.

53. Exemptions and disapplications to FFI can be found in HSE FFI guidance on the HSE FFI website. FFI charges do not apply:

- a. when the contravention(s) have been resolved to the satisfaction of the Inspector; or
- b. after HSE has formally notified the Department that it intends to take Crown Censure proceedings; or
- c. where another fee is already payable.