
# Analysis and summary of responses to CD284 – Proposal to revise the process for considering disputes under Fee for Intervention (FFI)

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## 1. Executive Summary

1.1 HSE provides a procedure by which disputes relating to fees for intervention (FFI) are considered, as required under Regulation 24(5) of the Health and Safety and Nuclear (Fees) Regulations 2016. HSE has undertaken a thorough review of the dispute process and taken the opportunity to consider moving to a fully independent system for considering disputes in relation to FFI.

1.2 To seek the views of stakeholders, HSE conducted a public consultation, which ran from the 21st April until 2nd June 2017. The consultation sought to obtain views on the proposals to ensure HSE's decision-making remains open, fair, transparent and proportionate.

1.3 In total, the consultation attracted 33 responses, the majority from industry, trade associations and the legal profession, with some respondents providing detailed comments against each of the questions. Most respondents agreed with the overall approach proposed by HSE however, some respondents raised concerns in relation to certain aspects of the proposal.

1.4 In respect of HSE providing sufficient information for dutyholders to understand why FFI is payable, a number of respondents commented that HSE should not introduce more, or additional, evidence to the adjudicating panel than that which was relied upon by the Inspector in the initial FFI action which formed their opinion that the duty holder was in material breach.

1.5 A number of respondents commented that the 'material breach' and application of the Enforcement Management Model (EMM) should be fully explained to the duty holder at the point of discovery by the Inspector taking enforcement action to ensure consistency of approach.

1.6 To enable a duty holder to make sufficient representations under the revised process, some respondents commented that this would be aided by HSE adopting a 'full disclosure' approach to the information / evidence it was going to rely upon in defending any enforcement action.

1.7 As to the membership of the panel ie chaired by a lawyer and two other members, some respondents commented that to ensure a fully independent process, careful consideration should be given to the constitution of the panel and the 'impartiality' of those appointed by HSE. On the whole most respondents agreed that the panel should be made up of members who had experience and understanding of health and safety legislation and the work activity involved.

1.8 Virtually all respondents agreed that the dispute process should be suspended where an investigation or appeal against an enforcement notice is still pending.

1.9 It was noted by several respondents that the Health and Safety and Nuclear (Fees) Regulations 2016 makes no provision for the recovery of a dutyholders costs in circumstances where a panel resolves an FFI dispute in favour of the dutyholder.

1.10 In summary, most respondents agreed with the overall approach being proposed, with the significant concerns around:

- The material breach giving rise to FFI being fully explained to the duty holder at the time of discovery.
- Early full disclosure of all relevant information that HSE would be relying upon
- The need for impartiality and sufficient relevant experience of any panel member.

1.11 Respondents provided comments on the proposed revisions to the disputes process and also took the opportunity to provide general comments on other aspects of FFI. HSE has considered all comments related to the disputes process i.e. the purpose of the consultation, with this report providing an analysis, and will take these into account in taking the revised dispute process forward. Generic comments in relation to FFI are noted by HSE but have not been considered for the purpose of this report.

## 2. Introduction

2.1 This report presents a summary of the outcome of HSE's public consultation on a revised process for considering disputes under Fee for Intervention (FFI) which was conducted between the 21st April and 2nd June 2017.

2.2 FFI was introduced in October 2012. The law is now set out in the Health and Safety and Nuclear (Fees) Regulations 2016 (the 'Fees Regulations '). The regulations put a duty on HSE to recover its costs for carrying out its regulatory functions from those found to be in material breach[1] of health and safety law. This shifts some of the cost of health and safety regulation from the public purse to those businesses and organisations that break health and safety laws.

2.3 The fee is based on the amount of time that the inspector spends identifying the breach, helping the duty holder put it right, investigating and taking enforcement action.

2.4 HSE, in reviewing its current arrangements for considering disputes under FFI, is proposing to move to a fully independent process and consulted on the details of how the process should operate.

2.5 In consulting, HSE sought views on whether:

- the revised process will provide sufficient information to enable a dutyholder to understand why HSE considers FFI is payable and how the costs have been reasonably incurred;
- the revised process will enable a dutyholder to make sufficient representations;
- disputes should be considered by an independent panel consisting of a lawyer as chair together with two other members with practical experience of health and safety management;
- there should be a different process where the amount of the fees is small and/or there is no dispute about whether there is a material breach;
- any dispute process should be suspended where an investigation or appeal against an enforcement notice is still pending;
- the respondent had any other comments on the revised FFI dispute process for HSE to consider.

2.6 Respondents provided comments by completing an online questionnaire or downloading a 'Word' version and returning to HSE either electronically or by post. General narrative responses were also received from respondents.

[1] A material breach is when, in the opinion of the inspector, there is or has been a contravention of health and safety law that requires them to issue a notice in writing of that opinion to the dutyholder or business.

2.7 This report should read in conjunction with CD284 – Consultation on a revised process for considering disputes under Fee for Intervention (FFI)

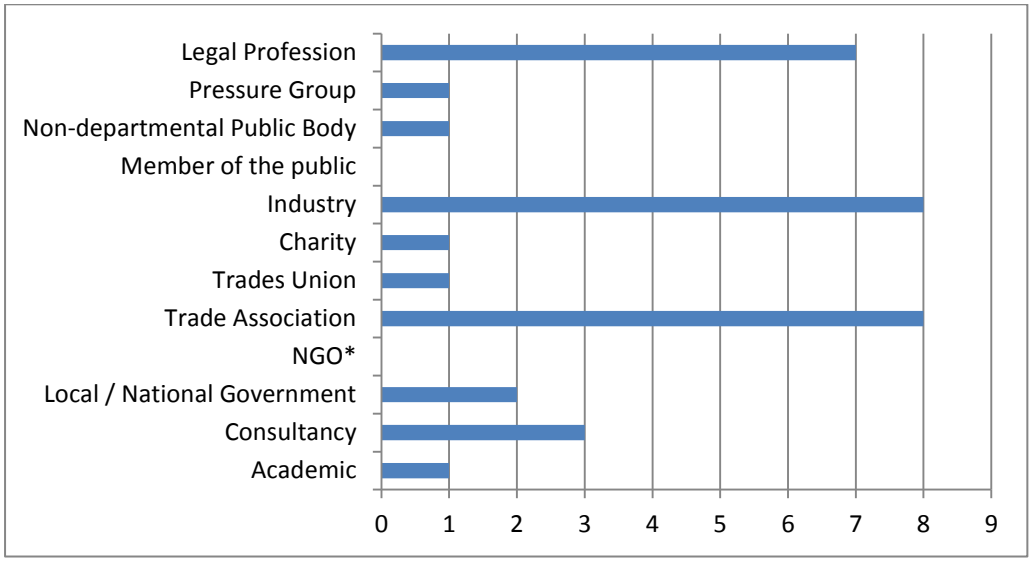
## 3.0 Response Demographics

3.1 Following the conclusion of the consultation the below response rates were noted:

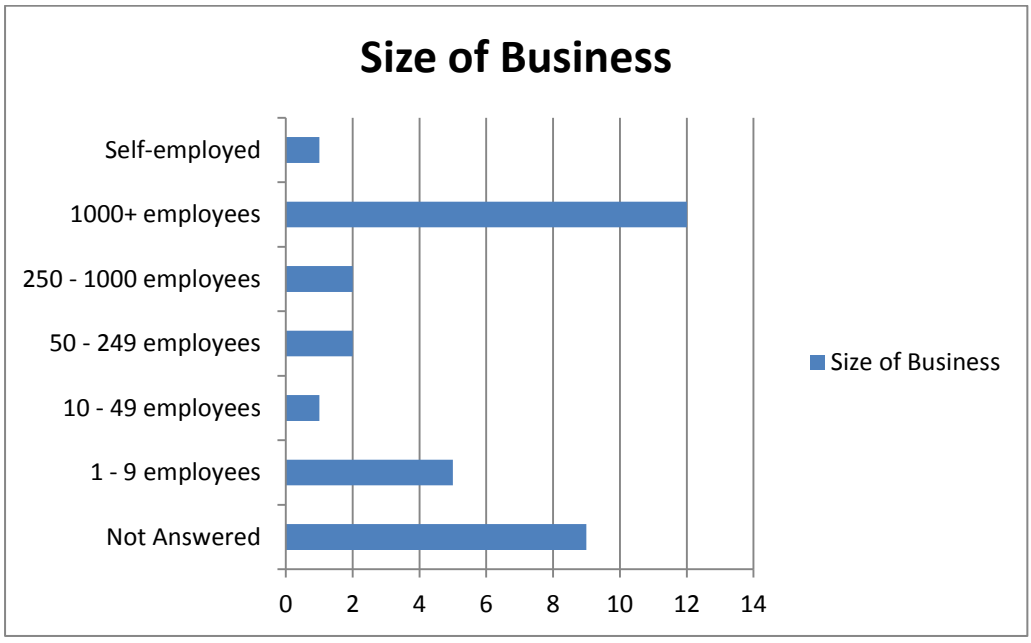
- In total there were 33 responses to the consultation
- 27 were received as word documents to a dedicated e-mail account
- 6 respondents completed the online survey
- 1 response was discounted as it had been submitted twice

All responses were analysed to establish common themes.

## 3.2 Response by Sector



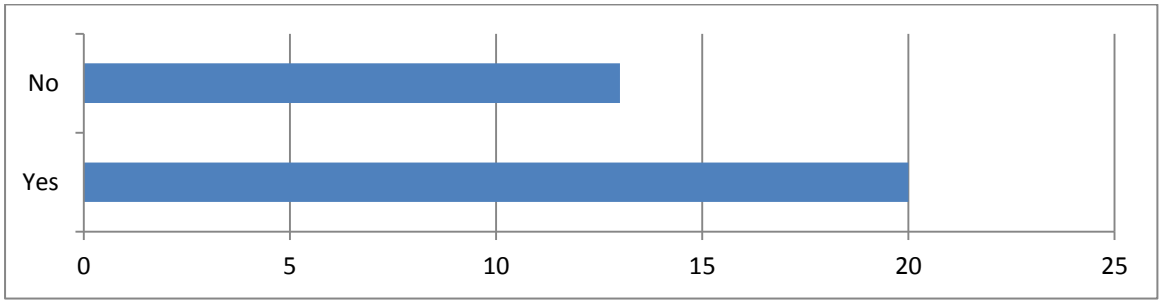

## 3.3 Response by Size of Organisation



## 4.0 Summary of Responses to Question 1

4.1 The consultation asked:

- '*Do you agree that the revised process will provide sufficient information to enable a dutyholder to understand why HSE considers FFI is payable and how the costs have been reasonably incurred?*




Overall, 60% of respondents agreed with this proposal, with 40% against. Of the responses received, 16 respondents provided further detailed comments which are reflected below.

Respondents were generally content but concerns expressed were that HSE should only rely on information or evidence that was available at the time that the material breach was discovered and therefore gave rise to FFI and not introduce further evidence at a later date.

HSE should fully disclose all evidence upon which it intends to rely upon when instigating FFI to the dutyholder at the earliest opportunity and likewise to the dispute panel prior to it being convened.

All information relating to the material breach which gave rise to a claim for FFI should be sufficiently detailed, not summarised, as to make it explicitly clear why such a claim is justified.

| Respondent | Comment |
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| Occupational Safety and Health Consultancy Services Ltd | The CD suggests that the fee is payable is to "help the business put it right" This is not the case as it is the time taken by the HSE inspector to enforce the relevant legislation.<br><br>It also suggests that the time is in relation to the material breach where is all the time taken in relation to the visit where a material breach is identified. If a visit and the associated paperwork and any revisit take a day then the charge is for the day if one or ten material breaches are identified.<br><br>Will the completed EMM form be part of the information provided as part of the NOC when the original communication is sent out? |

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| | In my view it is vital that the dutyholder understands how the inspector interpreted the EMM which resulted in the charge.<br>I have looked at several NOCs and it is not clear to me what material breaches are being alleged. |
| Bowmer & Kirkland Holdings | The process still does not explain the decision in the context of the Enforcement Management Model in terms of mitigating factors.<br><br>For investigations there is still an overwhelming need to demonstrate compliance with the Code for Crown Prosecutors in terms of 'all reasonable enquiries' including whether these point towards or away from a suspect.<br>The list A- H at Section 7 should be explained in relation to all FFI invoices and alleged material breaches as a matter of transparency in demonstrating proportionality and consistency in the decision making process. |
| OCS Group UK Ltd | For greater transparency I would suggest that under the paragraph concerning the "provision of information" should not be a summary but be all documents that are relevant and on which HSE have formed their opinion. |
| SAFED | Information provided by the HSE against any appeal should not be different from or more than that provided in the initial FFI action. The sole exception to this is at paragraph 7h in providing a response to the dispute, but this should not include additional evidence.<br><br>The appeal should not be used as an opportunity to reinvestigate the organisation to reinforce or qualify the alleged breach. If a breach is identified, technically, the evidence should be sufficient for a prosecution (or a caution). The standard of proof should be beyond all reasonable doubt, not merely an opinion. As it is an 'expert' opinion, the inspector should also outline his qualifications and experience in the particular work activity to which the breach applies.<br><br>The definition of a material breach is far too vague as it is still an inspector's opinion. Merely outlining the reasons for an opinion does not necessarily satisfy the evidence test, particularly in cases, which are qualified as requiring 'adequate' provision, 'suitable and sufficient' or 'so far as is reasonably practicable'. |
| Keoghs LLP | The HSE should not provide more, or additional, evidence to the adjudicating panel than that was relied upon by the Inspector at the time he / she formed the opinion that the duty holder was in material breach. The HSE should not be allowed the opportunity to retrospectively remedy or strengthen the original decision taken by their Inspector.<br><br>The HSE should provide the duty holder with copies of all documents they intend to put before the panel considering the dispute. Written summaries of evidence can be subjective or omit important information and should not be used, especially where prepared by a party to the dispute.<br><br>In addition to sending the duty holder copies of all documents the HSE intend to put before the panel the duty holder should be provided with copies of all other documents relevant to the issue of material breach in dispute, including those which undermine the opinion formed by the Inspector. At the very least a schedule of other relevant documents should be provided to the duty holder. |
| Health and Safety Lawyers Association (HSLA) | The crucial point is that the HSE should not provide material to the panel considering the dispute that goes beyond the material it has already provided to the dutyholder.<br><br>The matters set out at a) – h) represent the basic criteria necessary to |

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| | ensure a fair hearing. The HSLA does not agree these should be limited by the proposed references to "Depending on the nature of the dispute" or "so far as it is relevant". Of course the size and complexity of a particular case may determine the volume of material generated; and the nature of the dispute may determine which criteria require more material. However, in every case all material relevant to the FFI dispute should be served on the dutyholder and the panel. This should include materials in the HSE's possession which support the dutyholder's position.<br><br>The HSLA considers the last paragraph under the heading "Provision of information" should be amended to read:<br><br>"*Much of this information should already have been provided in the Notification of Contravention, invoices and other correspondence from HSE. However, where it is missing, HSE will provide the relevant material a written summary. This material, summary together with any other documents which HSE wishes to put before the panel to show that FFI is payable, will be provided to the duty holder.*" |
| DAC Beachcroft Claims Ltd | Our concern is that sufficient information should be provided to dutyholders from the start of the process. In many cases our clients tell us that they do not understand the reasons why an inspector has concluded that a material breach has occurred. In the absence of adequate information to explain (from the start) how an inspector has reached his or her decision, there can often be a perception that the decision is simply based on the inspector's personal opinion.<br><br>We also think that there must be absolute equality of arms between the parties and openness about the materials and information shared with the disputes panel. A dutyholder should be entitled to see all correspondence between the HSE and the disputes panel.<br><br>The consultation document suggests that the HSE will provide a written summary of missing information. Such a summary could be subjective and it is not clear why the HSE is suggesting this approach rather than simply providing any underlying documents. |
| University Hospitals Coventry and Warwickshire | Who decides what is relevant? It appears to be left up to the HSE to decide what is relevant and the dutyholder would not necessarily receive all the information indicated in the list a-h.<br><br>Having the discretion to decide what to provide does not indicate the "open and transparent" image the HSE are striving for.<br><br>f.) needs to clarify what person. Within our team it was interpreted by some as the dutyholder and by others as a specific individual<br><br>We also felt the information listed should be automatically made available when an FFI is instigated and not because you have to when it goes to dispute. |
| Port Skills and Safety Ltd | For clarification. In the supporting document, the provision of information will be set out as 8 items a) to h)<br>Please would you confirm who the 'person' performing the functions in instances e) and f) is, presumably this would be the HSE Inspector?<br><br>The information a) to h) should be provided in a coherent and collected format. It is reasonable that where a dutyholder is being asked to pay, it should be clear to them why and how this has been arrived at.<br><br>The collected 'summary' is proposed only where a dispute has been raised and where information is missing from other documents. Items a) to g) should be provided as a matter of course in all cases, prior to any |

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| | decision of the duty holder to appeal or not. If such information is not available as a minimum, it is difficult for a duty holder to make a reasonable judgement on what action to take. With a) to g) provided as a standard operating procedure it is likely that fewer unnecessary/unrealistic appeals will be made. |
| Anonymous | Based on past experience of HSE Improvement/Prohibition Notices, I don't believe the HSE Inspector may have the expert knowledge to present sufficient information to demonstrate the basis for non-compliance with UK Legislation i.e. Risks are ALARP to Workforce |
| Anonymous | In our view there should be a process, much like in the court process, where there is both a requirement and timetable requiring the HSE to provide information not previously supplied to the duty holder. This should be provided sufficiently in advance of any consideration of the dispute by the panel so that the duty holder can consider whether any alternative resolution can be found in view of that further information. |
| Home Builders Federation | It is strongly felt that the HSE need to clearly state the exact legal status of a Notification of Contravention and how these can be used in subsequent investigations/prosecutions.<br><br>In particular, why one type of material breach (less serious, minor in nature, is it/is it not a breach?) is dealt with through NOC's and other more serious material breaches are dealt with via Enforcement Action.<br>In essence, the HSE should grade material breaches so Courts are made aware of the level of concern the HSE have with the matters at hand at the time at which they observe.<br><br>In this way, the Courts will be able to make more certain whether an NOC is significant enough to be for disclosure.<br>Bearing in mind the use of Lawyers by the dispute panel then this will, in some circumstances (dependent on the seriousness of the material breach) mean organisations will engage similar legal support.<br>Therefore, there should be a process by which a claim against the HSE can be lodged in order to secure reimbursement of costs incurred (legal or otherwise) where the dispute is upheld.<br><br>Industry should be provided with a more detailed breakdown of time allocation and costs than is what is currently provided on FFI invoices. Details of both internal and external experts assisting the HSE should also be provided. |
| Environmental Services Association | While the level of information outlined within points a-h (of the consultation paper) broadly cover what might reasonably be expected to be provided to the dutyholder we suggest that this should not simply become a 'tick box' exercise and that HSE instead exerts far greater diligence than at present in ensuring that the dutyholder is furnished with the relevant facts. This of course should apply equally in all cases and as a matter of routine, regardless of whether or not a dutyholder decides to proceed with an appeal.<br><br>In many instances, duty holders are left unclear as to the nature of the material breach and may only become aware that they are subject to FFI upon receipt of a formal letter by an HSE inspector in follow up to a site inspection. Similarly, the costs associated with interventions are sometimes unclear, particularly when an inspector has sought further assistance from external sources as part of the investigation. |
| Anonymous | The HSE have proposed that, depending on the nature of the dispute, they will provide information, so far as it is relevant.<br><br>Our view, and the view of our clients, is that if this is going to be a fully independent process then, as with any litigation process, full disclosure is |

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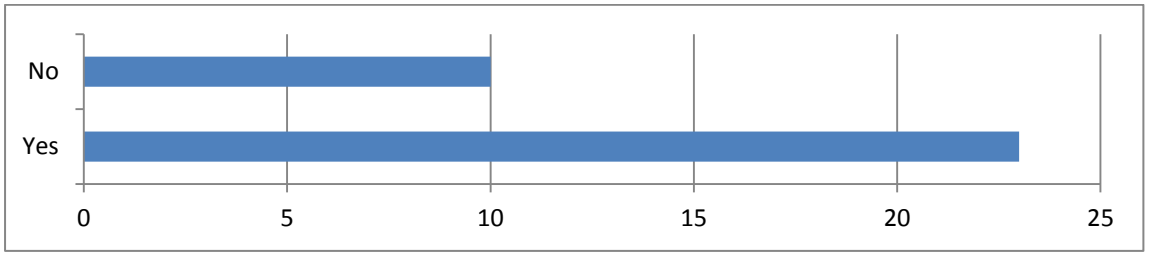
| | integral and needs to be provided at the earliest stage by the HSE in order that the dutyholder can fully understand the nature of the dispute and be able to challenge the decision.<br>By providing this information at the outset, the benefits are two-fold:<br>a) A full explanation of the reasoning behind the finding of a material breach could prevent some disputes arising in the first place as the dutyholder is made fully aware of why there has been a material breach; and<br>b) Where a dispute does arise, the process would be more efficient because the dutyholder will have all of the relevant information to enable it to provide a reasoned and full response, setting out its position against the points raised by the HSE inspector at the start.<br><br>It is our view that the HSE should provide a written statement at the beginning of the dispute process which exhibits the Notice of Contravention, invoices and correspondence but also explains in more detail the areas set out at c) to h). |
| Warwickshire County Council | Yes - Also, The guidance document hse47 gives a good explanation and understanding and assume this will be updated to reflect the revised process |
| Kennedys | We submit that fundamentally, the HSE must provide better details than it does currently. We submit that full information to support the belief there has been contravention must be provided at the outset with the Notification of Contravention and fully supported details of the sums claimed be supplied with each invoice and not at the dispute stage as suggested in the consultation document.<br><br>There seems to be a prevailing unacceptable view that HSE understanding the contravention and fees claimed is sufficient. It is noted that it is said “much of this information should already have been provided in the Notification of Contravention, invoices and other correspondence from the HSE.”<br><br>In practice this is far from being the case and the detail provided is generally inadequate to be able to make any proper assessment. Fundamentally we believe the HSE should put greater effort into presenting its justification for contravention and claim for FFI in the Notification of Contravention and provide full detail and justification for the time charged, with supporting documents as necessary, so the claim is fully understood and seen to be supportable and this may well circumvent with greater effect the need for a dispute resolution process.<br><br>We believe that items (a)-(g) set out the fundamental requirements and we submit that these should be set out comprehensively in the Notification of Contravention such that the duty holder will have clear and unambiguous detail of why there is believed to be a “contravention”, not simply a “material breach”, and must identify in greater detail the time charged and why it has necessarily involved the actions of an inspector, or more than one inspector, and/or the need for external expert evidence, etc.<br><br>To avoid confusion and the merging of separate issues, we submit that the Notification of Contravention must be specifically and exclusively used in relation to FFI claims only and not merged as it often is with demands for remedial actions. The detail in the Notification of Contravention should be set out comprehensively with sufficient clarity to enable the duty holder to know precisely what he is required to respond to and to enable him to assess properly whether there has been a fair and justifiable assessment of the contravention and to identify the fees charged directly in relation to that assessment have been fairly and justifiably incurred. We do not see item (h) as being relevant to the provision of this initial information. |

## 5.0 Summary of Responses to Question 2

5.1 The consultation asked:

- '*Do you agree that the revised process will enable a dutyholder to make sufficient representations?*




Overall, 69% of respondents agreed with this proposal, with 31% disagreeing. Further comments were provided by 14 respondents as detailed below.

Respondents were generally of the view that the existing system already allows for representations to be made to HSE. Significant comments were that a dutyholder would only be able to make sufficient representations if they were in possession of all the facts and evidence upon HSE was relying when making the original claim for FFI. Many of the issues raised are similar or link to those made previously in response to Q1.

The matter of a dutyholder being represented by a third party (legal or with specific technical knowledge) was raised. This could be as a result of more than one respondent confusing the calling of a 'meeting' to discuss the dispute, with the conduct of a 'hearing'.

| Respondent | Comment |
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| Cast Metals Federation | The process will only allow the dutyholder to make representations if all the information that is listed in question 1 items a - g has been provided. The consultation states it should have been.<br><br>This is not good enough and especially to small and micro businesses; it MUST ALL be provided in order for such dutyholders to even understand what is going on in the first place before they can look to see if there is a potential for them to be able to dispute the notice issued. Being issued with notices and FFI is terrifying for a lot of people. |
| Communication Workers Union North West Safety Forum | Yes but - only those duty holders who push compliance to the limit + try to comply with minimum standards will fall outside "reasonably practicable" - duty holders who think that they are compliant (almost always) usual are. |
| Bowmer & Kirkland Holdings | Again in the case of investigations HSE do not disclose their evidence so you are left second guessing what has been stated by witnesses which may be a different version of the facts or not consistent with the facts. |
| Anonymous | This should form part of a discussion in person before the HSE leaves site. This should be a quality conversation that takes place prior to the HSE Inspector leaving site. |
| OCS Group UK Ltd | I feel that the dutyholder could only make meaningful and sufficient representations if they had been provided with all the information on which HSE were relying. |

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| Warwickshire County Council | As long as the provision of information, explained and outlined in the process for "provision of information" is fully implemented and applied. You also state that "ordinarily HSE will accept the recommendations of the panel unless it considers the recommendation to be "clearly wrong". If the panel has been carefully chosen with the most suitable lawyer and H&S members with the right practical experience, then the recommendations and decision would surely have to be accepted, or else it negates the reason for the "independent panel".<br><br>The consultation document doesn't give an explanation around what the definition of "clearly wrong" is in relation to the consideration of disputes. A suggestion would be that if the HSE didn't accept the decision/recommendations on this basis, that the appeal was heard again by a panel of different members. |
| SAFED | Not sure of the relevance of this question. If the inspector does not give an adequate explanation of why FFI should apply of course the dutyholder will make a representation for appeal. However, in the case of the actual charge, HSE Guide 47 is not specific, but it is generally understood that FFI costs are based on an hourly rate for the whole visit. How this is justified if the inspector investigates a number of issues, which are satisfactory, but then identifies one which is considered a breach, is not explained. |
| Health and Safety Lawyers Association (HSLA) | The HSLA believes the first sentence of the second paragraph under the heading "Consideration of disputes" should be amended so as to read:<br><br>"The panel will be provided only with the written information and/or details a summary provided by HSE to the dutyholder and the written representations and information provided by the dutyholder"<br><br>The HSLA notes that the HSE proposes that where the panel believes it is necessary and desirable to do so it may "convene a meeting" to address the issues but not a "hearing". It is not immediately clear how such a "meeting" differs from a "hearing"; the requirements for natural justice will still need to be met.<br><br>If there is to be a "meeting", then the HSE may want to send one or more inspectors. Similarly, subject to the panel's discretion, the dutyholder should not be prevented from being represented or sending other individuals from whom it wishes the panel to hear (for example on a relevant technical question). A blanket ban on "witnesses" is inappropriate. It is accepted that cross-examination by or on behalf of the parties may not be appropriate. However, there may be circumstances where the panel has questions arising from the material it has received and heard.<br><br>It would be helpful to set out that the panel can meet by telephone or in person, whether for their own deliberations or if both parties are attending, and also that communications can be by email where appropriate. |
| DAC Beachcroft Claims Ltd | We have assumed that this question refers to the whole of the disputes process (as set out below question 2).<br><br>Whilst we understand fully the need to control the costs in this process, we have concerns about the vagaries within the current proposal. These include:<br>• How and when the panel will decide to call a meeting? The HSE should identify some examples of when this would be appropriate.<br>• Will one party be entitled to demand a meeting rather than allow |

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| | dispute to be decided on the papers? There should be a process of electing to have a meeting if a party thinks it could more effectively make representation to the panel in an oral submission.<br>• Why will the meeting not be a hearing at which evidence can be heard? It is not clear why this distinction is made, other that because of a desire to avoid a face-to-face process.<br>• If the inspector who has identified a material breach is making representations at the meeting, how will that not be considered as giving evidence?<br><br>It is our view that the credibility of the FFI process would be strengthened by having HSE inspectors explain their decisions face-to-face to a panel and the relevant dutyholder. That should encourage a more thorough approach to the initial decision making process for issuing a notice of contravention, which may in turn avoid disputes. |
| University Hospitals Coventry and Warwickshire | Struggle to see any difference. A general comment is why the system cannot be made easier to follow with the use of a simple 3 stage process flowchart. i.e.<br>1. HSE issue letter FFI/Breach with the information listed in a-h<br>2. Dutyholder dispute the findings/costs<br>3. Dispute goes to panel<br><br>At the moment it appears to be at least 5 stages and therefore costs more in time etc<br><br>Also Does it have to be the Dutyholder or can it be a representative of that Duty holder. For example, an NHS chief Executive may be the duty holder but appoints a health and safety manager to be his expert and representative. |
| Port Skills and Safety Ltd | This kind of open response format gives sufficient flexibility. However, there should be clear guidance/example submissions provided by HSE to make sure that information that is needed for the dispute is clearly and efficiently presented. This is also important for SMEs where they may not have the same level of legal support that is available to larger organisations. If a dispute is to be heard, the decision should be based on the facts. |
| Anonymous | Unless the process clearly states that the Duty Holder can bring evidence that would NOT be available to the Inspector at the time of Enforcement, then the whole appeal process will be flawed. The inability to ask questions of the HSE Inspector : “This is not a “hearing” and there will be no opportunity for witnesses to be called or questioned” makes the process of determining the true status of a site/work place with regards safety flawed.<br><br>The following statement is confusing: “However, the panel will have the discretion to convene a meeting with the duty holder and HSE to address the issues where it is considered necessary and desirable to do so.” I don’t understand what we are trying to achieve :<br><br>1) Is it the Truth and an Improvement in Safety? OR<br><br>2) Did I comply with the Law and the HSE Inspector never makes errors in Judgement? |
| Environmental Services Association | While we have no concerns on the proposal for dutyholder representation it is nonetheless difficult to envisage how the revised approach differs from the existing system, which already allows for representations to be made to HSE. |
| Kennedys | In practice the information provided by HSE is often inadequate. Properly |

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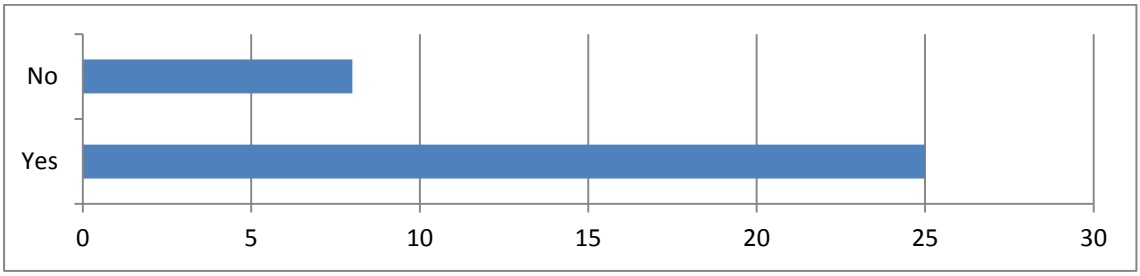
| | applied (see response to Question 1) the revised process should enable a dutyholder to make sufficient representations but the dutyholder must be given an opportunity, by way of query or other procedure, to identify any further information he requires in order to make an assessment and for the HSE to be obligated to provide such information as appropriate in order to enable a dutyholder to respond to the specific issues raised. |

## 6.0 Summary of Responses to Question 3

6.1 The consultation asked:

- *'Do you agree that the disputes should be considered by an independent panel consisting of a lawyer as chair together with two other members with practical experience of health and safety management?'*




Overall, 76% of respondents agreed with this proposal, with 24% against. More detailed comments in response to this questions were received from 17 respondents.

Whilst respondents agreed with this proposal, a number of consistent themes were raised by respondents, specifically that:

- the panel should be 'independent' of HSE
- have sufficient knowledge and experience of health and safety law
- have insight into the industry to which the claim for FFI relates
- that HSE should establish a clear and transparent selection process so dutyholders and others can have confidence in the makeup of the panel
- that the lawyer who chairs the panel should not have been previously been instructed to act for HSE in any matter.

| Respondent | Comment |
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| Trinity House | I consider a lawyers presence at an initial appeal appears too judicial, costly and two levels of dispute/appeal should remain. At the first level, any appeal should be heard by senior HSE managers (as it is now), assisted by independent H&S professionals with H&S management experience. Perhaps two HSE managers and two independent H&S advisors from a similar industry steam. This will allow an avenue for low cost disputes. If an appeal is not upheld the duty holder is to cover the additional cost of this panel on top of the FFI costs. If the duty holder disagrees with the opinion of this first panel then they have the option to take this the 2nd level appeal. It is this panel that should consist of a lawyer and two senior H&S independent consultants with management experience. Again, duty holder to pay costs if the appeal fails. |
| Cast Metals Federation | Important - Please read this comment. Who is to appoint the panel and therefore prevent bias in favour of the HSE? There is nothing stated in the consultation. Is there a process for the panel makeup to be known before the hearing so the independence of the members can be |

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| | established, either by the person/business challenging the FFI or their legal representation who could advise them? There is nothing to indicate that a lawyer other than one who routinely works for the HSE would be the panel chair so confidence in the revised system will never be good as transparency is poor before even starting to change the process. |
| Communication Workers Union North West Safety Forum | There should be a workers/trade union representative member; has to be seen to be transparent. |
| Bowmer & Kirkland Holdings | Seems a reasonable solution – however in any case they should be held to the same accountability and transparency in the decision making and report back in full as to their decision and any observations or further recommendations |
| Anonymous | The 2 other members should not be diverted from their normal HSE operational inspection work. |
| Warwickshire County Council | As long as the lawyer fully understands H&S Legislation and in particular the use of "so far is as reasonably practicable" where relevant and as this can be applied to the majority of requirements for HSWA and regulations, unless "absolute" requirement/duty and the principles of "interpretative" risk gap categories (Stage 3 of EMM)<br>Also, as long as the 2 other members have sufficient H&S knowledge, experience and understanding of any particular area of H&S or work activity pertinent to the contravention, e.g. Construction and CDM. This will ensure that they are able to make an informed judgement, based on the criteria and principles of enforcement in hse47, EPS & EMM<br>In addition, that all three members of the panel should have an equal status in the decision and outcome of the appeal to help balance out some of the concerns around legal v reasonable and sensible application, even if the Lawyer is the Chair. Or else, a scenario could occur that both H&S members agree a decision/recommendations but the Lawyer as chair could disagree and have the final say, so this may not be equal or a majority decision. |
| SAFED | This is an unnecessarily leading question. The whole purpose of this is to establish an independent appeals process. This suggestion could be one option to satisfy the requirement but perhaps not the only one. Provided all members of the panel are independent and impartial that should satisfy the requirement. Who chairs the panel and what qualifications/profession they belong to are largely irrelevant, provided they are competent to understand the work activity involved and associated legal responsibilities to hear the appeal and reach a balanced judgement based on the evidence. In many cases the issue may not be a legal one but a practical work related issue. Much of the legislation is enabling and can be qualified as requiring adequate, suitable and sufficient or so far as is reasonably practicable standards. None of these qualifications are properly defined in law, other than in vague and general terms. It would be wrong for any such appeal to 'interpret' the law and neither should hindsight bias always imply fault in such cases. |
| Keoghs LLP | The constitution of the panel is considered sensible albeit further information is required regarding the process and criteria for the selection of panel members.<br><br>The lawyer chair of the panel should be independent of and not associated with HSE. For example, the chair should not be, or have been, employed by the HSE or engaged to act as their agent or counsel appointed to the Attorney-General's panel of advocates for health and safety. It is questioned whether an independent academic could chair the panel albeit the person would also need to have suitable and relevant practical experience.<br><br>As with the lawyer chair the other members of the panel need to be |

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| | independent of the HSE and should not be current, past or retired HSE Inspectors. It is questioned what constitutes practical experience of health and safety management? Will these members be required to hold a minimum level of health and safety qualification, management position or number of year's practical experience? Are members to be drawn from industry, commerce or consultancy practice?<br><br>The panel should be provided with copies of all documents to be relied upon by both parties and not summaries of evidence or other materials.<br><br>Will the panel be at liberty to exercise their discretion to call a meeting at any time or will certain conditions need to be met to do this? As a precursor to convening a meeting should the panel write to the relevant party for them to clarify any issues? Both parties would receive a copy of the panel's letter seeking clarification and the response provided.<br><br>In the event the duty holder does not accept the panel's decision it is still open to them not to pay the fee and allow the HSE to issue civil proceedings which will provide them with a further opportunity to argue their case. Will the HSE's position be that they simply accept decisions that go against them or will they seek to take further action in such instances? |
| Health and Safety Lawyers Association (HSLA) | Agreed. However, the panel must be impartial as well as independent, which raises the issue of the process of selecting the panel. It would be undesirable, for example, if lawyers appointed to sit on the panel were members of the Attorney-General's List of Specialist Regulatory Advocates for Health and Safety and Environmental Law or the HSE's agent solicitors. This is not in any way to denigrate any of those counsel or solicitors who prosecute on behalf of the HSE. However, the system must be seen to be fair.<br><br>The HSLA proposes that there should be an open applications process whereby lawyers will be able to demonstrate their suitability for the role of chair.<br><br>This process should result in a small pool of suitable panellists. Consideration should be given to limiting the tenure of any person who gets through the selection process, so they do not become dependent on these HSE panel instructions. There should also be a mechanism for the HSE to demonstrate transparently that it would not select repeatedly from the panel, once established, those particular members who are seen to favour the HSE in their decisions.<br><br>It would be easy to undermine the transparency and trust driving the independent appeals process if these concerns are not robustly addressed. |
| DAC Beachcroft Claims Ltd | We do not disagree with the HSE's proposal for the composition of a panel, but are concerned about the lack of clarity or detail about how panel members will be selected. We think it would be beneficial for the lawyer member of the panel to have some background or experience of practice in health and safety enforcement/prosecutions in order that they have an adequate understanding of the issues which they will be asked to consider.<br><br>Some lawyers have a specialist practice acting for the HSE or representing it in Court. We would be concerned at the potential conflict of interest that could arise for such lawyers should they be appointed to a panel to adjudicate disputed FFI invoices. We accept that the same argument could be raised in relation to lawyers whose practice is the defence of dutyholders who are the subject of HSE enforcement action. |

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| | The HSE needs to consider and offer proposals as to how balance would be achieved in the composition of a panel so that there can be so suggestion of overwhelming bias in the disputes process.<br><br>We have similar concerns about the absence of details for the criteria to select lay panel members. Whilst health and safety consultants could be obvious candidates, the HSE might query the potential commercial conflict of interest they face in determining disputes for duty holders who might otherwise be their customers.<br><br>In our view the consultation does not serve any purpose until these issues have been clarified by the HSE. To proceed without clarification of the proposal, and then an adequate further period of consultation, creates the risk of future dissatisfaction with the process which might lead in turn to further judicial review proceedings. |
| University Hospitals Coventry and Warwickshire | Yes it can be reviewed by a panel and not have the HSE involved in the review process unless the panel call for a meeting with them.<br>If the panel comprises of people with practical health and safety management experience why have a lawyer, as they will be able to give due consideration to the relevant regs. A lawyer involved will make it a judicial hearing.<br>Having a lawyer on the panel will inflate the cost considerably and this penalises small businesses. Smaller businesses may be inhibited from challenging the HSE because of the cost.<br><br>The practical health and safety management experience needs to be relevant peer health and safety management experience because a person very experienced in the NHS may have no understanding of life within a flour mill, for example.<br><br>It also raises other questions. Who selects the panel? If it's the HSE is this an unbiased panel? |
| Port Skills and Safety Ltd | Clear guidelines are needed on the make-up of the panel and how it operates.<br><br>• Panel Member Entry Requirements<br><br>The lawyers should be experienced in workplace health and safety cases, but what level of experience will be required, we would value some clarity on for example a minimum practicing period?<br>The two members with practical experience should be qualified to at least a specified minimum level e.g. NEBOSH Diploma. Should there also be a level of seniority e.g. someone who has held a senior management position in H&S for a minimum number of years and should they hold some form of occupational qualification eg be expected to hold Chartered Status<br><br>As a minimum at least one (though preferably both) should have an operational knowledge of the industry in question If only one of the panel knows the industry, the second person should at least be demonstrably competent in the subject area under dispute e.g. work at height, food hygiene, radiological protection etc.<br><br>Panel members should still be working in their respective areas or have retired within a set maximum time period to ensure that their occupational knowledge remains up to date<br><br>• Panel Member Selection |

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| | It is not clear how the panel members will be selected. Will there be a pool? Who will undertake the selection?<br><br>• Panel Terms of Reference<br><br>It is not clear what the decision criteria for panel findings will be. Is there going to be any presumption in favour of one or the other party as this will affect decision making and perceived fairness of the decision, for example if there is a requirement for the panel to vote unanimously to overturn the Fee. There should be a majority vote with no presumption in favour of the duty holder or HSE.<br><br>Presumably there is no intention to have an 'appeal of the appeal' process?<br><br>There is also the statement that the panel recommendations will ordinarily be accepted by the HSE unless it considers the recommendation to be clearly wrong. The HSE can still take civil action to recover the debt. Does this mean the dispute process is flawed as the HSE can still take the option to ignore the dispute? Surely the only option for HSE to recover costs should be to issue a summons for prosecution of the material breach?<br><br>Will the costs of the dispute panel be set or will they vary dependant on the individual and their own personal fees?<br><br>Will the HSE be liable to fees from the panel if the panel finds in the Duty Holders favour, this would seem reasonable? If so what happens if the HSE chooses to disagree with the Panel will the HSE be seeking the cost of the dispute in their civil action to recover the debt? |
| Anonymous | Although I agree with the proposal in theory, the practical issues around "2 other members with practical experience of health and safety management" will be difficult to achieve. It is a giant improvement on the existing "laughable" Industrial Tribunal process: 1 Lawyer , 1 Company Rep , 1 Union Rep – assuming this replaces this appeals process Interesting comment about independent panel decisions: "which ordinarily HSE will accept unless it considers the recommendation to be clearly wrong." I.e. the members of the panel with practical health and safety experience are not competent.<br><br>Interesting comment about Lawyers. However, many disputes centre on whether there has been a material breach of the law and therefore the skills of a lawyer will be valuable in considering this. Sorry, I forgot it was about the Law and not Safety. |
| Anonymous | In our view, in order to maintain the integrity and independence of the panel, we suggest that the Chair and the panel members are individuals who have secured the positions through an open and transparent appointment process. We would not support the appointment of panel members who have previously worked for or do work for the HSE in any capacity. In terms of the Chair specifically, although health and safety is a specialist area of the law, in our view there is no reason why an individual with no previous experience of the area but with the right skills, could not make a determination based on the evidence before them much like is done in adjudication.<br><br>We also suggest that these positions be appointed on a rolling basis or fixed term. |
| Environmental | We broadly support measures included in the consultation to improve the |

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| Services Association | impartiality of the panel and the decision making process and believe that the three panel members would provide the necessary expertise to assess the facts and make recommendations to HSE. We suggest that terms of reference would be required to address such matters as the selection process; skills and competence of panel members; and the panel voting process (ie unanimous or by majority vote).<br><br>It would be useful if HSE explained the circumstances in which recommendations of the panel (of experts) might be considered to be "clearly wrong" and therefore discounted. This clearly has the potential to undermine dutyholders' confidence in the independent dispute resolution process. If HSE should go to the effort of establishing a more impartial dispute resolution process then we suggest that it should be bound by the outcome.<br><br>We note that HSE does not envisage a material increase in its fees in handling those disputes which were not upheld, but makes no reference to the likely fees (or costs incurred) by panel members. The fact that HSE is not liable to costs in cases where an appeal is upheld is also rather disappointing and is likely to discourage legitimate cases from being brought forward. The intention not to make any changes to the fee regulations in this regard therefore limits the potential benefits offered by the revised dispute resolution process. |
| Anonymous | We agree with the idea of an independent panel but in relation to the suggestion of a lawyer chairing the panel we would immediately question who that lawyer should be – if it was one of the HSE Panel Solicitors who conduct all their prosecutions then there is clearly a potential conflict of interest and certainly an issue of independence, which is the main reason why we are in the current situation. It is vital that independence is achieved and maintained for the process to be seen as fair and equitable. We would argue whether a District Judge or Employment Tribunal chair would be more appropriate. |
| Kennedys | No panel for the resolution of FFI disputes comprising any member of the HSE, including any safety professional or lawyer appointed by the HSE, can ever be regarded as "independent" nor "impartial" as the law requires and any procedure for resolution of FFI disputes by such a panel can never be consistent with natural justice nor compliant with the requirements of Article 6 ECHR.<br><br>Article 6(1) provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…". We submit that the requirement for any panel is that it is both independent and impartial and it must demonstrably be shown to be that.<br><br>We draw analogy with International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA 158. Parker LJ, in the majority, held that a disputes procedure which culminated in a decision by the same Secretary of State that exacted the penalties that were in dispute, breached Article 6: "…for the simple yet fundamental reason that the scheme makes the Secretary of State judge in his own cause, the scheme is in my judgment plainly incompatible with article 6. This conclusion is not affected by whether the scheme is to be regarded as civil or criminal in nature" (at paragraph 157).<br><br>We submit an FFI dispute resolution process should only be applied and pursued in the event of there being no dispute by the dutyholder that he is contravening or has contravened health and safety laws and there is agreement between the parties that resolution may be by an independent |

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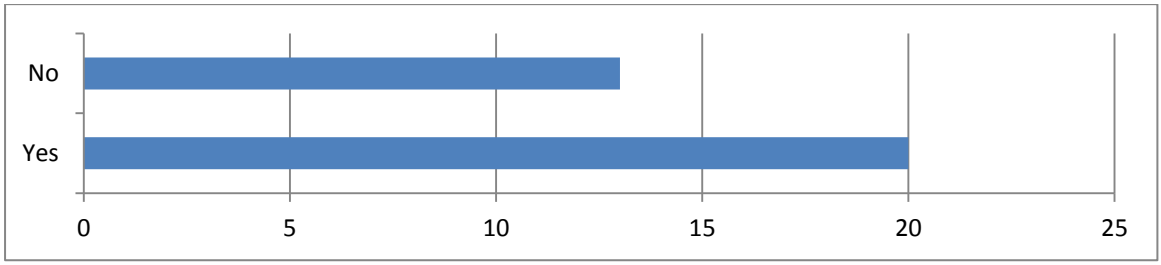
| | and impartial panel where costs of doing so will be payable by the unsuccessful party only in the event that the panel considers the submissions made are frivolous, vexatious or otherwise unreasonable.<br><br>Where the parties do not agree to a dispute resolution process, the issue must be resolved by criminal court in the event of a prosecution proceeding or County Court if there are no criminal proceedings |

## 7.0 Summary of Responses to Question 4

7.1 The consultation asked:

- '*Do you think that there should be a different process where the amount of the fees is small and/or there is no dispute about whether there is a material breach?'*




Overall, 60% of respondents agreed with this proposal, with 40% disagreeing. In response to this question, 14 respondents provided further comments which are detailed below.

A number of respondents suggested that where the level of fee was small and or the material breach not disputed then the matter should be reviewed by one panel member, preferably by a lawyer who has an understanding of legal costings.

There was a concern that small and micro businesses, with limited financial resources, may feel compelled to simply accept the fee rather than risk incurring extra cost by contesting the matter.

| Respondent | **Comments** |
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| Cast Metals Federation | If the fees are very small and / or there is no dispute about whether there is a material breach, the only person required to resolve this issue should be in independent lawyer.<br><br>The two other panel experts on health and safety should not be required. If the issue is over fees and the amount due is small the HSE should have a duty not to conflate matters and as a direct result not therefore spend extra time and resources, which, potentially end up with the person disputing the FFI having to incur large costs. In principal it can be the same process but the cost element should not be able to be used as an excuse to claim extra monies in a disingenuous manner. |
| Bowmer & Kirkland Holdings | It is about the legitimacy of the breach not the amount of time involved in spotting it or the duration of the investigation / inspection. This is about the accountability of the Inspector and HSE.<br><br>Ideally it should be free – if the process is a true proportionate and accountable process the HSE should treat it as QA and a learning opportunity to review their processes and performance of Inspectors |
| Knutsford Safety LLP | Where fees are small, the duty holder could be offered a free review by an independent health and safety specialist, someone with experience of the FFI review process. This would give them an indication of whether their challenge has any merit or not. This would not be binding but it could help the duty holder to understand the HSE's position more clearly. If they then choose to proceed to the disputes panel, they do so in the understanding |

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| | that the overall costs may be greater than the original costs.<br><br>I believe the process described for occasions where the material breach is not disputed should remain as described in the consultation process. The independent H&S specialists will have a reasonable view on the reasonable time for the activities of the HSE Inspectors. |
| Warwickshire County Council | Cost should not be more than the fees, regardless of HSE time spent.<br><br>Perhaps a % of the costs incurred. This should also apply to were the breach has been agreed but the cost of the fees disputed. |
| SAFED | This question rather exposes what FFI is all about. A simple process of charging industry for HSE Inspectors activities in identifying low level contraventions of health and safety law, without the effort, stigma and bureaucracy of a prosecution. Whilst this general principle is fully supported, it must be applied with the appropriate checks and balances to ensure the system is fair. This question rather suggests a '2 tier' system' with lesser checks and balances for smaller fees and potentially this could lead to 'fee bargaining', which would be equally unacceptable.<br><br>Where the FFI is applied to a micro/ one man businesses, with a small turnover and very tight margins, with little finance for legal representation, there will be greater pressure to accept the fee. Whilst there is no particular answer to this, it is important that HSE inspectors recognise this. A further concern is challenging the actual fee.<br><br>The fee structure outlined in Guide 47 can be complex, although it is generally accepted that the fee is based on the time taken for the Inspector during his visit and not on the seriousness of the breach. In addition, few organisations deliberately set out to break the law, albeit many may not understand the risks they take.<br><br>As FFI is perceived to be the 'effect' of a 'material breach', the principle of the 'effect' being proportionate to the breach should be maintained. This is not necessarily seen to be the case. |
| Pennon Group Ltd | A review by a HSE officer from a different part of the HSE and an independent reviewer could be utilised in this type of case as it is likely to be resolved more quickly.<br><br>Consideration could also be given to clearly setting out the situations when a material breach is not in question and what the criteria would be for raising a dispute (e.g. appropriate hours/time taken to deal with meetings/investigations), which would dissuade those disputes which are not relevant. |
| Keoghs LLP | It may be appropriate to have an alternative system for disputes which solely relate to the level of fee.<br><br>As first step, this could be dealt with by the lawyer chair alone, or an alternate agreed costs expert, on the papers alone. In such circumstances a fixed fee of say 20% of the invoice sum would be payable by the duty holder in the event their dispute is unsuccessful. This would hopefully prevent purely speculative disputes being pursued.<br><br>However, it should always be open to the duty holder to seek full panel consideration should they disagree with the decision of the single panel member. |
| Health and Safety Lawyers Association (HSLA) | Yes. It cannot be assumed that the number of challenges to FFI will remain constant. Anecdotally, many dutyholders have been inhibited from challenging an FFI in the past precisely because the system was not perceived as being fair. Equally, it is to no one's advantage if the system is |

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| | over-burdened with small but time-consuming cases.<br><br>Therefore the system could be modified in the following respects:<br><br>• If the FFI claimed is less than £1,000, then the matter should ordinarily be considered on the papers by a single panel member;<br><br>• If the FFI claimed is not less than £1,000 but is less than £3,000 and the dispute does not concern material breach, then the matter should ordinarily be considered on the papers by a single panel member;<br><br>• If the dutyholder or the HSE request that a meeting should be convened because the decision is expected to impact an important point of principle or policy, then the panel can exercise its discretion in favour of a meeting even if the above financial limits have not been reached. |
| DAC Beachcroft Claims Ltd | We think that in these cases a single lawyer with experience in civil or criminal dispute resolution could apply their knowledge of the assessment of legal costs. Whilst we accept that legal costs are not the same as the HSE's investigation costs, a lawyer with an understanding of these issues would be able to make a relatively quick and effective determination by reference to the FFI regulations. We frequently see reasons to challenge FFF invoices where fees are claimed for apparent duplication between inspectors or purely administrative work. Applying the rigorous approach to the assessment of costs in civil (and to a less extent in criminal) dispute resolution would result in greater scrutiny of such items.<br><br>We think that the feedback to the HSE from this type of costs assessment would help them to provide clearer explanations of time claimed in FFI invoices or to ensure that time is not included when it should not be. Ultimately that should in turn lead to fewer disputes. |
| University Hospitals Coventry and Warwickshire | The proposed process may not need to be changed but tweaked as it potentially has more impact on SMEs.<br>Smaller businesses may be inhibited from challenging the HSE because of the cost.<br>For small amounts of money or for small businesses there should be a cap or limit on how much the panel and HSE can charge in total. Perhaps it can be set so that it doesn't exceed the cost of the FFI or be means tested for SMEs. |
| Port Skills and Safety Ltd | We are not sure what would be in dispute if there is no dispute regarding a material breach. The only dispute would be over the fee being incurred and this would most likely centre on Fee's for which the Duty Holder is unable to verify e.g. Reviewing reports or meeting with Principal Inspectors or Expert witnesses done at HSE office that cannot be verified. Could this be clarified please? |
| Anonymous | Yes. However, we would caution that in order for a fair consideration of the issues it will be necessary for the evidence and information presented by both the HSE and the duty holder to be properly considered. We suggest that this could be done by way of the panel considering matters on paper only without any hearing where oral submissions are made. Alternatively, a determination could be made by one panel member, with recourse to the full panel should that outcome not be agreed by either party |
| Anonymous | The consultation guidance document makes reference on more than one occasion to the HSE recovering its costs from the dutyholder in the event that a dispute is unsuccessful. Nowhere in the consultation document does it say that if a dispute is upheld then the costs incurred by the dutyholder can be recovered from the HSE. This is not a fair approach.<br>Also, given the nature of the proposals, the costs of disputing the FFI invoice could quite easily outweigh the invoice itself which will ultimately leave the dutyholder out of pocket even if they win – how can this be considered fair? |

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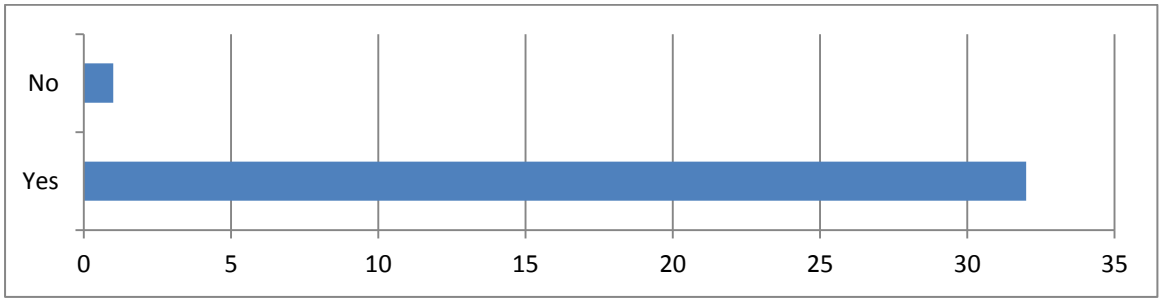
| | The new regime will ensure that an independent panel of adjudicators hears the matter and that the chairperson will be a lawyer. This will be a costly exercise even in circumstances when the matter is dealt with on the papers rather than at a formal hearing. It would be unfair for a dutyholder to have their dispute upheld only to have to pay a similar amount or more to its lawyers for making the application in the first place.<br>Consequently, we believe that it would be sensible to have a different process for smaller invoices and/or if there is no dispute about whether there is a material breach. We would suggest that there is a fixed fee system where the fee disputed is under a certain sum. |
| Kennedys | It is often the case that the first small FFI invoice is followed by more substantial invoices. The dutyholder has no means of knowing the total amount of the FFI claim at the time he considers his challenges.<br><br>Fundamentally, the dutyholder must be given an opportunity to challenge the assessment of contravention as well as the fees claimed regardless of the amount of the invoice.<br><br>We do however submit that it would be possible for an FFI dispute resolution process to work fairly regardless of the amount involved where there is no dispute as to contravention, as opposed to “material breach” as stated, if there is agreement between the parties that resolution may be by an independent and impartial panel and where the costs of resolution will be payable by the unsuccessful party only in the event that the panel considers the unsuccessful submissions are frivolous, vexatious or otherwise unreasonable. |

## 8.0 Summary of Responses to Question 5

8.1 The consultation asked:

- '*Do you agree that the dispute process should be suspended where an investigation or appeal against an enforcement notice is still pending?'*




Overwhelmingly, 97% of respondents agreed with this proposal, commenting that it was fair, logical and appropriate but that this proposal may be affected by the outcome of the enforcement action. Further comments were received from 10 respondents.

| Respondent | Comment |
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| Cast Metals Federation | Is this not the appeal against the enforcement notice, the query is not satisfactorily resolved? |
| Communication Workers Union North West Safety Forum | Natural justice, not to do so would be inappropriate |
| OSHCS Ltd | If this is not the case then by paying the fee the duty holder could be in effect accepting the breach. A problem here is that most HSE inspections take many months if not years and thus the FFI charge should not be sent out until the decision is made about enforcement action. |
| Bowmer & Kirkland Holdings | The process has already been reported as 'unfair' following the termination of the judicial review. |
| Safety Assessment Federation (SAFED) | Of course, this is a rather obvious, as, if the FFI is based on a notice, then clearly the appeal against an enforcement notice, which is more formal and held by an industrial tribunal, should take precedence over any issue of FFI, whether appealed or not. The result of the tribunal would clearly have an effect over whether the FFI should stand or otherwise. |
| Keoghs LLP | It is agreed that any dispute regarding FFI should be suspended until the outcome of any investigation, and subsequent enforcement action, is known or the appeal against a Prohibition Notice of Improvement Notice has been concluded. |
| University Hospitals Coventry and Warwickshire | Don't know. If their appeal was successful would that automatically wipe-out the FFI? If yes, it would save time and money for both parties. |
| Anonymous | Don't understand the question i.e. why should somebody pay the HSE when he is in dispute? |
| Anonymous | Yes. We consider that a trial of issue or employment tribunal determination to be the most appropriate forum to determine whether there has been a material breach. During this stayed period, we suggest that the payment of fees is also suspended but that duty-holders be provided with ongoing updates in respect of the level of fees being incurred. |

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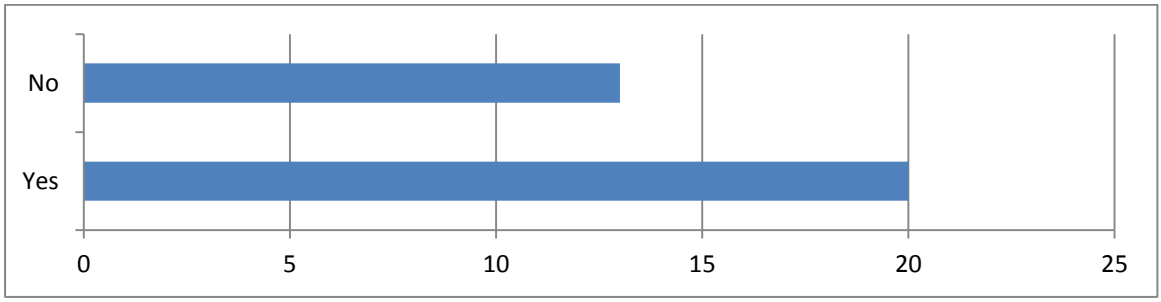
| Kennedys | We agree that the dispute process should be suspended where an investigation or appeal against an enforcement notice is pending. We also submit that the process should be suspended if there is any challenge to the Inspector's assessment that there has been contravention. |

## 9.0 Summary of Responses to Question 6

9.1 The consultation asked:

- '*Do you have any other comments on the revised FFI dispute process not covered by the previous questions?'*




Over 60% of respondents (20 in total) chose to make a submission to this question.

This question attracted the most responses. The majority of these repeated comments in relation to questions asked previously in the consultation or commented on FFI in general. For the purpose of this analysis, only those in relation to the disputes process have been taken into account.

One specific concern raised by a number of respondents related to the fact that those raising a dispute under FFI have no mechanism by which they can recover their own costs under the process.

| Respondent | Comment |
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| Mears Group PLC | The HSE Inspector should consider giving advice in some cases rather than an FFI |
| Trinity House | An avenue needs to exist to deal with simple admin error or dispute over time on site |
| Cast Metals Federation | Not enough space in some boxes to answer questions fully. I will write to Mr Judge and complain. |
| Communication Workers Union North West Safety Forum | Duty holders who quote FFI as a money making scheme have little intention of complying with H&S law |
| Bowmer & Kirkland Holdings | The initial 'query' process should also address the items in the list A- H at Section 7 if not already explained in relation to all FFI invoices / Notice of Contravention letters<br>The current 'list' of material breaches is simplistic and unhelpful.<br>The current proforma response in relation to queries 'I am the line manager of…. I have reviewed… uphold the decision…' is not consistent with an appropriate management review of what Inspectors are doing during investigations and inspections. |
| Loughborough University | Try to limit the amount of HSE Inspector time on the dispute process. Their value to me is in having quality conversations with industry and company owners. |
| Knutsford Safety LLP | I have been involved in reviewing FFI disputes and, on occasions where the duty holder denied being the organisation involved the material breach, the panel made use of information available in the public domain. |

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| | This included information from Companies House and planning applications. This information was vital in determining the truth of claims made by the duty holders. The HSE should identify such information and include it in the information made available to the review panel. |
| OCS Group Ltd | The dutyholder should be able to recover their costs if they have been successful in their appeal |
| Warwickshire County Council | The HSE should openly share the document (if produced) that shows the criteria/guidance that HSE Inspectors use or consider to decide on a material breach and award a FFI. |
| Safety Assessment Federation (SAFED) | In most cases appeals against FFI are because, for whatever reason, the dutyholder does not believe the Inspector has applied the HSE Guide 47 properly. This is particularly so for cases which are qualified 'so far as is reasonably practicable', unless there has been an incident, which clearly identifies the breach. The revised process merely outlines further instructions and procedures for Inspectors, it does not guarantee these will be followed.<br>Finally, it is noted that including the initial start, this is the third attempt at revising the FFI appeals process to make it independent. There are other examples of enforcement action, such as cautions, which appear to be rarely used, notices and prosecutions, whose challenge/appeals process has stood the test of time. Perhaps these could be considered. Finally, should the dutyholder refuse the FFI, not only could the HSE seek to recover the cost through the Civil Courts, they could pursue a prosecution. A Civil Court may ask why this is not the case. |
| Health and Safety Lawyers Association (HSLA) | The Health and Safety and Nuclear (Fees) Regulations 2016 make no mention of the recovery of a dutyholders costs in circumstances where a panel resolves an FFI dispute in favour of the dutyholder.<br><br>The HSLA recognises the importance of a regulator being able to carry out its regulatory functions in the public interest without being inhibited by considerations of costs. However, the HSLA considers that a panel should have discretion to award costs to a successful dutyholder.<br><br>Circumstances where a panel might exercise its discretion in favour of a dutyholder could include where: there has been material non-disclosure; the HSE has taken into account irrelevant material or failed to take into account relevant material; the panel considers the FFI should never have been issued; or, for costs disputes, HSE has failed to accept a reasonable offer that matches or exceeds the panel's costs determination. |
| DAC Beachcroft Claims Ltd | We respectfully suggest that there is scope for much more certainty in the Consultation document as to the costs of a dispute process. The HSE should be able to define with certainty the costs of the dispute process, either by confirming the fees and allowances which can be charged by panel members or settling on a fixed fee (perhaps based on the 2.6 hours the HSE says it takes to resolve a dispute on average). We think this would be of benefit to all parties to the dispute process and could help dutyholders decide whether or not to raise a dispute. |
| Hospitals University Coventry and Warwickshire | Under what circumstances would it be right to phone a dutyholder when they query an invoice as it may become a she said/he said scenario. Any phone call should be followed up with confirmation in writing.<br>Overall it would appear to be a better process if HSE were not involved in the panel and it would appear to be more impartial if they are not on the panel. |
| Port Skills and Safety Ltd | One of our association members has raised the question about the non-binding nature of the appeal process. The HSE consultation document states that the HSE would 'ordinarily' accept the recommendation, unless they consider it to be wrong. The respondent's view is that if a FFI has "…reached appeal, the HSE must believe that they are correct anyway." |

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| | Otherwise presumably, the FFI would be withdrawn. If there is to be scope for ignoring the dispute process findings "what is the point of an appeal process, when the HSE is not bound by the outcome?" By this view, the appeal panel's judgement should be final and binding.<br><br>Another member has raised the question of the amount chargeable in FFI. Will the dispute panel be able to recommend or decide a cap depending on the circumstances? They should be able to reduce the Fee where there are mitigating features as well as waive the fee entirely where the dispute is found in favour of the dutyholder.<br><br>One of the challenges since the inception of FFI has been that it has been seen by some as a revenue generating scheme that uses businesses as a "cash cow". I have spoken with a number of members who point out good working relationships that they have had in the past with HSE and the desire to continue working effectively with the regulator to prevent accidents and continuously improve health and safety.<br><br>None of them are against the 'polluter pays' principle. If a dutyholder is in breech then we look to the HSE to enforce. But a number feel that FFI has changed the relationship, particularly with the self-governance that has been in place around dispute resolution until now. One member commented "How on earth can you believe in justice if you are already feeling unfairly treated and you have to complain to the same place?" The more fair and transparent process that the HSE is proposing here is to be commended. |
| Anonymous | I am confused and deeply concerned that this process of appeal is additional to the appeal process via Industrial Tribunal? If this fear is correct, I will need to assess how to best to progress with this major concern. |
| Anonymous | There are two additional areas we would ask the HSE to consider in relation to the FFI disputes regime:<br><br>1. We would ask the revised FFI process to acknowledge and record that if a duty holder exercises the right of appeal from the query stage to the disputes panel, this does not in itself constitute a lack of cooperation in terms of any subsequent mitigation by reference to the Sentencing Guideline on Health and Safety Offences.<br><br>2. In our experience, where a FFI is issued many of our clients do not accept they are in material breach of their duties in respect of a particular incident. Nevertheless, they elect to pay the fee to avoid entering a formal dispute with the HSE and to foster a constructive and positive working relationship.<br><br>However, it is of concern to duty holders that in these circumstances, the HSE may suggest in the future and specifically in the context of future proceedings, that payment of the fee constituted an admission of a breach of duty. We would ask the HSE to consider whether in appropriate cases it would confirm formally and in writing that this would not be represented as such. We believe that if the HSE were to provide this, it would result in more FFI disputes being avoided and only those that cannot be resolved by any other means being considered by the panel. |
| Anonymous | In relation to the Query process, we note that there is no intention to change this other than for the person dealing with the query to speak directly with the dutyholder. At present, there are no additional costs incurred by the dutyholder in the Query process and we would seek confirmation from HSE that this will remain the case. |

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| Kennedys | By Regulation 24(5) of the Health and Safety and Nuclear (Fees) Regulation 2016 the Secretary of State granted the HSE the duty and power to create a disputes procedure.<br><br>Any unfair exercise of this power by devising a procedure wherein disputes in which it has an interest are determined by a panel comprising its own members including its appointed lawyer will be contrary to the principles of natural justice and Article 6.<br><br>We submit that the Secretary of State cannot have intended that the HSE would exercise the power to this effect and implementation of an unfair procedure would consequently be ultra vires the power granted by Regulation 24(5) and beyond the range of rational or reasonable ways the power granted by Regulation 24(5) can be exercised.<br><br>We and other lawyers will almost certainly continue to make legal challenges to any process imposed by the HSE that is unreasonable, unfair and not compliant with natural justice and Article 6 ECHR or otherwise interferes with the process of law and interests of justice. |
| Chemical Business Association (CBA) | Business is concerned about the subjective nature of a material breach. In some cases, the situation will be clear and unlikely to be in dispute. However, at the margin, the issue will be decided by the perceptions of an individual Inspector. It is this type of case that is likely to result in an appeal.<br><br>A simpler, more transparent and objective approach would be to define a material breach as circumstances which would justify the issue of an Improvement Notice or a Prohibition Notice.<br><br>This also resolves an issue raised by the current consultation regarding disputes that arise for relatively small amounts. Any event that does not meet the threshold for an Improvement Notice or Prohibition Notice could be referred to a process analogous to the small claims court process and share its low cost and procedurally straightforward approach.<br><br>We also wonder about the strategic significance of the HSE pursuing FFI for relatively trivial amounts (which imply they relate to relatively trivial events). Purely as a matter of priorities at a time of reducing resources, it would be more cost effective for HSE's Inspectors to focus on more serious issues.<br><br>We do not doubt the accuracy HSE's statistics for FFI disputes contained in the consultative document. They should not however, be taken to indicate, as appears to be suggested, that the relatively low numbers involved indicate business satisfaction with the current discredited FFI appeals process.<br><br>Companies are unlikely to appeal against a FFI charge if they know that the appeals mechanism is heavily weighted in favour of the HSE and that significant costs would be payable if they lose.<br><br>The consultative document proposes that if the HSE wins an appeal, the duty holder should pay the costs of this process.<br><br>CBA believes strongly that, as in most civil cases, the losing party should be responsible for the winner's costs. In the case of FFI disputes, this means that, if HSE loses, it becomes responsible for the duty holder's costs. To suggest the question of costs is a simple one-way street, allows HSE to fight each and every appeal without any consideration as to the merits of its case or the likely outcome – considerations that should be |

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| | central to any quasi-judicial process.<br><br>We believe the duty holder must be allowed to adduce expert evidence if it is appropriate. This could take the form of a written report or, exceptionally, giving evidence in person. It follows that the duty holder must also be allowed to call witnesses. In both cases, we believe the decision to allow this evidence should be made by the lawyer chairing the appeals panel – not by HSE officials.<br><br>We also believe there should be an obligation on the disputes panel to publish a written statement of its findings on the HSE website or in one of its publications. It might also help future appellants if the decisions were used to build a public domain database that could be consulted by interested parties. This may also lead to more consistent decisions being made.<br><br>We assume that the disputes panel will only occasionally convene as a body and that most of its work will be conducted on paper. However, this process, whilst cost-effective, could also be seen as 'justice behind closed doors'. We recommend that, in appropriate cases, hearings make use of available technology – conference calls, Skype, Face Time – if it is appropriate to allow either side to make its case.<br><br>Given the intention of the consultative document is to create a fairer unbiased disputes procedure, the following statement is surprising. 'The (disputes) panel will make recommendations in relation to the determination of the dispute, giving written reasons for its decision, which ordinarily HSE will accept unless it considers the recommendation to be clearly wrong.' Whatever the outcome, the result of this quasi-judicial process must be accepted by both sides. To do otherwise renders the whole disputes process, and this consultation, pointless. |
| Fisher Scoggins Waters LLP | The revised process should comply with the consent order dated 7th February 2017 signed on behalf of OCS Group UK Ltd and HSE in the judicial review in the High Court of Justice (Case number CO/2420/2015) and approved by the Court on the 23rd February 2017.<br><br>The information and documents provided by HSE to the dutyholder should be the same information and documents provided by HSE to the panel to determine the dispute.<br><br>In respect of the dispute panel it is understood that HSE intends to appoint a lawyer from the Attorney Generals Civil Panel and to appoint the other members from the existing pool of independent persons who currently sit on the panel. We support this approach. We would not support the lawyer being appointed from the panel of Specialist Regulatory Advocates in Health and Safety and Environmental Law that prosecutes on behalf of HSE and other regulatory bodies.<br><br>We submit that HSE should not recover the cost of counsel advising HSE in respect of the dispute, only the cost of counsel appointed as chair of the dispute panel. |

## 11.0 Conclusion

11.1 In conclusion, the dutyholder analysis revealed that, of the 33 responses received, the majority generally agreed with HSE's proposals to move to a fully independent process for considering disputes in relation to FFI and how the revised process should operate.

11.2 Whilst, overall, the revised process was considered to be fair, open, transparent and proportionate, there were some key areas requiring clarification and for further consideration by HSE. Specifically:

11.3 **Provision of information** – To help businesses understand why HSE considers they are in breach of health and safety law, they need to have sufficient information to provide any challenge where a fee is in dispute. It was considered imperative that businesses are given all relevant information to enable dutyholders to understand, in all disputed cases, the relevant information on which a decision was based in the context of the EMM so that sufficient representation can be made; and that the information submitted to the panel should not be different from or more than that provided to inform the initial FFI action. Respondents also stated that HSE guidance on the disputes procedure should be updated to reflect the changes to the disputes process.

11.4 **Representation from dutyholders** – Sufficient and meaningful representations can only be made if the dutyholder is in receipt of all the information upon which HSE has based their opinion. Overall, respondents were of the view that the revised process differed very little from the existing systems which already allows for representations to be made to HSE.

11.5 **Consideration of disputes by an independent review panel** – To ensure the integrity, impartiality and independence of the process, the members of the review panel should:

- be appointed through an open and transparent appointment process;
- be independent of and not associated with HSE
- have their roles clearly established and set out in Terms of Reference
- have an understanding of health and safety legislation; the work activity involved; and HSE's principles of enforcement in relation to the Enforcement Management Model and Enforcement Policy Statement;
- where a meeting is convened, allow representations from both HSE and the dutyholder;
- clearly document and publish the outcome of the decision and the evidence on which it is based.

11.6 **Different process where fees are small and/or there is no dispute as to the material breach** – 62% of respondents indicated that a separate process in these instances could have a significant, beneficial impact on micro and small businesses where currently, payment of the fee is more likely than the risk of disputing the fee and potentially incurring large costs. Where the dispute is solely in relation to the level of the fee incurred and does not concern the material breach, consideration of such cases by a single panel member would help reduce burdens on unnecessary business and utilise to best effect panel resource. Several respondents agreed that such cases could attract a fixed fee.

11.7 **Suspension of dispute process** – By far the majority of respondents (97%) agreed the dispute process should be suspended where an investigation or appeal is pending.

11.8 Additionally, a number of respondents raised the issue of recovery of dutyholder costs where a panel resolves a FFI dispute in favour of the dutyholder – the Fees Regulations and HSE guidance (HSE47) currently makes no provision for dutyholders to recover costs incurred.