

Health and Safety Executive		Operational Circular	
Field Operations Directorate		OC 168/11	
Review Date	18/11/2015	Open Government Status	Fully Open
Version No & Date	1: 18/11/2005	Author Unit/Section	HSE's Legal Adviser's Office

Target Audience:
All HSE Inspectors

This OC incorporates revisions to the criteria for Independent Legal Oversight (ILO), restates the principles of ILO. It replaces OC 168/8. This OC applies to England and Wales.

CONDUCT OF CRIMINAL CASEWORK – INDEPENDENT LEGAL OVERSIGHT – REFERRAL OF CASES TO LEGAL ADVISER’S OFFICE

1 In April 2004 a new system of Independent Legal Oversight (ILO) was set up, requiring inspectors to refer their most serious, complex and sensitive criminal cases to Legal Adviser’s Office (LAO) for conduct. The system applies to all cases approved after 5 April 2004. The criteria used to identify cases which require ILO have now been slightly revised.

2 The revised criteria are set out in Appendix 1.

REFERRAL TO LAO

3 Where a case meets one of these criteria, or is likely to do so, then the approval officer or the investigating officer should contact the Head of Litigation in LAO, in the first instance by email, so that discussions can take place on referral. The examples set out under the categories are not rigidly defined, neither are they exhaustive. If you are unsure whether a case meets the criteria please contact the Head of Litigation in LAO to discuss.

4 A Quick Reference Guide to ILO is set out at Appendix 2. Although the formal system of ILO only applies once a case has been approved for prosecution in accordance with established procedures, please contact LAO **as soon as you think a case may meet the criteria**. This will enable discussions to take place about the case with LAO at an early stage and you will be able to obtain early legal advice to assist you in your investigation. The ILO system does not usurp the usual approval process; LAO will only assume formal conduct of an ILO case once the case has been approved.

5 Solicitor agents cannot provide ILO. However, you may refer non ILO cases to solicitor agents for conduct (see OC 168/7 which gives guidance on this).

CHANGE IN CIRCUMSTANCES

6 Sometimes a change in circumstances during the life of a case may mean that what was regarded as a straightforward case meets the criteria for ILO. This may happen post approval – a solicitor agent may already be instructed - for example, if you wanted to appeal by way of case stated following the loss of a case in the magistrates' court. It is important that such cases are referred as soon as possible to the Head of Litigation in LAO in accordance with the ILO provisions. The conduct of the case will not necessarily be removed from the solicitor agent.

7 Equally there may be a change in circumstances in an ILO case being dealt with by LAO which means it could be dealt with satisfactorily at local level. LAO may then refer on to a solicitor agent for conduct.

APPENDIX 1

CRITERIA FOR CASES REQUIRING INDEPENDENT LEGAL OVERSIGHT

If a case is approved for prosecution which meets one or more of the criteria set out below it must be referred to Legal Adviser's Office (LAO) for conduct following the procedure set out in appendix 2. If a case which may fall within these criteria is being investigated please also refer the case to LAO for early legal advice (see also appendix 2).

If a case has already been referred to a solicitor agent for conduct and it later becomes clear that the case meets the criteria for ILO (for example an appeal by way of case stated), you must inform LAO so that a decision can be made about ongoing conduct. Please discuss with the Head of Litigation in LAO.

HSE cases vary considerably in type and nature. Remember the examples set out below under each criteria are not exhaustive or rigidly defined. They are there to assist you in assessing whether a case falls within the criteria. If you are in doubt please discuss with the Head of Litigation.

CASES OF NATIONAL IMPORTANCE OR HIGH PUBLIC INTEREST

Examples

- All section 14(2) investigations or inquiries into the circumstances of the case;
- Where the Executive has declared a major incident under its corporate instructions;
- All other potential prosecutions arising from major incidents as defined at major hazard installations (e.g. COMAH establishments, offshore installations, major hazard pipelines);
- All potential NSD prosecutions involving serious risk or radiation safety issues;
- A case involving biological agents (pathogens and genetically modified organisms);
- A case where **many** members of the public may have been put at risk.

WHERE HSE NEEDS TO DEFEND HEALTH AND SAFETY LEGISLATION OR TO MANAGE THE DEVELOPMENT OF CASE LAW.

Examples

- Cases involving novel points of law of **national** importance to HSE or its legislation (such as a challenge under the Human Rights Act to the

compatibility of section 20 or section 40 of HSWA, or the unlawful use of section 20 powers);

- Cases where either HSE proposes to appeal by way of case stated, or the defendant is appealing by way of case stated;
- Applications for judicial review, whether by HSE, a duty holder, or a third party. N. B. All cases should be referred where judicial review is threatened or where a letter before claim in relation to a proposed judicial review is received, whether sent to HSE as a potential defendant or an interested party;
- Proposed appeals to the Court of Appeal, whether against conviction or sentence;
- Proposed prosecution appeals under section 58 of the Criminal Justice Act 2003 (appeal by the prosecution against a terminating ruling made by the judge either at a pre-trial hearing or the trial itself).

CASES WHICH IMPACT UPON WIDER ISSUES OF LAW AND POLICY

Examples

- Cases where there is uncertainty about standards, expertise or reasonable practicability, such that the decision on the case might undermine the future enforcement of relevant standards;
- Cases which involve developing areas of HSC/HSE policy (e.g. work related deaths on roads and other issues at the boundaries of section 3 HSWA (probably for advice only rather than conduct));
- Cases in which there are cross cutting issues of law or policy for HSE and other prosecuting agencies or Government Departments.

CASES WHICH PRESENT DIFFICULTIES OR SENSITIVITIES ON EVIDENTIAL SUFFICIENCY OR PUBLIC INTEREST.

Examples

- Cases which themselves involve or which are linked to, politically sensitive issues (for example where the prosecution of a public body may call into question government policy);
- Where HSE proposes to prosecute a police force or fire brigade, particularly where the public service imperative may be an issue;

- Where HSE proposes to prosecute an NHS trust where there are patient care issues and/or dissolution or transfer of functions to a new NHS trust;
- Where HSE proposes to prosecute a local authority and there are issues arising from dissolution or transfer of functions to a newly constituted local authority;
- Cases where there is a significant risk of loss of liberty on conviction;
- Cases involving the same duty holder, where there is a series of similar or related incidents, and similar fact/bad character evidence should be considered;
- Where there are particularly complex issues arising on the disclosure of unused material;
- Public interest immunity issues - such as where there is an informant or material giving rise to national security issues.

CASES WHICH REQUIRE HSE TO DEMONSTRATE PROSECUTORIAL INDEPENDENCE TO MAINTAIN HSE'S REPUTATION FOR IMPARTIALITY

Examples

- Prosecutions of duty holders with whom HSE has had a significant prior role and where it is necessary to demonstrate prosecutorial independence, for example, where there is a long history of close contact between the investigating inspector and the duty holder, particularly in some permissioning regimes;
- Cases involving the obstruction of an inspector in the course of his or her duties;
- Cases in which it is necessary to avoid an imputation of local influence (for example, where the duty holder is a close relative of an HSE employee).

CASES INVOLVING JOINT WORKING ON ENFORCEMENT WITH OTHER ENFORCEMENT AUTHORITIES.

Examples

- Investigations by the police which are likely to lead to potential prosecutions by the CPS for a serious criminal offence and there are potential allied health and safety offences;

- Joint or parallel investigations with the Environment Agency (COMAH major accident investigations will also be caught by category 1) which may lead to joint or separate prosecutions;
- Investigations by the DTI;
- Investigations by the DfT.

APPENDIX 2

QUICK REFERENCE GUIDE TO INDEPENDENT LEGAL OVERSIGHT (ILO)

The arrangements outlined in this guide are intended to provide independent legal oversight (ILO) of serious, complex or sensitive cases, as set out below. Legal Adviser's Office (LAO) will consider each case that meets the criteria – and will advise the referring inspector on alternatives if in house legal resources are not available to deal with the case.

WHY DO WE NEED ILO?

The Attorney General has stressed the need for independence in prosecutions generally. HSE's Prosecution Review recommended in May 2001 that HSE should put in place a system of independent legal oversight of the decision to prosecute.

WHAT DOES ILO INVOLVE?

If a case is accepted for ILO, HSE's lawyers will assume the role of prosecutor. Inspectors retain the role of investigator and remain the only people who can commence proceedings. ILO cases will only be conducted effectively if the inspectors and lawyers work closely together as a team. In some cases, the lawyer in LAO who is allocated an ILO case may instruct a solicitor agent where pressures of work demand. This will only be done after discussion with the inspector however the HSE lawyer will retain overall responsibility for the case and the agent will act on the lawyer's instructions.

As ILO cases will be complex and sensitive, it is highly likely that the investigating inspector will require early legal advice from LAO in respect of admissibility of evidence, lines of inquiry etc. Guidance on seeking advice from LAO is set out in the Protocol on seeking advice from LAO which is on the LAO Bulletin Board. Approval Officers will find it helpful to refer to the section entitled 'Approving Prosecutions' in the Investigations section of the Enforcement Guide.

The formal role of independent legal oversight will only begin once a case has been approved in the normal way in the operational directorate and accepted by LAO as requiring independent legal oversight. The lawyers are obliged to apply the principles set out by the Government in the **Philips' Report 1981** in relation to the separation of investigations and the prosecution decision and will follow the 'Guidance Note for Government Lawyers'. Further explanation of this is set out at Appendix 3.

In the same way as approval officers, lawyers in LAO will make their decisions in accordance with the Code for Crown Prosecutors and the HSC's Enforcement Policy Statement. Their decisions will be taken fairly and objectively, having regard to their duties under the Civil Service Code and their professional code of ethics.

WHEN TO CONTACT LAO DIRECT:

To seek early legal advice on an ILO case:

LAO may be approached for early legal advice particularly in high profile or complex cases that may meet the ILO criteria.

If you require general legal or enforcement advice then you should contact your directorate legal and enforcement contact in the usual way.

Referring an ILO case to LAO:

You should discuss the case with your line manager as soon as you believe an investigation may lead to a prosecution, which meets any of the criteria for independent legal oversight.

You should then inform the Head of Litigation in LAO, by email, identifying the reasons why you believe that the case meets the criteria.

You will then be contacted by LAO to discuss the case, first to see if it does require ILO and secondly to see whether it can be accepted by LAO. The instructing Inspector should produce the prosecution report for approval and this will be considered by the line manager, in the normal way. Once the case is approved and LAO has accepted conduct, you will be asked to send a copy of the case file to LAO. The final decision as to whether LAO can accept conduct of a case will remain with the Head of Litigation.

What happens next?

Once an HSE lawyer has been assigned, he or she will assume the role of prosecutor. A letter will be sent to you, as the instructing inspector, setting out what you can expect from LAO. The lawyer will review the evidence and proposed charges, discuss the case with the inspector and advise on the prosecution decision. The case will only proceed if the lawyer is satisfied that there is sufficient evidence to provide a realistic prospect of conviction. Sometimes LAO may request that you attempt to obtain further evidence to strengthen your case. Inspectors and lawyers will normally resolve any disagreements over a case proceeding by discussion.

If the case passes the evidential sufficiency test, it can only proceed to a prosecution if it also passes the public interest test, which both the lawyer and the inspector will feed in to. In the majority of cases there will be no difficulty in reaching a joint decision on the public interest. However, in those cases which are finely balanced, or where you and the lawyer cannot agree, the lawyer and inspector may need to refer the case upwards through the line management chain. If agreement cannot be reached in this way, the Head of Litigation and Corporate Advice Division will make the final decision on the public interest test, taking into account any representations from the operational Division, which investigated.

If the case proceeds to a prosecution the responsibilities will be shared. The inspector's role will particularly include the duties of the investigator, disclosure officer, for ensuring liaison with the bereaved or other victims, warning witnesses, and for informing the defendant(s) about the impending prosecution. LAO will handle most of the administration work associated with the prosecution of the case, e.g. court liaison, preparing and serving advance disclosure. LAO will arrange representation at court, conferences with counsel etc. You and the lawyer/case worker will liaise regarding the conduct of your case in court and you will be expected to attend all substantive hearings.

APPENDIX 3

THE PHILIPS' REPORT

The Royal Commission on Criminal Justice (the Philips' Committee) in 1981 recommended a separation of functions between those who investigated cases and those who prosecuted cases as a way of securing fairness, efficiency and accountability. The Commission recognised the 'importance of legal expertise in the decision to prosecute and to make the conduct of the prosecution the responsibility of someone who is both legally qualified and is not identified with the investigative process'. This approach has been endorsed by the Attorney General, the Lord Goldsmith QC, who has made it plain that he sees the independence of the prosecutor as being fundamental to securing fairness in prosecutions. National and international standards recognise the importance of the independence of the prosecutor, the ability to exercise the prosecutor's discretion independently and free from political interference, and to perform their duties without fear, favour or prejudice.

The Guidance Note for Government Lawyers

The Government lawyer who reviews a case for prosecution has a special position in the decision-making process. The Guidance Note for Government lawyers explains this. Government lawyers are civil servants and bound by the 'Civil Service Code' which sets out the constitutional framework within which civil servants work and governs the responsibilities of civil servants. Equally, as members of the legal profession, Government lawyers are independent professionals bound by the codes of conduct applicable to their branch of the profession and, where they are involved in civil or criminal litigation, they also owe duties to the courts. These obligations are complementary; indeed the duty to comply with the law, to uphold the administration of justice and to act in accordance with professional standards is expressly reaffirmed in the Civil Service Code. This means that compliance with their professional obligations will not bring Government lawyers into conflict with the standards set out in the Civil Service Code.

In relation to prosecutions, the role of the Government lawyer 'involves advising on the sufficiency of evidence and, depending on the arrangements for prosecuting within departments, may extend to taking the decision whether or not to prosecute and the subsequent conduct of the proceedings. Whatever the extent of the role of the Government lawyer in the prosecution process, he or she must discharge the role with professional independence.

All Government prosecutors are expected to comply with the principles set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions and with any other guidance issued by the Attorney General from time to time on prosecution issues. The duties imposed by the Code for Crown Prosecutors include ensuring that cases are conducted fairly, independently, objectively and effectively, that there is a realistic prospect of a conviction and that it is in the public interest to continue the case.'

The Guidance note explains the role of the Law Officers and the particular role of the Attorney General in relation to prosecutions. 'This role makes it appropriate to consult him in cases of difficulty, for example, those raising particularly difficult public interest considerations or issues of propriety or important issues of law of general importance.'