

Notification of prosecution cases

OC 168/14

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Summary

Approving and taking prosecutions is one of HSE's most important functions and one on which we are closely judged. It is therefore important that approval decisions in sensitive cases are fully informed and made at the most appropriate level within HSE. This OC provides guidance on notifying senior officers of sensitive or high profile prosecution cases, on the procedures to be followed by the person making the prosecution decision, and on the recording of the decision process, in accordance with Stage 3 of the 'Prosecution' Operational Procedure.

Introduction

1 All prosecution cases must be subject to independent review of the evidence and, if there is sufficient evidence, the public interest, before the case is approved. See HSC's Enforcement Policy Statement (EPS), and the Code for Crown Prosecutors in England and Wales, and the Prosecution Code in Scotland (the Codes), and also [OC 168/9](#), "Assuring the Independence of Prosecution Decisions". Stage 3 of the 'Prosecution' Operational Procedure, and the Enforcement Guides for England/Wales and Scotland give further guidance on prosecution approval procedures. The decision maker, who must be sufficiently independent of the investigation, must be satisfied that the evidential stage and public interest stages have been met, i.e. that the Code and EPS have been applied properly. For most cases this will continue to be done by the normal approval officer (NAO), who is generally the investigating Inspector's line manager - in FOD this is typically the Band 2 Principal Inspector.

Scotland

2 The principles behind this referral framework and the guidance in this document apply equally in Scotland as they do in England and Wales. The framework acknowledges the different legal system in Scotland where the decision whether or not to prosecute is one entirely for the Procurator Fiscal. Where reference is made in this guidance to 'approval', then, for Scotland, this should be taken to mean 'HSE recommends prosecution'.

Purpose of this guidance

3 This guidance assists NAOs in identifying cases which more senior line managers should be informed of **before** the prosecution decision is made. This will (i) provide more senior officers with the opportunity to input to any discussions and considerations about the case and (ii) to provide senior managers with the opportunity to take the prosecution decision if they so wish. The following procedure, which reflects existing good practice, will therefore assist in ensuring that approval decisions for sensitive cases are fully informed and made at the most appropriate level within HSE, in accordance with legal and operational expectations. It also gives guidance on notifying others in HSE **after** the prosecution decision has been taken.

Notifying senior officers of a prosecution case BEFORE approval decision is made

4 The NAO should consider whether s/he should notify a senior manager of the case before the prosecution decision is made. [Appendix 1](#) gives guidance to assist NAOs in considering whether to notify more senior operational line managers¹. The prosecution decision must be made by one individual person, who must personally consider both stages of the Code's test, and also the EPS. The decision will, in most cases, be made by the NAO, who should make a record of any input received from senior officers ([paragraph 10](#) refers). However, the senior officer may, decide that s/he will make the prosecution decision. [Paragraphs 11 to 13](#) give guidance on how this can be done – and on how the senior officer can take account of, and rely upon, work done by others.

1 Where it is appropriate to notify a senior officer, the NAO should follow their normal line management chain so those within the chain, up to the identified senior officer, are aware that a notification has taken place.

Considering NOT to approve a case

5 This notification procedure should also be considered and applied where the NAO is of the opinion that the case should not proceed to prosecution. Where a prosecution report has been submitted to the NAO, or an investigation is being considered for submission of a prosecution report, the NAO should consider notifying a senior officer as they would do if the case appeared to be one that was likely to lead to prosecution.

6 If it is apparent, early in the investigation, that further action targeted against a particular dutyholder would not be in accordance with the EPS (e.g. would be disproportionate), then the decision NOT to continue that investigation should be made at that stage, even if some lines of enquiry have yet to be completed.

Notifying others BEFORE approval decision is made

7 Where a senior officer is notified of the case they should consider if a more senior officer should also be notified prior to the approval decision, so that they also may have the opportunity to input to, or take the role of, the decision maker. In particular, in all cases where the Divisional Director (DD) has been identified as the person to be notified (from either [Table 1](#) or [2](#)) the DD must notify their line manager (e.g. Head of Directorate), of the case **prior** to the approval decision. (Those involved in the process may also seek input

as appropriate from others, e.g. legal advisers, interested sectors, more senior colleagues etc.). Whatever is decided, there must be clear, and recorded, agreement as to who makes the final approval decision and takes the role of decision maker. As indicated in [paragraph 10](#), the final decision maker should record the outcome of discussions with senior officers.

Notifying AFTER approval decision has been made

8 All those notified or consulted should be advised of the prosecution decision². In addition, consideration should be given by the person making the approval decision whether others need to know of the decision. This may include senior staff within the directorate as well as more senior HSE staff, and also, where there may be significant media interest, press office. For specific cases falling into the categories listed in [Table 1](#), the right-hand column of the Table indicates those who should be advised routinely of the decision. Others may also need to know of a prosecution decision, e.g:

- Sectors may have an interest for statistical analysis or technical interest and to be aware of the case if asked by external contacts.
- Senior Civil Servants, or Minister, may, in high profile cases, need to be aware of the case so they can respond to questions asked about the investigation and/or ensuing prosecution. (Note: Notification to anyone external to the HSE is subject to the rules of disclosure. If there are any concerns about notification to such external bodies then legal advice, from HSE's Legal Adviser's Office and Procurator Fiscal as appropriate, should be sought)
- Other enforcing authorities may be involved, and have interests, in the case, e.g. Environment Agency and Scottish Environment Protection Agency.

<p>² There will, additionally and routinely, be subsequent notification to the accused, and to other interested parties, e.g. victims and employees or their representatives in accordance with section 28(8).</p>

Independent legal oversight (ILO) in England and Wales

9 HSE already has specific procedures addressing the requirement for independent legal oversight (ILO) in HSE's most serious, complex and sensitive criminal cases (see [OC 168/11](#)). The ILO procedures only apply once a case has been approved for prosecution within the operational directorate/division. Where a case is subject to ILO then consideration should be given to consulting Legal Adviser's Office (LAO) as early as possible during the case.

Prosecution decision made by the normal approving officer (NAO)

10 In most HSE cases the NAO will be responsible for deciding whether or not to approve the case. At any point during this process the NAO may seek advice or guidance from others including, for example, senior officers. The person making the prosecution decision must do so in a fair, independent and objective way so that any decision is free from improper or undue pressure from any source. It is important therefore that the outcome of any discussions with senior officers is recorded. The NAO should make a detailed record, at the time, of the reasons for their decision in relation to the approval or rejection of the proposed prosecution. A clear and succinct record on how a decision was reached is vital to defend any subsequent challenges.

Prosecution decision made by senior officer

11 Where a case is submitted to a more senior officer to make the approval decision then the senior officer becomes the decision maker, and will consider both of the stages as set down in the Code, and the EPS. However, whilst the responsibility for the prosecution decision remains entirely with the senior officer, in the most complex and serious cases others may assist in marshalling and analysing the relevant evidence.

12 When making the decision on approval, the senior officer may choose to rely on the material provided by the NAO³. In such cases we would expect that the NAO should provide the senior officer with:

- a detailed analysis of the evidential sufficiency considerations;
- a statement as to the NAO's conclusion on evidential sufficiency;
- a statement that the conclusion was reached in accordance with the Code and EPS; and
- any information on any significant public interest factors identified by the NAO.

³ Guidance from the Attorney General indicates that when a senior officer is making the prosecution decision, and chooses to rely on work done by others, then the senior officer should be provided with a detailed analysis of the case, including the essential evidence which the NAO believes substantiates a realistic prospect of conviction, plus other supplementary information and evidence – and the whole prosecution file should be made available to the senior officer, including any unused material.

13 Alternatively, the senior officer may disregard this material and review the prosecution file and reach his/her own conclusions on the evidence. Whichever option s/he chooses, the senior officer may continue to seek advice from others, including legal advisers.

14 The senior officer making the decision should ensure that a detailed record is made, at the time, of the reasons for the decision in relation to the approval or rejection of the proposed prosecution – and also of the material relied upon or disregarded. The senior officer must record their own reasons and not merely that they endorse the reasons and conclusions of the NAO – and the approval decision should be recorded on COIN in accordance with Operational Procedures.

Appendix 1 - Guidance on whether to notify a senior operational line manager

Notification factors and the public interest

(1) The reasons why a case is notified upwards to a more senior officer, and the reasons why the senior officer may wish to make the prosecution decision themselves, may be irrelevant to the approval decision. Some of the matters identified are likely to be regarded as inappropriate when considering the public interest stage under the relevant Code. It is important therefore to differentiate clearly between the factors that make a case suitable for notification, or for the senior officer to take over the approval decision, and those that are properly relevant to the public interest stage. As an example; a case that is likely to generate significant legal costs may be a factor in deciding that a senior manager should be notified of a case, and may wish to make the approval decision, but is not a factor to be included in the approval decision itself⁴. This notification procedure should in no way detract from the evaluation of the public interest stage required under the Code. Some common public interest factors are listed in the Codes, and in the EPS (paras 39 and 40).

4 The issue of financial costs to the HSE is not strictly relevant to the approval decision itself, since that would fall outside the requirements of the Code or the EPS. Where it is suspected a case is likely to incur a significant cost (relative to other cases of a similar nature) then a senior line manager should have the opportunity to be involved in considering how those costs are going to be managed.

General factors to consider

(2) Having the most suitable person involved in the prosecution process will help in providing a fully informed decision that takes account of any relevant existing, or potential, factors. It is therefore appropriate that senior managers have the opportunity to input into approval decisions in cases involving significant internal risk or external impact, and that they are also accountable for decisions that they decide to make themselves. The factors below do not fall under the public interest stage of the Code test, but are just some examples of issues that would need to be taken into consideration by the NAO when deciding whether a prosecution case should be notified to senior managers. The risks involved may be in relation to taking, not taking or losing, a prosecution. General examples may include:

HSE business risk factors:

- Contrary to HSE's policy or operation;
- Challenges to health and safety legislation, guidance or benchmarks;
- Contesting HSE's expertise (technical, scientific etc.);
- Wider political impact;
- Financial costs (see [note 4](#)); etc.

External impact factors:

- Commercial restrictions or trading embargoes;
- Other wider public interest considerations;
- Loss of livelihood (individual or communal) or civil liberties;
- Industrial demands;
- Difficulties for duty holders to comply with the law; etc.

Who should be notified ?

(3) A few specific cases have already been identified as suitable for notification to senior managers - these are listed in [Table 1](#). (The list is deliberately limited as it would be impractical to list all types of cases that may fall under this notification framework.) In all other cases, a judgement will need to be made on whether it should be notified. This judgement should take account of the extent of (a) the risk to HSE's business and (b) the external impact associated with the case. [Table 2](#) should be used to assist the NAO in deciding whether a case should be notified, and also which senior officer would be the appropriate person to receive the notification. The examples in [Table 2](#) are to indicate that the level of any notification should be proportionate to the extent of the business risk to HSE and the external impact. [Table 2](#) should therefore be used only as a guide.

Table 1 – Specific cases

Case	Notification to:	Additional specific notification requirement AFTER approval decision.
Emergency Services (involving the operational arm of the Police, Fire or Ambulance Service)	Divisional Director ⁵ (see para 7)	Deputy CE (Ops). Head of Directorate. Public Services Sector (as required in SIM 07/2003/30)
Major Incident (as defined)	Person appointed by Deputy CE (Ops)	Deputy CE (Ops). Head of relevant Directorate. Member(s) of the Major Incident Investigation Board.
Section 14 HSWA (i.e. resulting from a HSC directed investigation)	Person appointed by Deputy CE (Ops)	Deputy CE (Ops). Head of relevant Directorate. Member(s) of the Major Incident Investigation Board.
In Scotland, cases where Solemn Procedure is recommended	Band 1	
Proceedings against offshore installations or within 500m of an offshore installation	Director of Public Prosecutions ⁶ (Petroleum Act 1998, Part II 12(3))	HID Director.
NSD cases involving serious risk or nuclear safety issues	NSD Chief Inspector NSD Deputy Chief Inspector	Deputy CE (Ops).
Crown Censures	Band 1HoOps (FOD and HID) Deputy CI and CI (NSD)	Head of Directorate. HQ of Crown body department concerned. (SIM 07/2001/34)

5 In all cases where the Divisional Director has been identified as the person to be notified (from either Table 1 or 2) the DD must notify their line manager (e.g. Head of Directorate), of the case prior to the approval decision.

6 Case to be referred to the Director of Public Prosecutions **for approval** via LAO in England/Wales only.

Table 2 – Non-specific cases

	HSE Business Risk →		
External Impact ↓	LOCAL Nil or negligible impact on HSE. e.g. local office, guidance.	REGIONAL Some impact but not significant. e.g. divisional, AcoPs.	NATIONAL Significant impact to HSE. e.g. organisational, UK or European legislation.
LOW Confined impact. E.g. Scope confined to duty holder or single premises.	NAO	NAO	NAO
MEDIUM Medium impact. E.g. Wider impact on industry sector, several premises or DHs.	NAO	NAO	Head of Operations ⁷ (see para 7)
HIGH Extensive impact. E.g. National/ International impact, across industry sectors.	NAO	Head of Operations ⁷ (see para 7)	Divisional Director ⁷ (see para 7 , and note 5 above)

⁷ For other than FOD operations the corresponding senior officer would generally be:
Head of Operations is, in FOD, 1 line management position above NAO = Deputy Chief Inspector (NSD), and Band 1 (HID)
Divisional Director is, in FOD, 2 line management positions above NAO = Chief Inspector (NSD), and Band 0 (NSD)