



Ministry  
of Defence



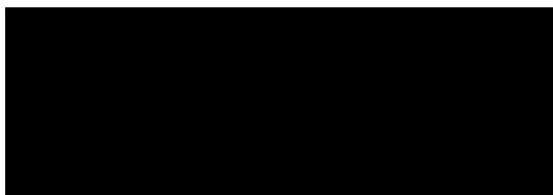
**MEMORANDUM OF UNDERSTANDING**

**BETWEEN**

**THE MINISTRY OF DEFENCE**

**AND**

**THE HEALTH AND SAFETY EXECUTIVE**



**Director Health, Safety and  
Environmental Protection**

**On behalf of the  
Ministry of Defence**

**December 2020**

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**Philip White**

**Director of Regulation**

**On behalf of the  
Health and Safety Executive**

**December 2020**

Note: The above signatures confirm approval of the General Agreement and Annex A only.  
An unredacted version of this document is available to HSE staff: <http://intranet/fish/working.htm>

## AIM

1. This Memorandum of Understanding (known as the 'General Agreement') records an agreement between the Ministry of Defence (MOD) and the Health and Safety Executive (HSE) in discharging their respective roles and responsibilities for regulation and enforcement of health and safety (H&S) legislation on the MOD estate and for MOD activities in Great Britain (GB)
2. This agreement:
  - a. sets out the approach of MOD to health and safety and the arrangements for compliance with relevant legislation by the MOD, and its employees (both Armed Forces and civilian);
  - b. sets out the approach of HSE as a statutory regulator for MOD activities;
  - c. describes liaison arrangements at a strategic level, for coordination of policy and activity; and for regulatory co-operation between HSE and MOD Regulators.

## MOD RESPONSIBILITIES AND ARRANGEMENTS

3. The MOD is the Department of State charged with the management and control of Her Majesty's Armed Forces and civilian personnel engaged in the defence of the United Kingdom (UK) and its citizens, property and interests at home and overseas.
4. MOD recognises its duty to comply with the Health and Safety at Work etc. Act 1974 (HSWA) and the relevant statutory provisions (RSP) in relation to its premises and when conducting MOD activities within the territorial scope of the Act/Order. This includes MOD activities outside mainland Great Britain only insofar as the HSWA 1974 (Application Outside Great Britain) Order 2013/240 permits. The responsibilities imposed by those duties are reflected in the Secretary of State for Defence's Policy Statement on Health, Safety and Environmental Protection.
5. The HSWA applies to all MOD civilian employees, Service Personnel under MOD employment and contractors working under the direction of MOD. Where there are Dis-applications, Exemptions, or Derogations (*See Note below*) from health and safety at work legislation, MOD will maintain Departmental arrangements that produce outcomes that are, so far as reasonably practicable, at least as good as those required by all relevant legislation.

### **Note:**

**Dis-application** – *Specific parts of statutory requirements do not apply. This is specified in legislation e.g. the Explosives Regulations 2014.*

**Exemptions** – *There are provisions within legislation for exemptions to be granted from specific requirements in recognition of a Defence imperative; other health and safety at work regulations alternatively specify the exemption in the interests of national security.*

**Derogations** - *Derogations are a lessening of a statutory requirement for justifiable practical or operational reasons (e.g. smoking in single living accommodation recognises the distinction from temporary accommodation such as hotels and hostels).*

6. The MOD is organised into Head Office, four Military Commands, the Defence Nuclear Organisation and 12 Enabling Organisations. The Service Chiefs or Chief Executives of these bodies deliver Defence activities and have the responsibility for managing the health and safety at work risks associated with their activities and undertaking.
7. The Directorate of Health, Safety and Environmental Protection (D HSEP) provides Head Office's oversight of Safety and Environmental Protection performance and risk and supports

the Permanent Secretary and all members of the Defence Safety and Environment Committee (DSEC) to improve Defence safety performance and culture.

## **DEFENCE REGULATORS**

8. The Defence Safety Authority (DSA) is an independent authority that provides MOD with regulation, assurance, enforcement and investigation for health, safety & environmental protection. It comprises six MOD Regulators: Military Aviation Authority, Maritime Regulator, Land Safety Regulator, Nuclear Safety Regulator, Fire Safety Regulator and the Ordnance, Munitions and Explosives Regulator, Medical Services Regulator and policy and business service teams.
9. The Defence Accident Investigation Branch (DAIB) is also part of the DSA which is established by Charter issued by the Secretary of State for Defence empowering it as the Defence Investigator. The DAIB is independent of the single Service commands (Royal Navy, Royal Air Force and Army) working directly to the Director General of the DSA, who is the primary Convening Authority for Service Inquiries<sup>1</sup> pertaining to safety-related investigations. The DAIB has a duty to conduct impartial, independent, safety investigations without apportioning blame or liability into serious Defence accidents and has discretion to investigate other accidents and incidents. It identifies causes and makes recommendations, which are tracked to closure, to prevent a reoccurrence. Held at very high readiness to deploy, both within the UK and globally, the DAIB is able to respond rapidly to provide Defence with a professionally trained accident investigation capability.

## **REPORTING OF INJURIES, DISEASES AND DANGEROUS OCCURRENCES 2013 (RIDDOR)**

10. RIDDOR defined injuries to civilian employees and incidents leading to the hospitalisation or death of members of the public are reportable to HSE. Equivalent injuries and diseases to armed forces personnel on duty are not reportable under RIDDOR but MOD has undertaken to notify any Work-Related Death, Major Injury, Disease or Dangerous Occurrence, to HSE as if they were RIDDOR reportable. Defined Dangerous Occurrences are reportable.
11. In the case of a fatality within the defined geographic limits, HSE expects the Commanding Officer/Head of Establishment or other responsible person within the relevant command to notify HSE within the time periods as laid down in RIDDOR.

## **HSE RESPONSIBILITIES AND APPROACH**

12. HSE is the national statutory regulator for health and safety at work in Great Britain. Its authority derives from the Health and Safety at Work etc Act 1974 (HSWA). HSE is responsible for the enforcement of health and safety at work legislation for work activities undertaken by MOD and its contractors. HSE is organised into Directorates/Divisions dealing with a range of specialist and general work-related hazards.
13. HSWA requires, amongst other things, an employer to ensure so far as is reasonably practicable, the health, safety and welfare of its employees and those not in its employment who may be affected by the conduct of its undertaking. In determining whether MOD has done what is reasonably practicable, HSE will consider the operational context in which MOD activities are conducted.
14. HSE recognises the importance of realistic training and its part in ensuring that the Armed Forces are competent and confident to conduct military operations in hostile environments, as acknowledged in HSE's High Level Statement on Realistic Training.  
<http://www.hse.gov.uk/services/armedforces/realistic-training.htm>

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<sup>1</sup> The term Service Inquiry is used by Defence for higher level investigations. The Armed Forces Act 2006 Part 16 and the Armed Forces (Service Inquiries) Regulations 2008 lay down the requirements for the conduct of Service Inquiries.

15. Under section 20 of HSWA, HSE Inspectors are granted a range of statutory powers to enable them to conduct inspections and investigations and to take enforcement action. These statutory powers, along with duties and responsibilities under other legislation, include (N.B. this is not a complete list – refer to section 20 HSWA);
- a. Powers under HSWA: Powers of entry; to take any other person and any equipment or materials; require premises or anything in premises to be left undisturbed; powers to take measurements, photographs, recordings and samples; cause an article or substance to be dismantled or to subject it to any process or test; to take possession of articles and substances etc.; to require any person to give information; to require books and documents and any other power to carry into effect any relevant statutory provisions.
  - b. Duties under the Criminal Procedures and Investigation Act 1996 as amended by the Criminal Justice Act 2003 (England and Wales only: similar principles apply in Scotland): duty to pursue all reasonable lines of enquiry.
  - c. Duties under the Police and Criminal Evidence Act 1984 (England and Wales only): the interviewing of suspects.
  - d. Responsibilities under the Criminal Justice Act 1967 (England and Wales only): the taking of voluntary witness statements.
16. HSE Inspectors will apply and consider the following in guiding their interventions with MOD;
- a) HSE's Enforcement Guide (England and Wales)  
<http://intranet.hse.int/legal/enforcement-guide-ew/>
  - b) HSE's Enforcement Guide (Scotland)  
<http://intranet.hse.int/legal/enforcement-guide-sc/>
  - c) HSE's Selection Criteria for the Investigation of Injuries  
<http://www.hse.gov.uk/enforce/incidselecrts.pdf>
  - d) HSE's Enforcement Policy Statement <http://www.hse.gov.uk/enforce/enforcepolicy.htm>
  - e) HSE's Enforcement Management Model <http://www.hse.gov.uk/enforce/emm.pdf>
  - f) Work Related Death Protocols <http://www.hse.gov.uk/enforce/wrdp/>  
<http://www.hse.gov.uk/pubns/wrdp1.pdf>
  - g) Work related death Protocol (Scotland)  
<http://www.hse.gov.uk/scotland/workreldeaths.pdf>
  - h) The Agreement between ACPO and the MOD/Service Police Forces  
<http://library.college.police.uk/docs/hocirc/ho-circ-2008-028.htm>
  - i) The Co-ordinating Police Protocol between the MOD Police and Police Scotland)  
<https://www2.gov.scot/Topics/Justice/policies/police-fire-rescue/police-scotland/Circulars/2002/Circular-13>
  - j) Code for Crown Prosecutors (England & Wales)  
<https://www.cps.gov.uk/publication/code-crown-prosecutors>
  - k) The Crown Office and Procurator Fiscal Service Prosecution Code (Scotland)  
[https://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Prosecution20Code20\\_Final20180412\\_1.pdf](https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf)

- l) Memorandum of Understanding between the Chief Coroner and HSE  
<https://www.judiciary.uk/wp-content/uploads/2019/08/MoU-The-Health-Safety-Executive-21.05.2019.pdf>
- m) Cabinet Office PIN 45: Procedures for enforcing health and Safety requirements in crown bodies (Censure and Crown enforcement notices)  
[http://www.hse.gov.uk/foi/internalops/sims/pub\\_serv/7\\_01\\_34/7\\_01\\_34a.pdf](http://www.hse.gov.uk/foi/internalops/sims/pub_serv/7_01_34/7_01_34a.pdf)

## INSPECTION

- 17. HSE engages with employers on a routine basis by conducting inspections of work activities. Planned inspections form part of HSE's intervention plans; reactive inspections may be conducted in response to an event (see also investigation). Themed inspections may seek information on a specific topic. More detailed arrangements for inspections and access are given in Annex A.

## INVESTIGATION

- 18. HSE Inspectors have powers to investigate incidents and cases of ill health which meet HSE's Incident Selection Criteria (see link below) and concerns raised with HSE. More detailed arrangements for investigations are given in Annex A.  
<https://www.hse.gov.uk/enforce/incidselcrits.pdf>
- 19. In the case of a work-related fatality, HSE's investigation will follow the procedure set out in the relevant Work-Related Deaths Protocol. There will usually be a joint civil police / HSE investigation, with the police having the initial primacy. Further details are given in Annex A

**Prior to commencing any investigation or other matter within the incident selection criteria relating to MOD, HSE Inspectors will contact HSE's Defence and Public Protection Team for further information.**

## ENFORCEMENT

- 20. HSE Inspectors act in accordance with HSE's Enforcement Policy Statement and the Code for Crown Prosecutors. This can result in verbal advice, letters which include a Notification of Contravention, and the issuing of Improvement or Prohibition Notices. (In the case of Crown bodies these are served as Crown Notices.)

**N.B: When any communication as listed in paragraph 20 is sent from HSE to any local unit/team/branch of MOD, copies will also be sent electronically to; [REDACTED] and to [REDACTED] marked for the 'Attention of the Defence and Public Protection Team'**

- 21. Crown bodies are immune from prosecution for offences under HSWA, but national administrative arrangements enable HSE to impose a Crown Censure for a contravention that would otherwise have led to prosecution in a criminal court. When considering enforcement, HSE's decisions are informed by public interest factors in accordance with its Enforcement Policy Statement and the Code for Crown Prosecutors
- 22. HSE Inspectors who propose to invoke procedures for either a Crown Notice or a Crown Censure will inform HSE Public Services Sector Defence and Public Protection Team who will further advise.
- 23. HSWA also places duties on individuals as both employees and in any management, role discharged on behalf of the employer. Where an offence is considered to have been

committed with the consent or connivance of, or is attributable to, any neglect on the part of a person in a management role, then that person can be prosecuted under HSWA. Individual Crown servants are not immune from such prosecutions. However, in accordance with its Enforcement Policy, HSE will not prosecute an individual Crown servant simply because the employer cannot be prosecuted.

**NB: It should be noted that Contractors working under the direction of MOD do not enjoy Crown Immunity or MOD Exemptions and therefore may be liable to enforcement up to and including prosecution. Depending on the level of direction and supervision by the MOD, the MOD may also be culpable.**

## **FEE FOR INTERVENTION (FFI)**

24. Under the Health and Safety and Nuclear (Fees) Regulations 2016\*\*, HSE will recover the costs of its regulatory work from dutyholders, including Crown bodies, that are found to be in material breach of health and safety law up to point of approval. Thereafter, FFI is not recoverable from Crown bodies nor are prosecution costs. (See Annex A for further detail.)

**\*\* There are Regulations relating to fee for intervention that will come into law in April 2021, they contain changes that will allow for HSE to recover costs for Crown Censures after the point of approval\*\***

## **INFORMATION, SECURITY, AND DISCLOSURE**

**25. Where HSE Inspectors carry out inspections or investigations at sites where an additional level of enhanced security clearance is required, they should immediately contact HSE's Defence and Public Protection Team for advice.**

26. In conducting their duties HSE Inspectors may need to have access to classified information. HSE will ensure that its staff have the appropriate level of security clearance and will make arrangements to handle classified information.

27. HSE is required by section 28(8) of HSWA to provide information to employees and their representatives about matters affecting their safety, health and welfare at work. In discharging this duty, HSE will only provide information to the named safety representative or trades' union official directly associated with the matter and who has the requisite security clearance. In the case of the Armed Forces, HSE will give the information to the Commanding Officer who receives it on behalf of the Service personnel under their control.

28. Information held by HSE about Defence activities is subject to the provisions of the Freedom of Information Act 2000 (FOI Act). If HSE receives a request under the FOI Act, then the decision on disclosure is the responsibility of HSE, as the information holder, but HSE undertakes to seek and take into account representations from MOD (particularly in respect of information originating from MOD) to assist its decision-making process. Where, following consultation with MOD, HSE decides to disclose MOD information, or, where disclosure occurs inadvertently without MOD consultation, HSE will notify MOD as soon as possible. Decisions on disclosure will be taken in accordance with FOI provisions and legal advice may be sought.

## **LIAISON ARRANGEMENTS**

29. Liaison arrangements described under this section operate in addition to the interaction between HSE Inspectors and those in MOD whom they regulate; they do not constrain the discharge of HSE's responsibilities as a regulator of defence activities.

30. Strategic level liaison will take place between MOD and HSE Public Services Sector and this will include an Annual Meeting to include as a minimum:
- a. From MoD, the Director General DSA and Director HS&EP
  - b. From HSE, the Director of Regulation and Head of the Public Services Sector, Defence and Public Protection Team
31. Local interactions will take place between relevant HSE operational divisions with assistance/ guidance where required from Public Services Sector, Defence and Public Protection Team.

## HSE ORGANISATION

32. HSE is organised into Divisions to deliver regulation for both general health and safety at work and in specific high hazard domains which typically operate permissioning regimes:
- a. **Field Operations Directorate (FOD)** – the largest operational division in HSE, responsible for regulating the risks to health and safety for many employment sectors including agriculture, general manufacturing, engineering, food and drink, quarries, entertainment, docks, domestic gas, education, health services, local and central government and domestic gas safety
  - b. **Building Safety and Construction Division** – responsible for regulating the risks to health and safety for the construction industry, including new build, refurbishment, demolition, groundworks, asbestos removal.
  - c. **Chemicals, Explosives and Microbiological Hazards Division (CEMHD)** responsible for:
    - Chemical Industry – regulating onshore major hazard chemical manufacture and downstream oil refining.
    - Explosives – Regulating the manufacture, large-scale storage and transportation of explosives throughout GB and Northern Ireland (in support of the Northern Ireland Office), as well as large-scale ammonium nitrate storage in GB.
    - Biological Agents – regulating work with biological agents across several sectors, including biotechnology and biomedical research, industrial vaccine and pharmaceutical production, healthcare, agriculture and food. The Unit also has national inspection and enforcement responsibilities for containment, research and commercial laboratories, infectious disease units and all work connected with genetically modified organisms.
  - d. **Energy Division (ED)** responsible for:
    - Offshore Industry – regulating work activity in the offshore industry on the UK Continental Shelf. Includes responsibility for diving activities across Great Britain.
    - Gas and Pipelines – regulating the natural gas supply industry and industries transporting hazardous substances by pipeline. A separate agreement addresses the safety of petroleum forecourts, domestic gas and supply with Principal Local Authorities.
    - Mines – regulating underground mines, the mines rescue service and cableways in Great Britain. It also inspects mines in Northern Ireland, under an agency agreement
  - e. **Chemicals Regulations Division (CRD)** - responsible for:
    - The regulation of biocides, pesticides, detergents, chemicals covered by REACH, and for compliance with the Classification, Labelling and Packaging (CLP) Regulation.

33. This Agreement will be reviewed jointly by MOD and HSE when both parties agree a review is necessary or, at a minimum, every five years.
34. The Annexes to this Agreement provide specific additional detail; with the exception of Annex A, they are presented on a domain basis. The Annexes may be reviewed independently (at minimum every five years) and the Agreement and Annexes may be updated at different times.

Annex A: The arrangements for inspection, investigation and enforcement by HSE Inspectors

Annex B: General Arrangements for Inspection, Investigation and Enforcement by HSE Inspectors

- Appendix 1: HSE and the Defence Accident Investigation Branch (DAIB)
- Appendix 2: HSE and the Military Aviation Authority (MAA)
- Appendix 3: Arrangements for inspection of HM ships, submarines, and auxiliaries
- Appendix 4: Military diving – regulations, inspection, and training
- Appendix 5: Enforcement of general fire safety legislation
- Appendix 6: Special arrangements for particularly sensitive activities
- Appendix 7: Arrangements for Inspection of Explosive related activity

## LINKED AGREEMENTS

35. A separate Memorandum of Agreement sets out arrangements in respect of United States Forces' observance of health and safety at work legislation in Great Britain.  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/262445/201107619-USF-MOD-HSE\\_MOA\\_Revision\\_FINAL-U.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262445/201107619-USF-MOD-HSE_MOA_Revision_FINAL-U.pdf)

A separate Memorandum of Understanding sets out the arrangements for nuclear inspection with the Office of the Nuclear Regulator  
<https://www.hse.gov.uk/aboutus/howwework/framework/mou/agencies-seveso.pdf>

A separate Memorandum of Understanding sets out the arrangements for inspection of Merchant Ships, ports and Government Auxiliaries with the Maritime and Coastguard Agency and the Maritime Accident Investigation Branch  
<https://www.hse.gov.uk/aboutus/howwework/framework/mou/mcamou.pdf>

## **ANNEX A - GENERAL ARRANGEMENTS FOR INSPECTION, INVESTIGATION AND ENFORCEMENT BY HSE INSPECTORS in GB**

1. These arrangements recognise the statutory right of HSE Inspectors (outlined in Paragraph 12-23 of the General Agreement) to conduct inspections, investigations or enforcement; and its commitment to do so in such a way as not to compromise national security and defence operations (Paragraphs 25-28 General Agreement).

**Reminder: HSE Inspectors should note that they may be asked to carry out inspections or investigations at incidents or sites where an additional level of enhanced security clearance is required – In these circumstances they should immediately contact HSE's Defence and Public Protection Team for advice.**

### **INSPECTION**

2. MOD Establishments may be inspected as part of HSE's inspection programme and these inspections will generally be topic based. Inspections can vary from a half day visit by a single Inspector to a team inspection over several days. HSE Inspectors should contact HSE's Defence and Public Protection Team before carrying out any proposed inspection, this can be done by telephone or by e-mail to: [REDACTED] **marked for the 'Attention of the Defence and Public Protection Team'**
3. Whilst HSE Inspectors have the statutory right to visit MOD establishments without prior notification, they will normally liaise with the Commanding Officer (CO) or Head of Establishment (HoE) to make arrangements for the inspection - including Her Majesty's (HM) ships, submarines or auxiliaries within those establishments. HSE Inspectors may inspect military training areas, establishments and units when training is being undertaken.
4. HSE Inspectors will expect the CO/HoE to provide information and as necessary an escort to minimise personal risks during the inspection and to indicate any information, areas or activities requiring specific security clearances. A safety briefing will also be provided at the discretion of the CO/HoE on a risk-based assessment.

### **Inspection of Contractors on MOD Premises**

5. The arrangements for planned inspections will also apply to inspections/investigations by an HSE Inspector to contractors working for the MOD, where access to the contractor is via MOD's premises.
6. For visits to a contractor working under the direction of MOD who has separate, controlled access onto the MOD premises, the HSE will arrange for access directly with the contractor.

### **Inspection of Visiting Forces**

7. Specific access and management arrangements apply to United States Visiting Forces on MOD premises. These arrangements are set out in a separate Memorandum of Agreement [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/262445/201107619-USF-MOD-HSE\\_MOA\\_Revision\\_FINAL-U.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262445/201107619-USF-MOD-HSE_MOA_Revision_FINAL-U.pdf)

## INCIDENTS AND INVESTIGATIONS

**Investigation** - Prior to commencing any investigation relating to MOD, HSE Inspectors will contact Defence and Public Protection Team for further information and advice, this can be done by telephone or by e-mail to [REDACTED] marked for the 'Attention of the Defence and Public Protection Team' See paragraph 17 for further information relating to incidents resulting in a fatality.

### Purpose of Investigation

8. The investigation will endeavour to determine:
  - a) The cause or causes of the incident or concern.
  - b) If there has been a breach of the law
  - c) Whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the law.
  - d) What response is appropriate to the relevant breach(es)
  - e) What lessons can be learned from the incident and how these can be used to influence the law and guidance.
9. HSE's primary focus will be to determine whether there have been organisational or systemic failures, although the duties of individuals will also be considered where appropriate.
10. On receipt of information that meets HSE's Incident Selection Criteria, an HSE Inspector will contact the CO/HoE to make arrangements to carry out an investigation. If there has been a fatality/potential fatality, if significant publicity is likely or if enforcement is likely the nominated inspector will inform HSE's Defence and Public Protection Team in liaison with the relevant command Safety Director and their Chief Environmental & Safety Officer (CESO).
11. During the early stages of an investigation an HSE Inspector may exercise their powers under section 20 of HSWA (as detailed in Paragraph 14(a) of the General Agreement) to require the incident scene to be left undisturbed to preserve evidence.
12. HSE has primacy in non-fatal incidents and dangerous occurrences but recognises that an investigation may also be conducted by the relevant Service Police Force (SPF) into possible offences under Service law. (See '*Liaison with other Investigators on Work Related Fatalities for information on fatal accidents.*)

**N.B:** When any communication as listed in paragraph 20 (letters -including a Notice of Contravention, and/or the issuing of Crown Improvement or Crown Prohibition Notices) of the General Agreement main document is sent from HSE to any local unit/team/branch of MOD copies will also be sent electronically to:

[REDACTED] and to [REDACTED] marked for the 'Attention of the Defence and Public Protection Team'

## **Assistance from MOD**

13. HSE Inspectors may exercise their statutory powers under section 20 HSWA to carry out an investigation. For example, by examining the scene for relevant evidence, taking possession of evidence and identifying and taking statements from potential witnesses. The CO/HoE is expected to facilitate this process, supported by their CESO.
14. If evidence emerges that an individual or individuals have committed a health and safety at work offence or offences, HSE will invite the relevant person to an interview under caution in accordance with the Police and Criminal Evidence Act 1984 (PACE).
15. The CO/HoE will assist HSE Inspectors with information about the chain of command or management responsibilities relating to the circumstances of the incident. If the line of enquiry leads to another chain of command or management within MOD, HSE Inspectors may need to liaise with the other relevant parties to facilitate access to that chain of command.
16. Any issues that cannot be resolved should be referred by Inspectors to Defence and Public Protection team who will liaise with the Director HS&EP in the MOD to seek resolution.

## **HSE Investigations, Service Inquiries and Unit Investigations**

17. After a military incident resulting in a fatality or serious injury, HSE recognises the MOD are likely to commission an internal investigation., This may take the form of a Unit Investigation and/or a Service Inquiry (SIs). Service Inquiries are convened by DG DSA under the Armed Forces (Service Inquiries) Regulations 2008. A SI's purpose is to ascertain the cause of an incident/accident with a view to preventing reoccurrence. On occasions, a formal SI may not be necessary; however, a non-statutory inquiry may be considered prudent by the military chain of command. Investigations relating to a SI are undertaken by the Defence Accident Investigation Branch (DAIB) - information on DAIB can be found in Paragraph 9 of the General Agreement. *(Also refer to Annex B Appendix 1 - A protocol for co-operative working between HSE and DAIB - being finalised)*

**Where a military incident results in a fatality the HSE Inspector will contact HSE's Defence and Public Protection Team on commencing the investigation to seek further information and advice.**

18. HSE Inspectors should enquire if a SI is to be held, whether it is statutory or non-statutory and can ask for any SI documentation to identify any further lines of enquiry. However, in the first instance Inspectors should contact HSE's, Defence and Public Protection Team to facilitate this.
19. A full copy of the SI report with operational and national security sensitive information redacted where necessary will be provided to HSE if requested. The SI report cannot be quoted from or admitted into evidence. If HSE are required to by operation of law, such as a CPIA *(where a prosecution is approved against a non-Crown body in relation to the same incident HSE may be obliged to disclose)* or Court Order, HSE will ensure that MOD are put on notice where such disclosure may be necessary.

20. MOD Safety Investigations are not afforded legal protection preventing disclosure of evidence and HSE has a duty to pursue all lines of enquiry. This may lead to requests to disclose material sitting behind these internal safety investigations. For example - note this is not an exhaustive list;
- a) Records – vehicle, maintenance, training etc.,
  - b) Risk Assessments
  - c) Safe Systems of Work,
  - d) Technical reports,
  - e) Physical evidence – for example a piece of kit, machinery, vehicle etc.,
  - f) Photographs/video footage
21. The witness accounts taken during MOD safety investigations and SIs do not have any of the safeguards afforded to statements taken by HSE and cannot legally be used during any civil or criminal proceedings. This encourages witnesses to be open and honest with the information they provide. MOD is therefore reluctant to provide copies of these accounts to external investigations fearing that to do so would deter witnesses from providing candid information and may have a negative effect on future SIs and improving the MODs overall safety culture.
22. Accounts provided by individuals for a SI or safety investigation cannot be used against them by HSE in any subsequent prosecution but may be used to identify further lines of enquiry. HSE Inspectors may subsequently obtain voluntary witness statements taken under Section 9 of the Criminal Justice Act 1967 (Section 9 Statements) or Compelled statements taken under section 20(2)(j) HSWA (or interview individuals under caution) as appropriate in order to obtain evidence.
23. Where an individual appears to incriminate themselves whilst giving a statement to HSE, the statement will be halted, and any further interview will take place under the Police and Criminal Evidence Act 1984 (PACE). If an SI account disclosed to HSE appears to incriminate that individual, that individual will be afforded the protection of an interview under PACE.
24. HSE Inspectors, have a duty under Section 67(9) of PACE to have regard to the provisions of the Codes of Practice. In the circumstances of Paragraph 24 all individuals will be treated in accordance with PACE, especially Code C (Requirements for the detention, treatment and questioning of suspects) and Code E (Audio recording interviews with suspects).
- 25. If HSE Inspectors investigating an incident are considering requesting the disclosure of witness accounts taken in any internal MOD investigation or inquiry they must contact the Defence and Public Protection Team, before any such request is made.**
- NB: Any decision to request disclosure should weigh the benefits of disclosure to the HSE with the potential effect on the MOD's safety culture and future openness of Defence witnesses to Service Inquiries.**
- 26. Regular contact with the Defence and Public Protection Team should be maintained throughout any investigation to allow them to provide ongoing support, advice and information and to facilitate constructive liaison with MOD centrally**

## **Liaison with Other Investigators on Work Related Fatalities**

27. In the case of a work-related fatality, HSE will follow the procedures set out in the relevant Work-related Death Protocol (WRDP) in support of the Civil Police. Normally there will be a joint Civil Police/HSE investigation with the Civil Police having initial primacy.
28. HSE is not the enforcing authority for homicide offences, corporate manslaughter (for which the MOD do not enjoy Crown immunity) or gross negligence manslaughter but will provide support to the Civil Police in line with liaison arrangements set down in the WRDP.
29. In the case of a work-related death the Police will initially have primacy and will be supported by HSE, where the Civil Police or Prosecuting Authority decide not to pursue a homicide offence, corporate manslaughter or gross negligence manslaughter then primacy will pass to HSE.
30. HSE Inspectors may need to liaise with investigators from other regulators or statutory bodies in a manner described in memorandums or agreements with those organisations.

## **CROWN ENFORCEMENT**

31. Crown Enforcement Notices are the non-statutory equivalent of Improvement or Prohibition Notices. The circumstances in which these notices can be used are set out in sections 21 and 22 of HSWA and the application of the criteria to Crown Enforcement Notices is explained at paragraphs 30 to 35 of this annex.
32. A Crown Enforcement Notice is not legally binding, and the Crown body cannot be prosecuted for failing to comply with or breaching a Crown Enforcement Notice, although it may receive a Crown Censure for non-compliance (see paragraphs 36-62 for more information on Censures). A Crown Enforcement Notice will normally be served on the Department via the responsible Commanding Officer (CO) or Head of Establishment (HoE), or a suitable officer of higher rank. In addition to the information in this annex HSE Inspectors will take account of Cabinet Office Personnel Information Note 45.
33. Information about Crown Enforcement Notices is published in the HSE's Public Register of Enforcement Notices database. HSE normally publish information from the front page of the Notice in question, but the whole Notice may be subject to release under Freedom of Information (FOI). Redactions in accordance with Freedom of Information Act exemptions before a Notice is released.
34. If the recipient of the Crown Enforcement Notice or their command / management chain considers that there are grounds to challenge it, appeal is made in the first instance to the HSE Inspector's line manager escalating as necessary and appropriate up to HSE's Chief Executive.
35. The recipient may request an extension of time in which to comply with the Notice by contacting the HSE Inspector who served the Enforcement Notice.

## **Crown Improvement Notice**

36. Where an HSE Inspector is of the opinion that a Crown-controlled Defence activity is contravening (or has contravened) one or more regulatory statutory provisions in circumstances that make it likely that the contravention will continue or be repeated, a Crown Improvement Notice may be served.
37. If an HSE Inspector intends to issue a Crown Improvement Notice, the Inspector will discuss the notice with the CO / HoE and, if possible, resolve points of difference before serving it.
38. The Crown Improvement Notice should:
  - a) Specify the statute / provision(s) in question.
  - b) State that the Inspector is of the opinion that there is a contravention (para 8).
  - c) Give particulars of the reasons why the Inspector is of that opinion.
  - d) Require the Commanding Officer or manager to remedy the contravention or the matters occasioning it.
  - e) Specify the period for compliance, which should be not less than 21 days from the date of service of the notice.

## **Crown Prohibition Notice**

39. Where an HSE Inspector is of the opinion that a Crown-controlled Defence activity, to which relevant statutory provisions apply, is being (or is likely to be) carried on and should be stopped because it involves (or will involve) a risk of serious personal injury, a Crown Prohibition Notice may be served.
40. The Crown Prohibition Notice should:
  - a) State that the Inspector is of the opinion that there is a relevant risk.
  - b) Specify the matters that, in the Inspector's opinion give, or will give, rise to the risk.
  - c) Where applicable specify the contravention of any regulatory statutory provisions that in the Inspector's opinion have taken place and give reasons for that opinion.
  - d) Direct that the activity should not be carried on by or under the control of the person on whom the notice is served until the matters giving rise to the Inspector's opinion have been remedied.
41. The requirement in the Crown Prohibition Notice that an activity should cease until specified matters have been remedied may either take effect immediately or be deferred until the end of a specified period. However, such a deferment would not occur in circumstances where immediate action is required to control the risk of serious personal injury. A deferred Crown Prohibition Notice would only be issued where stopping the activity immediately would introduce additional risks (e.g. where it would be dangerous to interrupt a process in mid cycle).

## **Crown Censure and the HSE's Enforcement Management Model (EMM)**

42. A Crown Censure is an administrative procedure to formally record the decision by HSE that the evidence of a Crown body's (in this case the Ministry of Defence) failure to comply with health and safety at work legislation would have been sufficient to provide a realistic prospect of conviction in the courts and, but for Crown Immunity, a prosecution would be appropriate.
43. Effective crown enforcement procedures are vital to maintain employee and public confidence in the health and safety at work regulation of Crown bodies.
44. Censures are not prosecutions, but rules relating to admissibility of evidence still apply to the investigation and the evidence gathered must be robust and adequate to demonstrate a breach(es) of health and safety law.
45. The usual HSE Approvals process will be followed including application of the evidential and public interest test for prosecution.
46. The HSE Inspector will notify the relevant CO/HoE in writing, of the identified breaches of legislation that may lead to a possible Crown Censure and set out the facts of the alleged breach(es) in the form of a Case Summary
47. At this point the HSE Inspector will request that the MOD accepts three points for the possible recording of a Crown Censure, these being
  - a) That MOD accepts that there has been a breach of the stated health and safety at work law;
  - b) That had the MOD not been part of the Crown, MOD would have been prosecuted;
  - c) That there would have been a reasonable likelihood of a conviction in the courts.
48. The CO/HoE will notify the relevant Top-Level Budget Holder Chief Environment and Safety Officer (TLB CESO) and the TLB Holder or Chief Executive.
49. The HSE Inspector will hold an informal meeting with the relevant MOD personnel prior to a formal Crown Censure hearing. At the meeting the MOD will be given the opportunity to evaluate the evidence provided by HSE and accept or challenge the basis of the Crown Censure.
50. The TLB CESO will normally advise the Senior Staff in the TLB and the TLB CESO will respond in writing to HSE on their behalf. *N.B. There is no interview under caution as the protection provided under a cautioned interview is redundant due to Crown Immunity*
51. If MOD wishes to dispute some or all, of the HSE's allegations or the facts, then the CESO and the HSE Inspector will attempt to resolve them – which may require a further meeting.

*Note: While PIN 45 states that HSE are not obliged to enter into further correspondence/communication with the Crown body after submitting the case summary but both HSE and the MOD have agreed that it is desirable to resolve any censure evidence or censure process prior to actual censure proceedings as this is an efficient and effective way of working*

52. If the issues cannot be resolved and the MOD declines to accept the Crown Censure, written representations will be made by the MOD to the relevant HSE Head of Division. If HSE remains confident that a decision to prosecute would have been justified, HSE's

Chief Executive will write to the Permanent Secretary of State for Defence seeking agreement to record the Crown Censure.

53. Once acceptance of the censure is agreed the HSE Inspector will send a letter along with a copy of the information and a summary of the evidence to MOD. The Inspector's written presentation of the facts of the case, photographs, diagrams etc. will also be provided at this stage.

### **Setting up the Crown Censure**

54. The MOD will be asked to confirm a mutually convenient time/date for the Crown Censure hearing. Statements are to be exchanged in advance of that date to provide the MOD and HSE with a clear understanding of the material to be presented to ensure that any material disagreements are resolved in advance of the hearing itself.
55. HSE is responsible for inviting the relevant Trade Union or other safety representatives to observe the Crown Censure hearing.
56. HSE and MOD recognise HSE PIN45 with regard to the attendance of members of the public. However, there is an expectation that the injured person and/or their immediate family may attend the Crown Censure unless there are exceptional circumstances. Where exceptional circumstances exist, the MOD will notify the HSE Inspector, otherwise HSE will make arrangements with those members wishing to attend.
57. All staff present at the Crown Censure should have security clearances appropriate to the level of information being discussed where public discussion of any aspects of the Crown Censure would:
- a) Harm national security or Defence operations; or
  - b) Refer to information that relates to an individual (in accordance with data protection and work-related death protocols with police etc. unless the individual has explicitly consented to the information being disclosed); or
  - c) Any other circumstances where there is a prohibition on the disclosure of information (e.g. enactment, rule of law or non-statutory code, information restricted by special access programmes with allies)
58. Subject to these same provisos, a copy of the information provided by the HSE is given to observers.

### **The Crown Censure Hearing**

59. Crown Censure hearings are normally held at the HSE office closest to the location of the incident, but those involving MOD may, subject to agreement with the HSE, be held at MOD's Main Building, London.
60. The hearing is generally chaired by the relevant HSE Director or someone nominated by them. Other HSE attendees include an official to minute the Crown Censure, the investigating Inspector who presents the agreed facts, and a representative of the, Defence and Public Protection team. Although not required, it may also be appropriate for a member of HSE's Legal Adviser's Office to be present.
61. The TLB Holder receiving the Crown Censure attends with supporting staff as appropriate.

62. At the Crown Censure hearing the Chair introduces the background and purpose of the Censure Hearing and should outline why the Crown Censure was warranted. No witnesses are called, and no legal representation is required.
63. The investigating Inspector is then invited to present the facts. The Inspector's presentation will include appropriate reference to any Victim Personal Statement. The presentation may include photographs and/or diagrams, and these should be provided in digital form to view on screen and should be agreed beforehand with the MOD.
64. On completion of the HSE presentation, the Chair invites the TLB Holder receiving the Crown Censure to:
  - a) Acknowledge the identified failings;
  - b) Acknowledge the breaches of legislation;
  - c) Make mitigating remarks;
  - d) Summarise the corrective actions that have been taken to remedy the circumstances leading to the breach; and
  - e) Acknowledge that if not for Crown Immunity the matter would provide a realistic prospect of conviction in the Courts.
65. The Chair then concludes the hearing by formally recording that were it not for Crown Immunity the matter would provide a realistic prospect of conviction in the courts.
66. HSE provides an agreed note of the Crown Censure. The person receiving the Censure advises the Secretary of State for Defence, having consulted HSE on the submission. A record of the Crown Censure is then entered onto HSE's enforcement database and the DSA's Enforcement database.
67. HSE may release a press notice outlining the circumstances of the Crown Censure.
68. The CESO ensures that any lessons learnt from the investigation are appropriately communicated throughout MOD.

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

69. Under the Health and Safety and Nuclear (Fees) Regulations 2016\*\*, HSE will recover the costs of its regulatory work from duty-holders, including Crown bodies that are found to be in material breach of health and safety at work law.

**\*\* There are Regulations relating to fee for intervention that will come into law in April 2021, they contain changes that will allow for HSE to recover costs for Crown Censures after the point of approval\*\***

70. Any HSE interventions that result in an HSE Inspector identifying material breaches of legislation will attract costs under the Health and Safety (Fees) Regulations 2012 (but see paras. 71 -77 below). The time that HSE spends on a matter, including anything from visiting premises to drafting letters, making phone calls or engaging experts to assist with investigations, is chargeable at an hourly rate.
71. The invoice for HSE work under FFI is sent out centrally by HSE to the CO / HoE where the material breach was identified, and it is for the CO / HoE to determine who pays the invoice to HSE.

72. A material breach is when, in the opinion of an HSE inspector, there is or has been a contravention of health and safety law that requires them to issue notice in writing of that opinion to the duty-holder
73. Written notification from an HSE inspector may be by any of the following - a notification of Contravention letter, a Crown improvement or prohibition notice, or Crown Censure - and will include the following information:
- the law that the inspector's opinion relates to;
  - the reasons for their opinion;
  - notification that a fee is payable to HSE.
74. Where the material breach is identified during a visit, costs for the whole visit are recoverable, from the point of entry at the site to the point of leaving. Where the material breach is identified during an investigation the costs for the whole of the investigation are recoverable.
75. The fee is payable until any investigation or enforcement action in relation to the material breach has been concluded. In relation to Crown bodies, the fee is payable up to the point where HSE formally notifies the Crown body that it would have begun a criminal prosecution against them, had it not been a Crown body\*\*.
76. FFI charges cease or do not apply:
- a. when the contravention(s) have been resolved to the satisfaction of an HSE Inspector;
  - or
  - b. after HSE has formally notified the MOD that it intends to take Crown Censure proceedings\*\*;
  - or
  - c. where another fee is already payable.
77. There are circumstances under which HSE will not recover its costs under FFI where the material breach relates only to any of the laws listed in Appendix 1 in HSE Publication '*Guidance on the application of Fee for Intervention (FFI)*' HSE 47 because these laws are not made under the Health and Safety at Work etc Act 1974<sup>2</sup>.

**\*\* There are Regulations relating to fee for intervention that will come into law in April 2021, they contain changes that will allow for HSE to recover costs for Crown Censures after the point of approval**

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<sup>2</sup> See page 10 of HSE 47 for a full list