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Police Investigations &
Review Commissioner

HSE

A PROTOCOL FOR LIAISON

Investigation of deaths or serious injury of police officers at work or members of the public following contact with the police

INTRODUCTION

This protocol has been agreed by the Health and Safety Executive (HSE) and the Police Investigations and Review Commissioner (PIRC). The protocol addresses the working arrangements for liaison in the event of a serious injury to, or death of, a police officer at work or a member of the public following contact with the police (including when in police custody). It is not intended to cover the operational practices of either organisation.

HSE and PIRC have different roles and responsibilities in relation to deaths or serious injury of persons in police custody or following contact with the police, and those employed by the police.

Where there is an allegation of criminality or where there has been a sudden, suspicious or unexpected death, it is the role of the Crown Office and Procurator Fiscal Service (COPFS) to investigate the matter. Under the terms of the Police and Fire Reform (Scotland) Act 2013 (the "Act"), COPFS may direct the PIRC to carry out an investigation

After an initial assessment, COPFS may conclude that there is no need to direct the PIRC to conduct an investigation. However, the Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013 (the "Regulations") require the Chief Constable to request that the PIRC investigates any "serious incident" involving the police. A serious incident is defined as a circumstance in which a person has died or has sustained injury and the person had at, or before the time or death or serious injury:

- had contact directly or indirectly with a person serving with the police, and
- there is an indication that contact with the police may have caused (directly or indirectly) or contributed to the death or serious injury.

(Appendix 1 provides information on exclusions from this definition)

If the PIRC is carrying out an investigation into a serious incident that is not under the direction of COPFS and information comes to light that suggests that a criminal offence may have occurred, it will immediately notify COPFS and await instruction.

HSE is responsible, under Section 18 of the Health and Safety at Work etc Act 1974 ("the HSW Act"), for making adequate arrangements for the enforcement of health and safety legislation with a view to securing the health, safety and welfare of workers and protecting others, principally the public. HSE investigates work-related fatal and other injuries that come to its attention via statutory reporting or other sources of information. A decision to investigate is taken according to HSE's published selection criteria and, in the event of death or injury to a member of the public, also according to its guidance on HSW Act Section 3. Appendix 2 provides more detail. Decisions on whether to prosecute health and safety offences, whether or not a fatality has occurred, are made by COPFS. When other offences may also have been committed, in the event of a death, HSE conducts investigations with the police under the Work-Related Deaths Protocol Scotland.

In the case of death or serious injury arising from their work, the police, in addition to referring the matter to the PIRC, may report the matter to HSE to meet their obligations under the HSW Act. In addition, HSE may be informed of a death by COPFS. Although COPFS has no authority to direct HSE, the Executive will assist COPFS and PIRC where it has the skills, competencies and resources to do so.

Liaison

The PIRC agrees that where it becomes aware, during the course of an investigation into a serious incident, of matters that may represent a breach of the HSW Act and health and safety regulations , the Commissioner will make both COPFS and HSE aware of these matters at the earliest opportunity.

Management of Joint investigations

Where the signatory organisations agree to carry out joint investigations, they will always manage these professionally, continually maintaining communications. They will agree which party will take the lead or take account of the authority or guidance of the Procurator Fiscal, as appropriate.

The organisations will keep the progress of the investigation under review, agree and monitor timescales and milestones, and record key decisions.

The organisations, in discussion with COPFS or, on their instruction to the PIRC where appropriate, will agree on:

- which organisation will take the lead role,
- how the organisations will use resources,
- how they will share evidence,
- how they will interview witnesses,
- how they will instruct experts and co-ordinate the forensic examination of productions ,
- how, and to what extent, they should investigate corporate or organisational failures,
- a strategy for keeping the bereaved, witnesses, and other interested parties informed of developments in the investigation,
- a media strategy to take account of the sensitivities of the bereaved and those involved in the incident, and to encourage consistency of approach in reporting,
- whether general warnings need to be given to the police service or policing body if the investigation reveals risks which may not be generally understood. The wording of such general warnings will need to be agreed with the Procurator Fiscal to minimise jeopardising any later proceedings.

In certain large-scale investigations it may be beneficial to form a strategic liaison group to ensure effective inter-organisational communication, and to share relevant information and experiences.

Disclosure of material

Disclosure of information by HSE to PIRC or *vice versa* must always follow the established law and procedure.

Section 46(1) of the Police, Public Order and Criminal Justice (Scotland) Act 2006 provides that information obtained by PIRC in connection with its functions may be disclosed by PIRC to any public body or office holder in the UK (or beyond):

(a) for any purpose connected with the carrying out of any of PIRC's functions; or
(b) for the purpose of enabling or assisting the public body or office-holder to carry out any function.

In terms of section 46(2) information disclosed by the PIRC under section 46 must not be further disclosed (i.e. by the recipient body) except for a purpose connected with any function of that body; and with the consent of PIRC.

In terms of section 46(5) a disclosure made under section 46 does not breach:

(a) any obligation of confidence owed by the person making the disclosure; or
(b) any other restriction on the disclosure of information (however imposed).

Section 46(6) (inserted by the 2012 Act) makes clear that none of the above requires or authorises the disclosure of information relating to a particular investigation carried out by the Commissioner under the direction of a prosecutor.

As PIRC is not an enforcing authority within the meaning of HSW Act Section 28, in most cases, the legal gateway for HSE sharing information with the PIRC will be the Freedom of Information Act and the Freedom of Information (Scotland) Act subject to the provisions of the Data Protection Act (DPA).

Both organisations have statutory functions which meet the exemption in DPA Section 29 and conditions in Schedules 2 and 3 of the Data Protection Act. This means where they are data controllers HSE and PIRC are exempt from the first principle of data protection as they process data necessary for administering justice, or for exercising statutory, governmental, or other public functions; and, if the information to be shared is for the purposes of the detection and prevention of crime or the apprehension or prosecution of offenders.

Requests for disclosure outwith the signatories would normally be denied under the exemptions of the FoI Act relating to on-going criminal investigations.

Signatories will agree responsibility for retaining the productions, documents and other relevant material.

Review

The signatories will review this protocol annually to ensure both organisations are working within the agreed framework, and consider whether the framework needs to be revised to meet changing circumstances.

Signed .....

Police Investigations & Review Commissioner for Scotland

Date..... 23 June 2014

Signed .....

~~*Chief Executive*~~, *Health and Safety Executive*, Acting Head of Scotland & Northern England

Date..... 4 July 2014

Exclusions from the definition of serious incident

Section 41B(2) of the Act excludes from the definition of "serious incident":

(a) a matter which the PIRC is investigating in pursuance of section 33A(1)(b)(i) of the Act, i.e. the investigation of a criminal offence on the direction of the prosecutor; or
(b) where criminal proceedings have been brought following such an investigation by the PIRC; or
(c) a matter which is being, or has been, investigated by the PIRC under section 33A(1)(b)(ii) i.e. an investigation, on the instruction of the procurator fiscal, of a death involving a person serving with the police which the fiscal is required to investigate under section 1 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976; or
(d) a matter which is being, or has been, investigated by any other person under section 1 of the 1976 Act.

This means that:

- The PIRC may not investigate as a serious incident the death or serious injury of a police officer where the PIRC, on instructions of the appropriate prosecutor, is investigating the incident as an alleged criminal offence.
- However, should no criminal proceedings be brought following the conclusion of the investigation the PIRC must under Regulation 4(2) of the Regulations, investigate the matter of a death, and may investigate the matter of a serious injury, as a serious incident.
- Should the COPFS have instructed PIRC to investigate the death of a police officer in the course of his employment, or in circumstances in which the Lord Advocate considers it to be in the public interest to investigate the death due to its sudden or unexplained nature, the PIRC cannot conduct a separate investigation into the death as a "serious incident". This would also apply if another agency, such as the HSE, was investigating the officer's death on behalf of the Lord Advocate under section 1 of the 1976 Act.
- However, should there been no Fatal Accident Inquiry, the PIRC must, under Regulation 4(2) of the Regulations, investigate the death of the officer as a "serious incident".

Appendix 2

Selecting incidents for investigation - extract from HSE's Enforcement Policy Statement HSE41(rev1) 02/09:

In selecting which complaints or reports of incidents, injury or occupational ill health to investigate and in deciding the level of resources to be used, HSE should take account of the following factors:

- the severity and scale of potential or actual harm;
- the seriousness of any potential breach of the law;
- knowledge of the dutyholder's past health and safety performance;
- the enforcement priorities;
- the practicality of achieving results;
- the wider relevance of the event, including serious public concern.

HSE policy on protecting members of the public (HSW Act Section 3)

Section 3 of the HSW Act places general duties on employers and the self-employed towards people other than their employees.

Since the scope of section 3 is very broad, HSE has adopted this policy to help enforcing authorities exercise discretion when determining action, including selecting incidents for investigation where a breach of section 3 is suspected. It will also help HSE staff to apply the principles set out in HSE's Enforcement Policy Statement consistently, when deciding which incidents to prioritise within the resources available.

Arrangements for enforcing section 3 need to take account of HSE's published Strategy and priorities while continuing to meet the HSW Act section 18 duty to make adequate arrangements for enforcing the relevant statutory provisions.

HSE has decided that:

- enforcing section 3 in areas key to our mission (eg in major and high hazards, including the nuclear industry and construction) remains a high priority. HSE will continue to address the most serious risks to the public's health and safety from work activities, using its expertise to best effect and taking into account the regulatory responsibilities of others;
- HSE's general approach to public safety is set out in the Strategy and reflected in priority programmes and incident selection criteria; and
- HSE and other enforcing authorities will take account of HSE's priorities and, generally, give less priority to the enforcement of section 3 in areas outside these priorities.

Working with other regulators

There are many situations where work activities that may give rise to risks to health and safety are regulated by other authorities using legislation that may address circumstances which are also relevant to health and safety at work issues.

- HSE's policy, in accordance with the Regulators Compliance Code and the regulatory principles required under the Legislative and Regulatory Reform Act (2006), is to ensure that, wherever practicable, enforcement action by the health and safety enforcing authorities is effectively co-ordinated with that of other, relevant enforcing authorities to minimise unnecessary overlaps and time delays.

However, initial enquiries, or information from other sources, may indicate that a breach of section 3 was or is the probable cause of, or a significant contributory factor to, the injury or risk complained of. In such circumstances, HSE and other enforcing authorities should generally consider investigating if:

- there was or is a high level of risk; or
- enforcing authorities need to act/investigate in the interests of justice.

Deciding which authority will lead an investigation

There may be, however, a relevant health and safety interest in some aspects of a work activity covered by specific legislation. HSE seeks to agree with other authorities who should take the lead on an investigation (to avoid unnecessary overlaps and time delays) and, where there may be a need to act alongside each other, which activities are most appropriately dealt with by each authority.

HSE expects enforcing authorities to consider the following principles when deciding whether it is suitable for them to take the lead on an investigation:

- **Effectiveness**: Which authority is best equipped, including appropriate powers, to investigate the alleged risks?
- **Capability**: is the other body capable of ensuring public safety? Does it have the enforcement powers necessary to do so?
- **Health and safety expertise**: Which body knows most about the risks concerned and the effective control measures?
- **Economy**: Is either body already inspecting/visiting the premises or activity in question? Can duplicate visits be avoided?
- **Efficiency**: Is health and safety enforcing authority involvement a good use of resources when considered against the scale of risk or level of public concern?