



HM Fire Service Inspectorate Investigation following significant incidents

Introduction

1. This document sets out the policy of HM Fire Service Inspectorate (HMFSI) when a significant incident occurs involving the Scottish Fire and Rescue Service (SFRS). It covers circumstances where (i) the Inspectorate chooses to act on its own behalf following a significant incident or (ii) advice is sought by other statutory investigating bodies.
2. In this document 'significant incident' means incidents the circumstances or outcomes of which are likely to attract public interest or concern. This may include, but is not limited to, incidents in which firefighters are killed or seriously injured, and incidents where there is a suggestion that action or inaction on the part of SFRS led to (or might have made more likely) death or injury to third parties or substantial, avoidable destruction of property.
3. HMFSI has statutory power to inquire into significant incidents under s42B(1) and (3) of the *Fire (Scotland) Act 2005*, as being matters that relate to the state and efficiency of SFRS, and the manner in which SFRS is carrying out its functions. There is no duty to inquire into any matter unless Scottish Ministers so direct HM Chief Inspector. An equivalent power of direction has been exercised in the past, but only rarely. In this document 'investigation' by HMFSI means an inquiry under s42B.

Primacy of Crown Office and Procurator Fiscal Service in relation to fatalities

4. It is important to note that in any case involving a fatality – whether an SFRS member or any other person – or possible criminal proceedings, the Crown Office and Procurator Fiscal Service (COPFS) has primacy in relation to any investigation. This means that HMFSI will in every such case contact COPFS to discuss before any decision is made on whether or how HMFSI should investigate.

Is it a 'significant incident'?

5. There are a wide range of possible circumstances that might be considered a significant incident. Whether or not an incident should be treated as a significant incident is a matter of discretion for HM Chief Inspector. HMFSI may carry out some preliminary work to establish the facts of an incident before deciding whether to mount an investigation following the principles set out below.

Notification of significant incidents

6. HM Chief Inspector may become aware of a significant incident through media reports, from COPFS or the Health and Safety Executive (HSE), or direct communication from a member of SFRS or the public. Decisions about whether an incident is 'significant', and whether HMFSI should or should not investigate, should be made as soon as possible. For that reason, an MoU with SFRS will be desirable in order to provide a formal protocol for SFRS to notify HMFSI of circumstances that are or might amount to a 'significant incident'.

Should HMFSI investigate?

7. Just because a significant incident has occurred does not necessarily mean HMFSI should investigate. There are a number of other stakeholders including COPFS, Police Scotland, HSE, the SFRS itself, and trade unions, any of whom may seek to carry out their own investigation. HMFSI should, where possible, avoid duplication of investigation work being done elsewhere.

8. A decision about whether or not to investigate needs to take into account a number of variables. It is not straightforward to predict what the answer should be in any given case: but the considerations to be taken into account before making a decision will be the same. They are set out below but are not necessarily an exhaustive list. HM Chief Inspector will apply professional judgement to the decision whether or not HMFSI should conduct an investigation, over and above a consideration of the criteria below.

- The existence of a Fire Service Inspectorate leads to an expectation on the part of government and the public that the Chief Inspector will make it his business to look into matters of concern. If it is considered unnecessary to do so, perhaps because another competent body will be investigating, then a short public statement to that effect may be appropriate.
- What other bodies may be carrying out an investigation into the incident? The advantages that an HMFSI investigation can bring include:
 - A public report
 - Independence both from SFRS and government
 - Professional and technical expertise
 - Impartiality with no 'agenda' to pursue (see discussion below)
 - Purpose of investigation: COPFS or HSE investigations may not be focused upon producing a safety focussed or lessons learned report. As a result, HMFSI may be able to produce a safety-oriented 'lessons learned' report before such lessons emerged from a criminal investigation
 - A 'lessons learned' focus which does not seek to fix liability or blame, and so can consider the facts in the round without having to fit them into a context such as a prosecution brief.
- Will an investigation by another body provide substantially the same advantages as an HMFSI inquiry, with or without participation by HMFSI? For example, there may be scope for HMFSI to be involved in an internal SFRS investigation as adviser or in an oversight role, without having to duplicate the steps of that investigation itself.

- Would an investigation substantially add to inspectors' knowledge of the state and efficiency of the SFRS and therefore support the Inspectorate in undertaking its key role?
- Where a significant incident involves a fatality or possible criminal offence, the Chief Inspector will discuss with COPFS, and in appropriate cases HSE, in order to ensure that there is no conflict with COPFS or HSE interests.
- Where criminal proceedings may take place, there is a possibility that HMFSI officers will get drawn in as expert witnesses by the fact of having carried out an investigation. Although this is not of itself a reason not to investigate, it should be clearly understood that this could happen, and could involve HMFSI investigating officers being required to give opinion evidence in court.
- What are the 'real issues' from the point of view of HMFSI's statutory function? For example, whether a particular area of SFRS doctrine is working well and/or was properly applied at the incident. Could a third-party investigation address those issues equally well?
- What are the logistics of an investigation and is it proportionate for HMFSI to investigate given the expected involvement of other bodies?
- Has HMFSI got the relevant technical expertise to conduct an investigation, for example in relation to technical testing of PPE and equipment?

9. If a consideration of these factors leads the Chief Inspector to conclude that an investigation by HMFSI is proportionate in all the circumstances and may confer benefits that investigation by another body will not, HMFSI will proceed to look at the appropriate methodology to be used in the investigation. If on the other hand an HMFSI investigation does not appear to be proportionate or would not add value, a short statement to that effect on the HMFSI website may be useful to publicise the reasons for this decision.

10. The impartiality of HMFSI is referred to above as a potential benefit of investigation. There may nonetheless be perceived conflicts of interest if the circumstances of an incident relate to advice that HMFSI has given in the past to Scottish Ministers, or if HMFSI is seen to have expressed or to hold a view on relevant issues. Before commencing any investigation HMFSI will carefully consider if any such perceived conflict might exist. If so, this does not mean that HMFSI cannot or should not investigate. Instead, any investigation report should contain a clear declaration of the possible conflict, and outline the steps that have been taken to mitigate its effects. By being transparent in this way, the impact of any perceived conflict may be reduced.

Consulting Scottish Ministers

11. Scottish Ministers have the power to direct HMFSI to carry out an investigation – and every effort should be made to avoid a situation where Ministers want to direct an investigation into a set of circumstances only to find that HMFSI is already carrying out an investigation that conflicts with their wishes. That is an unlikely situation in any event, and may be avoided by consultation with the Scottish Government (SG) before an investigation is commenced. Ministers do not have the power to direct HMFSI *not* to investigate – and to do so would be inconsistent with HMFSI's independence – but of course SG's and Ministers' views need to be taken into account and given proper weight in the decision-making process.

Investigation methodology

12. The first issue to be addressed is what other bodies are carrying out inquiries into the incident. It is highly likely that SFRS will be conducting its own internal inquiry and it should be established whether COPFS, police, HSE or other bodies will be investigating – this becomes particularly important when considering evidence gathering.

13. A lead inspector will be identified who will generally be HM Chief Inspector or an Assistant Inspector. Consideration will be given to whether specialist knowledge is required by the lead inspector, for example interviewing techniques. As a general rule, HMFSI will not assign anyone to carrying out tasks such as interviewing or evidence gathering unless they have appropriate training and experience in these fields.

14. The lead inspector will prepare an Investigation Plan which will set out:

- The objectives of the investigation i.e. the anticipated end result be it a safety recommendation, testing of doctrine, or identification of a point of failure.
- What the core issues, from HMFSI's perspective, are – and conversely, what (if anything) is out of scope.
- Proposed methodology for investigation e.g. physical evidence gathering, interviewing, co-operation with another investigating body, or a 'desk-top' exercise.
- What other bodies are investigating and the identity of lead contacts in those organisations.
- A timeline for concluding the HMFSI investigation, with milestones identified for complex cases.

The investigation plan will be succinct and need not exceed one page.

Liaison with other investigating bodies

15. Once other investigating organisations have been identified, the lead inspector should make contact with them to discuss how they intend to approach the investigation and minimise the duplication of effort. Pragmatic decisions need to be taken about matters such as interviewing, and all efforts should be taken to avoid people who have been involved in a significant incident from being interviewed repeatedly. Existing protocols dealing with joint agency co-operation on significant incidents, namely *Work-related deaths: A protocol for liaison* and *Investigative Guidance: Firefighter Fatality in the Workplace*, will be relevant to the way in which these investigations are likely to proceed; and whereas HMFSI is not formally a party to these protocols, their spirit should be observed wherever possible. In particular, any HMFSI investigation should not conflict with the work of other investigating bodies and should not duplicate their work except insofar as unavoidably necessary.

Evidence gathering and interviewing

16. Where COPFS, police or HSE are investigating they are likely to be taking statements from persons involved in the incident. Efforts should be made to discover whether that evidence can be shared with HMFSI and on what terms. It may be unlikely that law enforcement bodies will be willing to share evidence but the possibility ought to be explored.

17. The provisions of 43B(4) of the Fire (Scotland) Act 2005 as amended should be considered in relation to any investigative activity being undertaken by SFRS. This provides that HMFSI can require SFRS to provide information or documents, which would on the face of it include all contemporaneous records relating to the incident, transcripts of radio traffic, logs, interview statements and the like. It would not be desirable to enter into a dispute with

SFRS as to what it can be required to provide, but nor should these powers be overlooked. SFRS may argue that statements it takes from members are privileged from production, but even if that is correct (and it may not be), that would not apply to contemporaneous logs, radio traffic and the like. In summary, it is likely that a substantial amount of the material that would be required to investigate a significant incident could be obtained from SFRS without the need to conduct interviews with participants.

18. Carrying out specific HMFSI interviews should always be seen as a last resort. There is no power to require individuals to give an interview and it needs to be made clear that interviews are given voluntarily. If interviews take place, the interviewer should have training and experience in interviewing techniques, and appropriate facilities for recording the interview and having the interviewee confirm the accuracy of the record need to be provided. HMFSI should consider approaching HM Inspector of Constabulary (HMIC) for assistance if suitably qualified people are not available on the HMFSI staff. It is expected that interviewers will be familiar with and use the PRICE model¹ for interviewing.

19. HMFSI is not bound by the rules of evidence and, subject to general legal duties of fairness, can draw inferences from the circumstances and make judgements about what is likely to have happened, based on the evidence available. Where interview evidence is withheld or not available, HMFSI can still draw conclusions about what probably happened. It will always however be important to cross-check with COPFS, and HSE in appropriate cases, before publishing a report based on assumptions of this nature, where there are or may be legal proceedings on foot involving the Crown (e.g. FAI or criminal prosecution).

Record keeping

20. It is important that comprehensive records be kept of HMFSI investigation processes and any decisions surrounding the conclusions reached. eRDM (Objective) may not be adequate as an audit trail without the creation of specific documents recording critical decision points during the process. In particular, records of any interviews carried out need to be comprehensive and agreed as accurate by the interviewee, as reference could potentially be made to them in related legal proceedings.

Secondees as investigation officers

21. Generally speaking, where an investigation is taking place that calls or could call into question SFRS practice and procedure, or the actions of individual SFRS officers, it would not be appropriate to have SFRS officers on secondment to HMFSI acting in relation to the investigation. There may, however, be scope to second staff with appropriate expertise from another UK Fire and Rescue Service, or engage such staff as consultants. Additionally, secondments from other bodies such as HMIC or the office of the Police Investigations and Review Commissioner (PIRC) should be considered, particularly where expertise in relation to investigative techniques is required.

Timescales for investigation

22. One important advantage that an HMFSI investigation may have over an investigation led by other bodies is the scope for a quick but effective process leading to an early report identifying safety-critical issues. In considering whether to carry out an HMFSI investigation or rely on investigations being carried out by other bodies, the question of timeliness should be

¹ This is the interviewing model used by Police Scotland and stands for Preparation; Rapport; Information; Confirmation; Evaluation. It is similar to the PEACE model used in England and Wales (Planning and Preparation; Engage and Explain; Account, Clarification and Challenge; Closure and Evaluation).

considered. If an HMFSI investigation is to take place, the desirability of a timely outcome should be prioritised, and the Investigation Plan should set a realistic but early date for the conclusion of HMFSI investigative activities.

23. It is legitimate in this connection for the HMFSI Investigation Plan to define a narrow scope for the HMFSI investigation, and to make it clear that the HMFSI work is directed to a particular issue or issues and is not intended as a broad overview of the circumstances surrounding the incident. That should not mean that the HMFSI investigation will fail to address root causes – indeed one of the advantages of an HMFSI investigation is the ability to look at root causes as well as proximate causes. But the HMFSI Investigation Plan can (and in many cases should) be selective about scope and may wish expressly to articulate that it does not intend to cover all possible relevant circumstances.

Natural justice and publication

24. It is an important principle that HMFSI should provide natural justice to persons involved in an investigation, quite separately from the importance of consulting COPFS and HSE before publishing anything that might prejudice ongoing proceedings. Natural justice means giving people who are expressly or impliedly criticised in a report the opportunity to comment, and where appropriate, to give them a ‘right of reply’ in a report. This does not mean that their account has to be accepted but may mean that their explanation of events should be placed on the record. Therefore, before any report is published, consideration should be given to whether anyone is criticised in the report, and if they are, they should be given an adequate opportunity to comment on that criticism.

Consultation with other bodies before publication

25. It is also important that before any HMFSI report on a significant incident is published, that other investigating bodies should be consulted and offered the opportunity to comment on the report or the intention to make it public. This is particularly important in relation to HSE, and to COPFS which might be contemplating legal proceedings in relation to the circumstances. As a general rule it will always be appropriate to consult COPFS before publication, even if their involvement has apparently ended.

Requests for assistance from prosecuting bodies

26. There have been cases in the past where the Inspectorate, or its parallel body the Advisory Unit, was asked to provide advice, or work with, other statutory bodies on the investigation of significant incidents. We think that if we committed to providing professional advice to prosecutors in particular then that could undermine the independence of HMFSI and the prospects of a potential ‘no blame’ investigation.

27. Of course, HMFSI will co-operate with prosecuting authorities in the same way as any good citizen should – but we take the view that we should not be seen to be driving, or providing consulting services in relation to, any investigation that is directed towards criminal proceedings or the imposition of a civil penalty. For this reason, we will not voluntarily agree to provide expert advice or opinion which is sought with a view to constructing a prosecution or case for a civil penalty, and we will, if our participation is required in any such case, expect to attend under citation in the same way as any other lay witness.

Risk management associated with our policy

28. Overall, we are of the view that timely investigation of significant incidents involving SFRS by HMFSI is beneficial in providing an impartial expert view of events and identifying safety-critical issues at an early point. The Chief Inspector may decide, in relation to any significant incident, that the investigations that will be carried out by third parties will (either with or without HMFSI oversight or other involvement) be sufficient to meet the interests of HMFSI, in which case a short statement to that effect may be issued. Where it is decided that HMFSI should undertake its own investigation, the associated risks, and possible mitigation and control measures, are set out in the table below.

Risk	Mitigations/control measure(s)
Cutting across scope of other formal investigations (HSE, Police Scotland, Crown Office/ Procurator Fiscal)	<p>Clear definition of scope of investigation</p> <p>Understanding of rules of evidence by HMFSI investigators including training as required</p> <p>(Non-statutory) guidance or assurance in relation to the scope and purpose of HMFSI involvement</p> <p>MoUs with other organisations providing for co-operation on investigations so far as possible and setting out protocols</p> <p>Disclaimer in published reports</p>
Contempt of Court	<p>Early and ongoing liaison with the Crown Office</p> <p>Awareness of concurrent criminal proceedings</p> <p>Withholding publication of full report while criminal proceedings ongoing (whilst considering, in consultation with COPFS, partial release of non-prejudicial information).</p>
Cutting across SFRS internal review	Explanation of independent scope of HMFSI investigation
Conflict with subsequent terms of reference directed by Scottish Ministers	<p>Consultation with SG on standing investigation protocols</p> <p>Advice to SG on significant incident investigations being undertaken and dialogue about any specific concerns</p>

Risk	Mitigations/control measure(s)
Delay to commencement of HMFSI investigation compromising quality of product	<p data-bbox="805 266 1380 331">MoU with SFRS that HMFSI will be notified of significant incidents</p> <p data-bbox="805 367 1364 465">Protocols for HMFSI to commence investigation immediately on notification of significant incident</p> <p data-bbox="805 501 1284 535">Training for HMFSI staff as required</p>
Reluctance of SFRS staff to co-operate over confidentiality fears	<p data-bbox="805 568 1332 667">Clear definition of scope of HMFSI investigation and disclaimer stating that investigation does not allocate blame</p> <p data-bbox="805 703 1364 768">Explanation of nature and scope of HMFSI investigation to participants</p> <p data-bbox="805 804 1348 898">Obtain legal advice on HMFSI's power to maintain confidentiality in records of interview etc</p>

29. Requests may come from outside the jurisdiction for use of HMFSI's investigative capacity. Such requests should be considered in partnership with the Scottish Government, as they amount to the supply of services by SG to the requesting body for which remuneration might be sought by SG. Consideration also needs to be given to the statutory basis for any such request, and on each occasion a request is made, clearance needs to be sought from responsible government bodies and investigating authorities in the jurisdiction in question to avoid any conflict arising.

Consultation

30. During the development of this policy, we have consulted with the following people or bodies:

- The Scottish Fire and Rescue Service
- Scottish Ministers
- The Crown Office and Procurator Fiscal Service
- Police Scotland
- HM Inspector of Constabulary in Scotland
- The Health and Safety Executive
- Fire and Rescue Service representative bodies
- The Police Investigations & Review Commissioner