
Health and Safety Executive**CD284: Consultation on revised process for considering
disputes under Fee for Intervention (FFI)****Questionnaire reply form****Completing this questionnaire**

You can move between questions by pressing the 'Tab' / 'Shift-Tab' or 'Page Up' / 'Page Down' keys or by clicking on the grey boxes with a mouse. Please type your replies within the rectangular grey boxes, or click on the square grey boxes to select an answer (e.g. 'Yes' or 'No').

Respondent's details:**Name:**

Simon Joyston-Bechal on behalf of HSLA

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Health and Safety Lawyers Association (HSLA)

Fax:

What is the size of your organisation?

Choose one option:

Not applicable

1 to 9 employees

10 to 49 employees

50 to 249 employees

250 to 1000 employees

1000+ employees

Self-employed

Which sector are you from?

Choose one option:

Academic

Charity

Consultancy

Industry

Local government

Member of the public

National government

Non-departmental public body

Non-governmental organisation

Pressure group

Trade association

Trade union

If you chose 'Other' please specify:

In what role will you be answering these questions?

Choose one option:

An employer <input type="checkbox"/>	An employee <input type="checkbox"/>
Health and safety professional <input type="checkbox"/>	Trade union official <input type="checkbox"/>
Training provider <input type="checkbox"/>	

Other – please specify:

Lawyers Association

Confidentiality

Please indicate below whether your comments can be made available to the public or if you want them to be confidential. (NB if you do not indicate your choice they will be made available to the public. This takes precedence over any automatic notes on e-mails that indicate that the contents are confidential.)

Public	<input checked="" type="checkbox"/>
Confidential	<input type="checkbox"/>

Q 1. Do you agree that the revised process will provide sufficient information to enable a dutyholder to understand why HSE considers FFI is payable and how the costs have been reasonably incurred?

Yes	<input type="checkbox"/>
No	<input checked="" type="checkbox"/>

If no, could you please state why?

The crucial point is that the HSE should not provide material to the panel considering the dispute that goes beyond the material it has already provided to the dutyholder.

The matters set out at a) – h) represent the basic criteria necessary to ensure a fair hearing. The HSLA does not agree these should be limited by the proposed references to “*Depending on the nature of the dispute*” or “*so far as it is relevant*”. Of course the size and complexity of a particular case may determine the volume of material generated; and the nature of the dispute may determine which criteria require more material. However, in every case all material relevant to the FFI dispute should be served on the dutyholder and the panel. This should include materials in the HSE’s possession which support the dutyholder’s position.

The HSLA considers the last paragraph under the heading “Provision of information” should be amended to read:

“Much of this information should already have been provided in the Notification of Contravention, invoices and other correspondence from HSE. However, where it is missing, HSE will provide the relevant material ~~a written summary~~. This material, ~~summary~~ together with any other documents which HSE wishes to put before the panel to show that FFI is payable, will be provided to the duty holder.”

Q 2. Do you agree that the revised process will enable a dutyholder to make sufficient representations?

Yes	<input type="checkbox"/>
No	<input checked="" type="checkbox"/>

If no, could you please state why?

The HSLA believes the first sentence of the second paragraph under the heading “Consideration of disputes” should be amended so as to read:

“The panel will be provided only with the written information and/or details ~~a summary~~ provided by HSE to the dutyholder and the written representations and information provided by the dutyholder”

The HSLA notes that the HSE proposes that where the panel believes it is necessary and desirable to do so it may “convene a meeting” to address the issues but not a “hearing”. It is not immediately clear how such a “meeting” differs from a “hearing”; the requirements for natural justice will still need to be met.

If there is to be a “meeting”, then the HSE may want to send one or more inspectors. Similarly, subject to the panel’s discretion, the dutyholder should not be prevented from being represented or sending other individuals from whom it wishes the panel to hear (for example on a relevant technical question). A blanket ban on “witnesses” is inappropriate. It is accepted that cross-examination by or on behalf of the parties may not be appropriate. However, there may be circumstances where the panel has

questions arising from the material it has received and heard.

It would be helpful to set out that the panel can meet by telephone or in person, whether for their own deliberations or if both parties are attending, and also that communications can be by email where appropriate.

Q 3. Do you agree that the disputes should be considered by an independent panel consisting of a lawyer as chair together with two other members with practical experience of health and safety management?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>

If no, could you please state why?

Agreed. However, the panel must be impartial as well as independent, which raises the issue of the process of selecting the panel. It would be undesirable, for example, if lawyers appointed to sit on the panel were members of the Attorney-General's List of Specialist Regulatory Advocates for Health and Safety and Environmental Law or the HSE's agent solicitors. This is not in any way to denigrate any of those counsel or solicitors who prosecute on behalf of the HSE. However, the system must be seen to be fair.

The HSLA proposes that there should be an open applications process whereby lawyers will be able to demonstrate their suitability for the role of chair.

This process should result in a small pool of suitable panellists. Consideration should be given to limiting the tenure of any person who gets through the selection process, so they do not become dependent on these HSE panel instructions. There should also be a mechanism for the HSE to demonstrate transparently that it would not select

repeatedly from the panel, once established, those particular members who are seen to favour the HSE in their decisions.

It would be easy to undermine the transparency and trust driving the independent appeals process if these concerns are not robustly addressed.

Q 4. Do you think that there should be a different process where the amount of the fees is small and/or there is no dispute about whether there is a material breach?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>

If yes what alternative system would you propose in such cases?

Yes. It cannot be assumed that the number of challenges to FFI will remain constant. Anecdotally, many dutyholders have been inhibited from challenging an FFI in the past precisely because the system was not perceived as being fair. Equally, it is to no one's advantage if the system is over-burdened with small but time-consuming cases.

Therefore the system could be modified in the following respects:

- If the FFI claimed is less than £1,000, then the matter should ordinarily be considered on the papers by a single panel member;
- If the FFI claimed is not less than £1,000 but is less than £3,000 and the dispute does not concern material breach, then the matter should ordinarily be considered on the papers by a single panel member;
- If the dutyholder or the HSE request that a meeting should be convened because the decision is expected to impact an important point of principle or policy, then the

panel can exercise its discretion in favour of a meeting even if the above financial limits have not been reached.

Q5. Do you agree that the dispute process should be suspended where an investigation or appeal against an enforcement notice is still pending?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>

If no please explain the reason for your answer.

Q6. Do you have any other comments on the revised FFI dispute process not covered by the questions above?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>

If yes please provide your comments

The Health and Safety and Nuclear (Fees) Regulations 2016 make no mention of the recovery of a dutyholder's costs in circumstances where a panel resolves an FFI dispute in favour of the dutyholder. The HSLA recognises the importance of a regulator being able to carry out its regulatory functions in the public interest without being inhibited by considerations of costs. However, the HSLA considers that a panel should have a discretion to award costs to a successful dutyholder.

Circumstances where a panel might exercise its discretion in favour of a dutyholder could include where: there has been material non-disclosure; the HSE has taken into account irrelevant material or failed to take into account relevant material; the panel considers the FFI should never have been issued; or, for costs disputes, HSE has failed to accept a reasonable offer that matches or exceeds the panel's costs determination.

Please send your response by: **2 June 2017** to:

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Thank you for taking the time to complete this questionnaire