

MEMORANDUM OF UNDERSTANDING
between
THE CROWN PROSECUTION SERVICE
and the
AIR, MARINE AND RAIL ACCIDENT INVESTIGATION BRANCHES

Introduction

1. This Memorandum of Understanding (MOU) is established between the Crown Prosecution Service (CPS) and the Air, Marine and Rail Accident Investigation Branches (the AIBs). When developing common policy or joint external agreements, the three AIBs coordinate their activities through the Accident Investigation Chiefs' Council (AICC), which comprises the three Chief Inspectors and a non-executive Chair. This MOU has been developed by the AICC. Annex A contains details about the participants in this MOU and the AICC.
2. This MOU is not legally binding. The three AIBs each have a separate legal regime and some of the differences between them are referred to in this MOU. The participants understand that its aim is to create practical working arrangements between the AIBs and the CPS. The specific legal regime of each AIB must still be respected.
3. The AIBs have a duty to conduct safety investigations into accidents in their respective transport sectors without apportioning blame or liability. Where there is evidence that an offence has been committed and it meets the Full Code Test in the Code for Crown Prosecutors, the CPS has a duty to make sure that the right person is prosecuted for the right offence, and to bring offenders to justice wherever possible.
4. The objective of this MOU is to provide best practice guidance, to facilitate cooperation (while respecting the AIBs' independence) and to set out the respective roles and responsibilities of the CPS and AIBs. The CPS and the AIBs will ensure that all staff in their organisation are familiar with this MoU.

Basic principles of co-operation

5. Safety investigations and criminal investigations into air, marine and rail accidents will proceed in parallel. The aim of this MOU is to ensure that both investigations can progress effectively and independently, while promoting cooperation where permitted.
6. The public interest requires that safety considerations are of paramount importance. This means that the interests of an AIB investigation (including consideration of the possible effects on future investigations) may sometimes take precedence over a criminal investigation. The ability of witnesses to talk openly and without delay to an accident investigator is fundamental to the operation of the AIBs, as is the protection of sensitive material from disclosure.
7. The participants in this MOU have an interest in the available evidence to support their separate and different purposes. In criminal proceedings, the CPS must consider whether evidence can be used in court and is reliable and credible, and ensure there is no other material that might affect the sufficiency of evidence. The AIBs will consider all requests

from the CPS for specific items of evidence and factual information and will disclose such material where permitted by their respective legal regimes.

8. The CPS will inform the AIBs if they have an interest in a specific investigation and may request information and/or seek cooperation at any time.

The sharing of evidence/information

Protected evidence

9. Witnesses providing evidence to AIB investigations are afforded specific protections. The legislation for each of the AIBs differs in its detail (see Annex B), but AIBs are prohibited from disclosing witness details, statements or declarations unless ordered to do so by the High Court¹.
10. A witness should always consult the relevant AIB before disclosing a statement to a third party. Generally, witness statements provided to the Air Accidents Investigation Branch (AAIB) cannot be disclosed in the absence of a court order, even with consent of the witness. If a witness to the event has provided a statement or declaration to the Marine Accident Investigation Branch (MAIB) or Rail Accident Investigation Branch (RAIB), he or she will be advised that they may share their statement or declaration with a third party if they wish. Nonetheless, it may be necessary for the AIB to insist on some redaction of material if the statement refers to material which is itself protected.
11. Where the AIBs are generally prohibited from disclosing information, its disclosure can be ordered by the High Court^{1,2}. The court is required to carry out a public interest balancing test between the benefits of disclosure in the interests of justice against the potential adverse impact it might have on the AIBs in conducting their current or future investigations.

Experts' reports

12. An AIB may commission reports from experts on technical or other specialist matters relevant to its investigation. AAIB experts' reports cannot be disclosed unless the High Court orders disclosure. The Chief Inspectors of the MAIB and RAIB can exercise discretion in deciding whether and when to share such material (if it has not already been published) with the CPS for any lawful purpose. They will normally do so unless disclosure would be prejudicial to an ongoing safety investigation or future investigations. Each case is considered on an individual basis. The guiding principle that will apply is whether such disclosure is likely to compromise the AIBs' general aims of improving safety and preventing future accidents. Even when disclosure is possible, some redaction of protected material may still be necessary. When disclosure is subject to discretion, the AIB may take into account whether or not the final investigation report has been published. An expert should always consult the relevant AIB before making any disclosure of their report.

¹ Crown Court or High Court for the RAIB.

² RAIB regulations permit a witness to consent to disclosure of certain personal details and statement. They also give the Chief Inspector discretion to disclose some protected information, subject to the application of a public interest test by the court.

Non-protected factual information

13. The three AIBs may be able to share non-protected factual information obtained during an investigation upon request from other agencies investigating the same event. There are some differences between the regulations governing each of the AIBs that affect the detail of what technical and other evidence can be shared. Further details of disclosure limitations for the three AIBs are included in Annex B.

Interface between the AIBs and CPS on evidence

14. If the CPS has decided to prosecute, it should notify the relevant AIB³ indicating the basis of the prosecution. For each case, the CPS will appoint a designated person to communicate with the AIB. The designated person will identify material which the CPS wishes to obtain from the relevant AIB, noting any legislative requirements which pertain to the request. The AIBs will consider the request and outline the type(s) of evidence held that is/are relevant to the request from the CPS where legislation permits them to do so (see Annex B for details of when the AIBs will be permitted to disclose information). If the requested evidence or information cannot be disclosed without an order from the High Court¹, the CPS will be advised accordingly. As the AIBs are prohibited from apportioning blame or liability, they cannot provide any advice to the CPS on the relevance of evidence held by the AIB to CPS cases. If deemed necessary, the CPS will submit an application to the High Court¹ seeking disclosure of the evidence or information. The Court will consider the wider public interest in its determination of the case for disclosure. The CPS will endeavour to make any disclosure application in good time so that issues arising are resolved well in advance of the commencement of a criminal trial.
15. Information given to an AIB by the CPS will be treated as having been provided in-confidence if the AIB is requested to do so. For example, there may be prejudicial risks to ongoing criminal proceedings should CPS information be shared more widely. If an AIB identifies a reason for treating the information in any other way, they will initiate a discussion with the CPS to resolve the matter.

Destructive testing of evidence

16. To establish the cause of an accident, the AIBs may need to undertake tests that will modify the condition, dismantle or possibly destroy all or part of the physical evidence. At this often early stage in the investigation, the AIBs are likely to liaise with the Police (and if necessary, the CPS) concerning the actions to be taken. In recognition of the interest that the CPS may have in the handling of evidence, this MOU sets out the principles that will apply to such actions in Annex C.

Urgent safety actions

17. If, during an investigation, it is discovered that action needs to be taken to ensure that the transport system remains safe, the AIB will issue urgent safety advice⁴, which may include Safety Recommendations. If the CPS had previously expressed an interest in an element of an AIB investigation that was directly associated with the subject of the advice, the CPS

³ The application should be made to the relevant Deputy Chief Inspector.

⁴ The AIBs use different terms when issuing urgent safety material, and the term 'advice' (used by RAIB) embraces 'information' (used by AAIB) and 'warning' (used by MAIB).

may be provided with a pre-publication version. The CPS will treat the document as confidential and will not disclose it before the date of publication. Any comments made by the CPS on timing of the publication of the advice will be considered, but the relevant AIB is not required to modify the timing of publication in response.

Action prior to the publication of the AIB report

18. The AIBs have a duty to publish reports on the accidents and incidents they investigate, as quickly as possible.
19. Before finalising a report, the AIB circulates a draft version to those parties specified in their respective regulations. The draft is confidential, and may not be disclosed by the recipient without permission from the respective AIB. The purpose of its circulation is to give those parties the opportunity to make representations to correct any factual discrepancies or to point out any relevant considerations that they believe have not been considered in the report.
20. Provided that the CPS has notified the AIB that they are considering whether to bring a prosecution or of its intention to prosecute, the AIB will give the CPS an opportunity to make representations regarding the timing of the publication of the final investigation report. In such circumstances, the AIB will make available to the CPS a pre-publication copy of the finalised report seven days before publication. The CPS will treat the pre-publication copy of the finalised report as confidential and will not disclose it before the date of publication.
21. Any representations made by the CPS on the timing of report publication will be considered. However, AIB Chief Inspectors must also consider the requirement to promulgate, without delay, lessons for the improvement of air, marine and rail safety. AIB reports may be published whether or not civil or criminal proceedings are in progress or planned, and the AIB is not required to modify the timing of the report.

The AIBs and criminal court proceedings

22. Although it is the AIBs' preference that any prosecution take place after their investigation report has been published there may be valid reasons why a prosecution should commence before publication.
23. AIB investigation reports are published and freely available for anyone to read. However, AIB investigations are required to be independent of any judicial investigations or proceedings. AIB investigations are prohibited from apportioning blame or liability, and the AIBs consider that the investigation report is not therefore suitable for that purpose either. MAIB reports are inadmissible in any judicial proceedings whose purpose is to apportion blame or liability (civil or criminal) without an order from the High Court.
24. If requested, AIB inspectors will produce factual statements to describe their activities, such as investigation progress, continuity of evidence statements and the timing and content of tests they have conducted where they have had the effect of altering the state of evidence. This description of procedural steps will not include any opinion or analysis,

because AIB inspectors are prohibited by regulation from including any opinion or analysis in such a statement (subject to order of the High Court^{1, 5}).

25. The AIBs do not normally appear in criminal court proceedings because the court's fundamental purpose is to apportion blame and/or liability, which the AIBs are explicitly prevented from doing by law. Therefore, the AIBs must not be put in a position where it could appear that they are supporting the apportionment of blame or liability. It must be made clear in court that any Inspector who appears is not appearing for either defence or prosecution, but to assist the court with the presentation of fact-based evidence.

Resolution of issues

26. Any disagreement between the CPS and the AAIB or MAIB about the practical application of this MOU that cannot be resolved locally will be referred to the Chief Inspector of the relevant AIB and the CPS Chief Crown Prosecutor/Head of Division. In the event of their absence, a designated deputy from within the respective AIB or the CPS may assume this responsibility.
27. For disputes involving the RAIB, if agreement cannot be reached the Chief Inspector will determine the course of action which best serves the public interest in accordance with sections 8(5) and (6) of the Railways and Transport Safety Act 2003, as amended. The Chief Inspector may only exercise this power where there is conflict with a RAIB investigation.

Review

28. The CPS and the AIBs will review the efficacy of this MOU every three years. Any of the participants may request a review of the provisions of this MOU.

⁵ For more detail, please see the section on inspector opinion evidence, in Annex B.

Signed:

Sue Hemming, Director of Legal Services,
Crown Prosecution Service



Sue.

Crispin Orr, Chief Inspector
Air Accidents Investigation Branch



Andrew Moll, Chief Inspector
Marine Accident Investigation Branch



Simon French, Chief Inspector
Rail Accident Investigation Branch

Dated: 30th September 2020

Roles and responsibilities

The Crown Prosecution Service.

- A1. The CPS is a public prosecution service headed by the Director of Public Prosecutions. The CPS operates across England and Wales, with 14 regional teams prosecuting cases locally. Each of these 14 CPS Areas is headed by a Chief Crown Prosecutor. A “virtual” 15th Area, CPS Direct, is also headed by a Chief Crown Prosecutor and it provides an out-of-hours charging service. There are also three central CPS Casework Divisions: the International Justice and Organised Crime Division, the Specialist Fraud Division and the Special Crime and Counter-Terrorism Division (SCCTD). In addition, there is a dedicated Proceeds of Crime Division. Within SCCTD, the Special Crime Division (SCD), is responsible for prosecuting high profile cases, including corporate manslaughter cases. The CPS prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. The CPS is independent, and makes its decisions independently of the Police and government.
- A2. The CPS makes independent charging decisions, in accordance with The Code for Crown Prosecutors, and the Director’s Guidance on Charging and related CPS policy. To charge someone with a criminal offence, prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction, and that a prosecution is in the public interest. When assessing the evidence, the prosecutor must consider whether there is any other material or information which might affect this decision, either by strengthening the prosecution case or by undermining it. Prosecutors will be proactive in identifying and, where possible, seeking to rectify evidential weaknesses, and will advise the police and other investigators about possible reasonable lines of inquiry, evidential requirements, pre-charge procedures, disclosure management and the overall investigation strategy
- A3. When making decisions about whether to charge a person with a criminal offence, or whether to authorise an out-of-court disposal, all prosecutors subject to this MOU must apply the principles set out in The Code for Crown Prosecutors (The Code) and any relevant legal guidance or policy. All prosecutors subject to this MOU must take into account the Director’s Guidance on Charging (DGC) when handling individual cases.
- A4. The Code and the DGC contain guidance and provisions that are designed to ensure that prosecutors have available to them all necessary material to make charging decisions expeditiously.
- A5. Failure to comply with the provisions of either The Code or the DGC is likely to result in any of the following:
- A charging decision being deferred.
 - The prosecutor being unable to make a charging decision, resulting in no further action on the case.
 - A case being discontinued.
 - The prosecution being in breach of a court direction, which may imperil the progress, or the outcome, of the case.
 - The denial of justice for victims.
- A6. To avoid these outcomes, the CPS will ask the police and relevant investigator to:

- Comply with the advice of the prosecutor.
- Provide all of the material required for a charging decision.
- Discharge their statutory disclosure obligations.
- Execute pre- and post-charge action plans by the agreed date.
- Follow advised reasonable lines of inquiry.
- Comply with requests for information.

Accident Investigation Chiefs' Council

A7. The Accident Investigation Chiefs' Council (AICC) was established in 2019, and comprises a part time non-executive chair and the three Chiefs of the transport accident investigation branches (Air, Marine and Rail).

A8. Its purpose is to optimise co-ordination and synergies between the three accident investigation branches, and enhance their individual and collective effectiveness, resilience and efficiency, while safeguarding their functional independence.

Accident Investigation Branches - General

A9. The sole purpose of a safety investigation conducted by an AIB is to determine the circumstances and causes of accidents and serious incidents in its respective mode of transport, promote safety action and make recommendations to prevent a recurrence. It is not the purpose of an AIB investigation to apportion blame or liability.

A10. The AIBs are functionally independent bodies within the Department for Transport, separate from the transport regulators⁶ and report directly to the Secretary of State on all air, marine and rail safety investigation matters.

A11. The AIBs have a collective MoU with the Chief Coroner. They also have a collective MOU with the National Police Chiefs' Council that sets out the grounds for co-operation, such that safety investigations can proceed in parallel with criminal investigations. The AIBs are not signatories to the Work-related Deaths Protocol.

The Air Accidents Investigation Branch

A12. The AAIB investigates aircraft accidents and serious incidents that occur in the UK and its Crown Dependencies and Overseas Territories. It also participates in accident and serious incident investigations worldwide where there is a specific UK interest.

A13. The AAIB conducts investigations into civil aviation accidents in accordance with the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018, and Regulation (EU) 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation. These regulations take account of international standards and recommended practices for this activity described in Annex 13 to the Convention on International Civil Aviation.

The Marine Accident Investigation Branch

A14. The MAIB was established in 1989 with responsibility for investigating marine accidents to determine their circumstances and causes. Its legislative powers are primarily

⁶ The transport regulators are: the Civil Aviation Authority (CAA), the Maritime and Coastguard Agency (MCA), and the Office of Rail and Road (ORR) or, in the case of the Channel Tunnel, the Intergovernmental Commission.

contained in Part XI of the Merchant Shipping Act 1995 and associated secondary legislation. The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 (SI 2012/1743) put this framework into effect.

- A15. The UK is obligated to investigate marine accidents by the International Maritime Organisation's Maritime Safety Committee Resolution MSC.255(84)⁷, and European Council (EC) Directive 2009/18/EC⁸. The EC Directive requires member states to carry out safety investigations into Very Serious Marine Casualties⁹ involving most types of vessels. The obligation does not apply to leisure craft carrying less than 12 passengers, fishing vessels under 15 metres in length, and certain other types of craft including warships.
- A16. The Accident Reporting and Investigation Regulations are the foundation for the MAIB's work. They apply to merchant ships, fishing vessels and (with some exceptions) pleasure craft. They define accidents, set out the purpose of investigations, and lay down the requirements for reporting accidents. They make provision for the ordering, notification, and conduct of investigations; but allow the Chief Inspector the necessary discretion, given the wide variety of cases, as regards when he chooses to commence an investigation into an accident or incident.

The Rail Accident Investigation Branch

- A17. The Railways and Transport Safety Act 2003 established the RAIB as the independent railway accident investigation body for the United Kingdom. The creation of the RAIB was the government's response to a recommendation of the Public Inquiry into the collision of two trains at Ladbroke Grove in 1999. It also met a requirement of the EU Railway Safety Directive 2004/49/EC that such a body be established by all member states.
- A18. The Railways (Accident Investigation and Reporting) Regulations 2005 (SI 2005/1992) provide the legislative framework needed to enable the operation of the RAIB by defining the obligations of duty holders and all other involved parties, including statutory bodies. Their scope includes the notification of accidents and incidents, the duty of cooperation, the management of evidence and the processes to be followed when publishing reports and recommendations.
- A19. The RAIB is required by the 2005 Regulations to investigate certain types of serious accidents, and has discretion to investigate other accidents and incidents. Its remit covers all main line, metro and many heritage railways in the United Kingdom (UK). It also includes tramways and the UK side of the Channel Tunnel Fixed Link up to the mid-point.
- A20. The RAIB has a separate MOU with the safety regulator for railways (the Office of Rail and Road) and the British Transport Police.

⁷ MSC.255(84) - Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (the Casualty Investigation Code).

⁸ Directive 2009/18/EC - Establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council.

⁹ A very serious marine casualty is one that involves loss of a vessel, death, or serious pollution (as determined by the member state).

AIB limitations on disclosure

This Annex summarises some of the key provisions of the AIBs' individual legal regimes in respect of their relevance to the Crown Prosecution Service and thus highlights where there are differences between them. It focuses on some key items of "protected material"; that is material which cannot be disclosed without an order of the relevant court (High Court for the AAIB and MAIB, Crown Court or High Court for the RAIB). It also identifies some areas of AIB discretionary disclosure. The relevant legislation is listed at the end of the Annex.

The Annex does not set out the full detail of legal requirements or exemptions, and endeavours to summarise a complex set of provisions. Reference should always be made to the relevant regulations if a more comprehensive understanding of their provisions is required.

General Data/Factual Material/Electronic Data

All AIBs – Protected material

- Statements
- Identities of witnesses to the event
- Medical records
- Draft reports

AAIB only – Protected material

- Records revealing the identity of persons who have given evidence in the context of the safety investigation including third party experts
- Cockpit video and image recordings and transcripts, air traffic control recordings, flight data recorders
- All communications between persons having been involved in the operation of the aircraft
- Information collected by the AAIB which is of a particularly sensitive or personal nature

(Article 14(1) and (2) of EU 996/2010; regulation 25 SI 2018/321)

AAIB only - Discretionary disclosure

Factual material which does not fall under Article 14 and proceedings of the investigation may be disclosed provided that their disclosure does not compromise the objectives of the investigation

(Article 15(4) EU 996/2010; regulation 26 SI 2018/321)

MAIB only – Protected material

- The names, addresses or other details of anyone who has given evidence to an inspector
- Correspondence between Chief Inspector and parties involved in investigation
- Communications between those involved in operation of ship
- Photographs and recordings made by inspectors

(Regulations 13(1) and 13(2) SI 2012/1743)

MAIB only - Discretionary disclosure

Chief Inspector may disclose information obtained from a voyage recorder or other recording system to the police or other authorities

(Regulation 13(7) SI 2012/1743)

RAIB only – Protected material

- The name, address or other information of anyone who has provided to the Branch a statement or declaration or other note or record relating to the statement or declaration (or who has indicated that he will do so), unless the person consents to disclosure. (RAIB are not under any obligation to seek that consent.)
- Working documents of the Branch

(Regulation 10(2)(b) and 10(3)(e) SI 2005 No.92)

RAIB only - Discretionary disclosure

May publish or make available for inspection any evidence or information it may acquire during the course of an investigation where such disclosure would not obstruct it in its general aims and provided it is not protected material which is covered by regulation 10(2) and (3)

(Regulation 10(1)(a) SI 2005/1992)

Expert reports/inspector opinions and notes

All AIBs – Protected material

In some cases, expert reports are specifically protected, but where that is not the case, there may be limitations on disclosure where they contain protected material

AAIB only – Protected material

- Material subsequently produced during the course of the investigation, including:
 - notes, drafts and opinions written by investigators
 - opinions expressed in the analysis of information, including flight recorder information

(Article 14(1)(d) EU 996/2010)

MAIB only – Protected material

- Inspectors' opinions expressed in the analysis of information
- Notes made by an inspector, whether written or held electronically

(Regulation 13(2) SI 2012/1743)

MAIB only – Discretionary disclosure

Chief Inspector may disclose independent technical analysis including opinions expressed in such analysis

(Regulation 13(4) SI 2012/1743)

RAIB only – Protected material

Opinions of and notes made by inspectors or persons appointed to conduct investigation which are unsubstantiated by evidence

(Regulation 10(3) SI 2005/1992)

RAIB only – Discretionary disclosure

Chief Inspector may disclose third party expert reports where doing so would not obstruct the general aims of the Branch

(Regulation 10(1)(a) SI 2005/1992)

Information provided by individuals/bodies from other countries

AAIB only – Protected material

Information and evidence provided by investigators from other Member States or third countries in accordance with the international standards and recommended practices, where so requested by their safety investigation authority

(Article 14(1)(e) EU 996/2010)

MAIB only – Protected material

All correspondence between Chief Inspector and parties involved in investigation

(Regulation 13(2)(e) SI 2012/1743)

RAIB only – Protected material

No express protection relating to point of origin, but all other protections apply.

(SI 2005/1992)

Legislation

- EU 996/2010 *Regulation (EU) 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation, as amended*
- SI 2018/321 *The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018*
- SI 2012/1743 *The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012, as amended*
- SI 2005/1992 *The Railways (Accident Investigation and Reporting) Regulations 2005, as amended*

Testing of evidence

C1. To establish the cause of an accident, the AIBs and other investigating bodies may need to undertake tests that will modify the condition of, dismantle or possibly destroy all or part of the physical evidence. However, a criminal investigator has a statutory duty to present to a court the best evidence available. Sometimes this may be the physical evidence in the state in which it was recovered from the site of the accident.

C2. Therefore, if notified of other party interest, the Police, CPS or the AIBs (depending on who holds the evidence and who is intending to undertake testing) will make every effort to consider other party needs before undertaking any destructive testing of evidence. This will include:

- giving notice before commencing any destructive testing;
- considering representations each party may make as to the impact such testing may have on their own investigation;
- coordinating the testing with the aim of reaching a mutual understanding on:
 - what testing is to be done;
 - in what sequence it will be carried out;
 - who will undertake the testing;
 - where and when it will be carried out;
 - who will be present at the testing;
 - how it will be recorded, and by whom;
 - the need for each party to have its own expert present, where consistent with the protections required by the relevant regulations;
 - how, in the event that some parties cannot be represented at the testing, their needs will be taken into account;
 - the steps that will be taken to address disagreements about any aspect of the testing before it proceeds (while acknowledging that indefinite delay will not be an option and AAIB regulations permit testing to commence if no representations have been made within two weeks of the initial notification);
 - the reports that will be produced, by which body, for what purpose and any restrictions or prohibitions that will apply to sharing them (note that it is not usually possible for such a report produced for the AAIB to be passed to any other party);
 - the need for the respective parties to discuss, and endeavour to reach agreement on, the outcome from the testing; and
 - the arrangements to be applied once testing has been completed, for example whether the evidence is transferred (and if so, to whom) and how it will be preserved.