



INSPECTOR FIELD MANUAL

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Enforcement Management System (EMS)

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Enforcement Management System (EMS)

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Enforcement Management System (EMS)

1.0 What is the EMS?

1.1 The Enforcement Management System (EMS) is a system designed to help inspectors to make enforcement decisions in line with the Occupational Safety and Health Agency's (Agency) Enforcement Policy. The Enforcement Policy sets out the principles inspectors shall apply when determining what enforcement action to take in response to breaches of the Occupational Safety and Health (OSH) Act. Paramount to this, the Agency's enforcement action should be proportional to the safety and health risks and the seriousness of each breach.

2.0 What is the EMS used for?

2.1 The EMS:-

- Provides inspectors with a framework for making consistent enforcement decisions;
- Helps SHI II's, Senior Inspectors and the Chief Inspector monitor the impartiality and consistency of Inspectors' enforcement decisions in line with the Agency's Enforcement Policy; and
- Assists new and inexperienced Inspectors in making enforcement decisions.

2.2 It can also assist others (e.g. those directly affected) to understand the principles applied by Inspectors in their decision making process.

3.0 When is the EMS used?

3.1 Inspectors shall employ the mechanisms outlined in the EMS in all of their regulatory actions. The Agency may develop procedures that specify the circumstances in which Inspectors will formally use the EMS.

3.2 Inspectors' enforcement decisions shall be sampled and reviewed using the EMS as part of routine monitoring. This, together with the uses described above, promotes increased consistency and impartiality in enforcement.

4.0 Limitations of the EMS

4.1 Inspectors are challenged by innumerable variables when carrying out inspections, assessments and investigations and other work activities, sectors, organisational structures, contractual relationships etc. Assessing risk and compliance with the OSH Act therefore ranges from being relatively straightforward to extremely complex.

4.2 The EMS is a straightforward linear system and will not be able to capture all the implications and complexities of decision making in all circumstances. While the EMS provides a framework for driving consistency, it is crucial that Inspectors' judgement is not confined by restricting all decisions to the EMS, however, decisions should be in line with the spirit of the EMS.

4.3 The EMS is therefore supported by a review process that requires SHI I's, SHI II's, Senior Inspectors and the Chief Inspector to consider whether the proposed enforcement action meets the Agency's Enforcement Policy. Occasionally, the review may reach an alternative enforcement conclusion. When this occurs, Inspectors will record the final decision and the reasons.

5.0	Review arrangements	<p>5.1 The EMS will be kept under review and revised as necessary by the Inspectorate on a yearly basis and forwarded to the Health and Safety Committee for further review.</p>
6.0	EMS overview Purpose of enforcement	<p>6.1 The Agency is of the belief that enforcement of the OSH Act should be firm but fair. The purpose of enforcement is to:-</p> <ul style="list-style-type: none"> • Ensure that duty holders take action to immediately deal with serious risks; • Promote and achieve sustained compliance; and • Ensure that duty holders, who breach the OSH Act, and fail in their responsibilities, are held to account. This may include bringing the alleged offenders before the courts in the circumstances set out in the Agency's Enforcement Policy.
7.0	Process of enforcement	<p>7.1 Inspectors use various enforcement mechanisms to deal with risks and achieve compliance with the OSH Act, ranging from the provision of advice to enforcement notices. Inspectors can also initiate or recommend prosecution where the circumstances warrant punitive action. Making decisions about appropriate enforcement action is fundamental to the role of the Inspector.</p> <p>7.2 The process of making enforcement decisions is complex. Each duty holder is different, and Inspectors must have a thorough understanding of the hazards and control measures associated with each duty holder's activities. It is paramount that Inspectors exercise discretion in their professional judgement so that action, appropriate to each situation, can be taken.</p> <p>7.3 Enforcement decisions must be impartial, justified and procedural. The Agency's Enforcement Policy sets out the approach that Inspectors shall follow. Enforcement action must also be taken in accordance with the constraints of the OSH Act.</p> <p>7.4 The EMS provides the Agency with a framework for making enforcement decisions that meet the principles in the Enforcement Policy. It captures the issues Inspectors consider when exercising their professional judgement and reflects the process by which enforcement decisions are reached.</p>
8.0	Purpose of the EMS	<p>8.1 The EMS is not a procedure in its own right. It is not intended to confine Inspectors' discretion when making enforcement decisions and it does not direct enforcement in any particular case. It is intended to:</p> <ul style="list-style-type: none"> • Promote enforcement consistency by confirming the parameters, and the relationships between the many variables, in the enforcement decision-making process; • Promote proportionality and targeting by confirming the risk based criteria against which decisions are made; • Be a framework for making enforcement decisions transparent, and for ensuring that those who make decisions are accountable for them; • Help experienced Inspectors assess their decisions in complex cases; • Allow for the SHI II, Senior Inspector review and consultation with the Chief Inspector on enforcement action; and • Guide less experienced Inspectors in making enforcement decisions.

8.2 The EMS and its associated procedures assists the review of the decision making process and Inspectors' enforcement actions to ensure the purpose and expectations of the Enforcement Policy have been met.

8.3 The EMS does not exist in isolation. It is supported by the Inspectors Field Manual and its procedures which address, among other things, the investigation of accidents. Its application also relies on guidance that provides Inspectors with yardsticks with which to promote consistent use of the EMS.

9.0 EMS in detail

9.1 Figure 1 provides an overview of the EMS and refers to a detailed explanation of each element.

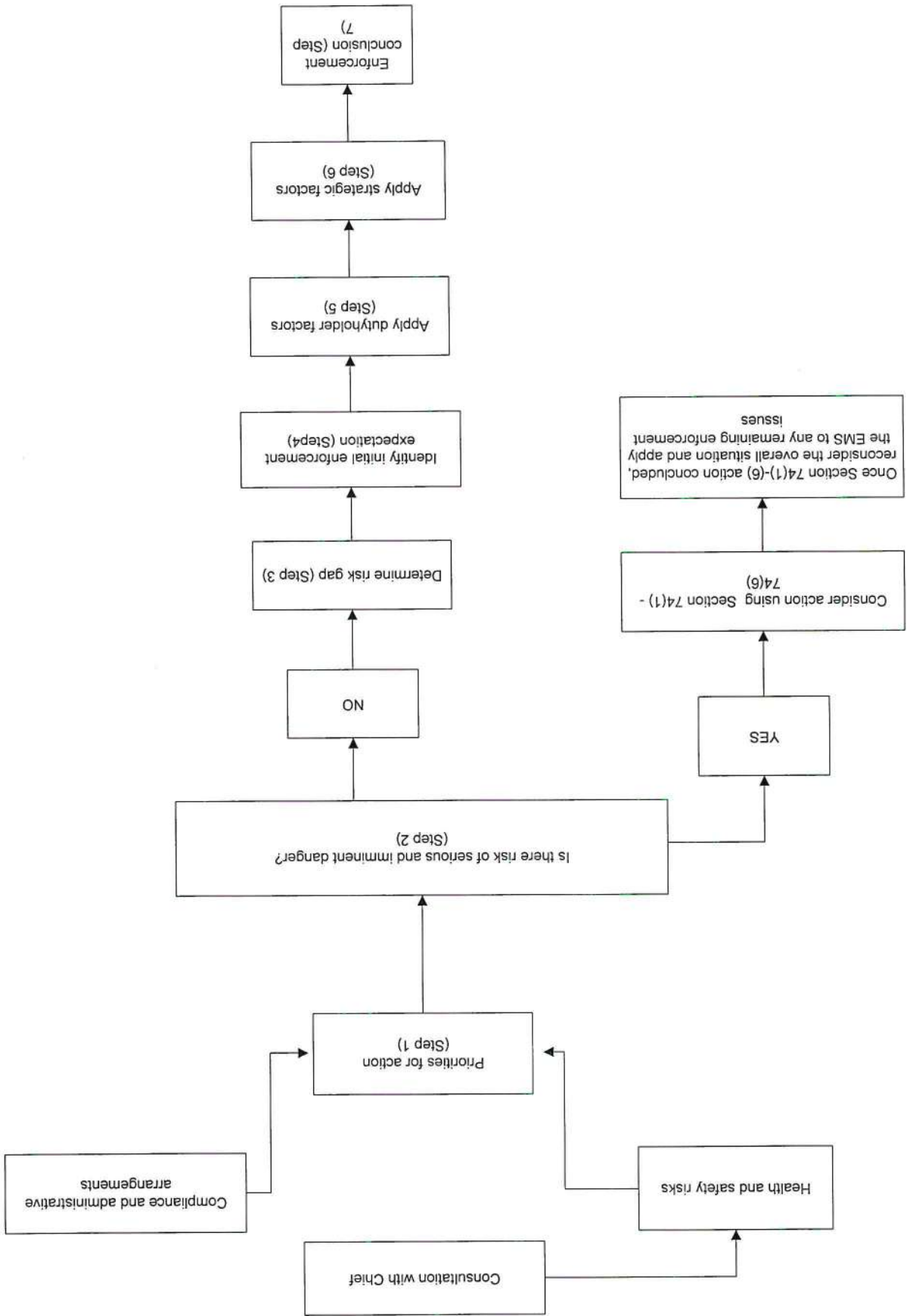


Figure 1 Process of the EMS

10.0 Step 1: Enforcement priorities

Priorities for action

10.1 Throughout this system, the issue, or group of issues making up the matter being considered, will be referred to as a 'priority for action.

10.2 Priorities are guided by the Agency's Enforcement Policy and Inspectors have discretion in deciding the priorities for enforcement action.

10.3 During compliance initiatives, Inspectors gather information about hazards and control measures. From this, they make decisions about the safety and health risks associated with the activity under consideration. Inspectors should prioritise specific hazards and consider

common root/underlying causes to ensure they deal immediately with serious risks. They should consider how best to achieve sustained compliance with the Act and whether any punitive action is required.

- 10.4 The priorities for action may involve a single issue or several issues, e.g. in the case of workplace transport where driver training, the segregation of pedestrians and vehicles, lighting, maintenance etc. are possible issues. When applying the EMS to a particular case, it is important to bear in mind all issues that make up the priority for action to ensure the right ones are assessed at the risk gap stage and the correct standards are used etc.

11.0 Health and safety risks

- 11.1 Hazards (*anything with the potential to cause harm*), may arise from various sources such as physical agents, hazardous substances, processes or activities. Control measures can take a variety of forms, e.g. workplace precautions, risk control systems, management arrangements and engineering.

- 11.2 The nature of the hazard and the potential consequences will determine the type and extent of the mitigative actions required. Evident hazards, such as the handling of the use of a chemical substance, may only require substitution or elementary safety precautions for control. More intricate hazards, such as the handling and use of explosives, require a wider range of precautionary and protective measures to ensure safety and health standards are achieved.

12.0 Consultation with the Chief Inspector

- 12.1 When an Inspector concludes that there is a dangerous condition or practice in an industrial establishment that requires him to take action in accordance with the provisions of **Section 74 (1)** of the **OSH Act** he must first consult with the Chief Inspector in relation to how he will proceed. Subsequently, in order ensure that the consultation process is fair, the Inspector shall at the earliest opportunity inform the Chief Inspector of what he proposes to do. He must also inform the Chief Inspector of the reasons why he believes that he should adopt that course of action.
- 12.2 The Chief Inspector shall be given sufficient time to review the Inspector's proposals and then make a response in relation to the information that has been presented to him. After careful consideration of the facts, he should then give the Inspector advice as to how to proceed. The Inspector should conscientiously take the Chief Inspector's response into account when the ultimate decision is taken.
- 12.3 The OSH Agency shall develop and institute a code of practice which would define a clear procedure for the consultation process. The importance of defining this procedure cannot be underestimated since, where the Court finds that the consultation process was unfair (or non-existent) in any given situation, it will be in rare cases that the decision-maker will be able to persuade the court that consultation would have made "no difference". A high hurdle is set for the decision-maker to show that "the decision would inevitably have been the same": **R (Smith) v North Eastern Derbyshire Primary Care Trust** in most cases, therefore, a failure to consult fairly will result in the quashing of the underlying decision.
- 12.4 Although the Inspector is not obliged to adopt any of the views or opinions of the Chief Inspector, if a question arises as to the validity or fairness of a decision that has been made in relation to a consultation and the decision is questioned by a duty holder for whatever reason, both parties must ensure that the process is fair otherwise the decision can be quashed in a Court of Law.

13.0 Non risk-based compliance and administrative arrangements

- 13.1 The OSH Act imposes legal duties on the duty holder, however, some of these duties do not directly result in the control of risk such as, assessing risks and reporting of incidents, but still demand compliance by the duty holder. These are referred to as compliance and

administrative arrangements and are considered separately in the EMS from risk-based issues.

13.2 However, there is often a strong relationship between the control of risk and failure to address compliance issues. In cases where both risk and compliance issues exist, inspectors shall consider action principally in relation to the control of risk.

14.0 Step 2: Risk of serious and imminent danger

Assess the actual risk of serious and imminent danger

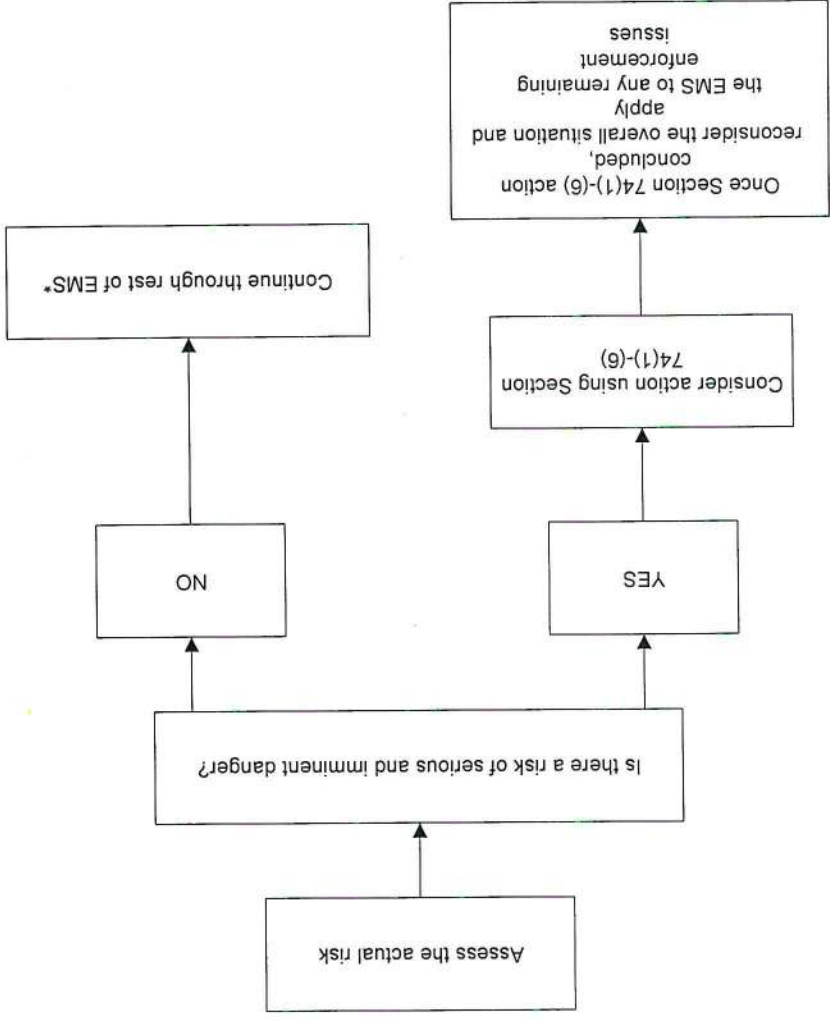
14.1 Inspectors shall always treat firstly with issues that give rise to risk of serious and imminent danger. Inspectors have the power to either prohibit the work activity, or prohibit the use of an article or substances that are creating the risk. Imminent danger shall be classified as "... any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures."

14.2 When considering the immanency of risk, Inspectors shall use the principles of 'risk gap analysis' described in Step 3. Inspectors must have an understanding of 'actual risk', and take account of any relevant standards when considering what can be done within the law to reduce the risk of serious and imminent danger.

15.0 Dealing with serious risk

15.1 The basic process of exercising these powers is shown below.

Figure 2 Dealing with serious risk



* This includes considering risk gap and compliance issues, the duty holder and strategic factors to determine if prosecution is appropriate.

- 15.2 By Prohibiting an activity or the use of an article or substance, the Inspector is likely to have controlled the risk to the extent where it is as low as is reasonably practicable or no risk remaining. However, the Inspector will still need to determine:-
- Whether they need to take further enforcement action to achieve sustained compliance with the Act in relation to the issue at hand, and all other priorities for action they have identified;
 - Whether punitive action is appropriate. (The Duty holder Factors flow chart headed Prohibition Notice will assist in making this decision.).

15.3 Therefore, once action in relation to Sections 74(1)-(6) of the OSH Act has been concluded, Inspectors shall reassess the situation, identify any remaining priorities for action and apply the EMS.

16.0 Step 3: Gap analysis Principles

16.1 During engagement of an Industrial Establishment Inspectors collect information about hazards and control measures. This is used to make an initial assessment of the safety and health risks posed by the various activities and determine the actual risk (*where the duty holder is*). Inspectors shall compare this to the risk accepted by the law or guidance documents and decide the benchmark risk (*the level of risk remaining once the actions required of the duty holder by the relevant standards, which are enforceable by law, are met*). The difference between where the duty holder is and where they should be is the risk gap.

16.2 The concept of risk gap is fundamental to the decision-making process. Risk gap analysis is used in two ways. Firstly, to assess what enforcement is necessary to achieve compliance with the Act and secondly, to determine whether prosecution should be considered. Risk gap analysis is not appropriate for non-risk based compliance or administrative arrangement issues.

16.3 When using risk gap analysis in relation to achieving compliance with the Act, all of the issues that make up the priority for action are considered. Where there is only a single issue, risk gap analysis is straightforward. Where there are several issues, each one is considered separately to determine its particular risk gap. This individual risk gap is used to arrive at the initial enforcement expectation appropriate to achieve compliance for that particular part of the priority for action.

16.4 When using gap analysis in relation to punitive action, the overall risk gap associated with the priority for action is considered. If the priority for action is a single issue, then the overall risk gap will be the same as the gap used when considering compliance with the Act. However, where there are several issues, the cumulative effect is used to assess overall risk. It is this overall risk gap that is used (along with the 'authority' of the most relevant standard) when considering prosecution.

17.0 Determining the risk gap: Actual risk

17.1 The first step in determining the risk gap is to assess the level(s) of actual risk arising from the duty holder's activities. Inspectors shall base their decisions on information about hazards and control measures informed by their training, experience, guidance and other relevant sources of information.

Actual risk: Example 1

Danger from an unguarded and rotating stock bar on a lathe.

Depending on the circumstances, the priority for action could be straightforward. The actual risk may be determined simply by considering:

➤ the consequences of contacting the rotating bar and becoming entangled leading to serious injury and perhaps death; and

➤ the likelihood of someone coming into contact with the stock bar taking into account, the extent and nature of physical guards and the foreseeability of approach.

This results in a probable risk of serious personal injury.

Actual Risk: Example 2
Fall from height

Consider the fall from a height risk from the installation of a concrete floor at a building under construction where edge protection is not possible. Actual risk is determined from an assessment of:

➤ The likelihood of persons falling a distance liable to cause personal injury; and

➤ The consequences of such a fall, eg serious injury or death.

The actual risk may be possible risk of serious personal injury.

17.2 In this process it is the potential for harm that should inform the Inspectors decision: not what actually happened. However, the occurrence of an accident or dangerous occurrence becomes relevant later when considering duty holder factors.

18.0 Determining the risk gap: Benchmark risk

18.1 Identifying the risk gap requires:

- Inspectors are to assess the actual risk arising from the circumstances under consideration (i.e. from the way the work activity is being conducted);
- Inspectors are to determine the benchmark risk, (i.e. the result of controlling the risk to as low as is reasonably practicable); and
- Inspectors are to do a comparison of the two to establish the risk gap. Note: In determining these risks, the EMS considers both the likelihood and the consequences of each risk.

Benchmark risk: Example 1 – Danger from an unguarded and rotating stock bar

Let's re-evaluate the danger from the unguarded and rotating stock bar on a lathe. From the above example the actual risk was determined to be a probable risk of serious and imminent danger. Using Section 25 A of the OSH Act (*Effective safeguarding of machinery*), requires effective measures to be taken:

'to prevent access to any dangerous part of machinery or in this example the rotating stock bar';

➤ Once this requirement is met, the likelihood of contact with a rotating stock bar is drastically reduced.

➤ However the danger from the stock bar rotating still remains.

Accordingly, the benchmark risk is no likelihood of serious and imminent danger.

Benchmark risk: Example 3: Fall from height

Let's re-evaluate the fall from height risk from the installation of a concrete floor at a building under construction where edge protection is not possible. The appropriate protective measure is the provision of collective precautions to mitigate the result of a fall, e.g. the installation of nets. The *likelihood* of persons falling a distance liable to cause serious and imminent danger remains the same.

However, the *consequences* of a fall are significantly reduced.

The benchmark risk is possible risk of minor injury.

19.0 Determining the risk gap: Defining risks and benchmark risk

19.1 It is not the norm for an Inspector to quantify the risk to determine the actual risk, or benchmark risk. The more practical approach adopted in the EMS uses three risk elements which is further subdivided into a number of descriptors reflecting a range of outcomes.

19.2 The risk elements are:

- *consequence* – the nature of the harm that could be reasonably expected to occur;
- *likelihood* – the probability of the event happening (event means the uncontrolled event which may lead to injury, not the activity, eg the dropping of a load, not the lifting operation); and
- *extent* – the number of people likely to be affected.

19.3 Some safeguards, or precautions, address *consequence*. Using an example of a trip device fitted to a radial arm drill, the trip will not affect the likelihood of an operator becoming caught up on the rotating parts of the drill. However, it will reduce the consequences of entanglement by stopping the movement of the drill within defined parameters, thereby reducing the consequences of the event.

19.4 Some safeguards, or precautions, address likelihood. For example, the provision of guard rails and toe-boards on scaffolding. These precautions do not affect the consequence of a fall from same, i.e. should a person fall from the platform the consequences would be the same whether or not guard rails and toe-boards were fitted. Some precautions address both consequence and likelihood. For example, consider the fitting of speed limiters to lift trucks. These devices make it less likely that a collision will happen and in the event of a collision the lowered speed also reduces the consequences of the event.

19.5 The precept of the EMS is to put likelihood and consequence in order. This is an appropriate method of including both approaches in the risk gap table. The order in which they are applied is immaterial and has no bearing on the outcome of the calculation of the risk gap.

19.6 When deciding on the most appropriate measures to address the actual risk, Inspectors shall apply the best strategy to what needs to be done. For example where Industry best practice requires specific illuminance of lighting (i.e. set lux or lumen values), whereas the law prescribes the standard to be achieved (i.e. suitable and sufficient lighting). This principle applies irrespective of whether the standards are defined, established or interpretative.

19.7 In this example, although the Industry best practice is interpretative, it is the applicable standard to employ.

19.8 The consequence of the event under review is linked to the potential for harm as set out in Table 1 below.

Table 1 Consequence table

What are the potential consequences of the event?	
Descriptor	Definition
Serious and imminent danger/ serious health effect	<p>It is likely that a fatal injury could occur.</p> <ul style="list-style-type: none"> Permanent or irreversible disabling condition, or Requires immediate treatment in hospital. <p>It is likely that a health effect could occur that;</p> <ul style="list-style-type: none"> Causes a permanent, progressive or irreversible condition, or Causes permanent disabling, leading to a lifelong restriction of work capability or a major reduction in quality of life
Significant injury/ Significant health effect	<p>It is likely that an injury could occur to a person that results in that person being unable to perform their normal significant work for more than 3 days.</p> <p>It is likely that a health effect could occur that;</p> <ul style="list-style-type: none"> Causes non-permanent or reversible health effects, Causes non-progressive conditions, or • results in temporary disability.
Minor injury/ minor health effect	Injuries or conditions not included above.

19.9 Likelihood can be a subjective assessment that varies both within and between industries. It is not something that can easily be tied to incident rates, or reported instances of ill health. Inspectors can take into account a combination of many factors, based on their knowledge of an industry/activity and supported by industry best practice/standard.

19.10 Inspectors should use their professional judgement and industry best practice/standard to determine whether the likelihood is probable, possible, unlikely or insignificant. In practice, insignificant means that the consequence should not be realised.

19.11 Extent is taken into account by the use of the two risk gap tables – one for single and low casualties (Table 2.1) and one for multiple casualties (Table 2.2).

20.0 Determining the risk gap: Health risks

20.1 The EMS can be applied to enforcement decisions for health risks in the same way as safety risks. When assessing the consequence of exposure to health risks and the likelihood that harm may occur, the most likely health effect arising from occupational exposure should be used.

20.2 There may be instances where the actual health effect is different to that which could have been anticipated as the most likely. However, when making decisions an Inspector shall not take into account an individual's resistance or susceptibility. The effect of exposure to a health risk shall be determined by the likely response of the working population as a whole.

20.3 The nature of some health hazards and risks and the hierarchical approach adopted by some health-related strategies, means that it is more difficult to derive consistent benchmark risks and to identify the accepted level of risk arising from particular circumstances.

20.4 A number of indicators of accepted health related benchmark risks have been developed, and shall be used where appropriate in alliance with Industry specific best practice/standards. Where there is no appropriate best practice/standard, Inspectors, Supervisors, Senior's and the Chief shall undertake to use the principles in the EMS in coming to an enforcement decision.

21.0 Risk tables

21.1 The risk gap is determined by charting the consequence and likelihood of the actual risk against the consequence and likelihood of the benchmark risk (see Table 2.1). The point of intersection represents the risk gap.

21.2 The size of the risk gap can be extreme, substantial, moderate or nominal. The area on the risk tables above the coloured squares represents circumstances where the duty holder is complying with, or exceeding, the standard required by law.

21.3 Two risk tables are provided to address the issue of the extent of risk. Table 2.1 should be used for a single or small number of casualties.

Risk gap: Example 1 – Danger from an unguarded and rotating stock bar on a lathe

As determined above, the actual risk was a probable risk of serious and imminent danger. It is only likely that one person will be affected (the lathe operator or someone in close proximity to the machine). Accordingly the Single and low casualties table (**Table 2.1**) should be used to locate the actual risk on the vertical axis. The Multiple casualties table (**Table 2.2**) should generally be used for major incidents/hazards with off-site risks where several members of the public/employees may be at risk.

The benchmark risk has no **likelihood of serious and imminent danger** on the horizontal axis.

Reading across the table from the vertical axis and up the table from the horizontal axis gives the risk gap at the point of intersection. In this case an **extreme risk gap** is indicated.

21.4 Risk gaps for the other examples can be determined in a similar fashion.

Measure of actual risk (where the duty holder is)	Likelihood			Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard
	Consequence	Insignificant	Likelihood				
Insignificant	Minor injury	Insignificant	Insignificant	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard
		Likely	Likely				
		Possible	Possible				
Significant injury	Significant injury	Possible	Likely	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard
		Likely	Possible				
		Probable	Probable				
Serious and imminent danger	Serious and imminent danger	Likely	Likely	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard
		Possible	Possible				
		Probable	Probable				
Likelihood	Consequence	Possible	Likely	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard	Duty holder complies with or exceeds legal standard
		Likely	Likely				
		Probable	Probable				
Benchmark risk (where duty holder should be)							
Probable Possible Likely Insignificant							
Significant injury							
Probable Possible Likely Insignificant							
Serious and imminent danger							
Possible Likely Insignificant							
Minor injury /Insignificant							
Probable Possible Likely Insignificant							

Risk gap:	Extreme	Substantial	Moderate	Nominal
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Table 2.1 Risk gap table: Single and low casualties

21.5 Having determined the risk gap (extreme, substantial, moderate or nominal), an initial enforcement expectation can be reached using the separate initial enforcement expectation tables for safety and health risks. (**Table 5.1**) (**Table 5.3**).

22.0 Non risk-based compliance

22.1 The Gap analysis method is not always appropriate for compliance and administrative arrangements that do not directly affect the control of risk. Inspectors shall use the Compliance and Administrative Arrangements Initial Enforcement Expectation Table (Table 5.2) in these circumstances.

22.2 However, there are occasions where the arrangements analysed do directly reduce safety and health risks, e.g. the provision of washing facilities to employees working with lead. Risk gap analysis is appropriate in these circumstances.

23.0 Step 4: Initial enforcement expectation

23.1 Principles

23.2 Once risk gap analysis has been used to determine how far a duty holder has deviated from the requirements of the OSH Act or Regulations, or the lack or void in compliance and administrative arrangements that has been established, the comparison of the risk gap or extent of non-compliance with compliance and administrative arrangements with the relevant standard/best practice allows the initial enforcement expectation to be determined. This is to ensure that the enforcement action reflects and is proportionate to, the risk to health or safety or the seriousness of any breach.

24.0 Standards

24.1 Standards, i.e. where a duty holder has to go to determine what needs to be done to comply with the Act come from various sources. They have differing 'authorities', e.g. they could be specified in the Act, or may be a speculated description of what the Act seeks to achieve set down in guidance. This influences the decision about the proportionate level of enforcement. A higher level of enforcement is expected where a duty holder has failed to meet well known and established standards/best practice compared to situations where there is very little information or guidance available.

Note The standards referred to here are linked to the specific requirements of safety and health legislation. They should not be confused with other standards such as customer service or product quality.

24.2 Standards are divided into three categories to capture their broad range of authority, as explained in the table below.

Table 3 Standards table

Definition	Descriptor
What is the authority of the appropriate standard?	

Minimum standard specified by Acts, Regulations, Orders and Approved Codes of Practice. (ACoPs)	Defined standard
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Codes of Practice and other standards linked to legislation, e.g. TTBS, providing specific standards of safety, health and welfare. Also published or commonly known standards of performance adopted by the MOBEA, TTFS, industry or other organisations such as NFPA, API, ACGIH, NIOSH etc, as levels of performance needed to meet a general or qualified duty under health and safety law.	Established standard
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Standards put forward by private entities such International Association of Drilling Contractors (IADC), International Marine Contractors Association (IMCA), are examples of the performance needed to meet a general or qualified duty. Also standards interpreted by Inspectors from first principles.	Interpretative standard
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24.3 The appropriate standard is the one that best describes what the duty holder needs to do to address the priorities for action. If an ACoP provides sufficient information then that is the standard that provides the level of 'authority' (i.e. **defined**). If the duty holder needs to turn to industry guidance documents they would be the standards that provide the level of authority (i.e. **established**).

24.4 Where multiple issues are being considered, different standards may be relevant to each issue (see Step 3: Determining the risk gap – benchmarking).

25.0 Determining the initial enforcement expectation (IEE)

25.1 The risk gap is considered with the authority of the standard to give an initial enforcement expectation. This is shown in separate Initial Enforcement Expectation (IEE) tables for safety and health risks. A separate IEE table refers to compliance and administrative arrangements and is used in conjunction with Table 4 below.

Table 4 Compliance and administrative arrangements

Descriptor	Definition
How well are the standards for compliance or administrative arrangements complied with?	
Absent	Total absence, appreciation or implementation of compliance or administrative arrangements. For example, assessment of risk not completed, toilets or sanitary conveniences not provided, or accidents not reported.
Inadequate	Only elementary observance with standards or inadequate compliance, where such failures are of a substantial or material nature. For example, only fatal or ‘major injuries’ reported.
Minor	Deficiencies or inadequacies are minor, have little material impact and can be remedied easily.

More information on compliance and administrative arrangements is provided below;

- 25.2 The Safety and Health risks Initial Enforcement Expectation tables, Tables 5.1 and 5.3 have two columns for enforcement expectations, the first relating to compliance with the law and the second relating to prosecution.
- 25.3 It is not usually appropriate to prosecute in relation to compliance and administrative arrangements that do not in themselves give rise to risks, unless there are relevant duty holder and/or strategic factors or the matter is specified in the Enforcement Policy. Table 5.2 is only concerned with action necessary to secure compliance.
- 25.4 However, in all cases, Inspectors shall base their decision on whether the enforcement action meets the principles and expectations of the Enforcement Policy before reaching a final conclusion.
- 26.0 **Prosecution**
- 26.1 The EMS captures the principles of the Enforcement Policy by providing a framework in which enforcement action is proportional to the breach and the associated risks. Where the circumstances warrant it, the Enforcement Policy states that prosecution may go ahead without recourse to previous advice or alternative sanctions.

26.2	<p>In practice, this will involve a combination of high risk and extreme failure to meet a specific or clearly defined standard, which is well known and obvious. This is not affected by factors such as the duty holder's previous record, or other moderating duty holder factors specific to the circumstances of a situation.</p>
26.3	<p>The EMS reflects this in the safety and health risks Initial Enforcement Expectation table 5.1 and 5.3. Reference to the term 'prosecution' in these tables means that OSH Agency shall prosecute.</p> <p>The Enforcement Policy identifies specific circumstances when the OSH Agency shall prosecute or recommend prosecution. Inspectors should be particularly careful when considering cases where:</p> <ul style="list-style-type: none"> • Death results from a breach of the legislation; • There has been a failure to comply with an Improvement or Prohibition Notice, or there has been a repetition of a breach that was subject to a formal caution; • False information has been supplied wilfully, or with an intent to deceive, in a matter that gives rise to significant risk; and • Inspectors have been intentionally obstructed in the lawful course of their duties.
26.4	<p>In addition to the above, prosecution shall be considered where it is appropriate in the circumstances, as a way to draw attention to the need for compliance, or a conviction may deter others from similar failures to comply with the Act.</p>
26.6	<p>Sometimes, the EMS may not indicate prosecution in these circumstances because of the emphasis it gives to the seriousness of the breach and the risk arising from it. In these instances, Inspectors shall review their decision against the Enforcement Policy before reaching any final conclusion. Although the initial enforcement expectation might not indicate prosecution, there may be factors particular to the individual duty holder, which may aggravate the situation to the extent that prosecution should be considered (see Step 5).</p>
26.7	<p>Prosecution of individuals</p>
26.8	<p>The above applies to all duty holders, including individuals such as individual employers, directors, managers, self-employed persons and employees. Inspectors should apply the principles of EMS as far as possible to the prosecution of individuals.</p>
26.9	<p>When considering the prosecution of employees, inspectors should also take account of the role that the individual employees played in the commission of the offence and any relevant actions by their employer.</p>
27.0	<p>Health and safety risks</p>
27.1	<p>The table below identifies the initial enforcement expectation for health and safety risks.</p>

Table 5.1

Health and Safety risks: Initial enforcement expectation

Risk gap	Standards	Initial enforcement expectation (to secure compliance with the law)	Prosecution
Extreme	Defined	Improvement Notice	Yes
	Established	Improvement Notice	Yes
	Interpretative	Improvement Notice	
Substantial	Defined	Improvement Notice	
	Established	Improvement Notice	
	Interpretative	Letter/inspection Report	
Moderate	Defined	Improvement Notice	
	Established	Letter/inspection Report	
	Interpretative	Letter/inspection Report	
Nominal	Defined	Letter	
	Established	Letter	
	Interpretative	Letter	
Immediate risk of serious and imminent danger have already been considered and dealt with where appropriate.			

28.0 Compliance and administrative arrangements

28.1 The term ‘compliance and administrative arrangements’ is used to describe legal requirements, which are not in themselves risk based. These arrangements are generally defined by Act or supporting ACoPs or standards. While they may not be risk control measures, their absence can undermine the workings of an efficient safety and health system or be evidence of poor safety and health management.

28.2 When considering compliance and administrative arrangements, Inspectors shall use Table 5.2 to assess the level of non-compliance. The level of non-compliance should then be combined with the authority of the standard to produce the initial enforcement expectation, using Table 5.2 below.

Compliance and administrative arrangements: Initial enforcement expectation

Descriptor	Standard	Initial enforcement expectation
Absent	Defined	Improvement Notice
	Established	Improvement Notice
	Interpretative	Report
Inadequate	Defined	Improvement Notice
	Established	Report
	Interpretative	Letter
Minor	Defined	Letter
	Established	Letter
	Interpretative	Letter

29.0 Step 5: Duty holder factors

Principles

29.1 This section and the ensuing looks at the factors specific to a particular situation which may vary the initial enforcement expectation. While enforcement action should secure compliance with the Act, it should also be fair and equitable and have regard for the wider socio-economic factors relevant to local and national business environments. The Inspector's intent and enforcement action has to be effectively targeted to achieve the maximum impact given the Agency's limited resources.

29.2 Inspectors shall first consider **duty holder factors** (Step 5), which may vary the enforcement expectation and then **strategic factors** (Step 6), which may influence the final enforcement conclusion.

29.3 Where the initial enforcement expectation is a Letter, it is unlikely that the outcome will be modified through consideration of duty holder factors. This is because the risk or compliance gap, upon which the initial enforcement expectation depends, will generally be nominal. However, there may be particular circumstances where a Report to the duty holder may be more appropriate. For example, where signage was lacking and the matter has been raised with the duty holder previously, a Report may be appropriate.

29.4 Whenever the proposed enforcement action does not fully address the strategic factors, or the outcome is not in accordance with the principles in the Enforcement Policy, the action should be reviewed and the final enforcement decision recorded. Further guidance is set out at the end of Step 6: Strategic Factors.

30.0 Duty holder factors

30.1 Duty holder factors are, on the whole, specific to the duty holder and their activities and usually confirm the initial enforcement expectation or alter the action up or down the hierarchy by one level, e.g. from an Improvement Notice to an Improvement Notice plus prosecution, or from an Improvement Notice to a Report.

Table 6 lists a series of duty holder factors that may influence the enforcement decision.

Descriptor	Definition
Yes	The duty holder has a history of related incidents, or there is evidence of related incidents, e.g. accidents, cases of ill health and/or dangerous occurrences.
No	No previous history or evidence of related accidents, ill health and/or dangerous occurrences.

Does the duty holder have a history of relevant enforcement being taken against them?

Yes	Enforcement action has been taken against the duty holder on the same or similar issues by Letter, Report, notice or prosecution.
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No	No history of enforcement action against the duty holder on the same or similar issues.
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Is the duty holder deliberately seeking economic advantage?

Yes	The duty holder is deliberately avoiding minimum legal requirements for commercial gain. (For example failing to pay for or provide scaffolding for high working at a height).
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No	Failure to comply is not commercially motivated.
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What is the level of actual harm?

Serious	A 'serious personal injury' or 'serious health effect' has occurred as a result of the matter under consideration.
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Not serious	There has been no actual harm, or the harm has been no greater than a 'significant personal injury' or a 'significant health effect'.
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What is the inspection history of the duty holder?	
Poor	The duty holder has an inspection history of significant problems, copious advice and poor inspection ratings.
Reasonable	The duty holder has an inspection history of nominal or piecemeal problems, where non-compliance has been related to new or obscure duties and where the rating history is in the average range.
Good	The duty holder has an inspection history of good compliance, effective response to advice, consistently high standards and a low rating.
What is the standard of general conditions?	
Poor	There is a general failure of compliance across a range of issues, including those matters related to the activity being considered through the EMS. For example failure to address risks arising from hazardous substances, machinery, transport, vibration, noise etc. or inadequate welfare facilities.
Reasonable	The majority of issues are adequately addressed with only minor omissions.
Little or no confidence	There is concern that the duty holder does not have the capability, or commitment, to comply with the Act and ensure the effective management of health and safety.

Does inspector's assessment of the duty holder give confidence the duty holder can and will comply?
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Confident	It is clear that the duty holder is both fully capable of, and is strongly committed to, compliance with the law through the effective management of health and safety, and can be trusted to put the matter(s) right.
Some confidence	The duty holder demonstrates some capability and commitment to compliance with the law through effective management of health and safety.

30.2 The way these elements are applied to the initial enforcement expectation is represented in flowcharts. The elements in each flowchart vary because different enforcement expectations have different duty holder factors influencing them.

30.3 Flowcharts are provided for a:

- Prohibition notice (Figure 3);
- Improvement notice (Figure 4);
- Report (Figure 5); and
- Letter (Figure 6).

30.4 Inspectors should go through the same process when a Prohibition Notice has been served to allow local factors to determine whether prosecution should be considered, see Figure 3.

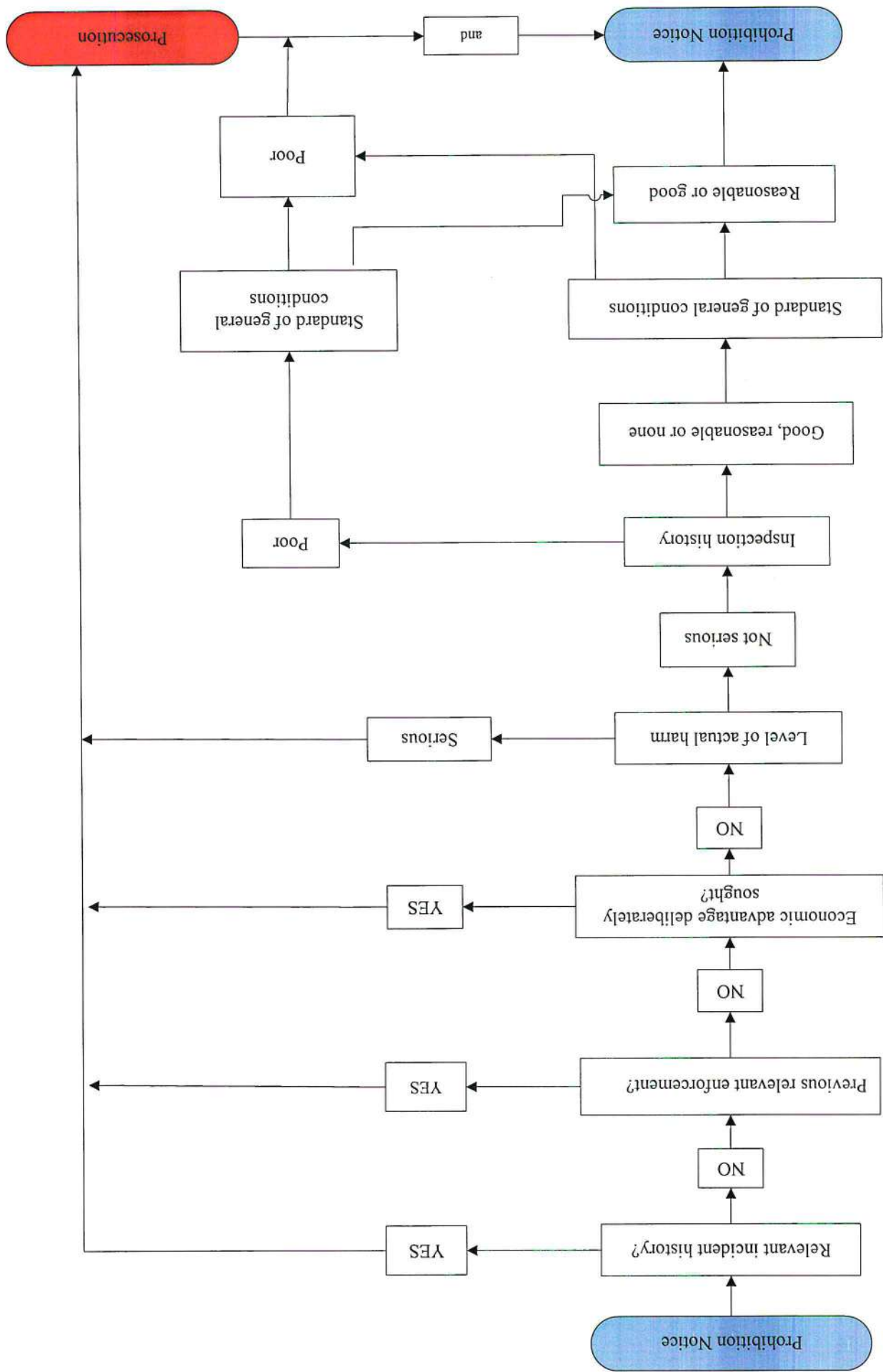


Figure 3 Duty holder factors: Prohibition Notice

Figure 4 Duty holder factors: Improvement Notice

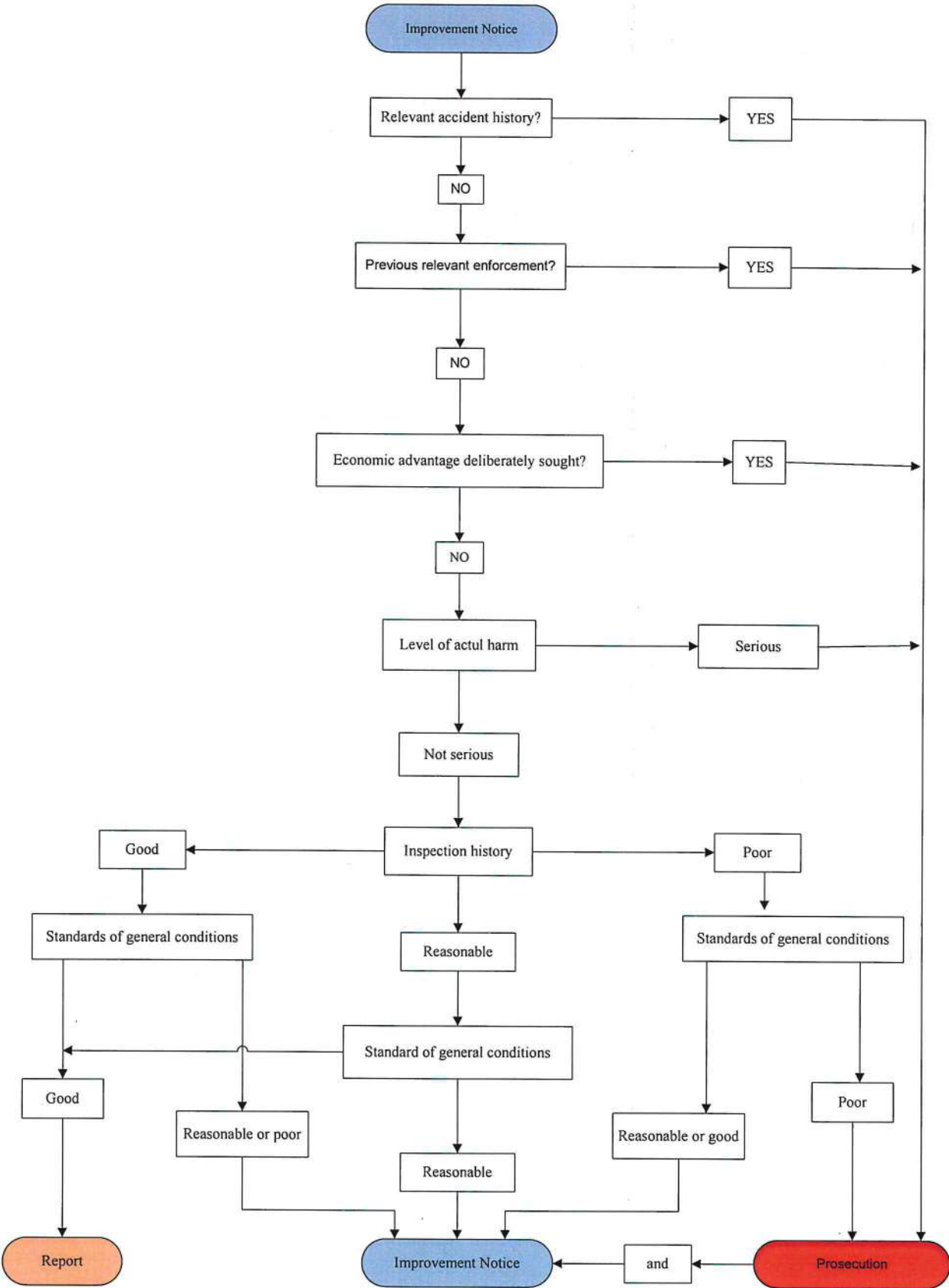
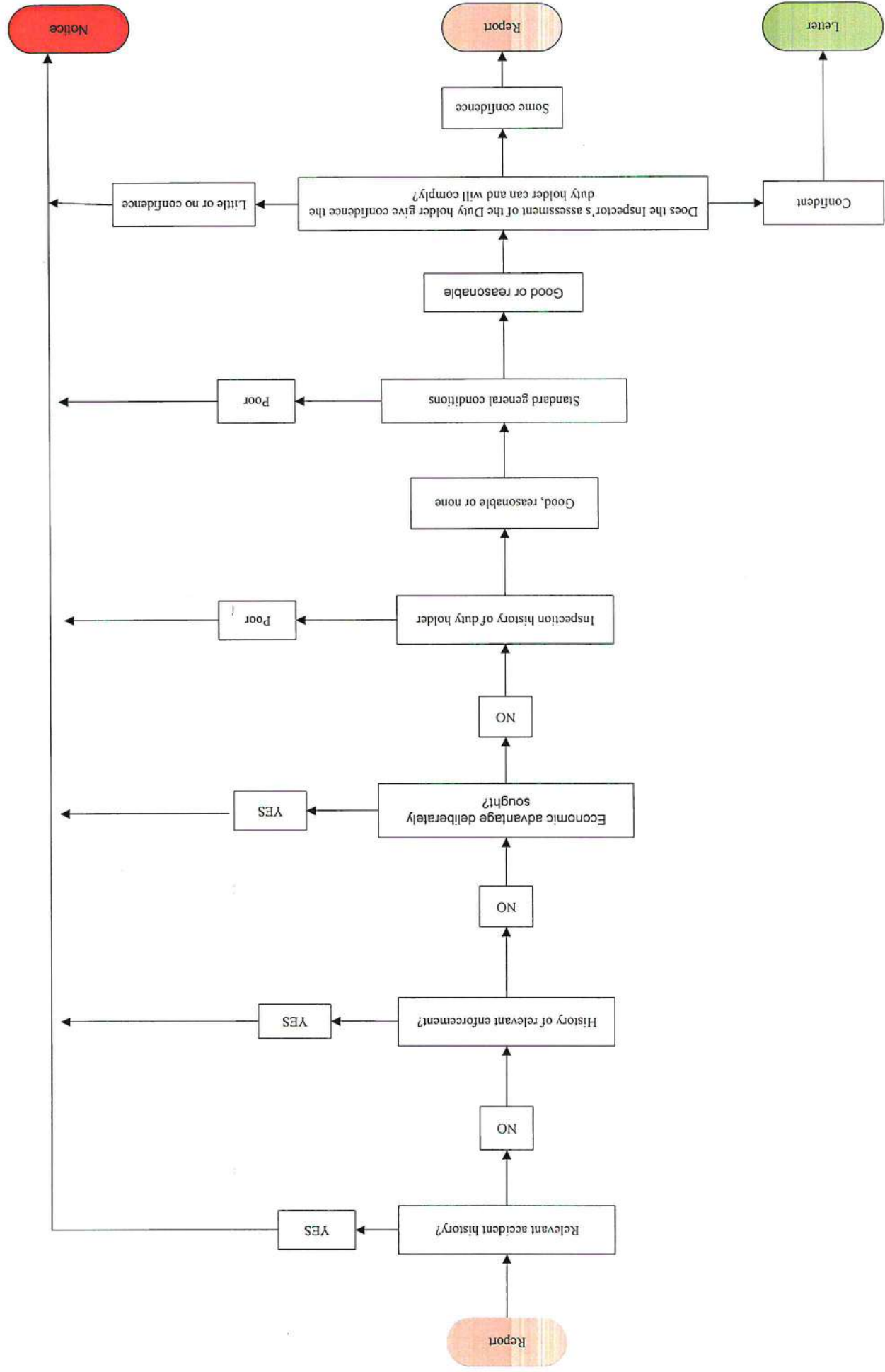


Figure 5 Duty holder factors: Report



31.0 Step 6 Strategic factors

31.1 There is a range of strategic factors which may impact on the final enforcement decision. Inspectors have to ensure that public interest and vulnerable groups (eg children and patients) are considered and that the broader socio-political impact of the enforcement action is taken into account. Strategic factors qualify the decision they do not determine it.

32.0 Public interest

32.1 There are competing demands on the finite resources available to HSE and a balance has to be achieved based upon risk, potential outcomes and public expectations. When considering public interest, inspectors are looking to satisfy themselves that the proposed action will produce a net benefit to the wider community in terms of reducing risks, targeting public resources on the most serious risks and the costs of pursuing a particular course of action.

32.2 Certain issues may have a significant bearing on public expectation, for example fatal accidents, and accidents involving vulnerable groups such as children or customers of leisure activities. While public expectation must be carefully considered, it should not determine the action taken. The public will not have possession of all the facts in any particular case, or indeed the professional training, experience or organisational support that inspectors draw upon when making decisions.

32.3 Public interest is a difficult issue to assess. Inspectors should ask themselves what a reasonable person would expect from HSE in the circumstances. A further test is whether the particular decision could be justified in any public forum or inquiry.

33.0 Process

33.1 Table 7 lists a series of factors which may influence the final outcome of the process.

Table 7 Strategic factors

Does the action coincide with the public interest?	
Yes	The action results in a net benefit to the wider community in terms of targeting resources on risk and meeting public expectations of the Agency.
No	The action results in a net disadvantage to the wider community in terms of addressing risk, targeting resources on risk and failing to meet public expectations of HSE.
Are vulnerable groups protected?	
Yes	The action results in control of risks to vulnerable groups, eg children, members of the public and patients.

Yes	There is a net benefit to the employees, and others who might be affected. Please note that risk is the overriding concern, and that the wider impact may be a qualifying issue, but is not definitive. For example where the risk gap is nominal or moderate and the strict application of the law would result in closure of the workplace or unemployment, then all of the ramifications of the action should be taken into account. The net benefit of the enforcement action in this situation is for the inspector to judge.
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Is the functional impact of the action acceptable?

Yes	The action secures compliance with the relevant benchmark, eg Health risk assessment completed, access to dangerous parts of machinery prevented.
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Will the action result in the benchmark being achieved?

Negative	The course of action undermines both positive duty holder perceptions of HSE and the wider appreciation of the standards of health and safety required. For example failure to prohibit construction work causing a danger to the public.
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Positive	Other duty holders within the same industry, geographical location or wider business community, are deterred from committing similar offences or encouraged to adopt a more favourable view of health and safety requirements. In effect, the action taken broadcasts a positive message about HSE.
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What is the effect of the action on other duty holders?

No	The action is insufficient to secure sustained improvements and problems may be expected at subsequent visits.
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Yes	The action is sufficient to achieve sustained compliance across the range of risks associated with the duty holder.
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Will the action result in sustained compliance?

No	The action does not result in control of risks to vulnerable groups.
----	--

No	There is a net disadvantage to employees and others who might be affected, from the action taken. Please note that risk is the overriding concern, and that the wider impact may be a qualifying issue, but is not definitive.
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Have the principles and expectations of the Enforcement Policy been met?

Yes	The policy has been followed.
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No	The policy has not been followed.
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33.2 The proposed enforcement actions are tested against the strategic factors by following the Strategic factors flowchart (Figure 7).

- 33.3 The flowchart leads to a confirmed enforcement action, which should be subject to review where it does not address all the strategic factors or accord with the Enforcement Policy.
- 33.4 There is no ranking of importance implied in the progression through the strategic factors. However, the proposed action has to meet the principles and expectations captured in the Enforcement Policy.

34.0 Review of action

- 34.1 Where the action stems from an **inspection** intervention, the Inspector shall review and record the reasons why the action taken is different from that which is indicated by the Strategic Factors Flowchart and/or Enforcement Policy, in accordance with current instructions.

Where the action stems from an **investigation**, the inspector shall review with input from their line manager. Again, a record shall be made of the reasons why the action taken is different from that which is indicated by the EMS and/or Enforcement Policy, in accordance with current instructions.

In both cases the sufficient detail shall be recorded to make it clear how the final enforcement decision was reached.

35.0 Step 7 Enforcement conclusion

- 35.1 The enforcement conclusion is used to check the level and focus of enforcement is appropriate. While this is not part of the framework of the EMS, it is a necessary part of any enforcement action; it ensures that the action is targeted.

- 35.2 The following **principles** shall be addressed in relation to the **priorities for action**:

- Does the enforcement action deal with the most serious risks in order of priority, and in appropriate timescales?
- Has the cause of the risk been addressed?
- Have immediate failures to control risk or comply with the law been dealt with?
- Are the underlying problems addressed?

36.0 Targets for action

- 36.1 Does the enforcement action:

- Take account of the scale of the failures, e.g. simple or multiple failures?
- Deal with the fundamental cause of the problem(s), e.g. workplace precautions, risk control systems or management arrangements?

37.0 Timescales

- 37.1 Do the timescales for action reflect:-

- The nature of the risk gap, and the imminence of risk?
- The resource impact to the duty holder?
- The resource impact on the operational unit?

38.0 Concluding factors

38.1 For the enforcement decision to be appropriate, the inspector will need to consider whether:

- the enforcement action will deal with all the serious risks;
- it is likely to secure sustained compliance;
- the principles and expectations of the Enforcement Policy have been met; and Evidence can be obtained to support the enforcement action.

The EMS will be reviewed every two years subject to any legislative requirements.

Approved by the Occupational Safety and Health Authority on 28th September, 2022.



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Chairman

Occupational Safety and Health Authority

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