

# Enforcement Management Model (EMM) Guernsey

## Operational version 1.2

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### Contents

Enforcement Management Model (EMM) – Summary .....	3
What is the EMM?	
What is the EMM used for?	
When is the EMM used?	
Limitations of the EMM	
Review arrangements	
EMM overview .....	4
Purpose of enforcement	
Process of enforcement	
Purpose of the EMM	
EMM in detail .....	5
Step 1: Enforcement priorities.....	7
Priorities for action	
Health and safety risks	
Permissioning	
Non risk-based compliance and administrative arrangements	
Step 2: Risk of serious injury.....	8
Assess the actual risk of serious injury	
Dealing with serious risk	
Step 3: Gap analysis .....	11
Principles	
Determining the risk gap: Actual risk	
Determining the risk gap: Benchmarking	
Determining the risk gap: Defining risks and benchmarks	
Determining the risk gap: Health risks	
Risk tables	
Permissioning	
Non-risk based compliance	
Step 4: Initial enforcement expectation .....	21
Principles	
Standards and benchmarks	
Determining the initial enforcement expectation	
Prosecution	
Prosecution of individuals	
Formal cautions	
Health and safety risks	
Compliance and administrative arrangements	
Permissioning	

Step 5: Dutyholder factors .....	28
Principles	
Dutyholder factors	
Step 6: Strategic factors .....	36
Public interest	
Process	
Review of action	
Step 7: Enforcement conclusion .....	39
Targets for action	
Timescales	
Concluding factors	

# Enforcement Management Model – Summary

## What is the EMM?

1 The Enforcement Management Model (EMM) is a logical system that helps inspectors to make enforcement decisions in line with the Health and Safety Executive's (HSE's) Enforcement Policy Statement (EPS). The EPS sets out the principles inspectors should apply when determining what enforcement action to take in response to breaches of health and safety legislation. Fundamental to this is the principle that enforcement action should be proportional to the health and safety risks and the seriousness of the breach.

## What is the EMM used for?

2 The EMM:

- provides inspectors with a framework for making consistent enforcement decisions;
- helps the Chief Inspector monitor the fairness and consistency of inspectors' enforcement decisions in line with HSE's policy; and
- assists less experienced inspectors in making enforcement decisions.

3 It can also assist others (eg those directly affected) in their understanding of the principles inspectors follow when deciding on a particular course of action.

## When is the EMM used?

4 Inspectors apply the principles of the EMM in all of their regulatory actions.

5 Inspectors' enforcement decisions are also sampled and reviewed using the EMM as part of routine monitoring. This, together with the uses described above, promotes increased consistency and fairness in enforcement.

## Limitations of the EMM

6 Inspectors are confronted by a myriad of unique variables when carrying out inspections, assessments and investigations, including different work activities, sectors, organisational structures, contractual relationships etc. Assessing risk and compliance with the law therefore ranges from being relatively straightforward to extremely complex.

7 The EMM is a straightforward linear model and so cannot truly capture all the nuances and complexities of discretionary decision making in all circumstances. While the EMM provides a framework for driving consistency, it is crucial that inspectors' discretion is not fettered by artificially constraining all decisions to the EMM.

8 The EMM is therefore supported by a review process that requires inspectors and the Chief Inspector to consider whether the proposed enforcement action meets HSE's EPS, and the outcome is reviewed by the Law Officers of the Crown. Occasionally, the review may reach an alternative enforcement conclusion. When this occurs, Inspectors will record the final decision and the reasons.

## **Review arrangements**

9 The EMM will be kept under review and revised as necessary.

## **EMM overview**

### **Purpose of enforcement**

10 HSE believes in firm but fair enforcement of health and safety legislation. The purpose of enforcement is to:

- ensure that dutyholders take action to immediately deal with serious risks;
- promote and achieve sustained compliance; and
- ensure that dutyholders, who breach health and safety requirements, and directors and managers who fail in their responsibilities, may be held to account. This may include recommending prosecution in Guernsey and Alderney, in the circumstances set out in HSE's EPS.

### **Process of enforcement**

11 Inspectors use various enforcement techniques to deal with risks and secure compliance with the law, ranging from the provision of advice to enforcement notices. They can also recommend prosecution where the circumstances warrant punitive action. Making decisions about appropriate enforcement is fundamental to the role of an inspector. States of Guernsey Governmental bodies are not exempt from statutory enforcement.

12 The process of making enforcement decisions is complex. Each dutyholder is unique, and inspectors must have a thorough understanding of the hazards and control measures associated with each dutyholder's activities. It is vital that inspectors have wide discretion to exercise their professional judgement so that action, appropriate to each situation, can be taken. Further guidance may be found in the Treasury Solicitor's document, [The Judge Over Your Shoulder](http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf) (www.tsol.gov.uk/Publications/Scheme\_Publications/judge.pdf).

13 Enforcement decisions must be impartial, justified and procedurally correct. HSE's EPS sets out the approach that inspectors should follow. As a public regulator, HSE is accountable for managing the enforcement process.

14 The EMM provides HSE with a framework for making enforcement decisions that meet the principles in the EPS. It captures the issues inspectors consider when exercising their professional judgement and reflects the process by which enforcement decisions are reached.

## **Purpose of the EMM**

15 The EMM is not a procedure in its own right. It is not intended to fetter inspectors' discretion when making enforcement decisions and it does not direct enforcement in any particular case. It is intended to:

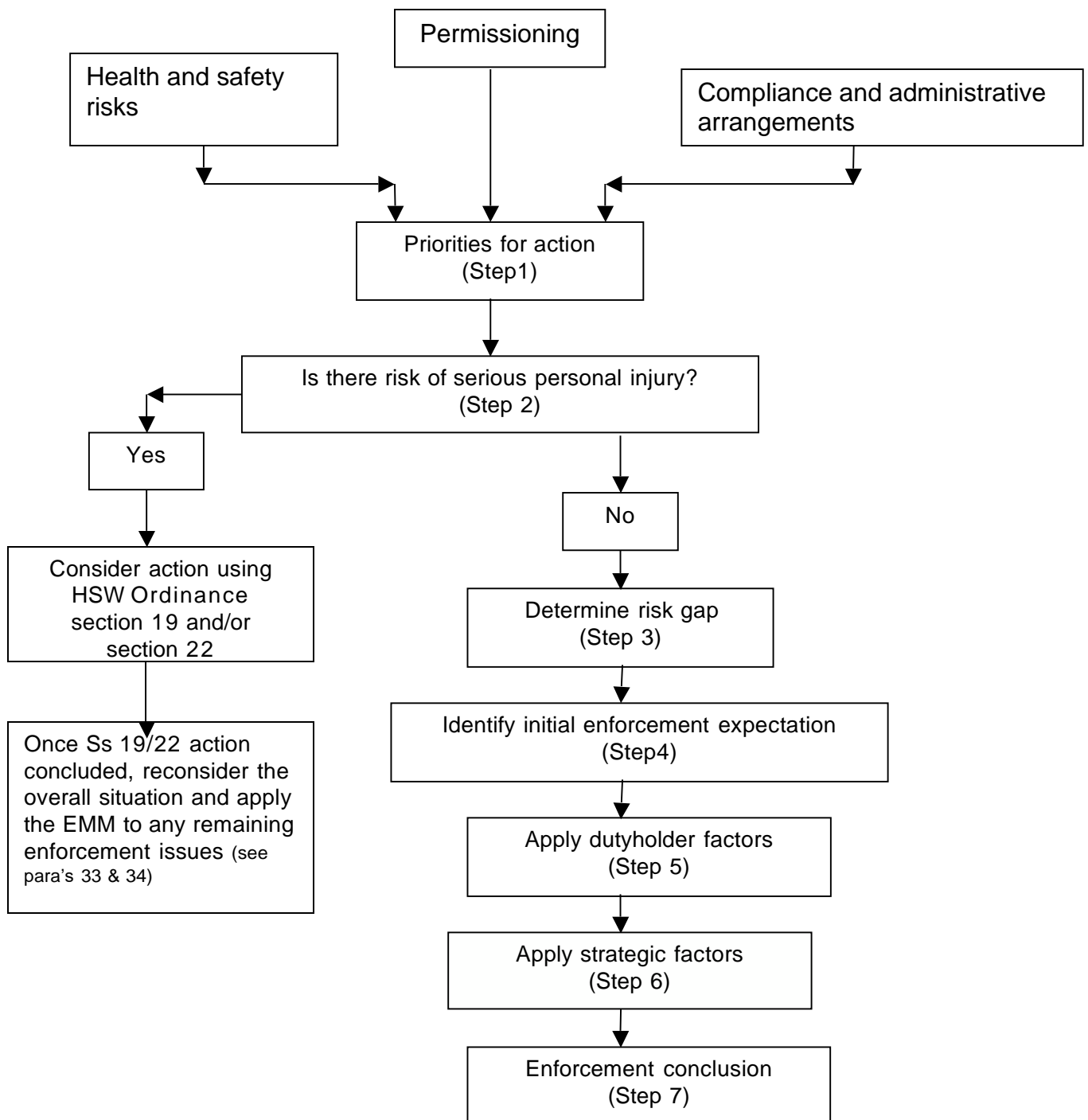
- promote enforcement consistency by confirming the parameters, and the relationships between the many variables, in the enforcement decision-making process;
- promote proportionality and targeting by confirming the risk-based criteria against which decisions are made;
- be a framework for making enforcement decisions transparent, and for ensuring that those who make decisions are accountable for them;
- help experienced inspectors assess their decisions in complex cases;
- allow peer review of enforcement action; and
- guide less experienced and trainee inspectors in making enforcement decisions.

16 The EMM and its associated procedures aides review of the decision-making process and inspectors' enforcement actions to ensure the purpose and expectations of the EPS have been met.

17 The EMM does not exist in isolation. It is supported by quality procedures which address, among other things, the selection and investigation of accidents. Its application also relies on guidance that provides inspectors with yardsticks with which to promote consistent use of the EMM.

## **EMM in detail**

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



**Figure 1** Process of the EMM

## **Step 1: Enforcement priorities**

### ***Priorities for action***

19 While intervention priorities are guided by HSE's Strategy, inspectors have discretion in deciding the priorities for enforcement action.

20 During regulatory contacts, inspectors collect information about hazards and control measures. From this, they make judgements about the health and safety 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 law and whether any punitive action is required.

21 The priorities for action may involve a single issue or several issues, eg in the case of workplace transport where driver training, the segregation of pedestrians and vehicles, lighting, maintenance etc might be issues. When applying the EMM 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.

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

### ***Health and safety risks***

23 Hazards (something 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, eg workplace precautions, risk control systems and management arrangements.

24 The nature of the hazard and the potential consequences determine the type and extent of the precautions needed. Straightforward hazards, eg handling irritant substances, may only require substitution or simple safety precautions for control. More complex hazards, eg handling explosives, require a range of preventive and protective measures to ensure health and safety.

### ***Permissioning***

25 In some circumstances, dutyholders are legally required to seek HSE's permission as a condition of undertaking specific work activities. Some health and safety legislation for high hazard industries require dutyholders to apply for licenses, approvals or certificates or to submit safety cases.

26 Permissioning also covers situations where a dutyholder applies to HSE for an exemption from a legal requirement, eg to introduce new equipment or safer technologies not catered for by current health and safety legislation. Inspectors should consider any permissioning regimes relevant to a dutyholder's activities.

27 The terms and conditions of granting such permission are captured in permissioning documents. In such cases, the inspector seeks information on compliance with the terms of these documents, as well as information about the hazards and safeguards associated with the activity, and any resultant risk.

### ***Non risk-based compliance and administrative arrangements***

28 Some legal duties do not directly result in control of risk, eg the requirements to submit safety cases, assess risks and report incidents but still demand compliance by the dutyholder. These are referred to here as compliance and administrative arrangements and are considered separately in the EMM from risk-based issues.

29 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 should decide on action principally in relation to the control of risk.

## **Step 2: Risk of serious injury**

### ***Assess the actual risk of serious personal injury***

30 Inspectors should always deal first with matters that give rise to risk of serious personal injury. They have the power to either prohibit the work activity, or seize and make safe the article or substances that are creating the risk. Sometimes they will do both.

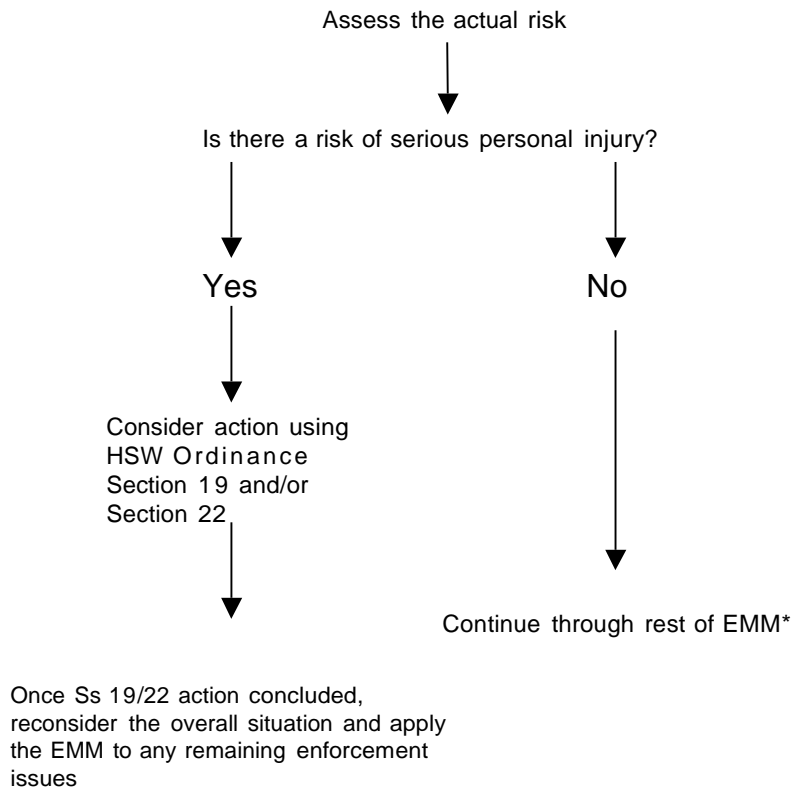
31 When considering the immediacy of risk, inspectors should use the principles of '**risk gap analysis**' described in Step 3. They must have an understanding of '**actual risk**', and take account of any relevant standards when considering what can be done within the law to reduce the risk of serious personal injury.



## ***Dealing with serious risk***

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

**Figure 2** Dealing with serious risk



\* This includes considering risk gap and compliance issues, and dutyholder and strategic factors to determine if prosecution is appropriate.

33 By using a Prohibition Notice or seizing and making safe an article or substance, the inspector is likely to have controlled the risk to the extent that there is now negligible or no risk remaining. However, they will also need to determine:

- whether they need to take further enforcement action to secure sustained compliance with the law in relation to that, and all other priorities for action they have identified; and
- whether punitive action is appropriate. (The Dutyholder Factors flow chart headed Prohibition Notice will assist in making this decision.).

34 Therefore, once action in relation to Ss 19 and 22 HSW Ordinance 1987 has been concluded, inspectors should readdress the situation, identify any remaining priorities for action and apply the EMM.

## Step 3: Gap analysis

### *Principles*

35 During a regulatory contact inspectors collect information about hazards and control measures. This is used to make an initial assessment of the health and safety risks posed by the various activities and determine the **actual risk** (where the dutyholder is). They should compare this to the risk accepted by the law or guidance and decide the **benchmark risk** (the level of risk remaining once the actions required of the dutyholder by the relevant standards, enforceable by law, are met). The difference between where the dutyholder is and where they should be is the **risk gap**.

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

37 When using risk gap analysis in relation to securing compliance with the law, all of the issues that make up the priority for action are considered in turn. 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 secure compliance for that particular part of the priority for action.

38 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 law. However, where there are a number of 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.

### *Determining the risk gap: Actual risk*

39 The first step in determining the risk gap is to assess the level(s) of actual risk arising from the dutyholder's activities. Inspectors should base their judgement 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 – Unsafe use of dental x-rays***

**Actual risk** is determined from an assessment of:

- the **likelihood** of exposure of any person to x-rays. This is informed by assessment of how the work with x-rays is carried out, including details of the x-ray operation, working practices, maintenance and supervision regimes, staff training, etc; and
- the **consequences** of exposure. This is informed by power, dosage, exposure periods etc.

If the activities are not properly controlled, depending on the actual circumstances, the credible risk may be **possible risk of serious personal injury**.

***Actual Risk: Example 3 – Fall from height***

Consider the fall from height risk from the installation of a concrete beam 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**.

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

## ***Determining the risk gap: Benchmark risk***

41 Identifying the risk gap requires:

- inspectors to assess the **actual risk** arising from the circumstances under consideration, ie from the way the work activity is being undertaken;
- inspectors to determine the **benchmark risk**, ie the result of controlling the risk to an acceptable standard; and
- comparison of the two to establish the **risk gap**.

**Note:** In determining these risks, the EMM considers both the likelihood of each risk having effect and the consequences of the harm resulting from each risk.

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

Reconsider the danger from an unguarded and rotating stock bar on a lathe. From the above example the actual risk was determined to be a **probable risk of serious personal injury**.

The appropriate standard in this case is Sections 1-4 of the Safety of Employees (Miscellaneous Provisions) Ordinance, 1952, which requires effective measures to be taken:

*'to prevent access to any dangerous part of machinery or to any rotating stock bar'.*

- Once this standard is met, the **likelihood** of contact with a rotating stock bar is nil.
- The danger from the stock bar rotating still remains.

Accordingly, the **benchmark risk** is **no likelihood of serious personal injury**.

### ***Benchmark risk: Example 2 – Unsafe use of dental x-rays***

The appropriate standards in this case are; the Protection of Persons against Ionising Radiation ACoP 1995 and associated guidance. This requires; warning devices (workplace precautions), controlled areas, adequate maintenance and local rules (risk control systems), and the appointment of a radiation protection supervisor (management arrangements).

Once this standard is met, the **likelihood** of dangerous exposure to dental x-rays should be remote. In this example, complying with the ACoP should also reduce the **consequences** of exposure.

Accordingly, the **benchmark risk** is **remote likelihood of minor injury**.

***Benchmark risk: Example 3: Fall from height***

Reconsider the fall from height risk from the installation of a concrete beam 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 or the use of bean/air bags.

The **likelihood** of persons falling a distance liable to cause personal injury remains the same. However, the **consequences** of a fall are significantly reduced.

The **benchmark risk** is **possible risk of minor injury**.

***Determining the risk gap: Defining risks and benchmark risk***

42 Inspectors do not normally use detailed or quantitative assessment techniques to determine actual risk, or benchmark risk. The more practical approach adopted in the EMM uses three **risk elements** subdivided into a number of **descriptors** reflecting a range of outcomes.

43 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.

44 Some safeguards, or precautions, address **consequence**. Consider 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 such entanglement by stopping the movement of the drill within defined parameters, thereby reducing the consequences of the event.

45 Some safeguards, or precautions, address **likelihood**. For example, consider the provision of guard rails and toe-boards on scaffold platforms. These precautions do not affect the consequence of a fall from the platform, 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. However, these precautions do reduce the likelihood that a fall will occur.

46 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.

47 The convention of the EMM is to put likelihood and consequence in order. This is simply a convenient way of including both concepts 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.

48 When deciding on the most appropriate measures to address the actual risk encountered, inspectors should apply (choose) that which best addresses what needs to be done. For example where industry guidance requires specific levels of lighting (i.e. set lux values), whereas the law describes the standard to be achieved (i.e. suitable and sufficient lighting). This principle applies irrespective of whether the standards are **defined, established** or **interpretative**.

49 In this example, although the sector guidance is Interpretative, it is the applicable standard to employ.

50 The consequence of the event under consideration 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 personal injury/ serious health effect	<p>It is credible that a fatal injury could occur.</p> <p>It is credible that an injury could occur that results in a permanent or irreversible disabling condition, or requires immediate treatment in hospital.</p> <p>It is credible that a health effect could occur that;</p> <ul style="list-style-type: none"><li>• causes a permanent, progressive or irreversible condition, or</li><li>• causes permanent disabling, leading to a lifelong restriction of work capability or a major reduction in quality of life.</li></ul>
Significant injury/ significant health effect	<p>It is credible that an injury could occur to a person that results in that person being unable to perform their normal work for more than 3 days.</p> <p>It is credible that a health effect could occur that;</p> <ul style="list-style-type: none"><li>• causes non-permanent or reversible health effects,</li><li>• causes non-progressive conditions, or</li><li>• results in temporary disability.</li></ul>
Minor injury/ minor health effect	Injuries or conditions not included above.



51 **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. Instead, a combination of many factors are taken into account by inspectors, based on their knowledge of an industry/activity, and supported by HSE guidance.

52 Inspectors should use their professional judgement, and any supporting guidance, to determine whether the likelihood is **probable**, **possible**, **remote** or **nil/negligible**. In practice, nil/negligible means that the consequence shouldn't be realised.

53 **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).

### ***Determining the risk gap: Health risks***

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

55 There may be instances where the actual health effect is different to that which could have been anticipated as the most credible. However, no account should be taken of an individual's resistance or susceptibility. The effect of exposure to a health risk should be determined by the likely response of the working population as a whole.

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

57 However, a number of indicators of general health related benchmark risks have been developed, and should be used where applicable in conjunction with industry specific guidance. Where there is no appropriate guidance, inspectors and line managers should endeavour to use the principles in the EMM in coming to an enforcement decision.

### ***Risk tables***

58 The risk gap is determined by plotting 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.

59 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 dutyholder is complying with, or exceeding, the standard required by law.

60 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 personal injury**.

It is only credible 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 is **no likelihood of serious personal injury** 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.

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

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

***Permissioning***

63 Gap analysis is also used when considering possible enforcement action where a dutyholder has failed to adhere to conditions set out in permissioning documents relevant to their activities. The actual risk created by deviations from the permissioning document is compared to the benchmark risk set by the permissioning document and associated guidance.

Measure of actual risk (where the dutyholder is)	Consequence	Likelihood	<div><div></div><div></div><div></div></div> <div>Dutyholder complies with or exceeds legal standard</div>			<div><div></div><div></div><div></div><div></div></div> <div>Dutyholder complies with or exceeds legal standard</div>				<div><div></div><div></div><div></div><div></div></div> <div>Dutyholder complies with or exceeds legal standard</div>			
	Nil	Nil											
	Minor injury	Remote											
		Possible											
		Probable											
	Significant injury	Remote											
		Possible											
		Probable											
	Serious personal injury	Remote											
		Possible											
		Probable											
Likelihood		Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg	
Consequence		Serious personal injury			Significant injury				Minor injury/ Nil				
	Benchmark risk (where dutyholder should be)												

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

Measure of actual risk (where the dutyholder is)	Consequence	Likelihood	<div>Dutyholder complies with or exceeds legal standard</div>			<div>Dutyholder complies with or exceeds legal standard</div>				<div>Dutyholder complies with or exceeds legal standard</div>				
	Nil	Nil												
	Minor injury	Remote												
		Possible												
	Significant injury	Probable												
		Remote												
		Possible												
	Serious personal injury	Probable												
		Remote												
		Possible												
	Likelihood			Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg
Consequence			Serious personal injury			Significant injury				Minor injury/ Nil				
	Benchmark risk (where dutyholder should be)													

Risk gap:	Extreme	Substantial	Moderate	Nominal
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**Table 2.2** Risk gap table: Multiple casualties

## ***Non risk-based compliance***

64 Gap analysis is not appropriate for compliance and administrative arrangements that do not directly result in the control of risk. Inspectors should use the **Compliance and administrative arrangements Initial enforcement expectation table** (Table 5.2) in these circumstances.

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

## **Step 4: Initial enforcement expectation**

### ***Principles***

66 Once risk gap analysis has been used to determine how far a dutyholder has departed from the requirements of the law, or the absence or deficiency in compliance and administrative arrangements has been established, it is necessary to consider the availability and 'authority' of the relevant standard that establishes what has to be done to comply. Comparison of the the risk gap or extent of non-compliance with compliance and administrative arrangement with the relevant standard 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 of the law.

### ***Standards***

67 Standards, i.e. where a dutyholder has to go to determine what needs to be done to comply with the law come from various sources. They have differing 'authorities', e.g. they could be specified in law, or may be a reasoned description of what the law 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 dutyholder has failed to meet well known and established standards 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 health and safety legislation. They should not be confused with other standards such as customer service or product quality.

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

**Table 3** Standards table

Descriptor	Definition
<b>What is the authority of the appropriate standard?</b>	
<b>Defined standard</b>	Minimum standard specified by Acts, Regulations, Orders and ACoPs. For example, defined standards of edge protection, requirement to fit rated capacity indicators to cranes, prohibitions of certain work activities, requirement to have a licence for storing explosives, or permits for scaffoldings on the highway.
<b>Established standard</b>	Codes of Practice and other standards linked to legislation, e.g. CEN standards, providing specific standards of health, safety and welfare. Also published or commonly known standards of performance interpreted by HSE, HSE's technical Support Groups (SG) or other specialists, industry or other organisations, as levels of performance needed to meet a general or qualified duty under health and safety law.
<b>Interpretative standard</b>	Standards put forward by HSE, and SG or other HSE specialists, which are not published or available generally, but are examples of the performance needed to meet a general or qualified duty. Also standards interpreted by inspectors from first principles.

69 The appropriate standard is the one that best describes what the dutyholder 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 dutyholder needs to turn to industry guidance documents they would be the standards that provide the level of authority (i.e. **established**).

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

## ***Determining the initial enforcement expectation (IEE)***

71 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 tables for health and safety risks and for risks associated with permissioning activities. A separate Initial Enforcement Expectation table refers to compliance and administrative arrangements, and is used in conjunction with Table 4 below.

**Table 4** Compliance and administrative arrangements

Descriptor	Definition
<b>How well are the standards for compliance or administrative arrangements complied with?</b>	
<b>Absent</b>	Total absence, appreciation or implementation of compliance or administrative arrangements. For example, safety case not submitted, assessment of risk not completed, toilets not provided, or accidents not reported. Also, a failure to provide information required by permissioning regimes.
<b>Inadequate</b>	Only rudimentary observance with standards or inadequate compliance, where such failures are of a substantial or material nature. For example washing facilities not provided with hot water, only fatal or 'major injuries' reported. Also poor quality of submissions required for permissioning.
<b>Minor</b>	Deficiencies or inadequacies are minor, have little material impact and can be remedied easily. Also minor defects in the information supplied for permissioning.

72 More information on compliance and administrative arrangements is provided below.

73 The Health and safety risks and Permissioning 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.

74 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 dutyholder and/or strategic factors or the matter is specified in the EPS. Table 5.2 is only concerned with action necessary to secure compliance.

75 However, in all cases, inspectors should consider whether the enforcement action meets the principles and expectations of the EPS before reaching a final conclusion.

## ***Prosecution***

76 The EMM captures the principles of the EPS by providing a framework in which enforcement action is proportional to the breach of the law or permissioning documents and the associated risks. Where the circumstances warrant it, the EPS states that prosecution may go ahead without recourse to previous advice or alternative sanctions.

77 In practice, this will involve a combination of high risk and extreme failure to meet an explicit or clearly defined standard, which is well known and obvious. This is not affected by factors such as the dutyholder's previous record, or other moderating dutyholder factors specific to the circumstances of a case.

78 The EMM reflects this in the health and safety risks Initial Enforcement Expectation table and the Permissioning Initial Enforcement Expectation Tables 5.1 and 5.3. Reference to the term 'prosecution' in these tables means that HSE would normally recommend that the Law Officers of the Crown take a prosecution.

79 The EPS identifies specific circumstances when HSE expects enforcing authorities to normally prosecute or recommend prosecution. Inspectors should be particularly careful when considering cases where:

- 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.

80 In addition to the above, prosecution should normally be considered where it is appropriate in the circumstances, as a way to draw general attention to the need for compliance with the law, or a conviction may deter others from similar failures to comply with the law.



81 Sometimes, the EMM 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 cases, inspectors should review their decision against the EPS before reaching any final conclusion. Although the initial enforcement expectation might not indicate prosecution, there may be factors particular to the individual dutyholder, which aggravate the situation to the extent that prosecution should be considered (see Step 5).

### ***Prosecution of individuals***

82 The above applies to all principal dutyholders under health and safety legislation, including individuals such as individual employers, directors, managers, self-employed persons and employees. Inspectors should apply the principles of EMM as far as possible to the prosecution of individuals.

83 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.

84 Directors or managers may only be prosecuted under HSW Ordinance, section 27, if the body corporate has committed an offence. Prosecutors must then be able to prove the offence was committed through the consent, connivance or neglect of the director or manager in question. When considering recommending the prosecution of such persons, inspectors should seek to apply the principles in the EMM wherever possible and, in particular, should consider the management chain and the role played by individual directors and managers. These additional elements are addressed in guidance, not the EMM itself.

### ***Formal cautions***

85 There may be rare instances where, due to the exceptional circumstances of a case, a formal caution is an appropriate alternative to prosecution. This option is outside the framework of EMM. Reference should be made to the Law Officers of the Crown on use of formal cautions.

### ***Health and safety risks***

86 The table below identifies the initial enforcement expectation for health and safety risks.

**Table 5.1** Health and safety risks: Initial enforcement expectation

Risk gap	Standards	Initial enforcement expectation (to secure compliance with the law)	Consider prosecution?
Extreme	Defined	Improvement Notice	Yes
	Established	Improvement Notice	Yes
	Interpretative	Improvement Notice	
Substantial	Defined	Improvement Notice	
	Established	Improvement Notice	
	Interpretative	Letter/inspection form	
Moderate	Defined	Improvement Notice	
	Established	Letter/inspection form	
	Interpretative	Letter/inspection form	
Nominal	Defined	Verbal warning	
	Established	Verbal warning	
	Interpretative	Verbal warning	
Immediate risk of serious personal injury has already been considered and dealt with where appropriate.			

### ***Compliance and administrative arrangements***

87 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 law or supporting ACoPs. While they may not be risk control measures, their absence can undermine the workings of an efficient health and safety system or be evidence of poor health and safety management.

88 When considering compliance and administrative arrangements, inspectors should use Table 5.2 to assess the level of non-compliance. This table may also be used when considering the provision of certain information required by permissioning regimes. 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.

**Table 5.2** Compliance and administrative arrangements: Initial enforcement expectation

Descriptor	Standard	Initial enforcement expectation
<b>Absent</b>	Defined	Improvement Notice
	Established	Improvement Notice
	Interpretative	Letter
<b>Inadequate</b>	Defined	Improvement Notice
	Established	Letter
	Interpretative	Verbal warning
<b>Minor</b>	Defined	Verbal warning
	Established	Verbal warning
	Interpretative	Verbal warning

### ***Permissioning***

89 The enforcement action to secure compliance, in respect of issues subject to permissioning regimes, is usually achieved through the permissioning document. This may be through formal directions, eg its modification including re-issue, its revocation/refusal, or the use of a specific enforcement power provided by the permissioning regime. The extent of deviation from the permissioning document is considered along with the risk gap it generates in order to identify an initial enforcement expectation (see Table 5.3 below).

90 In some circumstances there may be risk arising out of the dutyholder's activity, which cannot be dealt with through the permissioning document. In these cases, Table 5.1 the Health and safety risks initial enforcement expectation table should be used to indicate the appropriate level of enforcement.

91 There may also be compliance or administrative matters associated with permissioning, for example the requirement to notify the relevant authority of a permissioned activity. The Compliance and administrative arrangements initial enforcement expectation table can be used where the matter cannot be dealt with adequately through the permissioning regime.

92 In some circumstances, for example where new applicants, new proposals or modifications are being considered, there is no actual risk because the activity has yet to take place. In such cases, the potential risk should be considered, based upon the information made available to inspectors, and compared to the relevant benchmark risk, to compute the risk gap in the usual way. This can be used to arrive at an initial enforcement expectation.

93 More detailed considerations are contained in HSE's Enforcement Policy Statement.

**Table 5.3** Permissioning initial enforcement expectation table

Deviation from Permissioning Document	Risk gap	Initial enforcement expectation*	
		Permissioning Document	Consider prosecution?
Contravention	Extreme	Revocation/refusal/direction	Yes
	Substantial	Revocation/refusal/direction	
	Moderate	Amendment/refusal/variation	
	Nominal	Amendment	
	Nil/negligible	Amendment	
Irregularities	Extreme	Amendment/refusal/variation	Yes
	Substantial	Amendment/refusal/variation	
	Moderate	Amendment	
	Nominal	Letter	
	Nil/negligible	Letter/verbal warning	
None	Any	Nil**	
*Immediate risk of serious personal injury has already been considered and dealt with where appropriate.			
** This is included because it is possible to have full compliance with the permissioning requirements but still identify a 'risk gap' that may require action to rectify. However, although the EMM predicts a 'nil' action through the permissioning regime, it may be that the permissioning document should be reviewed.			

## Step 5: Dutyholder factors

### Principles

94 This section and the next consider the factors specific to a particular case which may vary the initial enforcement expectation. While enforcement action should secure compliance with the law, 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 effort and enforcement action has to be effectively targeted to achieve the maximum impact given finite resources.

95 Inspectors should first consider **dutyholder factors** (Step 5), which may vary the enforcement expectation, and then **strategic factors** (Step 6), which may influence the final enforcement conclusion.

96 Where the Initial enforcement expectation is a verbal warning, it is unlikely that the outcome will be modified through consideration of dutyholder 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 writing to the dutyholder may be more appropriate. For example, where washing facilities have been provided, but towels or other means of drying have not been provided, and the matter has been raised with the dutyholder previously, a letter may be appropriate.

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

### ***Dutyholder factors***

98 Dutyholder factors are, on the whole, specific to the dutyholder and their activities, and usually confirm the initial enforcement expectation or alter the action up or down the hierarchy by one level, eg from an Improvement Notice to an Improvement Notice plus prosecution, or from an Improvement Notice to a letter.

99 Table 6 lists a series of dutyholder factors that may influence the enforcement decision.

100 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 dutyholder factors influencing them.

101 Flowcharts are provided for a:

- Prohibition notice (Figure 3);
- Improvement notice (Figure 4);
- letter (Figure 5); and
- verbal warning (Figure 6).

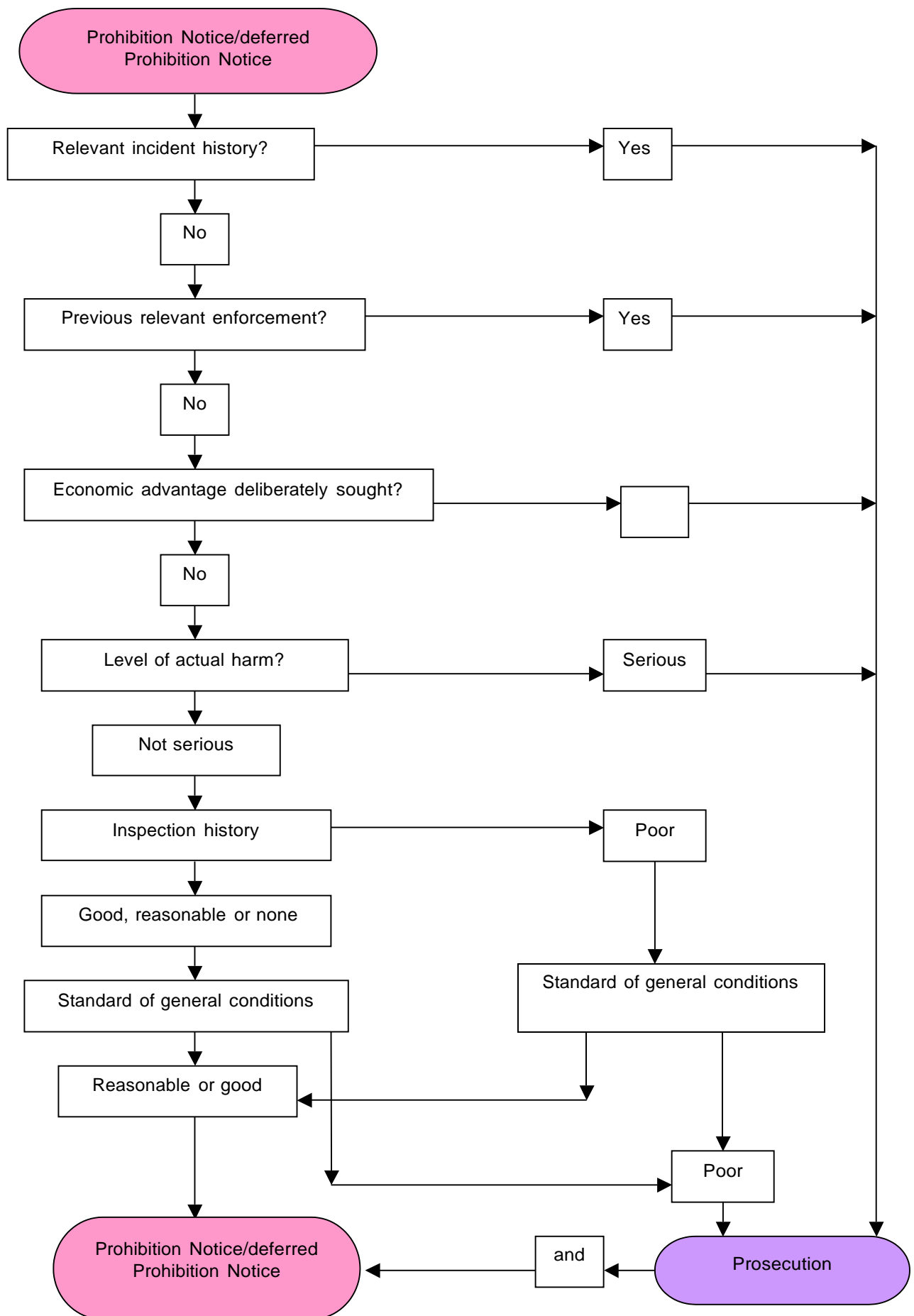
102 When considering what enforcement action is appropriate for permissioning requirements, the dutyholder factors in Table 6 should be applied, where relevant, to the Initial enforcement expectation derived from Table 5.3.

103 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.

**Table 6** Dutyholder factors

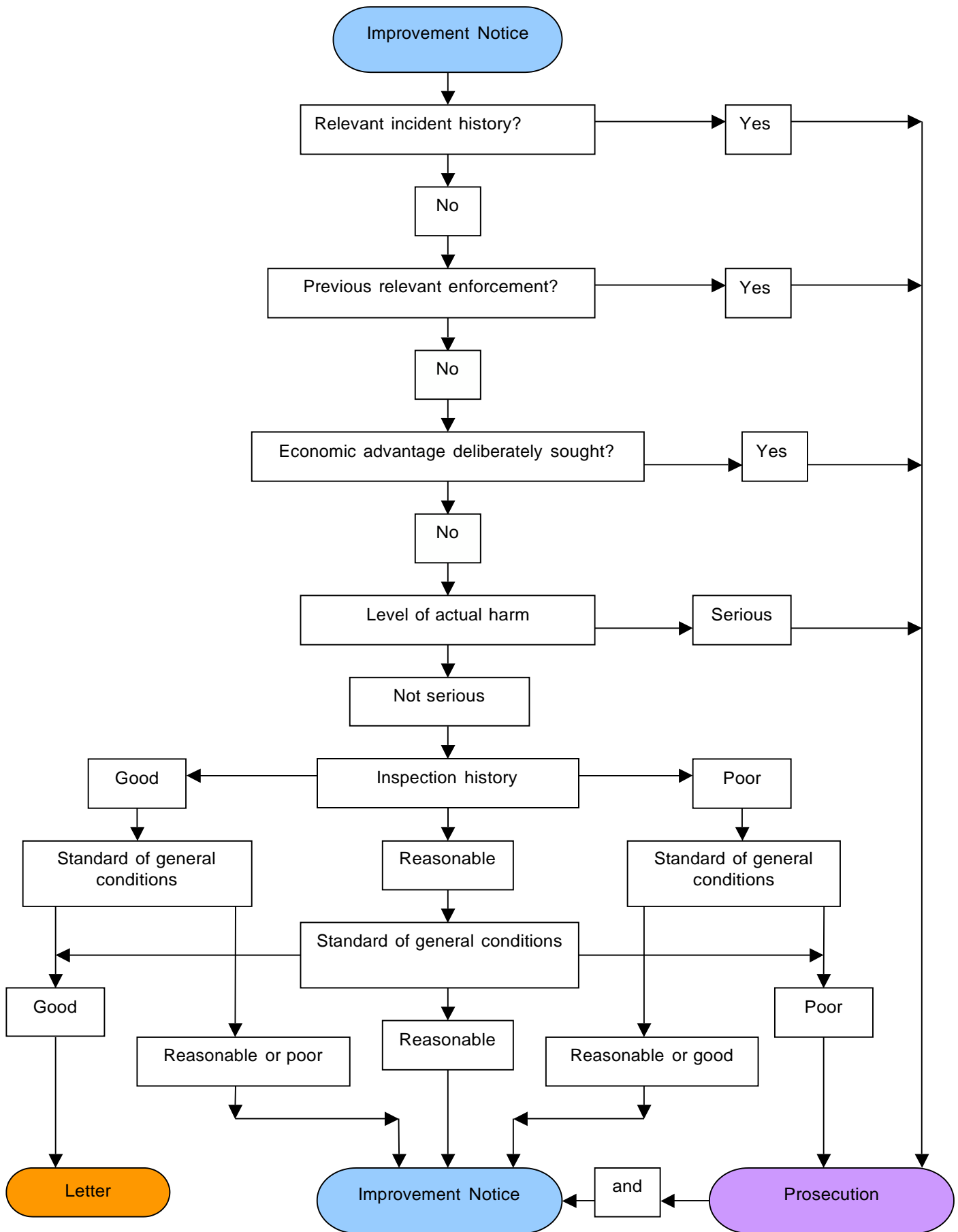
Descriptor	Definition
<b>Is there a relevant incident history?</b>	
Yes	The dutyholder has a history of related incidents, or there is evidence of related incidents, eg accidents, cases of ill health and/or dangerous occurrences.
No	No previous history or evidence of related accidents, ill health and/or dangerous occurrences.
<b>Does the dutyholder have a history of relevant enforcement being taken against them?</b>	
Yes	Enforcement action has been taken against the dutyholder on the same or similar issues by verbal warning, letter requiring action, notice or prosecution.
No	No history of enforcement action against the dutyholder on the same or similar issues.
<b>Is the dutyholder deliberately seeking economic advantage?</b>	
Yes	The dutyholder is deliberately avoiding minimum legal requirements for commercial gain. (For example failing to price for or provide scaffolding for high roof work).
No	Failure to comply is not commercially motivated.
<b>What is the level of actual harm?</b>	
Serious	A 'serious personal injury' or 'serious health effect' has occurred as a result of the matter under consideration.
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'.
<b>What is the inspection history of the dutyholder?</b>	
Poor	The dutyholder has an inspection history of significant problems, copious advice and poor inspection ratings.
Reasonable	The dutyholder 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 dutyholder has an inspection history of good compliance, effective response to advice, consistently high standards and a low rating.

<b>What is the standard of general conditions?</b>	
Poor	There is a general failure of compliance across a range of issues, including those matters related to the activity being considered through the EMM. 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.
Good general compliance	Full compliance across the whole range of indicators with no notable omissions.
<b>Does inspector's assessment of the dutyholder give confidence the dutyholder can and will comply?</b>	
Confident	It is clear that the dutyholder 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 dutyholder demonstrates some capability and commitment to compliance with the law through effective management of health and safety.
Little or no confidence	There is concern that the dutyholder does not have the capability, or commitment, to comply with the law and ensure the effective management of health and safety.

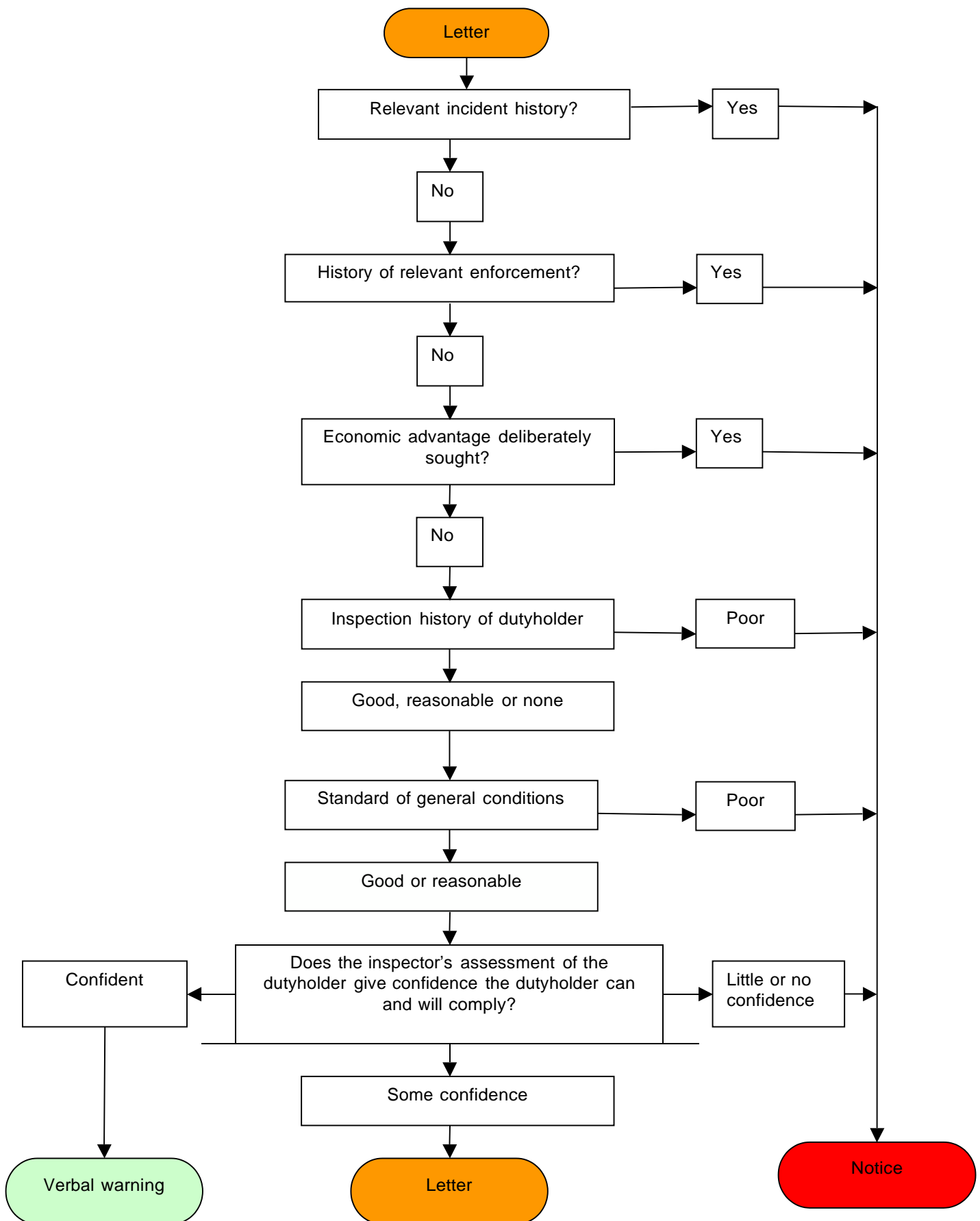


**Figure 3** Dutyholder factors: Prohibition Notice

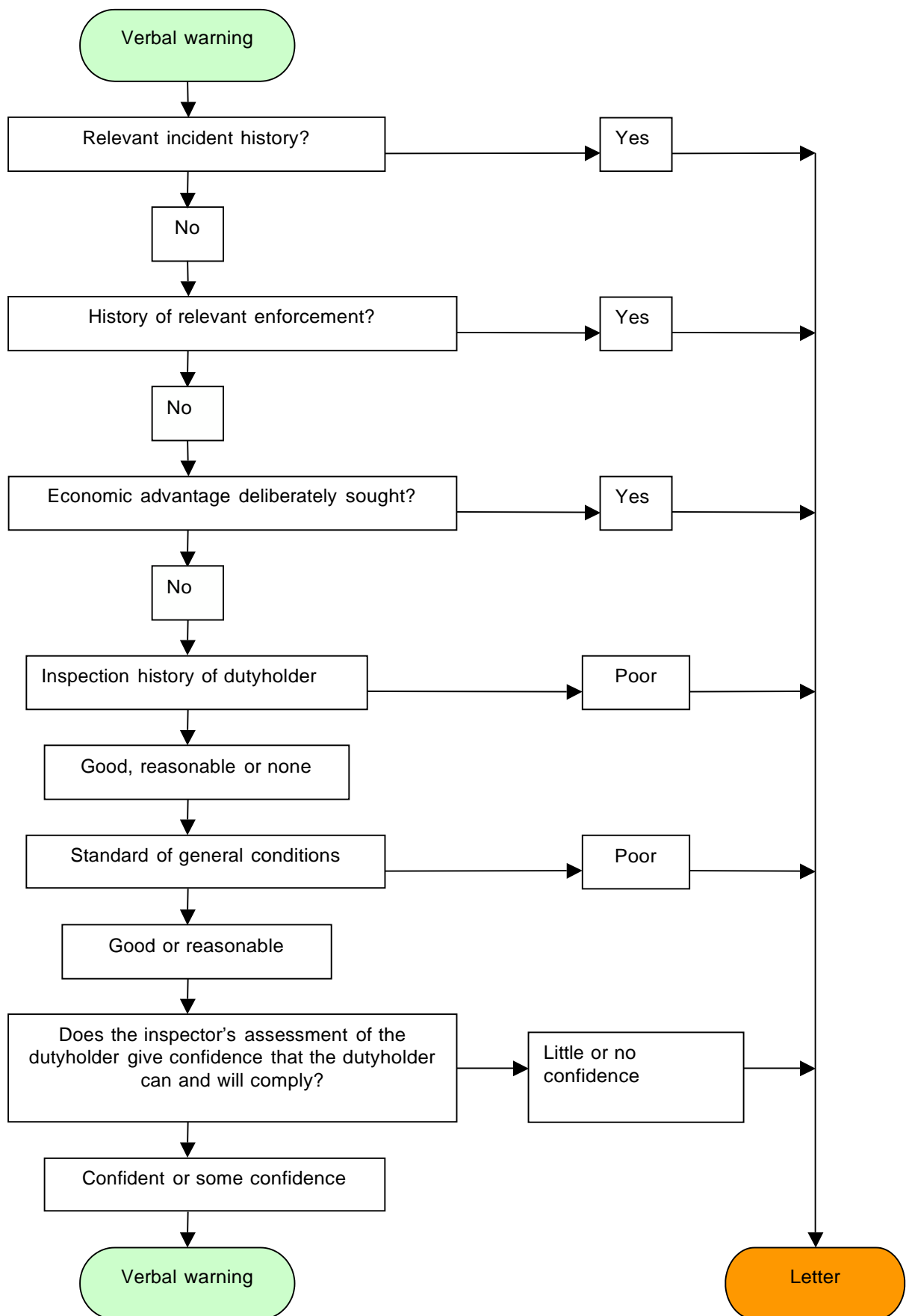




**Figure 4** Dutyholder factors: Improvement Notice



**Figure 5** Dutyholder factors: Letter



**Figure 6** Dutyholder Factors: Verbal warning

## **Step 6 Strategic factors**

104 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.

### ***Public interest***

105 As well as providing guidance on the evidential tests, HSE also applies a public interest test to decisions and subsequent referrals to the Law Officers of the Crown. The same principles of evidential sufficiency and public interest apply to all inspector enforcement activities.

106 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.

107 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.

108 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.

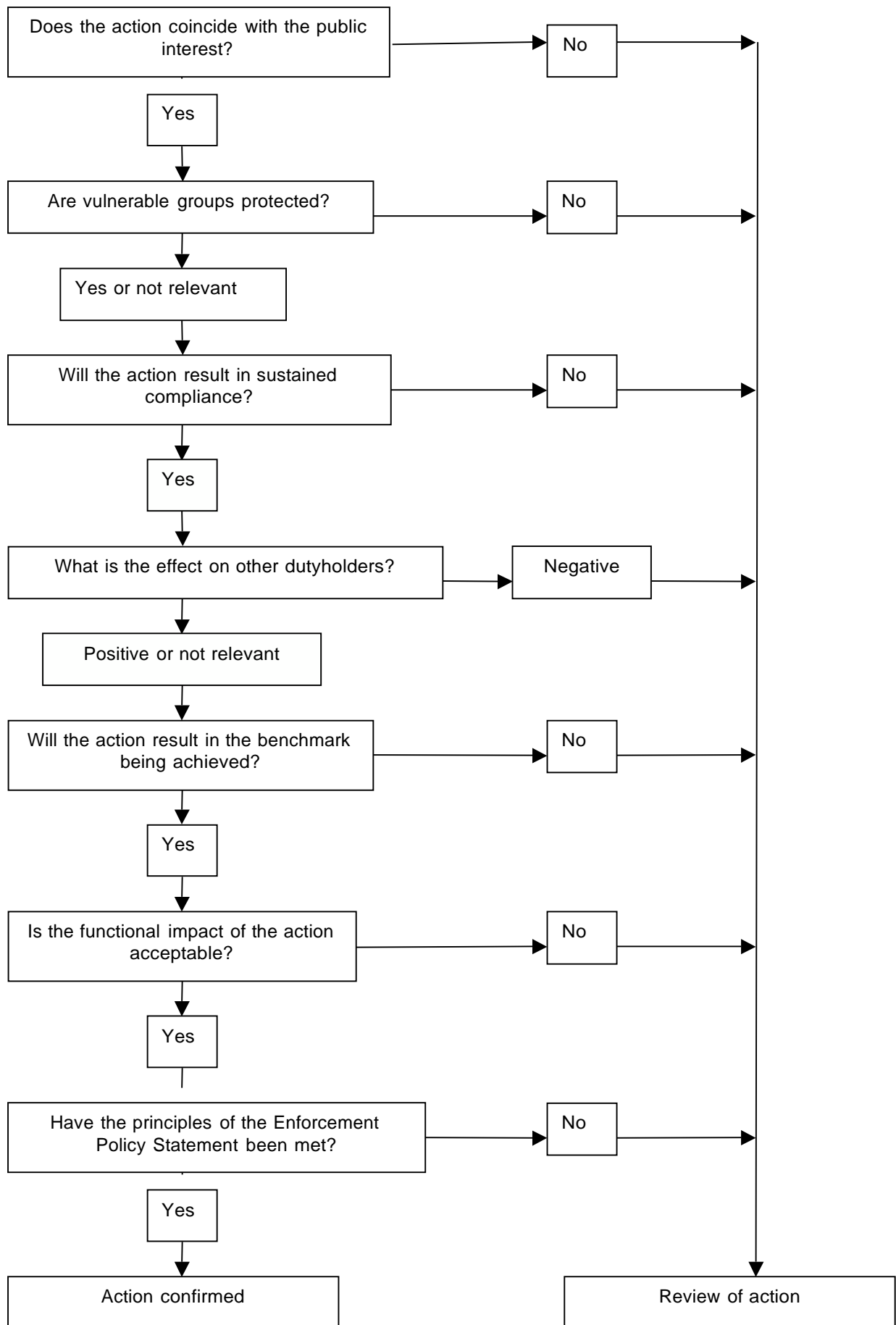
### ***Process***

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

110 The proposed enforcement actions are tested against the strategic factors by following the Strategic factors flowchart (Figure 7).

**Table 7 Strategic factors**

<b>Does the action coincide with the public interest?</b>	
Yes	The action results in a net benefit to the wider community in terms of targeting resources on risk and meeting public expectations of HSE.
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.
<b>Are vulnerable groups protected?</b>	
Yes	The action results in control of risks to vulnerable groups, eg children, members of the public and patients.
No	The action does not result in control of risks to vulnerable groups.
<b>Will the action result in sustained compliance?</b>	
Yes	The action is sufficient to achieve sustained compliance across the range of risks associated with the dutyholder.
No	The action is insufficient to secure sustained improvements and problems may be expected at subsequent visits.
<b>What is the effect of the action on other dutyholders?</b>	
Positive	Other dutyholders 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.
Negative	The course of action undermines both positive dutyholder 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.
<b>Will the action result in the benchmark being achieved?</b>	
Yes	The action secures compliance with the relevant benchmark, eg COSHH assessment completed, access to dangerous parts of machinery prevented.
No	The action does not secure full compliance with the benchmark.
<b>Is the functional impact of the action acceptable?</b>	
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.
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.
<b>Have the principles and expectations of the EPS been met?</b>	
Yes	The policy has been followed.
No	The policy has not been followed.



**Figure 7** Strategic factors flowchart

111 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 EPS.

112 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 EPS.

### ***Review of action***

113 Where the action stems from an **inspection** intervention, the Inspector should review and record reasons why the action taken is different from that indicated by the Strategic factors flowchart and/or EPS, in accordance with current instructions.

114 Where the action stems from an **investigation**, the inspector should review with input from the Chief Inspector. Again, a record should be made of the reasons why the action taken is different from that indicated by the EMM and/or EPS, in accordance with current instructions.

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

## **Step 7 Enforcement conclusion**

116 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 EMM, it is a necessary part of any enforcement action; it ensures that the action is targeted.

117 The following **principles** should 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?

### ***Targets for action***

118 Does the enforcement action:

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

### ***Timescales***

119 Do the timescales for action reflect:

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

## **Concluding factors**

120 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 EPS have been met; and
- evidence can be obtained to support the enforcement action.