

**Labour Administration and Inspection Programme
LAB/ADMIN**

**Study on Labour Inspection Sanctions
and Remedies: The case of the United Kingdom**

Virginia Mantouvalou

International Labour Organization – Geneva

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List of acronyms used in this report

ACAS	Advisory, Conciliation and Arbitration Service
BERR	Department for Business, Enterprise and Regulatory Reform
BIS	Department of Business, Innovation and Skills
CBI	Confederation of British Industry
DEFRA	Department for Food and Rural Affairs
EAA	Employment Agencies Act
EAS	Employment Agency Standards Inspectorate
GLA	Gangmasters' Licensing Authority
HMRC	Her Majesty's Revenue and Customs
HSE	Health and Safety Executive
HSWA	Health and Safety at Work Act
LAs	Local Authorities
NMWA	National Minimum Wage Act
RIDDOR	Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995
TUC	Trade Union Congress
UCATT	Union of Construction, Allied Trade and Technicians

1. Methodology and Scope

This study examines labour inspection sanctions in the United Kingdom. There are five bodies conducting inspections on labour matters: the Health and Safety Executive (HSE); the Employment Agency Standards Inspectorate (EAS); Her Majesty's Revenue and Customs (HMRC); the Department for Food and Rural Affairs (DEFRA); and the Gangmasters' Licensing Authority (GLA). The main focus of the study is on the HSE, because in the area of health and safety there has been more thought and innovation concerning regulation (including enforcement and sanctions) than in other fields of employment and working conditions. However, there is also analysis of the rest of the authorities, and particularly the relatively newly established GLA, which provides an important example of an innovative regulatory approach. A number of different sources have been used to assess the framework, such as policy documents, academic literature and think-tanks' reports. In addition, two telephone interviews were conducted: one with a member of the HSE, and another one with a member of the Union of Construction, Allied Trade and Technicians.¹ This study does not examine Northern Ireland.²

2. Labour Inspection Structure and Legal Sources for Labour Inspection Sanctions

The labour inspection structure in the UK is composed of five bodies with different mandates: the HSE; the EAS; HMRC; the DEFRA; and the GLA.

2.1. The Health and Safety Executive

The Health and Safety Executive (HSE) monitor issues of health and safety and working time.³

Health and Safety inspection looks at occupational health and safety matters only. It does not address issues such as pay disputes or other matters that occur outside the workplace.⁴ The key legislation applicable in the field of health and safety in the UK is the Health and Safety at Work 1974 (HSWA) with modifications in 2008. The Corporate Manslaughter and Corporate Homicide Act 2007 involves death. In addition, there are numerous regulations that are applicable in the field.⁵ Examples include the Management of Health and Safety at Work Regulations 1999 (Risk Assessment), the Regulatory Reform

¹ The telephone conversation with the member of the HSE provided guidance on aspects of inspections in practice. The telephone conversation with the member of UCATT highlighted key health and safety problems in the specific sector.

² The author received specific guidance by the ILO, which excluded the system of Northern Ireland from the scope of the study.

³ The HSE also has the support of LAs and specialist regulators in certain fields. Although these are not examined in this study, certain statistical information on their activities is discussed later on.

⁴ Unlike other countries, such as Belgium, where labour inspectors have wider powers. See Philippe De Baets, 'The Labour Inspection of Belgium, the United Kingdom and Sweden in a Comparative Perspective', (2003) 31 *International Journal of the Sociology of Law* 35 at 41.

⁵ The HSE website has a search engine, which is available at <http://www.hse.gov.uk/legislation/trace.htm>.

(Fire Safety) Order 2005, the Health and Safety (Consultation with Employees) Regulations 1996 and the Safety Representatives and Safety Committee Regulations 1977. This is a rapidly growing area of law both at domestic level alone and through EU legislation. The key European Directive is the health and safety Framework Directive (89/391/EEC), which was primarily implemented in Britain with the Management of Health and Safety at Work Regulations. The existence of the general standards, which are also supplemented by specific regulations on different areas, taken together with the threat of sanctions against employers is considered to be an important strength.⁶

The aim of the HSWA is to secure the health, safety and welfare of people at work, protecting persons other than the employees from risks stemming from work-related activities, and controlling dangerous substances, according to Section 1(1). To this effect, the act imposes several duties on the employer and on others. The basic model of regulation involves the imposition of overlapping duties, subject to reasonable practicability, according to Section 2 of the HSWA. Health and safety legislation applies to employees and self-employed, but Section 51 of the HSWA specifically excludes domestic employment from the scope of protection.

The HSWA and subsequent regulations are enforced by the HSE and by over 400 LAs. The allocation of areas of enforcement between the HSE and the LAs is to be found in the Health and Safety (Enforcing Authority) Regulations 1998. It can generally be said that the HSE is responsible for the areas of construction, agriculture, general manufacturing, engineering, food and drink, quarries, education, entertainment, health services, local and central government and domestic gas safety. LAs are responsible for the enforcement of health and safety legislation in retailing, wholesale distribution, warehousing, hotel and catering premises, offices and the consumer and leisure industry. In addition to the legislation and regulations, and as the UK is a common law country, judicial decisions have special importance, because they create precedent. A number of recent cases on sanctions have been codified in documents of the HSE, which provide guidelines. These cases will be discussed later on.

2.2. The Employment Agency Standards Inspectorate

The Employment Agency Standards (EAS) focuses on agency workers. Employment agencies are regulated by the Employment Agencies Act 1973 (EAA) as amended, and by the Conduct of Employment Agencies and Employment Business Regulations 2003. The EAA provides for the powers of inspection of EAS. The Employment Act 2008 brought certain changes to the powers of EAS inspectors, which will be discussed and assessed later on.

2.3. Her Majesty's Revenue and Customs

Her Majesty's Revenue and Customs (HMRC) enforces national minimum wage standards under the National Minimum Wage Act 1998 (NMWA), on behalf of the Department of Business, Innovation and Skills (BIS), which Policy in this field, including compliance and enforcement, is informed by the independent Low Pay Commission that reviews NMW matters every year and issues recommendations to Government. Apprentices under the age of 19 do not qualify for the national minimum wage, and apprentices over 19 do not qualify for the national minimum wage for the first 12 months of their apprenticeship. The Employment Act 2008 brought changes in enforcement in this field too.

⁶ See Hugh Collins, Keith Ewing, Aileen McColgan, *Labour Law*, Hart, 2005, 2nd ed, p. 12.

2.4. Department for Food and Rural Affairs

The Department for Food and Rural Affairs (DEFRA) enforces the Agricultural Minimum Wage in agriculture in England and Wales, under the National Minimum Wage Act 1998.

2.5. Gangmasters' Licensing Authority

The Gangmasters' Licensing Authority (GLA) regulates those individuals that supply labour or use workers in the fields of agriculture, horticulture, shellfish gathering, food processing and packaging.⁷ The key legislation is the Gangmasters (Licensing) Act 2004 that set up the GLA,⁸ and subsequent regulations, including the Gangmasters (Licensing Conditions) Rules 2009 that set out the standards with which gangmasters should comply in order to be licensed. The 2004 Act introduced a system of licensing of gangmasters in the fields where it applies. A gangmaster is anyone who supplies labour directly or through an intermediary.⁹ The Act stipulates that a licence will be issued if certain standards are satisfied, many of which involve working conditions and aim to prevent abusive practices.

2.6. Enforcement bodies

The above enforcement bodies secure compliance with the law, first, through raising awareness and providing advice, and second, through targeted inspections and penalties for non-compliance. Labour inspections are initiated either after a complaint through available help lines, the internet or the post; or through inspections based on risk-assessment.

The activities of the above bodies lacked co-ordination until recently. The picture was confusing, according to a Report for the Department of Business, Enterprise and Regulatory Reform, which recommended setting up the Fair Employment Enforcement Board.¹⁰ This Board brings together the enforcement agencies, trade union representatives and business groups. It is part of a general campaign that should raise awareness about employment rights and means to enforce them. Additional initiatives that attempt to co-ordinate the activities between the five enforcement agencies include a single enforcement helpline for all bodies; joint working between the workplace enforcement bodies, in order to address complaints that raise issues for more than one of these bodies; the establishment of a Best Practice Group in 2008, which will promote collaboration, examine how the five bodies work together; the work with LAs that may be able to pass on information that raises issues for the rest of the bodies.¹¹

⁷ It ought to be noted that this may be extended to the construction industry, according to the Gangmasters Licensing (Extension to Construction Industry) Bill 2010.

⁸ This legislation was adopted in response to the Morecambe Bay tragedy, where 18 Chinese cockle pickers were killed. See <http://news.bbc.co.uk/1/hi/england/lancashire/3464203.stm>.

⁹ Gangmasters Licensing Act, Section 4.

¹⁰ 'Vulnerable Worker Enforcement Forum – Final Report and Government Conclusions', available at <http://www.bis.gov.uk/files/file47317.pdf>.

¹¹ Low Pay Commission 2010 Report, pp 178-179 at http://www.lowpay.gov.uk/lowpay/report/pdf/LPC_Report_2010.PDF.

3. Nature and Scope of Labour Inspection Sanctions

UK law recognizes labour inspectors wide powers, including a power to impose administrative sanctions and to initiate criminal proceedings.¹² There are several steps that the inspectors can take, such as giving warnings and advice instead of imposing penalties. This section discusses sanctions available to labour inspection bodies, and focuses particularly on the HSE, where there is an elaborate and detailed sentencing regime.

3.1. Health and Safety Executive

The HSWA provides for a system of inspection and the possibility of sanctions. The key principles are described as follows: enforcement should be proportionate in the application of the law and in securing compliance; it should be consistent in its approach; it should be targeted; it should be transparent about the regulator's operation so that the duty-holders know what to expect; finally, the regulator should be accountable for its actions.¹³ Health and safety inspectors can enter premises without warning. If they are not satisfied by the standards, they may offer the duty-holders information or advice face to face and in writing. In terms of administrative sanctions, inspectors can withdraw or vary license conditions or exceptions, and issue simple cautions.

Most significantly, inspectors under the HSWA can issue 'improvement notices' and 'prohibition notices', which depend upon the inspector forming an opinion about the occurrence of a breach of the legislation. According to Section 21 of the HSWA, an inspector may issue an improvement notice to anyone who contravenes the health and safety legislation or to anyone who has contravened the legislation and is likely to continue or repeat this conduct. The improvement notice explains why the inspector is of this view, sets out the law, explains the reasons that lead to the notice, and requires the employer to remedy the situation. According to Section 22 of the HSWA, if activities involve or are likely to involve a risk of serious injury, the inspector may issue a 'prohibition notice'. A prohibition notice stops work so as to prevent this risk. An employment tribunal can hear an appeal against improvement or prohibition notices. Failure to comply with an improvement or a prohibition notice is a criminal offence. In addition, if an inspector finds that an item in the premises poses an imminent danger of severe personal injury, they can seize it and render it harmless. The inspector ought to prepare a report on the circumstances (Section 25 of the HSWA). This system of regulation is generally considered expensive to administer, as it needs many inspectors to visit workplaces frequently.¹⁴

In terms of the criminal process, in England and Wales health and safety inspectors themselves can prosecute individuals for the most serious acts, and in Scotland they prepare a report for the Procurator Fiscal who decides whether to prosecute or not. Section 33 of the HSWA provides for criminal sanctions. It states that it is a criminal offence to fail in the general duties of the HSWA or the relevant Regulations. Although there is no specific reference to bribing health and safety inspectors, it is a criminal offence to obstruct

¹² The term 'labour inspectors' is used here as a generic description for all those involved in enforcement by the different agencies.

¹³ 'Health and Safety Commission's Enforcement Policy Statement', available at <http://www.hse.gov.uk/pubns/hse41.pdf>, paras 10-29.

¹⁴ Collins, Ewing, McColgan, above n 3, p. 12.

an inspector (S. 33(1)h). Moreover, it is an offence to contravene the requirements set by inspectors in improvement and prohibition notices. Prosecutions can turn against a corporate defendant or individuals.

According to S. 33(1)e of the HSWA, failure to comply with a prohibition notice, an enforcement notice or a court remedy order carries the following implications. A lower court can impose a maximum fine of £20,000 and/or 12 months' imprisonment. A higher court's maximum fine is unlimited and/or 2 years' imprisonment. For a breach of Sections 2–6 of the HSWA, which set out the general duties, the lower court maximum is £20,000 and/or 12 months' imprisonment. The higher court maximum is an unlimited fine and/or 2 years' imprisonment. For most other breaches of the HSWA and relevant regulations, the lower court maximum is £20,000 and/or 12 months' imprisonment and the higher court maximum is an unlimited fine and/or 2 years' imprisonment. The Health and Safety (Offences) Act 2008, which provides for sanctions, increased the potential use of imprisonment.¹⁵ Finally, if there is conviction of directors for indictable offences that involve the management of a company (Ss. 36-37), courts may also order their disqualification for a period of up to 5 years (lower courts) or up to 15 years (higher courts).¹⁶

In cases where a work activity leads to death, the authorities consider if there is necessity for a manslaughter investigation (culpable homicide in Scotland) or corporate manslaughter (corporate homicide in Scotland). A Corporate Manslaughter and Corporate Homicide Act 2007, which makes gross failures in the management of health and safety causing death a criminal offence, came into force in April 2008.¹⁷

Moreover, there can be prosecutions under specific Regulations. One such example is the Control of Asbestos at Work Regulations 1987 (as amended by the Control of Asbestos at Work (Amendment) Regulations 1992). These provide for prosecutions of companies or individuals for improperly using or disposing of asbestos.

The law related to sentencing is to be found in the Criminal Justice Act 2003. Section 167 of this Act provides for a Sentencing Guidelines Council that develops guidelines to promote consistency in sentencing in particular areas. While sentencing guidelines in this area of health and safety are somewhat specific, they are usually no more than the application of general sentencing principles to the particular context of safety and health. In 2005 guidelines on sentencing for Health and Safety Offences were issued, which were based on the case *R v Howe & Son (Engineers) Ltd*¹⁸ and on *R v Rollco Screw and Rivet Co Ltd*.¹⁹ According to these, fines must reflect the gravity of the offence and the means of the offender. Moreover, they need to be large enough to convey the message that the aim of prosecution is to have a safe environment at work. The court has to look at the whole amount (fine plus costs) of fine that it seeks to impose and assess the impact upon the offender. As far as the period over which a fine should be paid, it is acceptable in certain

¹⁵ See http://www.opsi.gov.uk/acts/acts2008/ukpga_20080020_en_2#sch1.

¹⁶ Disqualification Act 1986, Ss. 1-2.

¹⁷ For a legislative note, see Rosemary Craig, 'Thou Shall Do No Murder: A Discussion Paper on the Corporate Manslaughter and Corporate Homicide Act 2007' (2009) 30 *Company Lawyer* 17. For further analysis, see Brenda Barrett, 'Liability for Safety Offences: Is the Law Still Fatally Flawed?', (2008) 37 *Industrial Law Journal* 100.

¹⁸ *R v Howe & Son (Engineers) Ltd*, [1999] 2 All ER 249.

¹⁹ *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr.App.R.(S) 436.

circumstances for a fine to be payable by a company over a substantially longer period than by an individual. When it comes to smaller companies in particular, the guidelines suggest that the court must ensure that it is not imposing a double punishment. The correct approach should assess what fine the offence should attract and then examine the financial penalty the offender could reasonably be ordered to pay.²⁰

In the third update to the Guidelines that was issued in 2007, the focus was on Section 3 of the HSWA, which involves the general duties of the employers and self-employed to persons other than the employees. Referring to the case *R v Balfour Beatty Rail Infrastructure Services Ltd*,²¹ it was highlighted that the Court endorsed several important principles from *Howe*, which shed further light on the approach to fines. First, failures to fulfil general duties like the ones imposed by Section 3 of the HSWA are particularly serious, as these set the foundations for the protection of the health and safety of the public. In determining the fine, it could be useful to look at how far short of the requirements of health and safety the employer fell. Significantly, the occurrence of death as a result of a breach of the health and safety legislation is an aggravating factor. Multiple deaths are at the same time more serious than single ones. Another seriously aggravating factor is a breach of the legislation with a view to profit. Further factors that are relevant are the degree of the risk and the danger. The resources of the offender should also be taken into account, as well as the impact of a fine on business.

In addition to the above guidelines on sentencing for health and safety breaches, in 2010 specific guidelines were issued on sentencing Corporate Manslaughter and Health and Safety Offences causing death.²² These guidelines are applicable when a gross offence is a significant cause of the death. They apply to convictions under the Corporate Manslaughter and Homicide Act 2007 and certain offences under Health and Safety legislation (most of the times offences under HSWA Sections 2 and 3), when the offence is a significant cause of the death. This set of guidelines does not apply to individuals, but only to organizations. The seriousness of the offence can be assessed by several factors, such as whether the outcome was foreseeable or whether the failure to meet the applicable standard was systematic. In addition, aggravating factors can include the cause of more than one death, the failure to take account of warnings of the health and safety inspectors, the reduction of costs at the expense of safety. On the other hand, mitigating factors can include a high level of co-operation with the investigation and a good health and safety record. The size of the organization will be relevant to the fine that will be imposed. The court will need to assess the financial implications of the fine on the corporation. Civil compensation will normally be payable separately.

The offence of corporate manslaughter requires a gross breach at senior level. For this reason, it is unlikely that the fine will fall below £500,000, while it may be millions of pounds (the fine is unlimited). Where the offence has been shown to have caused death, the fine will most probably be more than £100,000. It may reach hundreds of thousands pounds or more. The compensation will most of the times be awarded by the civil court dealing with the case. Moreover, in corporate manslaughter there may be publicity orders.

²⁰ Sentencing Guidelines Council, 'Guideline Judgments – Case Compendium', available at http://www.sentencing-guidelines.gov.uk/docs/complete_compendium.pdf, pp 100-101.

²¹ *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586.

²² Sentencing Guidelines Council, 'Corporate Manslaughter and Health and Safety Offences Causing Death', available at <http://www.sentencingcouncil.org.uk/guidelines/guidelines-to-download.htm>.

The aim of these orders is deterrence and punishment. A remedial order, on the other hand, is available for both corporate manslaughter²³ and HSWA offences.²⁴

3.2. Her Majesty's Revenue and Customs and Department for Food and Rural Affairs

Inspectors under the NMWA examine compliance with the legislation either by visiting employers after a complaint has been made, or by visiting certain employers as a sample. Failure by an employer to allow inspections can be challenged before an employment tribunal (S. 11, NMWA). The remedy for failure to allow access to records is a declaration and a maximum payment of 80 times the hourly national minimum wage. Inspectors have the power to issue 'enforcement notices' requiring the employer to remunerate the worker at a rate equal to the national minimum wage at least. The employer has a right of appeal against the enforcement notice before an employment tribunal within a period of four weeks (S. 19, NMWA). If the employer does not comply with the enforcement notice, the inspector can issue a 'penalty notice', imposing a financial penalty that ought to be paid to the Secretary of State (S. 21, NMWA). The employer has again a right of appeal before the employment tribunal (S. 22, NMWA). Moreover, the inspectors have a power to complain on behalf of the worker, whose enforcement notice has not been complied, of unlawful deductions, or to initiate proceedings for breach of contract. The NMWA provides for criminal prosecutions for six offences relating to the minimum wage (S. 31 NMWA), such as refusing or willfully neglecting to pay the minimum wage and furnishing false records or information. The penalty is a fine of up to £5,000 for each offence.

3.3. Employment Agency Standards Inspectorate)

Inspection powers of EAS are to be found in the EAA and the Employment Act 2008. Section 9(1) of the Employment Agencies Act 1973 gives EAS inspectors powers to inspect premises used for the purpose of an employment agency or employment business. Inspectors can inspect, copy or remove records and documents.

Section 3(a) of the Employment Agencies Act 1973, provides for prohibition orders. EAS can, on application by the Secretary of State, apply to an Employment Tribunal to ban someone from running or being involved in an employment agency or employment business, due to misconduct or unsuitability. A prohibition may be sought if there has been a successful prosecution for offences under the Conduct of Employment Agencies or Employment Businesses Regulations. The maximum period of prohibition orders is 10 years, while a breach of a prohibition order can lead to criminal proceedings.

Obstruction of an inspector is an offence under Section (9)3. The Employment Act gives inspectors wide powers in case of obstruction, such as a power to require the provision of information at a specific place and time or financial information from third parties. If the inspector is refused entry or access to records, they have the power to issue a formal caution (in accordance with the Police and Criminal Evidence Act 1984). EAS also performs targeted inspections of employment agencies and employment businesses on the basis of risk analysis and intelligence.

²³ Corporate Manslaughter and Corporate Homicide Act 2007, S. 9.

²⁴ HSWA, S. 42.

3.4. Gangmasters' Licensing Authority

The GLA has a wide mandate to investigate and wider powers to impose sanctions than the EAS. The activities of the GLA have been split into two phases: first, licensing as many gangmasters as possible; second, ensuring that licensed providers comply with the relevant standards and that unlicensed ones are captured through enforcement. There are two types of inspection: application inspection for new applicants and compliance inspection for license-holders. The standards with which a gangmaster ought to comply in order to be licensed include issues such as payment of a minimum wage, prevention of forced labour and mistreatment of workers, decent working conditions, health and safety.²⁵ The officers of the GLA have powers to enter premises and examine documents (S. 16 of the Act), to enter under force with a warrant with a power to search and seize (S. 17 of the Act), to exchange information with other bodies (S. 19 of the Act). They also have powers of surveillance and interception of communications. It is a criminal offence to obstruct or fail to comply with requests of officers who perform their duties under the Act.

The GLA licensing system is expensive. The GLA can refuse a license, grant it with additional conditions, and revoke it. There is a right of appeal against any decision of the GLA to refuse, revoke, set conditions to or refuse transfer of a licence. According to the 2004 Act, it is a criminal offence to operate as a gangmaster without a licence (maximum penalty: 10 years imprisonment and a fine) or to use an unlicensed gangmaster (maximum penalty: six months imprisonment and a fine). It is also an offence to hold a relevant document that is false, one that is obtained by deception, or one that relates to someone else intending to cause a third person the belief that the holder of the document or someone else is a licensed gangmaster. The penalties for operating without a licence are as follows: up to a maximum ten years imprisonment and/or a fine on conviction. Moreover, the penalty for a labour user who engages an unlicensed labour provider is up to 51 weeks imprisonment and/or a fine on conviction.

4. Prosecution Proceedings

4.1 Health and Safety Executive

Enforcement by the HSE can be triggered in two ways. First, through routine inspection, whereby the health and safety authorities come across cases that lead to enforcement action. Second, it is triggered through the system of Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR). According to this latter avenue, employers are under a duty to report fatalities, serious injuries, injuries for over three days, illnesses that are related to work.

According to S. 38 of the HSWA, criminal proceedings for an offence can be instituted by an inspector or by the Environment Agency.²⁶ They can also be instituted either by or with the consent of the Director of Public Prosecutions. The inspector has to be authorized by the authority that appointed them in order to initiate a prosecution before the magistrate's court (S. 39). A prosecution can be initiated either for breach of Regulations and the general duties or for breach of the general duties only set out in the HSWA 1974 (Ss. 2-3).

²⁵ For further details, see the GLA Licensing Standards, 2009, at http://www.gla.gov.uk/embedded_object.asp?id=1013491.

²⁶ The Environment Agency is a public body established by the Environment Act 1995.

As was stated earlier, the model of regulation followed in the HSWA is that of overlapping duties, subject to reasonable practicability. More precisely, Section 2(1) of the HSWA provides that '[i]t shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. Section 3(1) states that '[i]t shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety'. In interpreting S. 3, it has been held that 'subject only to the defence of reasonable practicability, S. 3(1) is intended to be an absolute prohibition'.²⁷ According to S. 40 of the HSWA, the onus for proving reasonable practicability is on the accused. The procedure of the prosecution covers the evaluation of any evidence, the preparation of a report on the prosecution and its appraisal. If the report is approved, it is referred to the Procurator Fiscal in Scotland. In England and Wales it leads to the initiation of legal proceedings. The prosecution procedure is different in England and Wales, on the one hand, and in Scotland on the other. The flowchart available in Appendix 1 outlines the procedure.²⁸

The role of health and safety inspectors is very significant in prosecutions, and differs in the lower and the higher courts. Inspectors take the case themselves in the process before the magistrate court, which is the lower court. Their role is to prepare the case, inspect, investigate, gather evidence, and complete the prosecution. They have a right of audience before the court. In higher courts, health and safety inspectors cannot prosecute themselves. They do all the preparatory work, and then instruct solicitors who take the case to court.²⁹ Improvement, prohibition notices and written advice issued by health and safety inspectors may be used in court proceedings.³⁰

The social partners are not involved in the proceedings, unless they were witnesses, in which case they give evidence. When the health and safety inspectors investigate a case, they take into account the views of the employees. The inspectors also consult with trade unions. In addition, they speak with the injured person or the family of the deceased (if injury or death are involved in a case). The employer is involved in the final stage of the investigation. The employer hears the case against them, and can put forward a response, which the health and safety inspectors take into account.³¹

According to a member of the HSE, the typical cost of a prosecution is somewhere between £5,000 and £15,000. Although this is the norm, the cost of prosecution can sometimes be higher than that. However, the Health and Safety inspectors only take forward the prosecutions that they believe to be successful. If they are successful, they take the costs back, both for the prosecution and the investigation.

In addition to any punishment imposed on an offender, the court may order the employer to take steps so as to remedy the cause of the offence within a specified time

²⁷ *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171.

²⁸ Source: <http://www.hse.gov.uk/foi/internalops/og/ogprocedures/prosecutions/prosflow.pdf>.

²⁹ On the role of solicitors, see http://www.hse.gov.uk/foi/internalops/fod/oc/100-199/168_13.htm#background.

³⁰ The source of the material in this paragraph is a telephone conversation with a member of the HSE.

³¹ Ibid.

limit.³² With respect to dangerous articles or substances, a court may order their forfeiture, so that these are destroyed or otherwise dealt with (S. 42(4)). Furthermore, according to the Enforcement and Policy Statement of the HSE,³³ enforcing authorities ought to arrange the annual publication of names of individuals and companies who have been convicted of breaking health and safety legislation, the convictions and the improvement and prohibition notices issued. They also ought to attempt to draw media attention to facts brought to court, ensuring first that the right to a fair trial is respected. Similarly, they have to consider making public any conviction to attract attention and deter others. In Scotland, the Crown Offices is responsible to take the relevant decisions.

Labour inspectors do not have a role in enforcing the prosecution decisions. If the duty-holder is found guilty, the court that has imposed a fine or other sanction pursues the relevant sanctions, and not the inspector. Finally, the inspectors will only appeal against a decision of the court, if they believe that there is an important flaw in the judgment.³⁴ The person who is convicted can appeal to a higher court following the normal procedure.

As regards civil liability, S. 47(2) of the HSWA provides that: 'Breach of a duty imposed by health and safety regulations... shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise'. Since 2003 employees can claim damages from their employers if they suffer injury or illness in breach of the Management of the Health and Safety at Work Regulations 1999 or the Fire Precautions (Workplace) Regulations 2003. Employees can claim damages from their employers when they suffer injury or illness as a result of a breach of these regulations. This change was brought by the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 SI 2003/2457). Employees cannot bring a claim against an employer, if the employer's duty is imposed for the protection of third parties.

4.2. Employment Agency Standards Inspectorate

Prosecutions are brought only in extreme cases, when there is evidence that this is in the public interest.³⁵ The decision whether it is in the public interest to prosecute is taken after an overall assessment of the circumstances, and factors taken into account include the question whether the conviction can lead to a significant sentence or whether the offence was premeditated.³⁶ In order to decide whether to bring a prosecution, EAS consults with BIS prosecution lawyers.³⁷ In Scotland the decision is taken by the Procurator Fiscal, who takes into account the views of EAS. Prosecutions in England and Wales are brought in a Magistrate's Court. However, cases which are taken forward might be tried in a Magistrate's Court (maximum fine: £5,000 per offence) or in a Crown Court (potentially unlimited fines).

³² Section 42(1) of the HSWA.

³³ HSE Enforcement Policy Statement, available at <http://www.hse.gov.uk/pubns/hse41.pdf>.

³⁴ The source of this is a conversation with a member of the HSE.

³⁵ BIS, *Enforcement Policy Statement - Employment Agency Standards Inspectorate*, March 2010, paragraph. 7.

³⁶ For further discussion, see 'The Code for Crown Prosecutors', February 2010, para. 4.10 ff.

³⁷ Ibid, n 35, p 8.

The EAS can share information with the GLA and HMRC inspection officers, and also has a public list of those who are banned from running an agency.³⁸

4.3. Gangmasters' Licensing Authority

The GLA does not regard prosecution as the most effective way of enforcement of standards. When deciding whether to prosecute, it takes into account a number of factors, including alternative sanctions, any financial gain by the offender, whether a failure to prosecute might undermine public opinion on the GLA and the history of the offender.³⁹ The decision on whether to initiate a criminal prosecution is taken by DEFRA in England and Wales, the Procurator Fiscal in Scotland, and the Public Prosecution Service in Northern Ireland. Alternatives to prosecutions include formal warnings and formal cautions, as well as improvement and prohibition notices.

4.4. Her Majesty's Revenue and Customs and Department for Food and rural Affairs

There are two ways in which enforcement is secured: first, through a helpline and, second, through inspectors' visits. The NMWA provides that an inspector has the power to issue an enforcement notice, if the inspector is of the view that a worker who qualifies for the national minimum wage has not been remunerated accordingly.⁴⁰ The notice will require the employer to remunerate the worker at the rate of the national minimum wage.⁴¹ According to S. 20 of the NMWA, if the enforcement notice that inspectors issue is not complied with by an employer, the inspectors have the power to sue on behalf of the worker before the Employment Tribunal.

5. Does the law provide for concurrent administrative, penal and or civil procedures?

The law provides for concurrent administrative, civil and penal procedures in most circumstances. Administrative sanctions include withdrawal of approvals, variation of license conditions or exemptions, issuance of simple cautions. Health and safety inspectors, for instance, can prosecute and can, in addition, issue an improvement or prohibition notice. An employer can appeal to an employment tribunal against an improvement or prohibition notice. Non-compliance with improvement or prohibition notices is a criminal offence and leads to the initiation of criminal proceedings. If the employer does not comply with such notices, the health and safety inspectors can prosecute both for the violation of health and safety legislation and for non-compliance with the notices.

According to the HSE Enforcement Policy Statement, enforcement is different to civil claims. It is not initiated all the times that civil claims are initiated and does not assist civil claims. Civil proceedings are independent of criminal proceedings. However, sometimes

³⁸ Available at http://www.bis.gov.uk/policies/employment-matters/eas/prohibited_persons.

³⁹ See 'GLA Approach to Prosecution', June 2010, available at http://www.gla.gov.uk/embedded_object.asp?id=1013688.

⁴⁰ NMWA, S. 19(1).

⁴¹ Ibid.

the civil courts will put the criminal proceedings on hold until the criminal case is decided. They then use the evidence of the criminal prosecution. The health and safety inspectors are not involved in civil proceedings.

Section 20 of the NMWA stipulates that an enforcement officer can initiate proceedings before an employment tribunal and at the same time initiate civil proceedings for the recovery of sums due to the worker. At the same time the worker can initiate civil proceedings to recover such sums.

6. Statistical Information on Sanctions and Prosecutions

This section includes statistical information on sanctions and prosecutions for the key labour inspectorates. Each of the inspection regimes presents different trends and faces distinct challenges.

6.1. Health and Safety Executive

The HSE and LAs inspectors (Crown Office and procurators fiscal in Scotland) prosecute about 1,600 offences per year. According to data issued by the HSE in 2009, about 78 per cent of offences prosecuted lead to a conviction.⁴² In addition, the 'Effective Inspection and Enforcement' Report⁴³ suggests that it is more difficult to enforce on health issues, such as stress and musculoskeletal disorders. Numbers of prosecutions are much higher in safety, rather than health. More precisely, 20 per cent of improvement notices involve health and 55 per cent involve safety. At the same time, 3.2 per cent of HSE prosecutions are related to health and 79 per cent are related to safety. According to this report, the difficulties in the enforcement on health issues may be partly due to the fact that in health matters it is harder to prove causation.⁴⁴

Figures published by the HSE show that there is no significant change in the trends in enforcement the last three years. According to the HSE Report 'Health and Safety Enforcement and Prosecutions in Local Authority Enforced Sectors 2008/2009',⁴⁵ the total number of convictions secured by LAs, county councils and fire authorities was 313. The fines imposed were £1,735,659, and the average fine per conviction was £5,545. The highest fine for one company was £250,000. This involved a haulage contractor for a lorry driver that was crushed between two 40 tonne vehicles whilst undertaking a transshipping operation. The person was injured and died a few months later. In 2008/09 LAs issued 6,340 enforcement notices. A total of 1,370 out of 6,340 were immediate prohibition notices.

In terms of convictions and looking at the data in comparison to previous years, it can be observed that the number of convictions under the HSWA was 169 in 2008/09, 190 in

⁴² HSE, 'A Guide to Health and Safety Regulation in Great Britain', 2009 (4th edition), available at <http://www.hse.gov.uk/pubns/web42.pdf>, p. 20.

⁴³ Review supported by the Better Regulation Executive and National Audit Office, 'Effective Inspection and Enforcement', available at www.bis.gov.uk/files/file45358.pdf.

⁴⁴ Ibid, para 83.

⁴⁵ HSE, 'Health and Safety Enforcement and Prosecutions in Local Authority Enforced Sectors 2008/9', available at <http://www.hse.gov.uk/lau/pdfs/lauprosecutions0809.pdf>.

2007/08 and 182 in 2006/2007. The number of convictions under associated health and safety regulations was 144 in 2008/09, 150 in 2007/08 and 136 in 2006/07.

As regards enforcement notices, 6,340 were issued in 2008/09, 6,010 in 2007/08 and 6,960 in 2006/07. Finally, the fines imposed by all health and safety authorities can be found in the table below:

Fines by all health and safety authorities	Total	Average	Highest per breach	Highest per case
2008/09	£1,735,659	£5,545	£225,000	£250,000
2007/08	£2,559,557	£7,528	£250,000	£325,000
2006/07	£2,195,544	£6,904	£175,000	£175,000

The above data is available at <http://www.hse.gov.uk/lau/publications/reports.htm>.

The collected fines go to the Treasury, namely the Central Government. They do not go to the Health Inspectors. Yet the Health and Safety Inspectors get back the costs that they have incurred from the fines paid.⁴⁶

The official data found in government documents, as described above, do not reveal any significant change in the numbers of inspections and prosecutions. However, a recent study entitled 'Regulatory Surrender: Death, Injury and the Non-Enforcement of Law', conducted by Steve Tombs and David Whyte for the Institute of Employment Rights,⁴⁷ reveals a different picture. The authors looked beyond official statistics, and tried to establish whether there have been significant changes at the rates of inspections and prosecutions. Looking at information dated since 1997/98, the study finds that the HSE has suffered detrimental effects over the last few years, because of fewer resources available to it than in the past. It is significant to note that the study uses both published data on health and safety enforcement and information obtained through a series of freedom of information requests under the UK Freedom of Information Act 2000. The study looks at the last 10 years and suggests that there has been a dramatic change in labour inspection practices. It suggests that there has been, first, a sharp decline in HSE enforcement action from 2002/2003, and a significant decline in prosecutions beginning in 2003/2004. Second, the study states that there has been a collapse in RIDDOR prosecutions, which began in 2002/03. Third, the fall in numbers of prosecutions may have been substituted by other methods of enforcement since 2004/2005. Enforcement notices, though, according to the same study, remain significantly lower than in previous years.⁴⁸ The study describes the picture emerging after 2002/2003 as a 'collapse in prosecution'.⁴⁹ This change is according to the study partly due to the Hampton Review of 2005, entitled 'Reducing Administrative Burdens: Effective Inspection and Enforcement'.⁵⁰ The key idea conveyed in the Hampton Review was that inspection should be more focused, and that more attention should be paid

⁴⁶ The source of this is a telephone conversation with a member of the HSE.

⁴⁷ Steve Tombs, David Whyte, *Regulatory Surrender: Death, Injury and the Non-Enforcement of Law*, Institute of Employment Rights, 2010 (hereinafter cited as Tombs & Whyte, 2010).

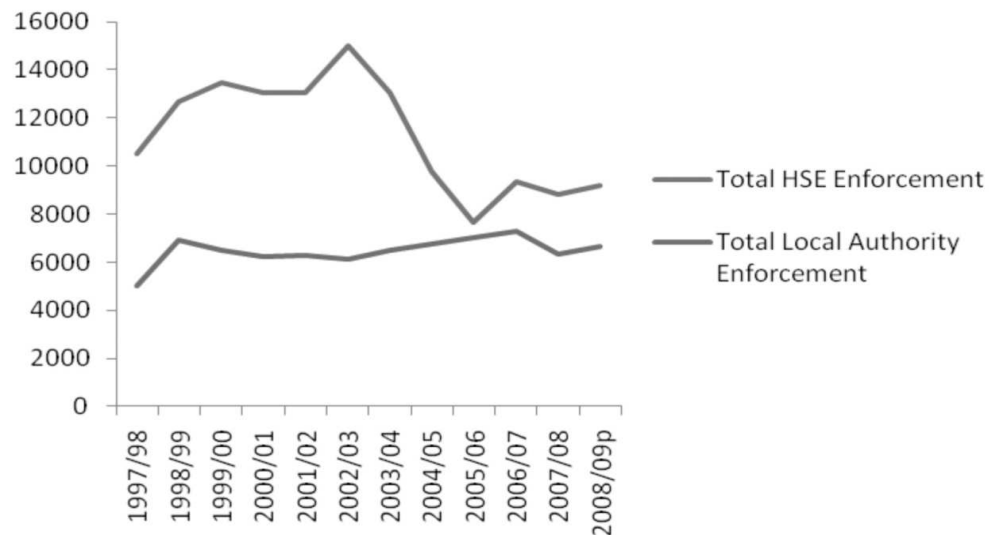
⁴⁸ Ibid, p. 2.

⁴⁹ Ibid, p. 63.

⁵⁰ Philip Hampton Report, 'Reducing Administrative Burdens: Effective Inspection and Enforcement', available at http://www.betterregulation.dk/graphics/EU/Better_regulation/hampton_2005.pdf.

on advice and education, rather than on inspection. The Hampton Report suggested that regulations of health and safety should be ‘self-enforcing’, where possible.⁵¹

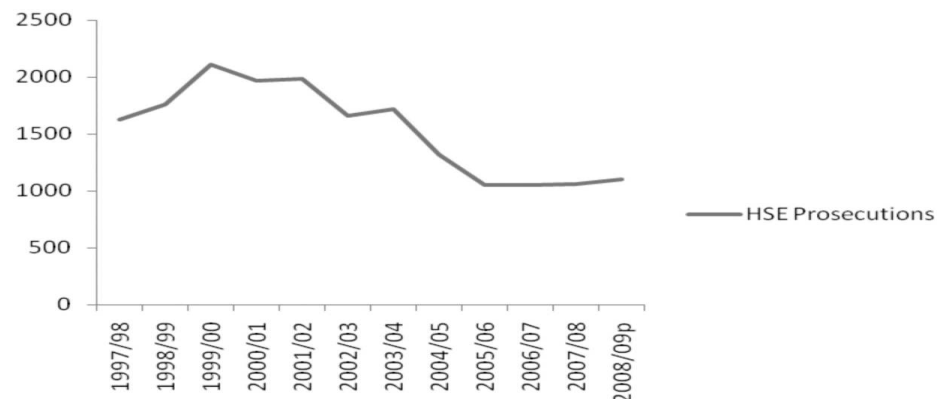
The trends in enforcement by the HSE and LAs are highlighted in the graph below:



Source: Tombs & Whyte, 2010, p. 46.

The above graph presents a total of prosecutions, enforcement notices and prohibition notices. It shows a drop in the HSE overall enforcement, coupled by a slight increase in the LAs' enforcement.

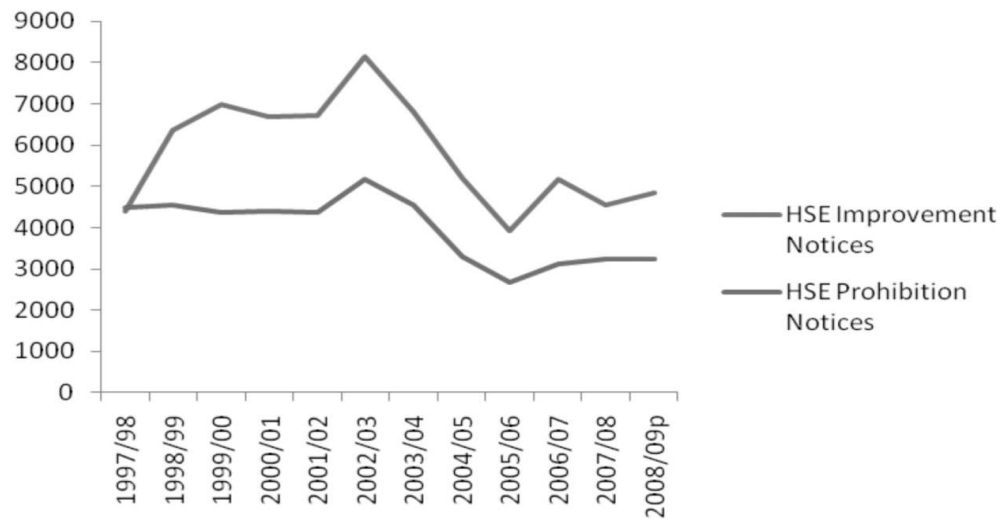
Indeed, if we look at the numbers of prosecutions only over the last ten years, there is a sharp decline. This is evident in the graph that follows, which involves HSE prosecutions:



Source: Tombs & Whyte, 2010, p. 49.

⁵¹ Ibid, p. 56.

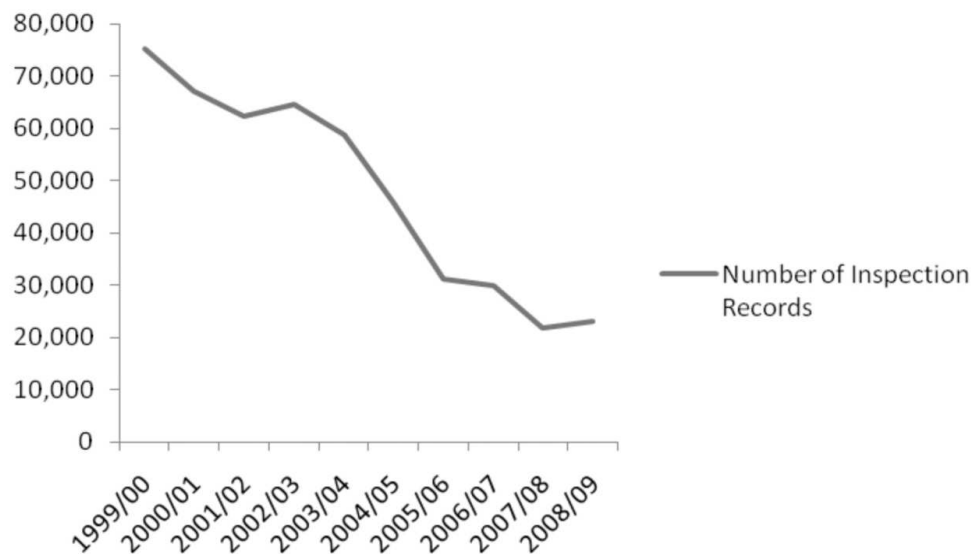
At the same time, there is a fall in the numbers of both the improvement and the prohibition notices:



Source: Tombs & Whyte, 2010, p. 50.

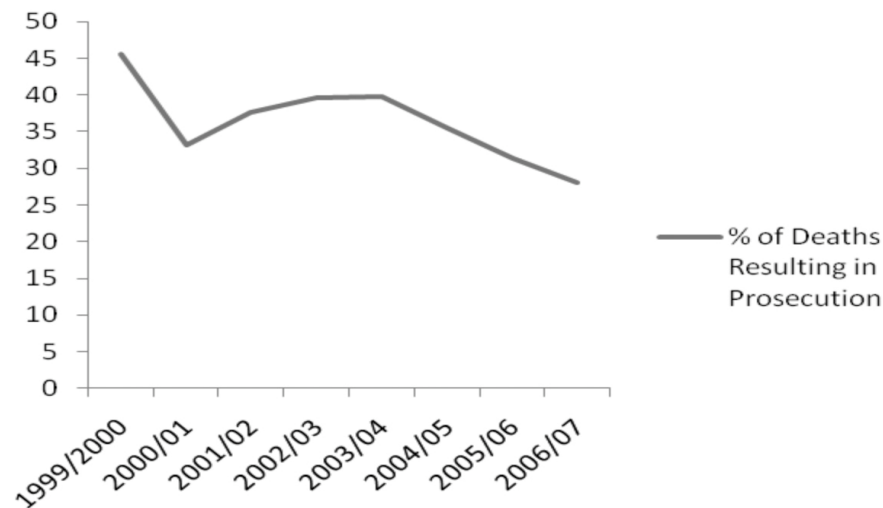
The fall in the number of prosecutions may partly be due to the shift of emphasis from prosecution to other forms of securing compliance, such as advice and guidance (discussed below).

At the same time, the records of inspection by the HSE have dropped significantly over the years:



Source: Tombs & Whyte, 2010, p. 51.

When focusing on RIDDOR reports it can be observed that there is a drop of deaths reported that result in prosecution:



Source: Tombs & Whyte, 2010, p. 58.

The Tombs & Whyte study sums up the key conclusions as follows:

- ‘A rapid decline in HSE enforcement action generally is apparent from 2002/03 [...] and in particular, the most recent sharp decline in prosecutions begins in 2003/04 [...].
- The collapse evident in RIDDOR prosecutions [...] also appears to begin in 2002/03 [...]
- Although RIDDOR data also suggests that the collapse in prosecutions is replaced to some extent by a rise in enforcement [...] from around 2004/05, [...] enforcement notices remain at a significantly lower level than in the early years of Labour’s first period in office.’⁵²

The view that sanctions have dropped significantly is also reflected in documents issued by the HSE. For example, the Report ‘Effective Inspection and Enforcement: Implementing the Hampton Vision in the Health and Safety Executive’ found that ‘in terms of an effective sanctioning regime for health and safety, levels of fines for health and safety offences are low’.⁵³ The concern about the decline in inspections and prosecutions also became apparent in the House of Commons Work and Pensions Committee 2008 conclusions and recommendations. It was said that ‘[m]any respondents to this inquiry raised their concerns that the number of inspections HSE undertakes has declined. Academic research has suggested a correlation between inspections carried out and employers’ compliance with their health and safety duties’. The Committee therefore recommended that the HSE increases its inspection and enforcement activities.⁵⁴

⁵² Tombs & Whyte, 2010, p. 63.

⁵³ Available at <http://www.bis.gov.uk/files/file45358.pdf> , para 80.

⁵⁴ Select Committee on Work and Pensions, Third Report, available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmworpen/246/24608.htm> , para 113.

Construction Industry: A Case Study

Some important figures emerge when looking at the 2009 'Health and Safety Dossier for the Department of Work and Pensions' by the Union of Construction, Allied Trade and Technicians (UCATT). In 2006/2007, for instance, only 14.1 per cent of major injuries in the field of construction were investigated, while six years earlier the number was 20 per cent. The number of improvement and prohibition notices has also fallen sharply between 2002/03 and 2005/06. In 2002/03 the total number of enforcement notices was 3,582, while in 2005/06 the total number was 1,846. Although the number has risen again more recently, still it is lower than it was in 2002/03. Insofar as prosecutions are concerned, UCATT again pointed towards a need to increase their numbers, because of their important deterrent role. This point was highlighted in an internal audit of the HSE in 2006, which found that the numbers of prosecutions should be more than double, if the HSE is to comply with its own criteria on when a prosecution should take place.⁵⁵ In addition, UCATT expresses serious concern about the drop in the figures of convictions over the last few years. For example, in 1998/99 the percentage of convictions for death in construction was 42 per cent, while in 2003/04 it was 15 per cent. UCATT suggests that this trend is particularly worrying in light of the fact that the HSE itself found that 70 per cent of deaths in the industry are due to management failures.

Former ACAS chair, Rita Donaghy, led an enquiry into the underlying causes of fatal accidents in construction. The resulting Report, which was prepared for the Secretary of State for Work and Pensions, confirms the concerns expressed by UCATT. Looking at the construction industry, the Report used strong words to criticize enforcement of health and safety standards in the sector, stating that 'prosecutions and sentencing are ludicrously low'.⁵⁶

6.2. Her Majesty's Revenue and Customs

Statistical information on National Minimum Wage Enquiries and Complaints to HMRC, Enforcement Action Taken, and Incidence of Non-compliance Identified, can be found in the table below:

	2006-2007	2007-2008	2008-2009
Enquiries received by the helpline	52,078	46,849	34,704
Complaints of underpayment	2,210	3,231	2,521
Enquiries completed	4,500	4,525	4,317
Cases of non-compliance	1,523	1,650	1,746
Enforcement notices issued	71	59	96
Penalty notices issued	2	25	30
Value of underpayments identified (£ million)	3.0	3.9	4.5
Average arrears per worker (£)	214	202	193
Total workers	14,189	19,264	23,247

Source: National Minimum Wage - Low Pay Commission Report, 2010.⁵⁷

⁵⁵ UCATT, p. 11.

⁵⁶ Rita Donaghy's Report to the Secretary of State for Work and Pensions, 'One Death is too Many', available at <http://www.dwp.gov.uk/docs/one-death-is-too-many.pdf>, p. 22. Ibid, Recommendation 15.

⁵⁷ Available at http://www.lowpay.gov.uk/lowpay/report/pdf/LPC_Report_2010.PDF, p. 167.

With reference to the above figures, the 2010 Low Pay Commission Report suggested that there has been no assessment of the actual degree of non-compliance in the formal or informal economy. It recommended that the new compliance strategy examines carefully which are the low-paying sectors and jobs, and which workers are the lowest paid and the most vulnerable, in order to have a better enforcement regime. This same Report also recommended, among others, increased publicity of those that breach the legislation (a 'name and shame' regime), that more attention should be paid to the informal economy and that there are more prosecutions for minimum wages. Another important problem that is identified in terms of enforcement in this field is that workers often hesitate to report breaches of the NMWA for fear of victimization or dismissal.⁵⁸ A possible way to address the problem of this fear is by permitting trade unions to bring cases on behalf of groups of workers.⁵⁹

It has been suggested that the low number of prosecutions every year under the NMWA (five successful prosecutions between 2006 and 2008, for instance) fails to act as a deterrent for those that do not comply with the legislation. The National Minimum Wage Report of 2009, therefore, recommended that the Government makes more resources available to increase the numbers of prosecutions, and highlighted the need to deal more effectively with the informal economy, vulnerable and migrant workers.⁶⁰

6.3. Employment Agency Standards Inspectorate

Turning to EAS, it was earlier said that one of its key problems is lack of resources, and this is evident in the numbers of inspectors employed. In 2005/06, for instance, it only employed 12 field inspectors, and later on another 12 posts were created.⁶¹ Like with HSE, EAS focuses on advice and persuasion, and only uses enforcement and prosecution if other methods have failed or are not suitable.⁶² EAS considers prosecutions in about five cases per year. Fines are very low, below the statutory maximum of £5,000, and at times as low as £50.⁶³ In 2007/08, about 1,300 complaints were investigated by EAS, and more than 200 targeted inspections were carried out. These led to 518 corrective letters. Two agencies were successfully prosecuted in 2007 and five individuals were banned from running an agency because of previous misconduct. Overall the levels of enforcement in this field are considered to be very low, and the Government is looking into ways to improve them.⁶⁴

6.4. Gangmasters' Licensing authority)

If compared with EAS, the GLA operates more intensely in terms of prosecutions of licensed gangmasters. In 2009, the GLA had licensed 1,201 gangmasters and revoked 78

⁵⁸ Available at <http://www.lowpay.gov.uk/lowpay/report/pdf/7997-BERR-Low%20Pay%20Commission-WEB.pdf>, p 193.

⁵⁹ Ibid.

⁶⁰ Ibid, p. 199 ff.

⁶¹ Michael Wynn, 'Regulating Rogues? Employment Agency Enforcement and Sections 15-18 of the Employment Act 2008', (2009) 38 *Industrial Law Journal* 64 at 68-69.

⁶² EAS, *Annual Report for 2007/08*, available at www.bis.gov.uk/files/file49464.pdf, p 7.

⁶³ Wynn, above n 61, p. 69.

⁶⁴ Ibid, n 41, p. 205 ff.

licenses. In one week, the GLA can complete between two and 20 compliance inspections and three to 10 application inspections.

Licensing is generally viewed as a successful way to regulate gangmasters, and the way that the GLA operates is regarded as exemplary for other bodies, as is evident in the 2009 Report of the Low Pay Commission.⁶⁵ The 2009 Annual Review suggested that levels of prosecutions under the GLA are very low, but this should not be regarded as a weakness. With an effective licensing system, prosecutions should be an exception rather than a norm.

Figures indicate labour providers' satisfaction with the work of the GLA. A 69 per cent felt the GLA was doing a good job, 62 per cent found inspections vigorous or very thorough, and under 75 per cent thought that the GLA scheme should be extended to other sectors. However, exactly because of the success of the GLA, concern was expressed by UNITE that gangmasters turn to industries that are not covered by this legislation. At the same time it is crucial to highlight that this system is very costly.

In terms of statistics of inspection activities of the GLA, a total of 586 compliance and enforcement inspections took place between October 2007 and September 2008, and numbers of unannounced inspections rose in 2008. In addition, by November 2008 the GLA had revoked 78 licenses (eight of which were revoked with immediate effect), and the judgment of the authority has been regarded as exemplary, because out of 39 appeals, only one has been lost by the GLA.⁶⁶

The GLA prosecution data up to November 2008 are as follows:

Convictions	1
Unsuccessful Prosecutions	0
Cases currently in court	2
Cases with other agency (Defra, DARD, Procurator Fiscal)	3
Arrests	1
Formal Warnings	64
Formal Cautions	55
Open Investigations (Ongoing)	207
Ongoing Investigations as % Total Agency Sector	15% (207/ 1348)

Source: GLA Annual Review, 2008, p. 85

⁶⁵ See <http://www.lowpay.gov.uk/lowpay/report/pdf/7997-BERR-Low%20Pay%20Commission-WEB.pdf> , p. 208.

⁶⁶ Annual Review of the GLA, as above.

The GLA's first successful prosecution: A Case Study

Fiona Clark of Perth, Scotland was the first person to be successfully prosecuted and found guilty of contravening the Gangmasters (Licensing) Act 2004 at the Sheriff Court of Tayside on Tuesday 29 April 2008 [...]. Clark had applied for and been refused a licence, but continued to trade, supplying workers to pick, process and pack potatoes. Her application had been refused because of: a lack of identity checks on workers; issues over deductions for tax and national insurance on some payslips; and non payment to HMRC. (The labour user received a written warning for using an unlicensed gangmaster).

This case was the first legal 'test' of the Gangmasters Act. The judge told the court that labour providers must comply with "both in spirit and accordance with the letter of the law". He also expressed the wish that the Act have the power to ban Clark from operating as a Gangmaster again. However, in the absence of this sanction, he sentenced the defendant to 140 hours of community service, and 18 months probation, but no fine. Although the case was a success, it was perhaps an 'easy win' as it was not about the ill-treatment of agency workers. Financially, Clark also appears to have made little profit (around £20,000 in the period in question and only £4,000 after covering costs). Her company's books were described as 'shambolic' and the defence was that the client was 'clueless' and 'confused' about the legislation.

Source: Annual Review of the GLA, p. 85.

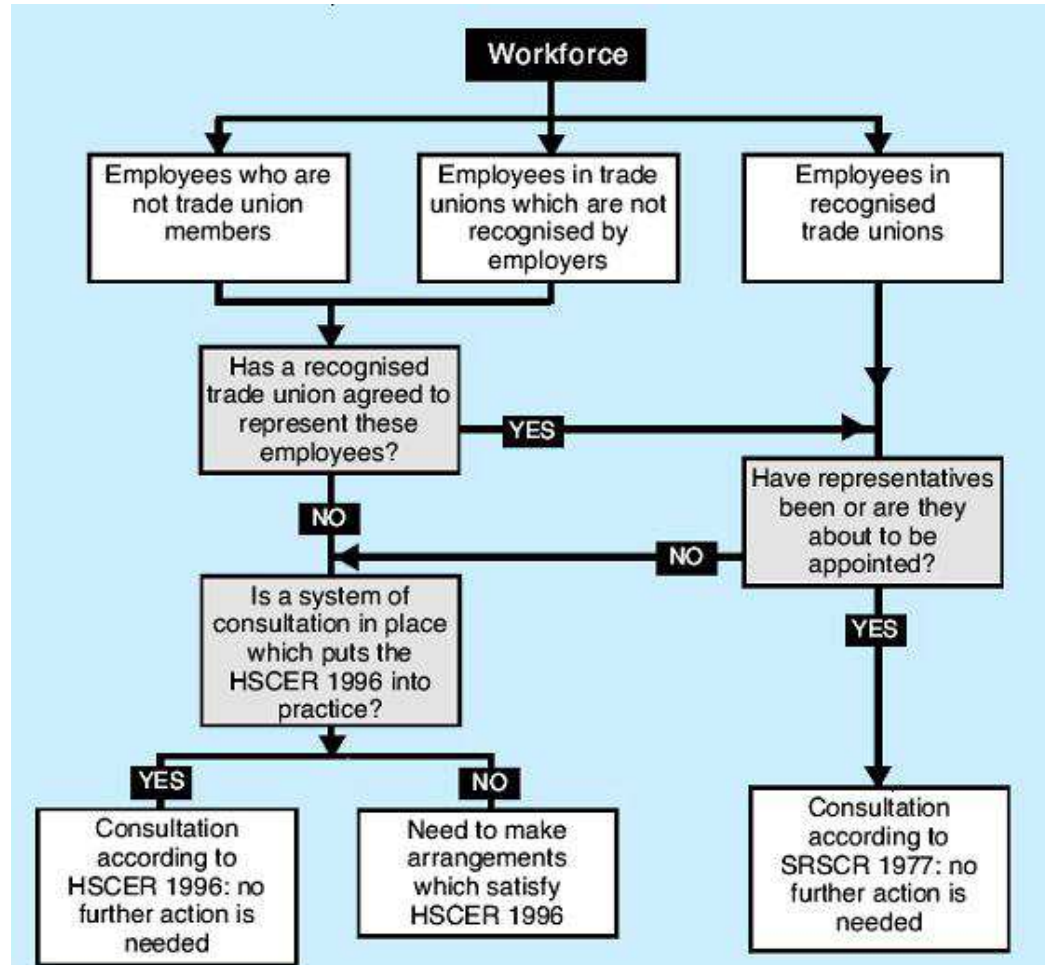
7. Social Partners

The role of the social partners in health and safety regulation contributes to an elaborate strategy that combines public standards and self-regulation by partners.⁶⁷ Two key sets of Regulations concern worker consultation on health and safety. One of them involves undertakings where trade unions are recognized for collective bargaining (the Safety Representatives and Safety Committees Regulations 1977). The second one involves circumstances where this is not the case (the Health and Safety (Consultation with Employees) Regulations 1996). The 1977 Consultation Regulations provide for involvement of health and safety representatives on issues of health and safety. There are about 150,000 trade union health and safety representatives in the UK.⁶⁸ These representatives act on behalf of the employees in consultation with the employer, when health and safety issues are involved.

⁶⁷ Hugh Collins, *Employment Law*, OUP, 2nd edition, 2010, p. 240.

⁶⁸ TUC, 'Safety Representatives: A Charter for Change', available at http://www.tuc.org.uk/h_and_s/tuc-15491-f0.cfm.

The circumstances in which the regulations apply can be seen in the graph that follows:



Source: HSE 'Worker Consultation and Involvement', available at <http://www.hse.gov.uk/foi/internalops/fod/inspect/workerinvolve.pdf>, p 7.

The HSE has also published several documents on the issue of consultation, which show that there is interest in workers' involvement. In 2007 it published a topic pack entitled 'Worker Consultation and Involvement', which recognizes the role of worker participation in issues of health and safety.⁶⁹ The book 'Consulting Employees on Health and Safety' describes the requirements of the legislation.⁷⁰ The document stresses the benefits of consultation for employers, employees, line managers and health and safety enforcers. Another book that contains examples of good practices was also published in 2008.⁷¹

However, the possibility of consultation has not materialized, according to the Trade Union Congress (TUC), which stated that '[d]espite the overwhelming evidence that

⁶⁹ HSE Topic Pack, 'Worker Consultation and Involvement', available at <http://www.hse.gov.uk/foi/internalops/fod/inspect/workerinvolve.pdf>.

⁷⁰ HSE, *Consulting Employees on Health and Safety – A Brief Guide to the Law*, 2008, available at <http://www.hse.gov.uk/pubns/indg232.pdf>.

⁷¹ HSE, *Involving your Workforce in Health and Safety: Good Practice for All Workplaces*, 2008.

consultation saves lives and prevents injuries, many employers do not consult with their workforce and, despite this being a legal requirement, there has never been one case where an employer has been prosecuted for failing to consult, or for refusing to meet their legal obligations under the 1977 regulations'.⁷² According to a TUC survey of safety representatives, only a total of 27 per cent of safety representatives said that their employer automatically consults with them frequently. Moreover, 24 per cent claim that the employer never consults with them automatically. Another survey prepared by Unite states that 46 per cent of employers always involved safety representative when undertaking risk assessments.⁷³

At the same time, Rita Donaghy's Report, entitled 'One Death is too Many – Inquiry into the Underlying Causes of Construction Fatal Accidents',⁷⁴ made a series of specific recommendations, one of which is that: 'The positive role that trade unions can play in health and safety is not fully appreciated by the construction industry and I recommend that more should be done, particularly by the larger companies, to encourage joint working with the unions'.⁷⁵

The Dramatic Effects of Lack of Consultation: A Case Study

The dramatic effect that the lack of consultation can have is evident in the case study of Ian Dicker, as reported by TUC.⁷⁶ Ian Dicker died from multiple injuries in 2003 at the West London Mail Centre in Paddington, having fallen from the roof while installing lights and supervising an apprentice. Both Mr. Dicker and the apprentice were working on skylights that were fragile and were not marked as dangerous. There was no safety guard to protect them from falling. Mr. Dicker fell 30 feet to his death, while inspecting the apprentice's work. Importantly for present purposes the safety representative had repeatedly expressed concerns on the dangers of roof working safety, but his claims were ignored because there was no legal obligation to respond. However, all the relevant evidence, such as the correspondence, were submitted to Westminster Council that prosecuted the contractor (Romec) and Royal Mail.

Looking at the sanctioning process in particular, there is no role for the social partners. The health and safety inspectors liaise with the social partners during the investigations, according to a member of the HSE. Although trade unions may be consulted when the health and safety inspector reaches a decision during investigations, the inspector would rarely change their decision, unless a case is borderline.⁷⁷ It is significant to note that there have been suggestions that trade union representatives should be given a right to issue provisional enforcement notices that would reveal shortcomings and, in this way, lead to the prevention of accidents.⁷⁸

⁷² See TUC, 'Safety Representatives: A Charter for Change', available at http://www.tuc.org.uk/h_and_s/tuc-15491-f0.cfm.

⁷³ Ibid.

⁷⁴ 'One Death is too Many', as above n 38, available at <http://www.dwp.gov.uk/docs/one-death-is-too-many.pdf>.

⁷⁵ Ibid, Recommendation 15, p 18.

⁷⁶ Ibid, n 53.

⁷⁷ The source of this is a telephone conversation with a member of the HSE.

⁷⁸ See, for instance, UCATT, *Building Worker*, 2005, p. 14, available at http://www.ucatt.org.uk/documents/BW_1_05.pdf.

As regards the views of the social partners on enforcement, a Confederation of British Industry (CBI) report found that business views the activities of the HSE as fair overall, although other research suggests that there is some uncertainty as to why enforcement action has been taken, and in certain circumstances there are questions whether the prosecution was fair (expressed by 25 per cent of those asked).⁷⁹ Another concern expressed by business was that the HSE tended to focus on businesses that were more willing to comply with the legislation by, for example, submitting RIDDOR reports. In this way, those more willing to comply were captured more than those that were less willing to comply with the legislation, and therefore less visible.⁸⁰

The trade unions, on the other hand, are concerned about the sharp fall in the number of inspections. UCATT, for instance, is seriously concerned about the low numbers of inspections and sanctions. This is exemplified in the Report ‘Small Isn’t Beautiful’ prepared by the Centre for Corporate Accountability for UCATT.⁸¹ This found that in 2007/08, 51 per cent of the construction workers killed, worked for small companies that have fewer than 50 employees. Almost half of these deaths happened in companies with five or fewer workers. These numbers are disproportionate to the total numbers in enterprises of this size. The particular concern expressed was that small companies are rarely inspected, unless a major accident or a fatality occurs, because of long term cuts in frontline HSE numbers. Additionally, a concern raised here is that the level of convictions as a result of major accidents and deaths is worryingly low.

With respect to enforcement of the national minimum wage in particular, trade unions believe that there should be a greater role for them to enforce the legislation by taking representative or group cases to the tribunals.⁸²

8. Proactive and Innovative Approaches to Sanctions

All five enforcement agencies attempt to raise awareness and publicize their activities. The National Minimum Wage awareness campaign in 2007/08, for instance, used methods such as radio advertising and posters. As part of the outreach campaign in 2008, a National Minimum Wage bus reached about 700,000 workers to distribute leaflets and speak to workers. The GLA has a ‘name and shame’ campaign, publicizing refused and revoked licences.⁸³

In addition, as it was earlier said with respect to health and safety, the drop in enforcement action, when looking at prosecutions and enforcement notices, has been coupled by an effort to use alternative methods to promote health and safety at work. The

⁷⁹ HSE, ‘Evaluation of EPS and Enforcement Action, available at <http://www.hse.gov.uk/research/rrpdf/tr519.pdf>.

⁸⁰ ‘Effective Inspection and Compliance’, available at <http://www.bis.gov.uk/files/file45358.pdf>, para 84.

⁸¹ UCATT, ‘Small Isn’t Beautiful: Construction Worker Deaths 2007/08: Employer Size and Circumstance’, available at <http://www.leighday.co.uk/documents/cc-a-ucatt-deaths.pdf>.

⁸² See <http://www.lowpay.gov.uk/lowpay/report/pdf/7997-BERR-Low%20Pay%20Commission-WEB.pdf>, p. 209.

⁸³ For further details, see BERR 2008 Report, Annex 4.

publication of the report 'Revitalising Health and Safety'⁸⁴ in 2000 marked a change in the approach by Government and the HSE. The key idea of the report was that the focus should no longer be on legal enforcement, but on the development of partnership. Enforcement action should only take place after education and encouragement of employers have failed. This report has been characterized as the 'first significant policy document to formally establish a "risk-based" approach to health and safety, an approach which relied upon businesses themselves weighing up the costs and benefits of good health and safety management'.⁸⁵

The HSE has over recent years paid more attention to innovative regulatory approaches. It has exhibited a preference for advice and guidance, rather than sanctions. In order to achieve a more innovative approach to health and safety, it was suggested that there is a need for advice and support that will not be part of enforcement.⁸⁶

One of the innovative approaches to regulation, which we find in the 'Revitalising Health and Safety at Work' report is its action point 8, which involves penalties. According to this, '[t]he Health and Safety Executive will monitor and draw public attention to trends in prosecution, convictions and penalties imposed by the Courts, by publishing a special annual report. This will 'name and shame' companies and individuals convicted in the previous 12 months. This information will also be available on the Health and Safety Executive's website.'⁸⁷

In order to raise awareness, the HSE also sends out leaflets to employers. The detailed website of the HSE aims to have a similar effect.⁸⁸ In addition, they organize road-shows and conferences. Health and Safety inspectors generally offer advice and guidance to employers during their inspection. They also conduct campaigns focusing on specific industries. One such example is the national campaign to hairdressers. This campaign attempted to inform hairdressers about the problems caused by chemicals. Another example is a protocol developed with local authorities and construction firms looking at the use of scaffolding. Yet, the concern that has been expressed by the HSE is that various businesses avoid asking for advice because they think that this can lead to enforcement action.⁸⁹

Several other activities illustrate the innovative approach of the HSE to regulation of health and safety. The recent Workplace Health Connect Pilot of the HSE between 2006 and 2008 provides another interesting case study.⁹⁰ Its purpose was to provide advice on workplace health issues to small and medium enterprises. The project aimed to achieve its

⁸⁴ HSE, 'Revitalising Health and Safety – Strategy Statement', 2000, available at <http://www.hse.gov.uk/revitalising/strategy.pdf>.

⁸⁵ Tombs & Whyte, 2010, p 30.

⁸⁶ HSE, 'A Strategy for Workplace Health and Safety in Great Britain to 2010 and Beyond', available at <http://www.hse.gov.uk/consult/condocs/strategycd.pdf>, p. 7.

⁸⁷ 'Revitalising Health and Safety at Work', available at <http://www.hse.gov.uk/revitalising/strategy.pdf> p., 24.

⁸⁸ See <http://www.hse.gov.uk/>.

⁸⁹ 'Effective Inspection and Enforcement', para 27.

⁹⁰ See the 'Workplace Health Connect Pilot – Final Report', prepared by the Institute for Employment Studies for the HSE, available at <http://www.hse.gov.uk/workplacehealth/finalreport.pdf>.

purpose in two ways. First, they set up a national advice line, which, among others, took calls from employers and employees and offered advice. Second, they organized problem-solving visits by advisers that were qualified. According to the final assessment of the project, there is a big difficulty in engaging with small and medium enterprises. The overall outcomes of the project are available in Appendix 2.

Moreover, the HSE employs the ‘health and safety awareness officers’ who visit workplaces and raise awareness on best practice. The health and safety awareness officers focus particularly on new and small businesses. They hold seminars and awareness days. Examples of their activities include targeting advice at farmers’ wives, in order to improve safety in farms.

The risk-based programme Fit for Work, Fit for Life, Fit for Tomorrow (Fit3) is also worth special mention.⁹¹ According to this programme, there is an effort to analyse injury in areas that are more hazardous. The programme focuses on evidence from industries and activities that pose the most significant risks on health and safety, and directs the HSE’s action towards them. Fit3, though, has been criticized for limiting the scope of inspections to certain specific targets (such as slips or trips), while neglecting others. Other innovative approaches include educational campaigns, such as Better Backs, which involves the prevention of back injuries’ at work,⁹² and further targeted campaigns, such as Work at Heights, where the HSE worked with businesses and developed the Ladder Exchange Initiative.⁹³ In this context, the HSE engaged with tool hire companies, aiming to remove dangerous ladders from the workplace. Through this project, firms were offered incentives to exchange their old and potentially dangerous ladders with new safe ones, which were provided in a discounted price.

From information found in the 2009 Report of the Low Pay Commission, targeted enforcement action by the HMRC regarding the national minimum wage looked into the hairdressing and care sectors.⁹⁴ The Government, though, has raised concerns about how successful targeted activities are.⁹⁵ The EAS undertook targeted enforcement action of sectors and areas that were identified as raising concern through its helpline.⁹⁶ Special mention ought to be made of Operation Ajax, which is a programme of surprise raids throughout the UK, in places where the GLA believes that there may be abuses.⁹⁷ The fact that these raids are unannounced might lead to more effective enforcement action.

9. Transnational Sanctions and Prosecutions

There is no process of transnational inspection or the administration and collection of fines. In terms of health and safety law, if an offence is committed in the UK, then UK law

⁹¹ ‘Effective Inspection and Enforcement’, para 6.

⁹² Information available at <http://www.hse.gov.uk/betterbacks/>.

⁹³ Information available at <http://www.hse.gov.uk/falls/ladderexchange.htm>.

⁹⁴ Report available at <http://www.lowpay.gov.uk/lowpay/report/pdf/7997-BERR-Low%20Pay%20Commission-WEB.pdf>, chapter 3.

⁹⁵ Ibid, p 195 ff.

⁹⁶ 2008 BERR Report, pp 11-12.

⁹⁷ Information available at <http://www.gla.gov.uk/index.asp?id=1013370>.

applies and it is for the HSE to conduct the investigation. Otherwise the HSE has no powers to inspect other countries. The only example of transnational cases might involve product safety. In this case, members of the HSE liaise with EU countries, and have a good network when they take action for dangerous products.

The GLA, though, faces particular problems when attempting to stop illegal gangmasters operating abroad, and depends on the co-operation of foreign regulators. As a result of allegations Bulgarian workers' about exploitation in the UK, for instance, the GLA made an agreement of co-operation with the Bulgarian labour inspectorate.⁹⁸

10. Conclusion

It could be said that the greatest weakness of the overall labour inspection regime in the UK is that it has developed in an ad hoc and unsystematic manner. It presents a patchwork of laws and regulations dealing with different labour standards with varying degrees of success. Even though there is a detailed and rapidly evolving labour inspection framework that uses a combination of regulatory techniques, and inspectors have important powers in enforcing the law, some of the agencies are more successful than others. Unsurprisingly, a general concern involves the issue of resources, which is raised by trade unions with respect to the NMWA, for instance.⁹⁹ The GLA is considered to provide a useful example of an innovative technique in licensing gangmasters,¹⁰⁰ but it is viewed as very costly and its effectiveness is also sometimes questioned. The EAS is faced with criticisms in relation to inspection of agencies. The changes brought by the Employment Act 2008 have been presented as an improvement of the previous regime, but have also been characterized in literature as a 'continuation of the "light-touch" approach' of the government towards agency workers.¹⁰¹ The key problems of EAS involve lack of resources and under-enforcement, and it has been argued that these issues are not addressed adequately in the current regime.¹⁰² A comparison between EAS and the GLA draws a 'disturbing picture'¹⁰³ because there are unjustified differences in enforcement activity across the industry. The lack of a licensing regime under EAS and the narrow coverage of the GLA are examples where there is significant scope for improvement. The key trend identified in the area of health and safety, which is the oldest regime, is that there has been a drop in enforcement action over the last 10 years or more. The health and safety authorities are focusing more on prevention, by using methods such as providing advice to the duty-holders. Several reports by academics, trade unions and others, express concerns about this trend, and suggest that more should be done to enforce the legislation. Other challenges facing the health and safety framework include maintaining public trust,

⁹⁸ See the GLA document at http://www.gla.gov.uk/embedded_object.asp?id=1013469.

⁹⁹ <http://www.lowpay.gov.uk/lowpay/report/pdf/7997-BERR-Low%20Pay%20Commission-WEB.pdf>, p 196 ff.

¹⁰⁰ This has been suggested in the 2009 Low Pay Commission Report, for instance, p. 207 ff.

¹⁰¹ Wynn, *ibid*, n 61 at p 64.

¹⁰² *Ibid*, Section 4.

¹⁰³ *Ibid*, p. 72.

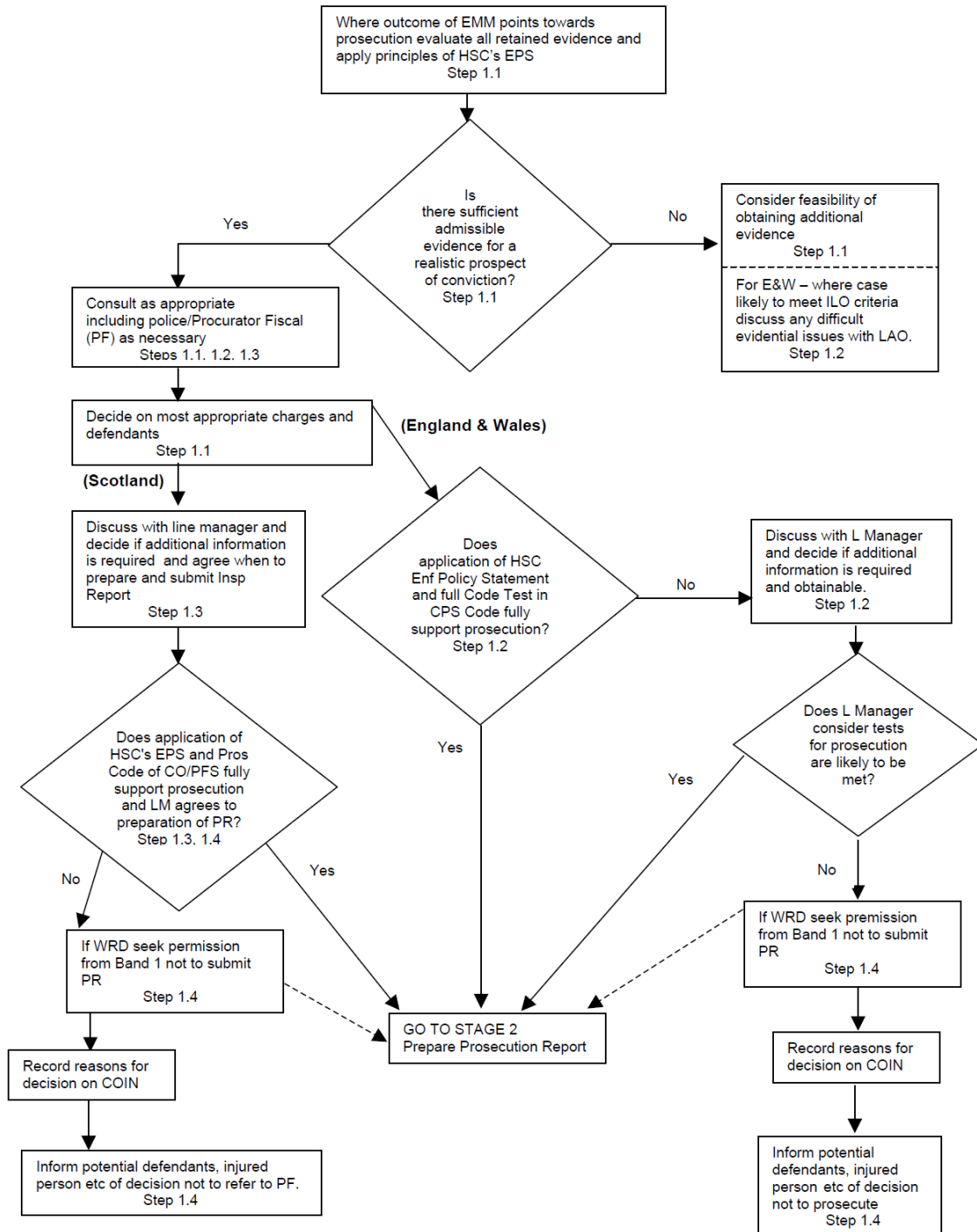
treating risk appropriately and ensuring that health and safety authorities deal with changes in an effective manner in the world of work.¹⁰⁴

¹⁰⁴ Bill Callaghan, 'The Health and Safety Commission and Executive', in *The Changing Institutional Face of British Employment Relations*, Dickens and Neal (eds), Kluwer Law International, 2006, p. 36 at 45-47.

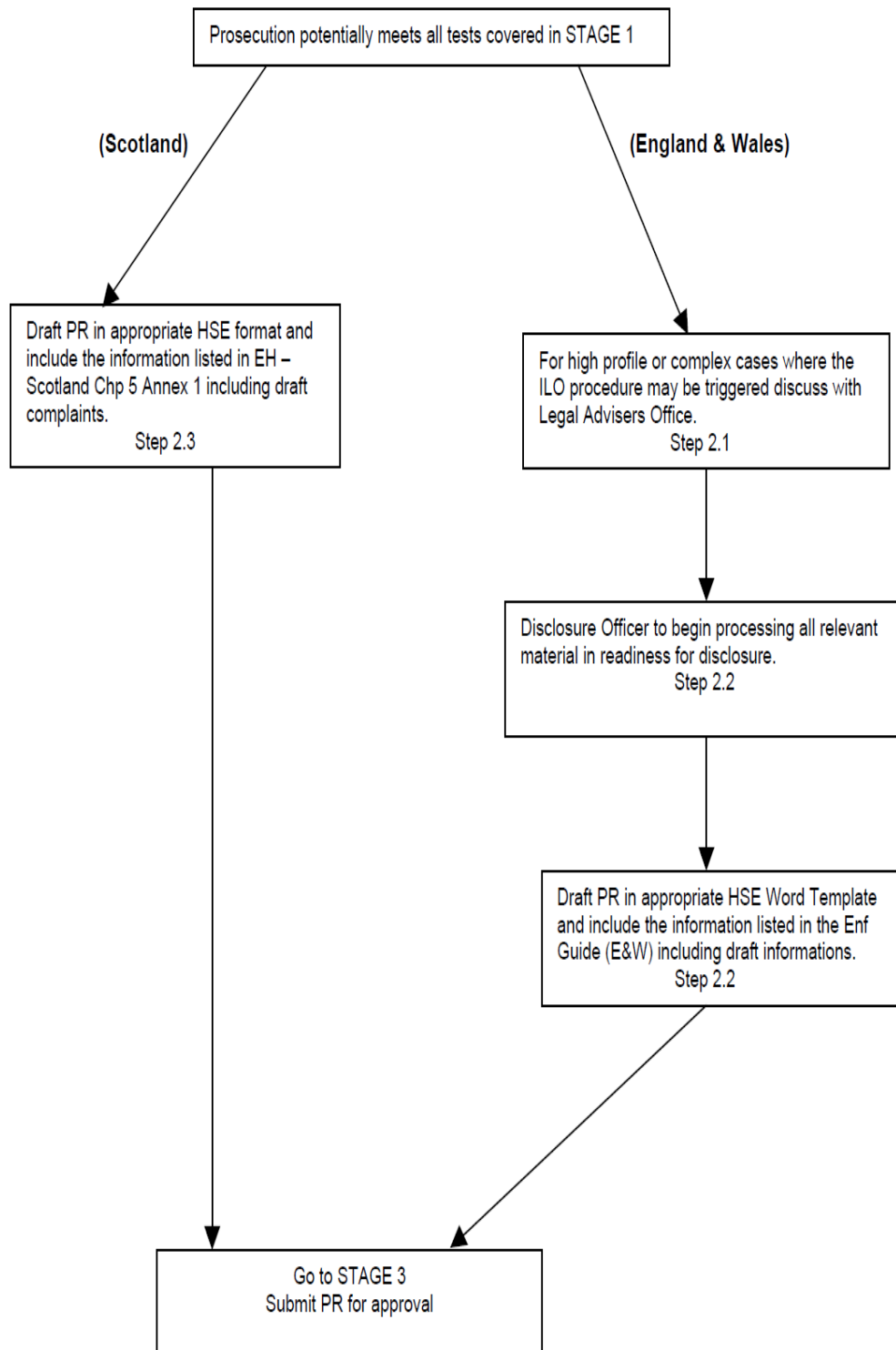
Annex I

Prosecution Procedure Flow charts

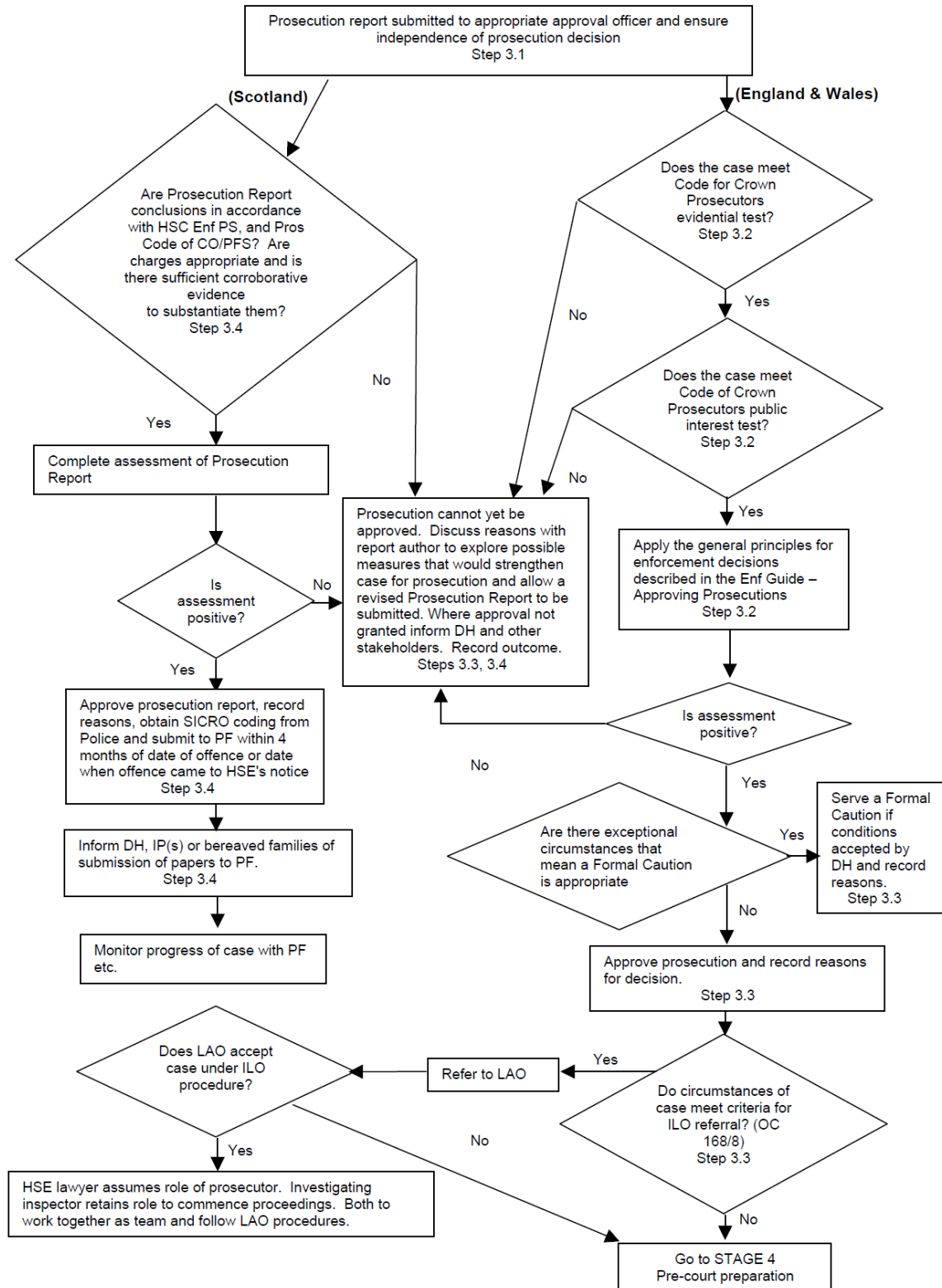
Stage 1 Consider prosecution



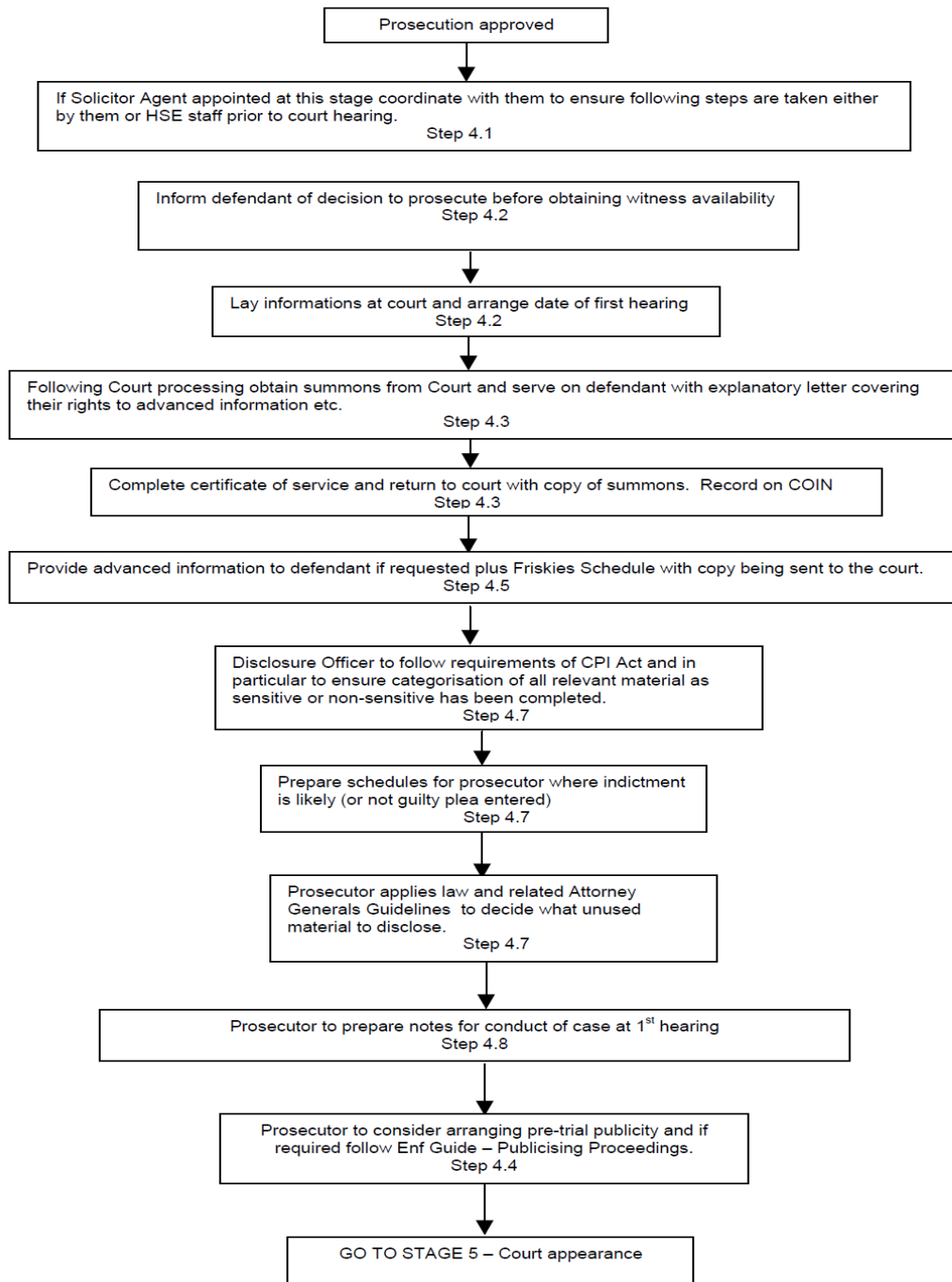
Stage 2 Prepare the prosecution report



Stage 3 Approval of prosecution

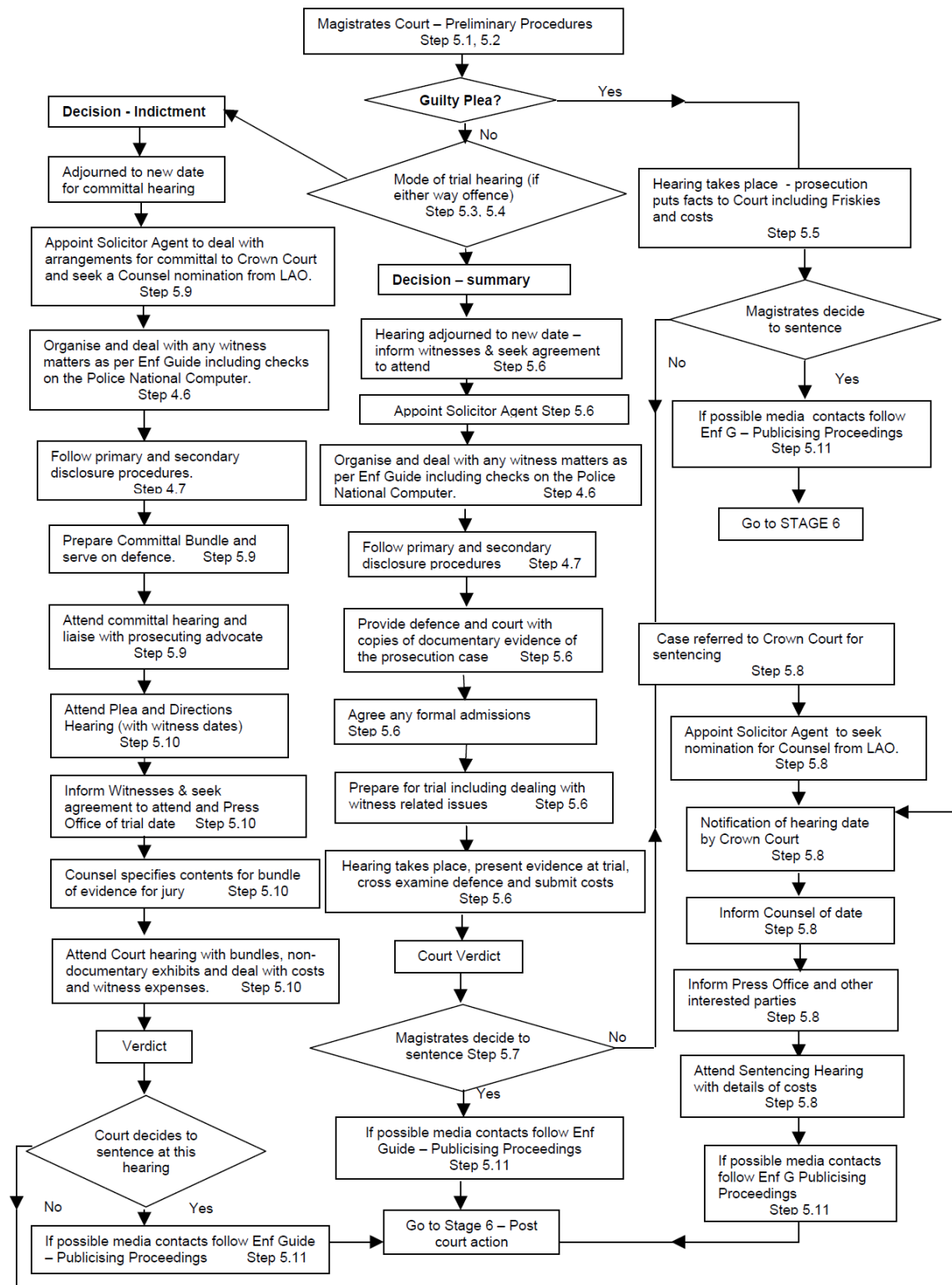


Stage 4 Pre-court preparation (E&W only) – Does not apply to Independent Legal Oversight¹⁰⁵ cases

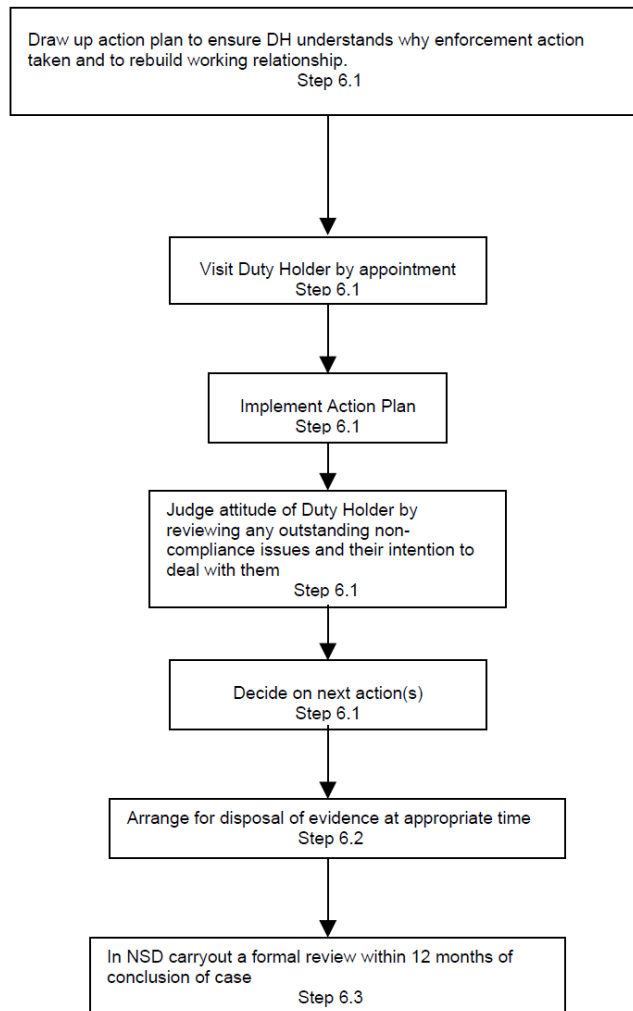


¹⁰⁵ In April 2004 a new system of Independent Legal Oversight (ILO) was set up, requiring inspectors to refer their most serious, complex and sensitive criminal cases to the Legal Adviser's Office (LAO). In Appendix I, the use of the abbreviation ILO is not to be confused with the identical abbreviation of the International Labour Organization. For more information, see http://www.hse.gov.uk/foi/internalops/fod/oc/100-199/168_11.pdf.

Stage 5 Court appearance (E&W only) – Does not apply to Independent Legal Oversight cases



Stage 6 Post court actions – Includes Independent Legal Oversight cases



Annex II

Evaluation of Workplace Health Connect, Findings of the Report, available at <http://www.hse.gov.uk/workplacehealth/evaluation.htm>

1. There remains a major challenge in connecting with SMEs on the topic of workplace health. Their primary concerns are related to meeting the legal requirements in relation to health and safety and their uptake for a health only service appears to be low.
2. WHC met its targets for the visit service, but the advice line received fewer calls than anticipated. Users preferred to take up the offer of face to face support. Overall, however, demand for support with health issues was low.
3. There is no evidence that taking part in WHC had a direct measurable effect on rates of sickness absence. There was, however, evidence that involvement with WHC did lead to improvements in a range of health and safety practices. These in turn were linked to a reduction in accident rates.
4. The costs of the service, when the costs incurred by employers are included in the calculation, outweighed the pilot's measurable benefits.
5. The advice and guidance provided was well received by a large number of SMEs.
6. The pilot demonstrated the importance of marketing in reaching SMEs, both in terms of messages and mode of delivery.
7. It demonstrated the benefits of using local and regional networks and partners to deliver the direct service.
8. The pilot established a commonality about the health and safety issues in SMEs, and that these are generally at a relatively basic level.
9. It also identified that existing sources of information and advice existed and benefit could be gained by helping employers navigate their own way towards a workable appropriate solution using these sources.

There are also some additional clear messages about engaging with SMEs. These include:

- Internet-based advertising was a good way to connect with those actively looking for help.
- A variety of marketing approaches are necessary to successfully target SMEs especially to attract employers who have not already identified any support needs.
- There are a range of existing sources of information and advice which SMEs could be encouraged to more fully utilise (e.g. HSE Infoline and website).
- Most SMEs do not see themselves as having a sickness absence problem and do not engage simply because there are potential savings in this area.
- Targeting should be based on topics which tap into their concerns, such as helping them find low cost, context specific approaches that directly meet their business needs and have other benefits (e.g. productivity, staff morale).