

Evaluation of EPS and enforcement action

Main Report

Prepared by **Greenstreet Berman Ltd**
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This report provides a summary of the first and second phases of a study that researched how enforcement influences duty holders and evaluated the Enforcement Policy Statement (EPS). The first phase included a literature review, exploratory discussions with stakeholders and a survey of inspectors and duty holders. The survey of duty holders includes those that have been subject to improvement notices, prohibition notices and prosecution. The results outline if, how and some of the reasons why, enforcement impacts duty holders' health and safety management. It also examines evidence about how hearing of enforcement action or incidents in other organisations influences duty holders, and summarises respondents' view of potential improvements. The second phase of work involved a further literature review, exploratory discussions with workers, employers and inspectors, worker focus groups and discussions with victims' representatives. The report concludes by drawing out the implications for the EPS (and one of its tools – the enforcement management model (EMM)).

Two supplementary reports provide appendices covering in detail each of the Phase 1 and 2 pieces of work. These are available on HSE's website at <http://www.hse.gov.uk/research/rrhtm/rr519.htm>.

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Executive summary of key findings

E.1: Aspects of EPS and EMM supported by the evaluation

The Enforcement Policy Statement (EPS) principles: All of the sources of evidence covered in this project indicate that the principles of enforcement in the EPS (**transparency, targeting, proportionality, accountability and consistency**) are important aspects of achieving effective enforcement and sustained compliance amongst duty holders. The need for enforcement to be perceived as fair, proportionate, substantive etc in order to have a positive influence on duty holders whilst also maintaining trust (which is important element of duty holders seeking and listening to inspectors advice), all reinforce the importance of the EPS principles. Given that trust is considered an important element of a constructive relationship between duty holders and inspectors, and that a perception of fair enforcement is necessary to stop enforcement reducing that trust, it is reasonable to conclude that the EPS principles are important for a sustained and effective enforcement strategy.

Despite a lack of understanding of terminology by victims and workers, both groups feel the principles are important, especially transparency, accountability and consistency.

Other specific points supported by this study are noted below.

Taking account of duty holder history: The EPS's principle of taking account of duty holder factors (history and intent) when deciding on enforcement action is consistent with our findings on 'responsive regulation'¹. Similarly, the Enforcement Management Model (EMM) guidance on taking account of the history and intent of the duty holder is supported in that enforcement needs to be recognised as fair and appropriate for there to be sustained and proactive compliance.

Notifying senior officer of the duty holder: The EPS's requirement for inspectors to notify a senior officer of the duty holder concerned, at board level, when serving notices or prosecutions is supported by the finding that senior management interest in the enforcement action is more likely to lead to sustained improvements.

Informing workers and victims: The EPS does cite a need to inform and notify victims and workers. This is consistent, as far it goes, with the findings of this study.

Consideration of directors' disqualification: The advice in the EPS to consider directors' disqualification is supported by the finding that fear of individual liability is a factor in compliance with H&S law and responding to enforcement.

Publicity: There is strong evidence that duty holders are particularly motivated to avoid the adverse publicity of offences and respond to news of offences in other organisations. The majority (61%) of duty holders do report they respond to hearing about enforcement action or incidents if they perceive them as relevant to their business. This evidence supports the EPS's general requirement on enforcing authorities to publicise enforcement action and convictions.

¹ Responsive regulation is where the decision on whether or not to take enforcement action takes account of the prior history and intent of the duty holder.

Reception of EPS/EMM by inspectors

The evaluation also found that the EPS was well received by inspectors; inspectors are familiar with the EPS and found both the EPS and EMM to be of value, changing the approach to enforcement decisions of the majority of responding inspectors. The EPS and EMM are also considered relevant to permissioning regimes. The findings from the survey of inspectors and duty holders indicates that, with a few exceptions, the EMM has helped achieve the principles of proportionality, transparency/accountability and consistency, especially amongst LAs – with most enforcement perceived as proportionate and fair by duty holders. The EMM has a high visibility and been taken up within the LA and HSE, not only as a decision-making tool, but as a training aid for more junior enforcement officers.

Targeting

The study has also shown that the EPS principles are, with one exception, considered to be important and relevant by all stakeholders, the exception being the form and extent of targeting of inspections, investigation and enforcement. Victims and workers do not want targeting to be achieved at the expense of some workers not being protected. In addition, victims see each case of injury and ill health individually and should be assessed on an individual basis rather than on some more general targeted basis. This view can be interpreted as querying the implementation of targeting rather than opposing the principle of targeting per se, specifically to what extent should inspection, investigation and enforcement be targeted onto higher risk activities based on the rates of injury and ill health in sectors.

Inspectors and duty holders accepted the principle of targeting. The study also found that where Duty Holders perceived that change was needed, in terms of recognising that a hazard existed that they needed to address, changes tended to be more long-term and generalised in the organisation. This supports the principle of targeting priority risks from the duty holders and inspectors' perspective.

E.2: Points for review

Although the scope of the EPS and EMM is 'as good as far as it goes', it could benefit from review on a number of points. A key finding is whether new principles should be added to the EPS and/or whether current guidance in the EPS needs to be given greater weight and elaboration. Those aspects of the EPS and EMM that could benefit from review are summarised below.

EPS issues for review

Communication of reasons for enforcement: Whilst the EPS advises that duty holders are advised on what they should do, as part of notices for examples, consideration could be given to giving greater weight to explaining the reasons for enforcement, especially prosecutions. Duty holders do report that enforcement process is transparent. However, prosecutions are seen as unfair by 25% of prosecution respondents, far more than notices.

Workers' and victims' representatives' perception of effectiveness of enforcement: The small number of interviews and workshops found that victims' representatives and workers do not agree that enforcement is effective or proportionate at this time. Victims' representatives do

not see enforcement as achieving the EPS principles, particularly effectiveness and proportionality.

Involving workers and victims: Whilst the EPS does cite a need to inform and notify victims and workers, some of the findings and feedback from this study relate to whether these stakeholders should be involved or engaged further. Some options include, for example, consulting workers on whether an improvement notice has been properly discharged and consulting victims on whether or not to investigate (say) a major injury.

EPS/EMM issues for review

Communication of the EPS and EMM: It is important to note that whilst the EPS expects enforcement to be transparent, it does not expect that the EPS itself is communicated or made transparent to workers and victims. The EPS was written as a public statement rather than an explanation, and the EMM was written specifically for inspectors. Most workers and victims are not familiar with and do not understand the terminology used within the Enforcement Policy Statement (EPS). Inspectors indicate that they normally would not refer duty holders to the EPS, and the EMM is only rarely employed to explain decisions to duty holders. This suggests that consideration should be given to a guide on enforcement policy, drawing on the EPS and EMM, which is designed specifically for communicating with duty holders and workers/victims.

Directors' disqualification: The EPS advice on directors' disqualification is not supported within the EMM (but is supported by other recent HSE guidance). However, care must be taken as respondents report that the need to protect the organisation is their main motivation, i.e. as the need to protect the organisation's reputation is the main driver, enforcement processes should be duly weighted between organisational reputation and directors' individual liability.

Publicity of offences: For organisations to respond to news of enforcement in other organisations, the information needs to be of sufficient detail to enable them to understand if the case is relevant to their organisation. The EPS provides very limited and narrow guidance on the extent and methods of publicity. There is very low awareness of the HSE's offenders' database (which is prescribed by the EPS) which also only provides a minimum of information on cases. Duty holders report that inspectors do not commonly use inspections as a means of advising them of enforcement in other similar organisations. Neither the EPS nor the EMM advises on the publicity of enforcement during inspections. Thus, publicity of enforcement appears from this survey to be a significant motivator for organisations which could be given more support in the EPS and/or EMM.

Targeting: Whilst duty holders and inspectors accept targeting, victims and workers are concerned that targeting of enforcement should not be at the expense of not protecting some groups of workers. Workers perceive a 'universal right' to protection that should not be lost by a targeting policy.

Also, it is reported by inspectors that the EMM has not assisted with the targeting of enforcement. However, this study does not indicate whether there is a need to improve targeting. It is possible that inspectors felt the EMM has not helped because enforcement was already effectively targeted.

EMM issues for review

Health related enforcement: There appears to be far less enforcement on health issues. This contributes to a perception amongst victims and workers that H&S enforcement is not effective

or proportionate. The EMM is considered easier to use for safety than health by 44% of inspectors.

Inappropriate enforcement: There is some indication that the application of inspector judgement in the use of the EMM is not being fully achieved, with some reports of inappropriate enforcement. In addition some duty holders express concern about a bureaucratic enforcement process that does not allow for ‘particular circumstances’.

Engaging and involving senior officers: The finding that senior management interest in the enforcement action is more likely to lead to sustained improvements can be interpreted to support a stronger statement than “notifying” a board member, perhaps a greater emphasis on effectively communicating with someone at board level, for instance. The EMM does not provide guidance on when or how to engage senior management in enforcement actions.

E.3: Alternative penalties

This study indicates that there is significant interest and support for consideration to be given to potential alternative penalties, in particular restorative justice. Victims' representatives' and workers express a wish for outcomes from enforcements such as an apology, prevention of re-occurrence etc that accord with the concept of restorative justice. Other penalties such as conditional cautions may also be of value, providing an alternative to prosecution for example where ‘particular circumstances’ argue for an alternative.

There appears to be a strong ‘appetite’ for alternative penalties, especially restorative justice, publicity of offences and enforceable undertakings. A strong finding is that ‘restorative justice’, whether via a statutory or voluntary process, is consistently supported by our review of previous research and discussions with workers and victims, and may also help address some of the concerns about the punitive nature of prosecutions and enforcement. We strongly recommend that the matter of restorative justice is further considered.

E.4: Impact of enforcement

A key aim of the study was to explore how and why enforcement influences duty holders, and in particular whether it encourages sustained improvement of health and safety.

Key findings include:

- Enforcement does influence duty holders to improve health and safety *to a reasonable extent*, both in response to enforcement against their organisation and in response to hearing about enforcement or incidents in other similar organisations;
- Duty holders report that inspectors rarely advise them of examples of offences elsewhere and that publicity of offences is generally low. The information currently provided on offences by the offenders database is insufficient for duty holders to assess if examples of offences are relevant to them;
- The extent to which enforcement prompts wider scale or sustained change is influenced by a number of factors such as the perceived fairness and proportionality of the action, the size of the organisation, whether the organisation has a reputation to protect, whether the enforcement prompted senior management interest and the nature of the action (notice or prosecution);

- There are mixed findings regarding how the level of enforcement, in terms such as the number of notices per 100,000 organisations, influences health and safety performance, which may be due to the above mentioned factors moderating the impact of enforcement, i.e. the extent to which the amount of enforcement influences duty holders may depend on the 'quality' of enforcement;
- There is a clear disparity between the level of enforcement on safety and on health, with far less enforcement reported for health offences;
- H&S enforcement does not damage the relationship between inspectors and duty holders so long as the enforcement is perceived by the duty holder to be fair and proportionate;
- Duty holders report that enforcement has an 'educative' rather than deterrent effect, and acts as a 'wake up call';
- The need to avoid adverse publicity is a key motivator for duty holders.

Further research

A larger scale study into victims and worker involvement could usefully explore duty holders and inspectors concerns about greater worker/victim involvement, as well as extend and verify the findings from this small scale examination of victims' and worker involvement.

Other potential topics include: relative impact of enforcement on controlling minds vs the organisation; degree of targeting of enforcement; the reasons for the EMM contributing to (occasional) inappropriate enforcement, and a larger scale statistical assessment of impact of the level of enforcement on H&S performance.

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1 INTRODUCTION

1.1 BACKGROUND

In January 2002 the Health and Safety Commission published a revised Enforcement Policy Statement (EPS) setting out, at a strategic level, the principles of enforcement, which the HSC expects enforcing authorities (mainly HSE and Local Authorities) to follow, namely proportionality in applying the law, consistency of approach, targeting of enforcement action; transparency about how the regulator operates; and accountability for the regulator's actions. The statement also lays out the principles by which it expects decisions to be made with respect to investigation and prosecution. The EPS constitutes the Health and Safety Commission's expectations regarding the approach to be taken to enforcement by health and safety enforcing authorities. The EPS is aimed first and foremost at inspectors.

The EPS states that "The purpose of enforcement is to:

- ensure that duty holders take action to deal immediately with serious risks;
- promote and achieve sustained compliance with the law;
- ensure that duty holders who breach health and safety requirements, and directors or managers who fail in their responsibilities, may be held to account, which may include bringing alleged offenders before the courts in England and Wales, or recommending prosecution in Scotland, in the circumstances set out later in this policy."

Key aims of the enforcement policy are to enforce consistently, fairly, and proportionately. The policy also reminds readers that "Enforcement is distinct from civil claims for compensation and is not undertaken in all circumstances where civil claims may be pursued, nor to assist such claims."

The EPS states that "enforcing authorities should set down in writing the decision-making process which inspectors will follow when deciding on enforcement action, and make this publicly available" (*para 9*). The Enforcement Management Model (the EMM) is a decision-making tool widely used by HSE and local authorities (LAs) to assist enforcement officers in deciding what action to take (in line with the EPS) in response to actual situations where breach (or imminent breach) of health and safety law is suspected and a "risk gap" is present. It defines the criteria that must be taken into account in deciding the appropriate action to be taken in order to reduce the risk gap to acceptable levels. These criteria include the extent of the risk gap, but also issues such as public interest, severity of injury if there is an injury, for example. As with the EPS the EMM is written first and foremost for inspectors.

Clearly, in guiding inspector decisions on enforcement, the EMM is a key tool in the effective implementation of the EPS.

The EMM has been applied in HSE as a whole for since 2002. Some Directorates have been using it longer e.g. FOD in the form of draft/pilot versions, before it was rolled out throughout HSE. It was expected to be used by LAs from April 2004.

Aims of this work

This study had two main aims. The first aim of this work was to evaluate enforcement and its effectiveness following the publication of the revised Enforcement Policy Statement (EPS), including a better understanding of how current enforcement practice influences duty holders. As a key practical tool for enforcement decision-making used by enforcement officers, an examination of the Enforcement Management Model (EMM) was an important part of this evaluation. Secondly, previous reviews have addressed the question of whether “enforcement works”, concluding that it does. The second aim of this work was to explore the mechanisms by which enforcement works. Therefore, we have first attempted to draw out the evidence regarding how and why enforcement works, and then identified the gaps in the evidence base. This is important because it bears on how regulators can increase the motivational power and impact of regulations and enforcement.

As our first phase of work identified some questions about the involvement of workers and victims, a second phase of work was carried out to explore, on a small scale, the role of victims and workers in enforcement. Thus, the study includes two main phases of work.

1.2 APPROACH TO THE WORK

1.2.1 Phase one: Impact on duty holders

The first phase of work had a number of aims including:

- To acquire evidence of how enforcement influences the attitudes and behaviours of duty holders, and why;
- To solicit feedback on how enforcement could be further developed;
- To acquire evidence of the impact and effectiveness of the EPS and EMM, and possible improvements to these.

As elaborated below, these aims were achieved by an in-depth literature review, a large scale survey of inspectors and duty holders and exploratory discussions with inspectors and duty holders.

Review of previous research and data (up to end 2004)

The review covered both UK and overseas research on the impact of occupational health and safety enforcement including both qualitative and statistical studies. A brief examination of UK injury rates was completed and compared with rates of enforcement using publicly available data to ascertain if there was ‘prima facia’ evidence of a statistical association between the two, but this did not comprise a full multivariate analyses of injury, enforcement and other confounding variables. It also included a brief re-examination of Australian enforcement and injury data to again ascertain if there was ‘prima facia’ evidence of a statistical association between the two. The review provided (1) evidence about the relationship between enforcement and health and safety performance, (2) an indication of how enforcement impacts organisational attitudes and behaviours and (3) a basis on which to scope further research.

Exploratory discussions with stakeholders in first quarter of 2004

The discussions aimed to help scope out the subsequent postal survey by identifying factors that stakeholders think influence the impact of enforcement. The discussions also provided some findings in their own right regarding the way enforcement influences duty holders. As with all exploratory discussions the feedback is subjective and the relatively small number of discussions do not provide quantitative information. Discussions were held with representatives from HSE policy divisions, local authorities, HSE divisions (both managers and enforcement officers), employer and employee representatives. In addition to numerous comments received and discussions, we held a total of 12 interviews with representatives from:

- HSE Local authority unit
- HSE enforcement policy branch
- HSE Field Operations Division including FOD Scotland
- The Procurator Fiscal's office
- HSE Railways Inspectorate (HMRI)
- HSE Nuclear Installations (NSD)
- HSE Hazardous Installations Division (HID)
- Five local authorities

The views of stakeholders external to HSE/LA were also sought, including:

- Trades Union Council (TUC)
- Union of Shop, Distributive and Allied Workers (USDAW)
- Confederation of British Industry (CBI)
- Engineering Employers' Federation (EEF)
- Federation of Small Businesses
- Centre for Corporate Accountability (CCA)

Interviews were also conducted with 12 duty holders and a safety representative. Most (9) had experienced some form of enforcement action.

The discussions provided a 'rich' body of subjective opinion about how enforcement impacts organisations and the factors that influence the impact of enforcement in the UK.

Postal questionnaire surveys of inspectors and duty holders in late 2004/early 2005.

The postal survey aimed to acquire quantitative results regarding duty holders' and inspectors' experience of enforcement, and inspectors' judgements of the EPS and EMM. The survey was designed to achieve statistically robust sample sizes. The survey was retrospective in that it explored experience of past enforcement, with duty holders drawn from the HSE Offenders Database. It explored respondents' knowledge of the extent to which organisations changed health and safety in response to either hearing about enforcement or being the subject of enforcement, and why they responded. It also explored general perceptions of enforcement, such as its proportionality. In the case of the inspectors' questionnaire, specific questions explored awareness, use and experience of the EPS and EMM. Data was not sought on health and safety performance for the periods before and after enforcement action.

The survey had three parts:

1. A survey of HSE and Local Authority inspectors;
2. A survey of employers who had been the subject of either a notice or a prosecution/formal caution (drawn from HSE/LA records); and
3. A random sample of employers (drawn from a commercial contacts database).

In total there were 399 Local Authority, 156 HSE and 838 duty holder respondents (215 served with an improvement or prohibition notice, 347 subject to a prosecution and 276 other duty holders). The overall response rate for duty holders was approximately 13%. As the questionnaires were issued during a period when HSE inspectors were in dispute and there were concerns about resources, a limit was placed on the number of questionnaires issued to the HSE. However, senior managers promoted the questionnaire resulting in a high response rate.

1.2.2 Phase two: Worker and victim involvement

The second phase included a literature review, exploratory discussions with duty holders and inspectors, interviews with victims' representatives and employee focus groups.

Literature review (to November 2005)

This section reviewed how workers and victims can already be involved with H&S enforcement decisions, and research on victims' involvement in areas such as clinical negligence cases.

Key areas included:

- Current enforcement processes and practices, including perceived problems;
- What victims of negligence or H&S enforcement breaches actually want;
- How to involve workers and victims more in enforcement; and
- Suggested changes to the processes and procedures.

Inspector and duty holder exploratory discussions (late 2005)

These discussions explored the opinions of employers (duty holders) and inspectors (all with high level of experience as inspectors with the HSE) concerning the involvement of workers and victims in enforcement activity. Five interviews were carried out with experienced HSE inspectors, one of whom was also an experienced magistrate; and four interviews were carried out with employers (a large utility firm, a large energy firm, a large oil exploration firm, and a small manufacturer – all long established firms). Interviewees were asked how workers and victims might be involved more in enforcement activity to their or to others' benefit.

The overwhelming response was that the involvement of workers may improve enforcement, but that the involvement of victims should not be increased. As a result of this response, it was felt important to seek the views of both workers and victims.

Interviews with victims' representatives (early 2006)

Due to ethical considerations (potential for causing psychological harm to victims), interviews were not conducted directly with victims, but with victim representatives. These included seven individuals working with victims for victim support groups (who provide advice and support for

victims); four union representatives; two solicitors – one claimants’ solicitor and one defendants’ solicitor; and one representative from the Centre for Corporate Accountability (an action group). All representatives were senior grade staff and experienced individuals.

This part of the research was limited to a small sample of representatives. The sample was kept small in part due to the point that this is a relatively unexplored area. The current study aimed to identify and understand key issues, and provide initial victims’ views on the EPS and EMM. It is considered that it would be useful to build on the findings of this initial study of victims with a larger scale study.

Employee focus groups (early 2006)

Workers’ views were sought through a series of five focus groups, composed of six to nine participants, with 38 participants in total. The groups’ composition included individuals from private and public sector; small and large organisations; high and normal risk industries; and unionised and non-unionised companies. Group participants ranged in age, gender and ethnicity as much as possible; and there was a geographical spread with two groups being run in Glasgow, two in Birmingham and one in London.

Key areas covered in all interviews and focus groups included:

- Current enforcement processes and practices, including perceived problems;
- What involvement workers want with H&S enforcement;
- What victims of H&S enforcement breaches want;
- How to involve workers and victims more in enforcement; and
- Suggested changes to the processes and procedures.

As with the victims’ representative work, the worker focus groups were limited to a relatively small number of people, partly as this is also a relatively unexplored area. The current study aimed to identify and understand key issues, and provide initial views on the EPS and EMM. It would again be useful to build on this initial study with a larger scale exercise.

2 KEY FINDINGS ABOUT HOW ENFORCEMENT WORKS

2.1 DOES ENFORCEMENT IMPACT H&S MANAGEMENT?

Whilst the findings of our discussions and our survey of duty holders and inspectors indicates that enforcement can have a positive impact on health and safety management, there are mixed findings from the review of literature and other data. Our exploratory discussions indicate that the expectation of being inspected is a key driver in motivating duty holders to act. Our survey of duty holders found that:

- The majority of prosecuted duty holders (71%) and those receiving notices (61% of those with improvement notices and 55% of those with prohibition notices) agree or strongly agree that it made them more motivated to improve H&S;
- On a three-point scale (where 0 = Not at all, 1 = Partly and 2 = Definitely) duty holders report, that they tend to 'partly' agree that enforcement impacts H&S management.

The responses from inspectors also indicate that they judge that enforcement leads duty holders to improve health and safety, indicating that:

- 68% willingly comply with notices, with 15% doing more than what is required;
- ~22% of duty holders are now more keen that their workers get involved in helping to make improvements to H&S;
- There was a higher interest in H&S amongst their senior managers/directors (54% of HSE improvement notices and 51% of HSE prosecutions for example).

However, only 16% of inspectors report that duty holders reviewed other activities (beyond the notice) after being served a notice, and only 27% of HSE and 9% of LA inspectors say that notices prompted plans for wider improvements in H&S – compared to 46% of prosecutions.

Other studies provide mixed findings on the impact of enforcement. On the one hand:

- A small number of studies previously summarised in Wright et al (2004), Hopkins (1995), Davis (2005) and Organisation for Economic Co-operation and Development OECD (2000) have examined the impact of Occupational Safety & Health Administration (OSHA) enforcement on American injury rates. They found a 13% to ~25% reduction in injuries statistically associated with increases in enforcement.
- There are moderate negative correlations between the number of Improvement Notices served by the HSE and the rate of reported 3 + day injuries for the construction and agriculture sectors (i.e. the higher the number of notices the lower the accident rate).
- The 2004 HSE commissioned survey of UK organisations (Wright et al, 2005) found that 49% of employers said that enforcement would force H&S up the list of priorities or have a long-term effect on willingness and ability to improve health and safety.

On the other hand, a KPMG Consulting (2001) study reported a series of findings that raise questions over whether the likelihood of inspection and enforcement is a significant factor. At the very least, it appears that the perceived deterrent effect of enforcement is not directly linked to the

actual level of enforcement and a deterrent effect of enforcement is reported even where the likelihood of enforcement is perceived to be low.

In addition, our review of injury and enforcement rates in Australia and the UK service sector found no consistent association between the rates of enforcement (which changed greatly) and sector or state injury rates. It is apparent, in the case of Australia, that between 1995 and 2001:

- The ‘injury with 5 or more days absence’ rates was close to 20% for all states, despite great variations in the rate of enforcement, i.e. the degree of decline in injury rates was similar across the states despite the level of enforcement increasing far more in some than others. In addition:
 - In Victoria, South Australia and Tasmania there was a great increase in the rate of Improvement Notices, with a relatively small decrease in Injury rates.
 - In the case of NSW, both the rate of Improvement Notices and the rate of injury declined

The reported rate of injury in the UK service sector declined steadily from the early 1990s to early 2000’s despite a large ‘spike’ in the number of formal notices issues by Local Authorities (who enforce in the majority of service sector premises) in the first half of the 1990s and a large reduction in the rate of visits per 1000 premises since 1997/98, i.e. there was no obvious impact on reported injury rates of a marked change in the rate of enforcement.

Indeed, a number of studies have suggested that enforcement may have adverse impacts on organisational commitment to health and safety and on their performance. For example:

- Hopkins (1995) cites various studies which argue that prosecution can, especially of every ‘petty’ violation, put the employer on the defensive and destroy the possibility of co-operation or open communication.
- Johnstone (2002) reviewed Australian prosecutions and found that courts examine offences in close detail, focus on machinery accidents and focus on individual culpability – rather than the process/management failings leading to the event;
- Yapp and Fairman suggest that the traditionally prescriptive nature of food safety enforcement and the high level of inspection in the UK may have made proprietors dependent on enforcement activity of their enforcement officers.

GSB’s exploratory discussions

Duty holders interviewed as part of our exploratory discussions also reported being motivated as a result of the enforcement action, or the incident, to improve workplace safety. However those that felt that the enforcement action had been wrong or unfair reported having more negative attitudes and emotions as a result. The in-depth discussions with employers found that enforcement can be de-motivating where it is considered to be disproportionate, reactive to an incident rather than focused on prevention, or a “technical” paper offence. In these cases health and safety requirements may lose their legitimacy and come to be viewed as a punitive or bureaucratic compliance process that is not aimed at improving health and safety. It is suggested that this can reduce respect for the law and with it commitment to proactively improve compliance.

Researchers' Conclusion

It is apparent from the previous and current research that if the adopted approach to enforcement creates dependency on the regulator, or leads to (say) active distrust by duty holders, or fails to support better OHS management, then enforcement may have a negative effect. In contrast, if the nature of the enforcement approach generates a more sustained level of compliance, then higher levels of enforcement as part of a wider strategy of advice and engagement can lead to higher standards. This may explain the conflicting findings on the link between enforcement activity and injury rates, in that the direction of the relationship between enforcement and injury rates may be a result of the nature of the enforcement process and employers' perception of the enforcer/regulations.

2.2 FACTORS INFLUENCING IMPACT OF ENFORCEMENT

The survey of duty holders and inspectors suggest that the mixed findings of previous research on the impact of enforcement (as measured in this study by the reported degree of widespread improvements/ more resources) can be explained, as shown in **Figure 1**, at least in part, by:

- The impact of prohibition, improvement and prosecutions varies; improvement notices have more impact than prohibition, whilst prosecutions have more impact than notices;
- The attributes of the duty holder: larger organisations are reported to respond more 'positively' to enforcement actions;
- Impact varies with the sector the organisation operates in;
- Whether the enforcement action receives senior management attention or not affects impact;
- The perceived fairness of the enforcement action affects the extent of the response.

Clearly as prosecutions tend to be for more serious cases, it is also possible that the duty holders also respond to the event.

It is difficult to separate out the effect of sector and enforcing body. Whilst Local Authority (LA) enforcement is rated as having a lesser impact than enforcement by the HSE, LAs enforce within the service sector that has a far higher proportion of smaller firms. Smaller firms are found to be less likely to go beyond the immediate requirements of notices than larger firms. The HSE enforce within sectors (manufacturing, construction, agriculture for example) that are typified as higher risk and which tend to have a higher representation of larger organisations (with exception of agriculture which is predominantly micro organisations).

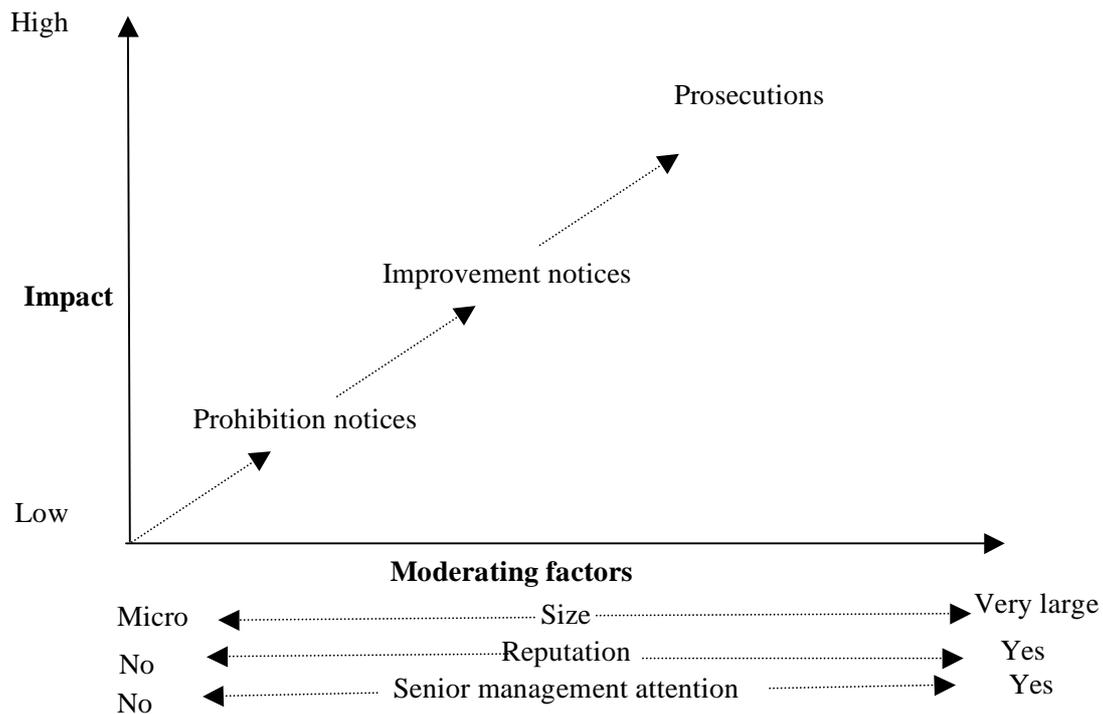


Figure 1: Schematic representation of variables influencing impact of enforcement

The exploratory discussions also reported that the long-term and wider effects of enforcement activities were largely dependent on the Duty Holder's perception of the enforced hazards, and inspectors' follow-up support and inspections. Where Duty Holders perceived that change was needed, in terms of recognising that a hazard existed that they needed to remove, changes tended to be more long-term and generalised in the organisation. Where Duty Holders did not perceive that there was a real risk, and that they were being required to make changes that were unnecessary, they are less likely to embark on a generalised response. This supports the principles of the EPS in that enforcement should be targeted and also transparent so that duty holders do understand the need for the action and are therefore more likely to respond positively to enforcement.

Senior management interest

An important finding from the survey is that enforcement actions that raise senior management interest are more likely to lead to better understanding of H&S priorities, more H&S resources and effects beyond the specific activity referred to by the action. Indeed, the correlation between whether the duty holder was prompted to make widespread H&S improvements and whether the action raised senior management attention was strong. The following types of enforcement actions are more likely to get senior management attention:

- Actions that are perceived to relate to how H&S is managed;
- Actions against larger organisations and where they fear the business impacts;

- Actions regarded as addressing a serious issue.

In addition, our exploratory interviews with duty holders found that it was important that inspectors communicate effectively with senior managers in stating the need for changes and appreciating the business constraints in which compliance actions have to be taken. This was felt to help achieve attitude and behavioural changes. It was also stated that the effectiveness of formal enforcement was due to the fact that these enforcement actions were reported to senior management in large organisations, who often otherwise would not be told about health and safety failings.

This supports the EPS's requirement (at para 20) that "When inspectors issue improvement or prohibition notices;or prosecute, enforcing authorities should ensure that a senior officer of the duty holder concerned, at board level, is also notified". Indeed the evidence that senior management interest is more likely to lead to sustained improvements might be interpreted to support a stronger statement than "notifying" a board member, perhaps a greater emphasis on effectively communicating with someone at board level, for instance. The EMM does not provide guidance on when or how to engage senior management in enforcement actions.

Size of organisations

In considering the role of organisation size, it should be noted that larger organisations are:

- More likely to have a health and safety board director;
- More likely to have a qualified health and safety manager;
- More likely to have trade union safety representative.

These attributes are also associated with greater response to hearing about incidents/enforcement actions.

Notices versus prosecutions

As noted above, prosecutions are reported as more likely to lead to impact H&S. The variable impact of notices versus prosecutions can be associated with the following:

- Prohibition notices tend to focus on specific improvements, whilst improvement notices also cover risk assessment and are more likely to cover management issues;
- Prosecutions are also more likely than both improvement and prohibition notices to cover management issues, which is a factor in raising senior management interest;
- Prosecutions adversely affected the business reputation of the duty holder more than improvement and prohibition notices do.

The role of reputation

The surveys indicate that:

- Duty holders rate 'having a reputation to protect' as the most important of 7 factors cited regarding what influences the deterrent effect of enforcement;

- Duty holders who agree that the need to protect their reputation motivates them to improve H&S also tend to say they respond to hearing about enforcement against another organisation;
- Inspectors report that they are more likely to prosecute organisations with a reputation in order to set an example to others;
- Organisations with a reputation to protect do not want prosecutions publicised and judge reputation impact to be greater than those who do not have a reputation to protect.

These opinions are cited despite a minority of inspectors reporting that notices are heard about by other organisations and very few reporting reputation impact of notices.

LAs compared with HSE

LA respondents indicate that duty holders are less likely to do more than required by the notice than HSE respondents. However, as previously mentioned, as LAs and HSE inspect different sectors, and LAs tend to deal with smaller organisations (who are less likely to have safety representatives, H&S advisors or H&S directors), it is difficult to determine whether the difference in impact is due to the difference in duty holder size/sector, or due to difference in the enforcing body.

There are differences in LA inspection practices, including:

- LAs tend to seek guidance before taking action more than the HSE;
- LAs are more likely than the HSE to take action in response to a complaint, and relatively less likely due to an accident investigation, though a higher proportion of HSE notices overall are as a result of reactive work.

The exploratory interviews did report some concerns about LA enforcement that would suggest that the lower impact of LA enforcement is, in part, due to the enforcing body rather than the sectors enforced, including:

- LA inspectors and some duty holders suggested that Environmental Health Officers (EHOs) were more driven by food safety requirements than by health and safety ones, and that health and safety checks were often done as a secondary task during food inspections. HSE interviewees who commented perceived some EHOs as having less technical and legal competence for health and safety.
- LA interviewees also commented that Local Authority inspections tended to be reactive, did not generally include health enforcement or covered management systems. The latter points are not supported by our survey of duty holders and inspectors: LAs issue as many if not more notices citing management provisions than HSE.

2.3 ENFORCEMENT AGAINST CONTROLLING MIND VERSUS ORGANISATIONS.

It is difficult to conclude whether enforcement against controlling minds or the organisation has an effect on the relative impact of enforcement. The ‘raw’ finding is that enforcement actions against the organisation have a greater impact than action against controlling minds. However, this is confounded by:

- The vast majority of actions against controlling minds occur in micro and small organisations;
- The number of actions against controlling minds in large organisations is minimal.

Therefore, it is difficult to ‘control’ for the effect of organisation size when comparing the impact of enforcement on controlling minds versus organisations.

This can also be interpreted as showing that paragraph 41 of the EPS that discusses prosecution of individuals or disqualification of directors² has had little impact within the timescale (2004/05) of this survey³. The survey did ask some other questions regarding the subject of enforcement action. These show that:

- Only 13% of duty holders agree “My organisation is affected more if they hear about enforcement action against an individual than hearing about the same action against a company”;
- 61% of duty holders agree or strongly agree that individuals believing they could possibly be imprisoned is essential or important for enforcement to have a deterrent effect – just ahead of fear of personal reputation damage at 60% whilst 52% cite individual legal consequence as essential or important;
- As duty holders and inspectors both rate banning directors for H&S negligence as a ‘quite effective’ and ‘effective’ improvement respectively, this indicates some agreement with the view that individual sanctions (or at least the fear of them) is important.

Thus, there are mixed findings about the effect of acting against individuals versus the organisation.

2.4 WHY/ HOW DOES ENFORCEMENT INFLUENCE DUTY HOLDERS?

The surveys of duty holders and inspectors indicate that enforcement has had an ‘educative’ rather than deterrent effect on duty holders. Duty holders rank ‘Because we learnt from the experience and are now much more knowledgeable about H&S’ as the most commonly agreed reason for increasing their motivation to manage H&S. Indeed, 72% of prosecuted duty holders report that learning from the prosecution motivated them to improve H&S. The second ranked (55% of the prosecuted and ~40% of those with notices) motivational factor was that it was a ‘wake up call’.

There are at least two possible interpretations of the latter findings. First, it can be interpreted as indicating that enforcement focuses attention onto H&S and prompts duty holders to recognise that their standards are inadequate, i.e. an educative impact. Secondly, it can be interpreted as indicating that the lower ranking given to the deterrent effect of enforcement is due to the severity of the penalties, i.e. as the penalties are not severe they do not have a strong deterrent effect.

² The EPS (*para 41*) states that “enforcing authorities should identify and prosecute, or recommend prosecution of individuals if they consider that a prosecution is warranted...” and “Where appropriate enforcing authorities should seek disqualification of directors under the Company Directors Disqualification Act 1986”

³ It is important to note that since this survey the HSE have developed additional guidance on the application of the Directors’ Disqualification process.

Clearly, enforcement could also have a combined educative and deterrence effect. Indeed, the Australian (Worksafe Victoria) Constructive Compliance Model (Meritt, 2002) presents education, incentives and deterrence as all part of one compliance strategy. Also, the 2004 study (Wright et al 2005) found that attitudes to health and safety vary between organisations, primarily according to their size and sector. Thus response to health and safety enforcement is also likely to vary, leading to the idea of responsive regulation and flexible enforcement strategies that relate to the observed attitudes and behaviours of the particular organisation.

These findings could be interpreted as supporting the consideration of duty holder factors within the EMM when deciding on the enforcement action, whereby the enforcement action takes account of the duty holder's history and intentions.

2.5 IMPACT OF ENFORCEMENT ON RELATIONSHIP WITH THE ENFORCING BODY

Whilst the exploratory discussions found that inspectors fear that enforcement can damage the relationship with the duty holder, the survey found that this was rarely the case in practice except where the enforcement is perceived as unfair. This is important as 62% of duty holders say that trust is important for the HSE/LA to have an influence, as do 79.5% of inspectors.

Inspectors also reported that duty holders who had no previous experience of an inspection were more fearful of what would be involved and the likely outcome. This is consistent with the findings of Wright et al (2005) who found that fear of contacting the HSE was greatest amongst those with no prior contact. Interviews in this study note that more frequent inspections allow relationships to be built up over time between the enforcers and a duty holder.

It is also clear, as per other studies that duty holders do go to the HSE/LA for advice. In addition, 90.3% of inspectors agree or strongly agree that duty holders listen to and act on their advice on the whole. Inspectors do not support a separate advisory body, and also think that employers are less likely to act on advice from organisations without enforcement power. In contrast there is reasonable support for a separate H&S advisory body amongst duty holders.

2.6 GENERAL 'RIPPLE' EFFECT

It has been suggested that enforcement can affect health and safety compliance, and hence performance, in a number of ways:

- It may have a specific effect on the enforced organisation, prompting them to improve health and safety either due to deterrence or awareness raising;
- It may raise awareness of other organisations about regulations, the standards expected of them and prompt recognition that they do not meet these standards, and;
- It may amplify the deterrence effect of regulations by increasing organisations' perception of the possibility of detection and enforcement.

Previous studies provide mixed findings on these points. Overall the current survey of duty holders indicates that:

- The majority (61%) of duty holders do report they respond to hearing about enforcement action or incidents if they perceive them as relevant to their business, but;

- The likelihood of hearing about enforcement action or incidents and responding to the news varies between organisations according to a range of factors, particularly size of organisation, from every few years to a few times a year, and;
- Only 12% of duty holders report an increased fear of enforcement in recent years.

Inspectors and representative bodies generally saw the HSE Offenders Database as ineffective in terms of changing Duty Holder behaviour due to low levels of awareness of its existence.

These findings are similar to those of Wright et al (2005) from a 2004 survey of 1700 UK organisations which found that 80% of respondents reported that they would “check their house is in order” if they heard of enforcement action in another organisation. Thus, the current study and the previous 2004 survey indicate that the variable level of enforcement influence on organisations beyond the subject of the action is explained by:

- Enforcement actions have a variable level of publicity;
- Inspectors rarely advise duty holders of enforcement in other organisations;
- The extent to which the duty holder identifies with the action (is it the same sector, do you have the same risks, do you carry out the same activities) greatly influences whether it prompts them to check their arrangements;
- Larger organisations are far more likely than smaller ones to hear about and act on news of serious accident/ill-health or enforcement actions against comparable organisations.

Thus, if the duty holder thinks the enforcement action raises an issue that is relevant to them and is also a risk for their organisation, they are more likely to react. A perception that enforcement against their organisation is unlikely may suppress a reaction.

This evidence supports the EPS’s general requirement on enforcing authorities to publicise enforcement action and convictions (paras 42-43). Both the level and type of publicity seem to be important, in particular making the information about the enforcement seem relevant to those who the enforcing authority wish to influence. The EPS makes no comment on this and the EMM provides no guidance on when or how to publicise enforcement actions during inspections or outside of inspection work.

The EPS is very specific regarding its publicity expectations, declaring a need to publish offenders names (as per the HSE’s offenders database) and drawing media attention about charges laid before courts and conviction. The EPS does not advise to publicise notices, nor does it refer to other publicity options such as publicising offences during inspections. Our work shows that the offenders’ database has a low level of awareness and does not provide sufficient contextual information for duty holders to make meaningful use of the information.

Thus, on the one hand the EPS provides a narrow ‘prescription’ of how to publicise enforcement, and, on the other hand, this survey indicates that the prescribed offenders’ database is not widely known. Accordingly, the publicity of offences element of EPS could be revised to be more ‘goal based’, with the HSE identifying publicity methods in, for example, the EMM.

3 WORKER AND VICTIM INVOLVEMENT IN ENFORCEMENT

3.1 INTRODUCTION

A finding from the Phase 1 survey of duty holders and inspectors was that they did not agree that victims should be more involved in enforcement; while workers should be more involved. In contrast, the TUC believe that currently the victims of ill-health and injury sustained at work are not accorded a voice in the criminal justice system. The TUC have lobbied for them to be acknowledged as, and accorded the same rights as, any other victim of crime.

This section provides a summary of the findings of victims' representatives and workers' perceptions of enforcement; what involvement and outcomes victims and workers would like in relation to enforcement; and suggested improvements to practices and procedures.

Interviews were held with 14 victims' representatives (7 victim support groups, 4 trade unions, 1 action group and 2 solicitors). In all cases in this report, 'victims' views' are actually the views of the victims' representatives who were interviewed on behalf of victims, to avoid the risk of distressing victims by interviewing them directly. In all cases victims' representatives were senior and experienced individuals. Five worker focus groups with a total of 38 participants were held. Individual workers were from a range of backgrounds covering unionised/non-unionised organisations, private/public sector, small/large organisations and high/normal risk industries. The groups were conducted in London, Glasgow and Birmingham. Focus group participants were encouraged to raise any issues within the areas outlined above that they felt were important. The focus groups were semi-structured, including free-flowing conversation and structured activities.

The victims and workers field work was of a small scale. This is the first occasion that victims and workers views on enforcement had been explored in a HSE study. Therefore, it was considered appropriate to explore issues and opinions in an open ended manner. The findings from this work could be used to guide a subsequent larger scale research exercise into workers' and victims' perspectives.

We also held exploratory discussions with five experienced HSE inspectors and four duty holders (who had experienced enforcement action, 3 large companies and one small) to understand their positions, specifically:

- To understand what they mean when they say they want more worker involvement in the enforcement process;
- To understand why they do not see a greater role for victims or the bereaved;
- Specifically to explore with HSE whether there have been any internal reviews / papers on the effect of worker/TU involvement on the enforcement process.

3.2 LITERATURE REVIEW

Whilst there is relatively little research in this area, what research there is does seem to be fairly consistent in what they report as needs of victims, namely:

- A process where they can participate and be confident that their views are heard (without having the responsibility of decision-making⁴);
- They want more information about the processing and outcome of their case throughout the process;
- They want material and emotional restoration (and this is seen as an appropriate function for the criminal justice system); and
- Victims want an apology (though the context of the apology and the victim's willingness to in fact accept it may affect its beneficial effect).

This is similar to research into clinical negligence cases which has indicated that injured patients want a wider range of remedies than are currently available through litigation. The National Audit Office believes that offering a range of remedies tailored to an individual can aid swifter and more satisfactory resolution, and in many cases prevent litigation. Options include:

- An apology;
- An explanation;
- Reassurance that lessons have been learned and that the incident will not reoccur;
- An offer of remedial healthcare, assistance with transport and/or childcare where necessary and appropriate; and
- Paying for victims' legal costs to enable an independent assessment of financial compensation.

3.3 EXPLORATORY INTERVIEWS WITH DUTY HOLDERS AND INSPECTORS

Duty holders

Overall the 4 duty holders indicated that:

- There was a limit to how much more workers could be involved in HSE/LA enforcement decisions and that worker views should certainly not be central to enforcement decision.
- All interviewees however did feel that there should be more contact between HSE and workers including during enforcement, but more generally as well in a number of respects:

“Educating” was a word commonly used, the perception being that there was a need for workers to better understand the role of the enforcer.

Help the workforce hold management to account, and;

To help motivate workers by helping them see why they needed to take health and safety seriously themselves.

⁴ Wemmers and Cyr (2003) stress that “victims are quite clear that while they seek input, they are content to leave decision control in the hands of authorities. What victims seem to want is recognition: they want to have a voice in the criminal justice process and they want that voice to be heard...”

Inspectors

Inspectors all agree that there should be more contact with workers from the enforcers both face to face and through other communication channels. Again whilst this included during enforcement, the general level of understanding of the role of HSE/LA was seen as the more important reason. One pointed out that there was much more information available and actively provided to employers than workers. Also most felt seeking wider views from a range of workers to get a more balanced view of the organisation during investigations would be a useful thing.

All accepted that victims have a genuine interest in criminal proceedings, and recognised their right to be involved.

There were mixed views about the extent of their involvement, one interviewee being very enthusiastic about Victim Impact Statements (VISs), another saying they felt VISs may distract from the actual offence which is to do with the circumstances leading to the injury not the injury itself. All inspectors though, expressed concern about victim (or worker) involvement in prosecution decisions as they felt it compromised their impartiality. On workers, all felt an obligation to explain a decision not to enforce to workers where they were concerned, though the inspectors were not aware if this was official policy.

3.4 PERCEPTIONS AND UNDERSTANDING OF THE ENFORCEMENT PROCESS

What is enforcement?

Most workers and victims prior to injury/ill-health perceive the HSE as the ‘H&S police’ whereby any breaches of legislation are uncovered and dealt with promptly and effectively – ideally through prosecution, rather than through notices. However, involvement with enforcement activity seems to lead to workers and victims viewing the process as being less efficient and effective; and to inspectors being seen as having fewer powers and less authority.

Perceptions of the EPS principles

Most workers and victims are not familiar with and do not understand the terminology used within the Enforcement Policy Statement (EPS). When the definitions were clarified both workers and victims felt that all principles were important to some extent, the most important being transparency, accountability and consistency. It is important to note that whilst the EPS expects enforcement to be transparent, it does not expect that the EPS itself is communicated or made transparent to workers and victims.

However:

- Most victims’ representatives felt that current enforcement is not consistent with these principles. In contrast around 75% of workers felt that current enforcement is consistent with these principles.
- Victims and workers expressed concern about targeting of enforcement if this leaves some workers ‘unprotected’.

H&S breaches versus other criminal offences

Although victims and most workers view H&S breaches as being on a par with other criminal offences, they feel that their employers and ‘the system’ do not treat H&S breaches in the same manner as other offences, unless the breach results in a fatality.

To clarify this, one respondent said “[If you were]...hit over the head with a brick and called 999, the person responding would not tell you to try to reason with them yourself, they would send the police round to deal with the matter. Why then, with a criminal act within the workplace, are employees instructed to first speak with their employers, before the HSE will take action?”

Criteria for effective enforcement

Neither victims nor workers see current enforcement as being effective (except perhaps for routine inspections); or current penalties as being proportionate. For current enforcement to be effective, victims’ representatives would like the following criteria to be taken into account:

- Consistency, accountability and transparency;
- Shorter timescales;
- Tougher enforcement/inspections; and more inspections (routine and incident follow-up);
- Prevention of breaches; and
- Better communication between the HSE, employers and workers/victims.

3.5 HOW DO VICTIMS/WORKERS WANT TO BE INVOLVED?

Most workers in this study do not want any contact with the HSE. They would prefer to take an informal route in reporting concerns, either via a manager or an H&S/union representative.

A handful of workers (all from high risk occupations) and most victims want to be involved with all stages of the process, whether this is a routine inspection, or as a result of an incident. Victims primarily want to be consulted, listened to, heard and kept informed. It is important that victims are offered the opportunity, but are not forced, to be involved; and that they do not have to instigate the majority of contacts. As victims’ and bereaved individuals’ needs and emotions can change profoundly over time, it is essential that the regulator maintains communication at all times throughout the process of enforcement to ensure that their changing needs are being met.

Perceived benefits and risks of involvement

Both workers and victims feel that their involvement would (they do not currently believe they are involved) facilitate an accurate analysis of the circumstances, resulting in a just outcome; would lead to a safe and healthy working environment; and would lead to psychological closure for victims in relation to the incident through which they were made ill or injured. Despite the perceived benefits, both workers and victims are afraid of involvement due to fears of victimisation or being blacklisted; or of the process resulting in difficult working relationships.

Exploratory interviews with inspectors found that they were concerned that involving victims more could lead to them seeking retribution: and a more emotive and thus more difficult process to manage.

3.6 WHAT TYPE OF OUTCOME DO WORKERS AND VICTIMS WANT IN EVENT OF AN INCIDENT?

Victims' representatives, especially support groups, indicate that most individuals are primarily seeking justice and an acknowledgement of the situation and their experiences. They do not usually seek punishment or retribution, unless the circumstances do not appear accidental or the H&S issues were ongoing and/or ignored. Many victims and workers believe they will be paid during absences that are work-related. If they are not, they would view compensation as being essential for earnings lost. They want – over and above retribution and punishment:

- An apology (although some individuals stated that this would be insulting);
- An explanation of what happened;
- Reassurance that lessons have been learned (evidence that the employer has learned and/or done something about the incident) and that it will not happen again;
- Care or rehabilitation for the victim; and
- Payment of compensation such that the individual is no worse off than they would have been had the incident not occurred, ideally available also to those who do not wish to litigate.

These needs could be achieved via some form of restorative justice, achieved by either a statutory measure or voluntary code for employers.

These findings are very similar to those of the aforementioned National Audit Office survey mentioned in section 3.2. The focus is, in both cases, on understanding what happened and why, emotional closure (via apologies and explanation) and restoration of the victim rather than punishment of individuals.

Victims and workers want most of these to be provided for as part of the employers' penalty for breaching H&S legislation. They additionally want employers to be fined; both the employer and the individual at fault to be named and/or fired, imprisoned or the business closed down where appropriate. Community service orders and disqualification of managers/licence removal were felt by workers to be useful in some circumstances.

Trade union representatives tended to focus more on the need for proportionate penalties for individual directors, as an aspect of justice, particularly imprisonment of culpable directors.

3.7 SUGGESTED IMPROVEMENTS TO WORKER/VICTIM INVOLVEMENT

There were some key areas in which victims' representatives and workers felt the HSE could do more to help victims and workers become more involved with enforcement. These included:

- **Communication:** confidential mechanisms for workers and victims to report breaches and obtain advice; improved communication with victims/workers directly and through their representatives; keeping victims fully informed of progress with enforcement ideally face to face and in writing; and consideration of special needs e.g. use of an interpreter.
- **Support:** services similar to that of unions provided by the HSE for non-unionised workplaces; information for workers/victims about available sources of support e.g.

relevant victim support groups, lawyer or agencies; General Practitioners (GPs) to report diagnoses of work-related injuries or illnesses; and H&S victims to be included in the Victims' Charter.

- **Publicity:** better use of advertising to raise awareness among workers of their duties and rights, and the role of the HSE in prevention/protection as well as enforcement; and education of older school children concerning H&S law, in time for their entry into work.
- **Enforcement:** employees could have a clause in their employment contracts requiring them to report breaches to the HSE or to management, and to provide full co-operation when requested by an HSE official; better training for inspectors in relation to liaising with injured and bereaved individuals; safety representatives to be involved with deciding the course of enforcement action.

What support do victims want?

Finally, feeling supported can encourage individuals to be more involved with enforcement. Victims tended to feel supported by trades unions and the National Health Service (NHS) (except in the case of mental health problems, where the opposite was the case). However, they felt particularly poorly treated by the Department for Work and Pensions (DWP), but also poorly treated by their employer, the legal profession and the HSE.

Workers said they would primarily seek support from the HSE. They would additionally seek support from their employer; friends and family; therapists and counsellors and the NHS (including GPs). Some workers said they would appreciate support from their union/employee representative; victim support groups; and colleagues.

4 EVALUATION OF ENFORCEMENT ACTION AND THE EPS / EMM

4.1 OVERVIEW

There are a series of positive findings regarding the EPS, including:

- All of the sources of evidence covered in this project indicate that the principles of enforcement in the EPS are important aspects of achieving effective enforcement and sustained compliance amongst duty holders;
- The EPS's principle of taking account of duty holder factors (history and intent) when deciding on enforcement action is consistent with our findings on 'responsive regulation'⁵;
- The EPS has been well received within LAs and HSE but is not understood by victims and workers; and
- Despite a lack of understanding of terminology by victims and workers, both groups feel the principles are important, especially transparency, accountability and consistency.

And on the enforcement decision-making tool, the EMM, including:

- The findings from the survey of inspectors and duty holders indicates that, with a few exceptions, the EMM has helped achieve the principles of proportionality, transparency/accountability and consistency, especially amongst LAs – with most enforcement perceived as proportionate and fair by duty holders;
- The EMM has a high visibility and been taken up within the LA and HSE, not only as a decision-making tool, but as a training aid for more junior enforcement officers.

And on enforcement practice generally, including:

- It is apparent that, inspectors do communicate well to duty holders the reasons for enforcement and what needs to be done, and this without any assistance of any published materials intended specifically for duty holders. (Inspectors confirm that they normally would not refer duty holders to the EPS, and the EMM is only rarely employed to explain decisions to duty holders);
- Also, duty holder respondents indicated that they felt most enforcement actions were fair and proportionate, although workers and victims' representatives do not necessarily see enforcement as effective or proportionate or well communicated to them.

⁵ Responsive regulation is where the decision on whether or not to take enforcement action takes account of the prior history and intent of the duty holder.

4.2 FEEDBACK ON THE EPS

4.2.1 Awareness of EPS amongst inspectors, duty holders and workers

The survey showed that:

- 96% of HSE and 87% of LA enforcement officer respondents were aware of the EPS;
- There was very little awareness of the EPS amongst duty holders;
- The vast majority of both workers and victims' representatives had little awareness or understanding of the EPS.

Workers and victims do not spontaneously understand the principles, but readily understand them once they are explained.

The EPS is not widely communicated to duty holders and hence is not seen as a tool for communicating with duty holders. Only 8% of inspectors say the EPS is useful for explaining decisions to prosecute. This can be interpreted in two ways. One interpretation could be that the EPS is not useful in explaining prosecutions because it is not considered appropriate for some reason, perhaps for instance, because it only explains the broad principles of decision-making and is not specific enough to help most duty holders. Another interpretation might be that explaining these decisions does not require support from the EPS.

Perhaps because so few inspectors feel it is appropriate to use the EPS when explaining enforcement matters, neither workers nor victims are familiar with the terms. Although most of the workers and victims interviewed had a fairly accurate understanding of the term 'consistency' within the context of H&S enforcement and the EPS, just half understood 'targeting'; a quarter understood 'transparency'; and only a handful understood 'accountability' and 'proportionality'.

Despite this, once the terms were clarified both workers and victims' representatives felt that all principles were important to some extent, the most important being transparency, accountability and consistency.

This suggests that consideration should be given to the need for a duty holder guide on enforcement policy, drawing on the EPS and EMM, that is designed specifically for communicating with duty holders, to help explain enforcement policy and decisions to duty holders, especially prosecution (as they are more likely to be perceived as unfair) and what is expected of them. It may also be useful to include a simpler version, or to provide a free downloadable version for employees. A key message that came out of worker and victims' representatives discussions is that they want more information on their rights and their duties under health and safety law.

4.2.2 Impact of the EPS on enforcement

The survey of inspectors found that:

- The majority of responding inspectors agree **the EPS has changed their approach to decisions** (67% of HSE and 50% of LA inspectors report the EPS has changed their approach to formal enforcement);

- 22% agreed that political or societal concerns are more important than the EPS, whilst 23% agreed that conflicting priorities for their time have more impact on enforcement decisions than the EPS; and
- Only 29% refer to the EPS in their inspection work, and 31% agree that apart from prosecutions the EPS is not specific enough to affect enforcement decisions.

For those enforcing permissioning regimes, the survey found a slight majority of the 63 respondents from the HID, NSD and railways agree that the EPS is relevant to their work

4.2.3 Support for EPS principles

Most EPS principles are accepted:

- Duty holders, inspectors and victims/workers express agreement with the EPS principles, with one exception;
- Workers and victims query principle of targeting.

The need for enforcement to be perceived as fair, proportionate, substantive etc in order to have a positive influence on duty holders whilst also maintaining trust (which is important element of duty holders seeking and listening to inspectors advice), all reinforce the importance of the EPS principles. In addition, given that trust is considered an important element of a constructive relationship between duty holders and inspectors, and that a perception of fair enforcement is necessary to stop enforcement reducing that trust, it is reasonable to conclude that the EPS principles are important for the sustainability of an effective enforcement strategy.

The exception is the principle of targeting of inspections, investigation and enforcement, which victims and workers do not want to be achieved at the expense of some workers not being protected. In addition, victims see each case individually and should be assessed on an individual basis rather than on some more general targeted basis.

The main finding about the EPS is whether new principles should be added and/or whether current guidance in the EPS needs to be given greater weight and elaboration. These points are elaborated below.

4.2.4 Involving workers, victims and senior officers

A number of findings raise the issue of how far to involve and engage (as opposed to inform and notify) workers, victims and senior officers in enforcement.

The EPS does cite a need to inform and notify victims, workers and senior officers. This is consistent with the findings of this study. However, some of the findings and feedback from this study relate to whether these stakeholders should be involved or engaged further, as follows.

Senior officers

Enforcement is reported to have a greater effect when senior officers are ‘involved’ in it and see that the enforcement relates to the management of the organisation. The EPS currently advises that senior officers, at board level, are ‘notified’. Our findings indicate that there are grounds for giving this greater weight in terms of advising that senior officers should be ‘involved’ or ‘engaged’ in the enforcement process for the purpose of achieving a more effective and fuller response to the enforcement action. Consideration could be awarded in the EPS to (1) ensure

directors understand and are involved in the enforcement process and (2) increase the frequency of enforcement actions covering management issues. Clearly guidance in the EMM would subsequently require review should such changes be made.

Workers

All stakeholders argue for a greater role for workers in the inspection and enforcement process.

The HSE does have an Operational Minute (OM 2001/107) specifying the process for contacting safety representatives during visits, providing a summary of findings on conclusion of a visit and upon corresponding with the employer, and providing copies of notices etc to the safety representative. It is not clear to Greenstreet Berman if this covers employee representatives (outside of a trade union) as opposed to trade union safety representatives. Therefore, there may be a case for more explicit steer in the EPS as to worker involvement in the enforcement process and any subsequent appeals/legal proceedings.

Although the clear message from workers is that they believe their involvement with enforcement would lead to a healthier and safer working environment, and would help inspectors and the HSE to do their work more effectively, they are afraid of losing their jobs, victimisation, or awkward working relationships as a result of involvement. Because of this, only those that feel they have more to gain, wish to be involved i.e. victims. Workers would prefer to be involved in a more non-direct or informal fashion such as through unions or other worker representatives. Where workers are required to have direct involvement, they want anonymous, discreet and direct communication; support where required; and reassurance that there will be no negative impact upon their jobs or lives as a direct result of their involvement.

Workers also want more information to be made available concerning their rights and duties in the workplace; and what support is available to them in the event of an incident e.g. support groups, legal representation, unions, mediators etc.

Victim involvement

There is mixed feedback on greater victim involvement:

- Duty holders and inspectors do not recommend more involvement;
- All victims' representatives said that the vast majority of victims want more involvement with the enforcement process;

The EPS does state that enforcement should be transparent to victims, it does not stipulate that victims should be 'involved' in enforcement. As elaborated below, the EPS is consistent with HSE policy on victims' role in enforcement. The HSE has a series of documents that relate to victim involvement, including the EPS, guidance on the Public Interest Stage of enforcement, guidance on Victim personal Statements, OM 2003/106 and the Work Related Deaths Protocol – which cross reference one another.

Therefore, this point touches on a wider issue of whether and how victims' role in enforcement should be changed. The EPS does not outline a role for victims in selecting cases for investigation or prosecution, nor does it include victims' need (e.g. for emotional closure) in the criteria for investigation, all of which are important to victims.

As previously mentioned, the EPS principle of targeting includes targeting when to investigate injuries (all work related deaths are investigated). Targeting is based on the nature and extent of risks posed by duty holders' operations. The criteria for selecting complaints or reports of injury or occupational ill-health to investigate are meant to take account of factors such as actual harm, seriousness of the breach and duty holders past performance, and the officer's judgement of wider relevance of the event. The concern is that this precludes victim involvement in the decision about whether or not to investigate or subsequent enforcement. It is not clear whether there is a mechanism by which victims or workers can express an opinion to inspectors regarding the case for investigation or how such an opinion may be taken into account (outside of work related deaths).

The EPS principle of transparency cites keeping victims or their families informed. Current HSE guidance does cite a role of victims' views as follows:

"The Crown Prosecution Service (CPS) should always take into account the consequences for the bereaved of the decision whether or not to prosecute, and any views expressed by them" (Work related deaths: A protocol for liaison, p 8).

The latter statement is repeated in the HSE's Public Interest Stage guidance (paragraph 6) and Operational Minute 2003/106. The OM elaborates on this by advising that during an investigation the HSE should "let them know what action we are proposing to take. This will give them the opportunity to put forward views on, and comment on the consequences of our action, should they wish to do so". It goes on to say that the HSE should 'take into account' such views but not be unduly influenced by them (whether they are for or against prosecution) and reaffirms that cases are on behalf of the public at large.

The HSE guidance on Victim Personal Statement (which is a non-statutory scheme) does state that the purpose of such statements includes giving the "victim an opportunity to state how the offence affected them, to request information, whether they want further support or to claim compensation and to provide information. The statement of how the offence affected the person may inform the assessment of level of actual or potential harm, which is a factor in whether to investigate and prosecute.

These points are consistent with victims expressed wish to be informed and be able to express an opinion.

However, it should also be noted that:

- It is also stated that "HSE prosecutes in the general interest of these groups rather than on behalf of any particular individual(s)." (Public Interest Stage guidance, para 6).
- The purposes cited for the Victim Personal Statement does not include their view on whether an investigation or prosecution should occur.

These latter points, along with victims' representatives expressed wish for more involvement, indicate that consideration needs to be given to whether more victim involvement would be beneficial and/or achievable; and how to communicate progress and decisions more effectively and in a more timely fashion.

4.2.5 Involvement of the police

The EPS, along with the 'Work related deaths: A protocol for liaison' notes the role of the police in manslaughter investigation.

Whilst 62% of responding inspectors agree that police involvement makes duty holders take the investigation more seriously, only a minority (23%) agree that involvement of the police helps firms/employers prevent re-occurrence of accidents or helps investigate the causes of accidents. However, only 24% of duty holders agree that police involvement helps find the true cause of accidents and only 11% agree that it makes them take the investigation more seriously.

4.2.6 Greater weight and process for publicity of offences in the EPS

A need to avoid the adverse publicity, with the impact of corporate image, is a key driver amongst duty holders. Many duty holders also report that they respond to news of enforcement in other organisations. This reinforces the suggestion that publicity of offences is an important aspect of securing compliance. Inspectors cite increased publicity as a top improvement. Workers argue for more publicity to help them understand what is and is not acceptable. Whilst the EPS states that names of convicted companies and individuals should be published, there is little awareness of the Offenders Database. In addition, duty holders express a need for more details about cases for the news to have an effect.

The EPS does also advise that media attention is drawn to charges. Again our survey indicates that more weight could be attached to this. In addition, it suggests that publicity could be given to cases during inspections.

Inspectors and duty holders agree that the current level of publicity of enforcement is low and varies between the types of enforcement action. Thus, it can be concluded that inspectors should increase the level of publicity awarded enforcement from what they perceive to be a low baseline because it has significant impact on duty holders. Duty holders whilst reporting that the fear of adverse publicity is one of the main reasons for complying with H&S law, do not wish for more publicity because of their fear of adverse publicity.

The EPS section on publicity limits itself to the annual publication of names of convicted companies and individuals, and information on notices. It does not extend to the dissemination of information about enforcement during inspections, or how to use the media/trade press for publicising notices. The EPS and EMM do not discuss what information should be communicated (other than names and the offence), which can be compared with the finding that duty holders need to be able to identify with the case and understand what it entailed.

Workers and victims felt that being able to access information concerning previous enforcement decisions would help them become more involved with ensuring health and safety. It was felt that accessing details concerning previous prosecutions may help them to ascertain whether a work-related concern was serious enough to report.

4.2.7 HSE as a source of advice and information

The EPS indicates that 'Inspectors may offer duty holders information, and advice, both face to face and in writing' (p4).

The HSE's role as a source of advice is supported by this study.

4.3 FEEDBACK ON THE EMM

4.3.1 Usage of EMM by inspectors

Again 96% of HSE respondents are aware of the EMM as are 83% of LA respondents. Whilst LA respondents have used the EMM for (typically) one year compared to 2 to 3 for the HSE, they make more use of it. This is possibly explained by the finding that LA respondents are:

- More likely to serve notices after seeking technical, legal or policy guidance (54% of LA improvement notices versus 27% of HSEs);
- Less likely to serve notices immediately/during visits (14% of LA improvement notices vs 23% of HSE, and 42% of LA prohibition notices vs 82% of HSEs).

Another possibility (though not addressed by the survey) is that the higher usage by LAs is simply because they are less familiar with it having used it for less time and their use is more conscious. Finally, it is pertinent to note that LA inspectors are more likely than the HSE to agree that the EMM has helped with consistency of decisions between inspectors, a useful training tool and with targeting least well-controlled risks. Thus, LA inspectors seek more guidance and have made more use of the EMM despite its relatively recent introduction to LAs.

4.3.2 Permissioning regimes

Whilst the exploratory discussions with inspectors from a range of specialities (HID, NSD and HMRI) found concerns about the role of the EMM (the relevance of the “risk gap” in a high hazard environment in particular being questioned), the survey found around a third (33.87%) agreeing they use the EMM regularly when deciding whether to take enforcement action under permissioning type legislation.

4.3.3 Assessment of the EMM

Since the EMM is a tool to assist inspectors to make enforcement decisions in line with the principles of the EPS (and also satisfies the EPS’s requirement of enforcing authorities to have their approach to decisions in writing) it is a key aspect of evaluating the implementation of the EPS.

The inspectors’ feedback on the EMM is summarised in Table 1.

Table 1: Inspectors’ assessment of the EMM (researchers categorisation of results)

Positive points	Neutral points, incl issues EMM has not helped on	Negative points
<ul style="list-style-type: none"> • Positively impacted transparency (71%), consistency between inspectors (58%) and proportionality (56%), especially amongst LA respondents • Helps them make decisions in line with organisations enforcement policy • The criteria are useful for logical approach to decision making • Always to frequently used when deciding to prosecute or serve notices • Useful for training inspectors • Only a minority (29%) agree it limits their discretion 	<ul style="list-style-type: none"> • 29% agree it has helped duty holders understand what is expected of them • Only sometimes used to explain decisions to duty holders, and sometimes to never used when deciding informal enforcement • 49% agree it helps the public judge acceptability of decisions • Has not helped target most serious risks (only 36% agree) 	<ul style="list-style-type: none"> • 47% agree it forces inappropriate enforcement in some cases. • Only 3% agree it reduced workload in serving notices, and 2% for prosecutions • 44% agree it is easier to use for safety risks than health risks (a very large minority)

EMM is useful in making decisions

The feedback on the EMM from the exploratory discussions and survey of inspectors is broadly positive. Inspectors report using it (consciously at least) more for formal enforcement than less formal enforcement (e.g. advice, letter). Our interpretation of the inspectors’ assessment of the EMM is summarised in Table 1. Overall:

- The EMM has **helped them make decisions in line with the EPS principles of transparency, consistency between inspectors and proportionality** of enforcement, but less so in respect of targeting;
- The EMM criteria are useful and help make decisions in line with enforcement policy;
- 46% of responding inspectors agree it helped communicate enforcement actions to duty holders, and 49% agree it helps the public judge the acceptability of decisions;
- Only a minority (29%) agree it limits their discretion as an inspector, 22% agree it is only for inexperienced inspectors and only 23% say they are not confident in using it.

Whilst inspectors agree that the EMM has helped achieved consistency between inspectors, they tend not to agree that it has helped them as individuals to be more consistent. This could be interpreted as a judgement on their part that they already were consistent, or that the EMM did not help them individually, but that it has helped other inspectors become more consistent.

EMM has not helped with targeting

However, **only a minority of inspectors agree it has helped target the most serious risks or in explaining decisions to duty holders**. That said this is a significant minority; 42% of local authority respondents thought it helped target and 21% of HSE respondents thought this. Neither group thought that the EMM helped duty holders understand what is expected of them. The EMM is used less often for purposes such as justifying enforcement decisions (sometimes), or explaining enforcement decisions to duty holders (between sometimes and never). These findings can be interpreted in two ways, either that the EMM is not particularly useful in explaining decisions notices or that explaining these decisions does not require support from the EMM. This might also suggest enforcement officers may be assisted by published material aimed at explaining enforcement decision-making to duty holders (and indeed those at risk from non-compliance).

EMM can force inappropriate enforcement

In addition, there is some negative feedback on the EMM such as **47% of inspectors agreeing it forces inappropriate enforcement in some cases**. The exploratory discussions suggested that inspectors sometimes found inappropriate the EMM's "automatic" requirements to escalate enforcement action following previous advice (or action). Indeed, 32% agree that they are more likely than before to take enforcement against large organisations because of the EMM's requirements where previous advice/enforcement has been issued. This suggests that the EPS's expectation that discretion is used when enforcing (and the EMM's consequent intention not to "fetter" discretion (para 7)), is not being fully achieved. It also seems that the consideration of duty holder factors when deciding on enforcement action (as noted in the EMM) is also not fully meeting its objectives. The reasons for these phenomena could benefit from further researched.

That said, this needs to be balanced against:

- The EPS's requirement that enforcing authorities "promote consistency in the use of discretion" (*para 23*).

- The HSE’s Operational Minute (OM 2002/116) does reiterate that the EMM is not a rigid decision making program, it is not a definitive absolute decision making device and the enforcement requires judgement.
- Duty holders did not widely report that enforcement was unfair or disproportionate.

For example, on a scale where 0 = not at all, 1 = partly and 2 = completely, duty holders scored 0.54 when asked if enforcement notices asked for disproportionate standards and 0.51 when asked if the notice was fair, whilst a score of 0.79 was given when asked if prosecutions were unfair. Thus, duty holders’ responses give only partial support to inspectors concern about inappropriate enforcement.

EMM easier to apply to safety than health

Other points of negative feedback include that it is **easier to apply to safety issues than health** (33% LA, 67% HSE respondents agreeing) and that it **does not reduce workload (only 3% agree it reduces workload)**. The former point is important as it links to the finding, noted in 4.4, that there is very little enforcement on health issues, and the point that the Revitalising Health and Safety Strategy targets include a 20% reduction in work related ill-health incidence rates and sought “better compliance with health law”.

The EMM is used most commonly when deciding whether to prosecute (“always to frequently”), followed by when deciding whether to issue a notice (“frequently”).

Directors’ disqualification

We noted that the EPS lead on seeking disqualification of directors, in certain circumstances, is not reflected in the EMM, such as by noting when/why/how it should be recommended to the court.

4.4 ENFORCEMENT IN PRACTICE

4.4.1 Consistency of current enforcement with EPS

Opinion varies:

- Duty holders generally agreed enforcement was consistent with the EPS;
- Most victims’ representatives felt that current enforcement is not consistent with these principles;
- Most workers in the focus groups felt that current enforcement is consistent with these principles.

It should be noted that all victims discussed by their representatives had been injured or made ill as a result of a breach; and the vast majority of workers had had no involvement with enforcement.

The survey findings about the achievement of the EPS principles is summarised in Table 2.

Table 2: Achievement of EPS principles in practice

EPS principle	Duty holders	Inspectors	Workers	Victims representatives
Proportionality	Achieved for notices and most prosecutions, but ~25% of prosecutions unfair.	Proportionate for safety Health rarely enforced	Mostly achieved	Not achieved, especially for health cases. Penalties are not proportion to the offences/harm done.
Transparency	Mostly achieved	Mostly achieved	Mostly achieved	Not transparent, esp where injury not investigated
Consistency	Mostly achieved	Mostly achieved	Mostly achieved	Not achieved
Targeting	Unsure	Not helped	Mostly achieved	Not achieved
Accountability	Enforcement process is well communicated	Enforcement process is well communicated	Little involvement may preclude this	Little involvement may limit this although decisions are explained

4.4.2 Transparency in serving the notice

The inspectors' survey responses do on the whole indicate a good level of communication with duty holders regarding the notice, i.e. they are transparent with duty holders. The enforcement process was also generally described by duty holders in exploratory discussions as reasonable. Most duty holders felt they had received clear explanations of why the action was being taken and what had to be done in order to become compliant.

However, during inspections only 11% of LA and 19% of HSE advised duty holders of enforcement notices served in other organisations, and only 12% of LA and 3% of HSE advise duty holders of prosecutions of other organisations. Thus, communication of 'news' of other enforcement actions is low.

Workers and victims' representatives generally feel that enforcement decisions were not well explained to them especially where the complaint concerned health, rather than safety; or where there was no union involvement. The picture for injuries or fatalities is slightly more positive, with a greater proportion of workers and victims feeling that their involvement was sufficient and that the HSE kept them informed at all stages of the process.

4.4.3 Proportionality in respect of enforcement of health

It is reported that there is very little enforcement on health issues, for example:

- 20% of HSE improvement notices definitely cover health versus 55% on safety;
- 3.2% of HSE prosecutions are definitely health related while 79% are safety related.

Both workers and victims have a strong perception that health issues are not considered at all important by employers, by the NHS, by the DWP or by the HSE. Those that have had work-related health complaints generally feel 'let down' by everyone involved with the exception of victim support groups. They indicate that the DWP needs to review its systems and criteria for awarding incapacity benefit; the NHS (including GPs) needs to be more aware of occupational health concerns such as illnesses arising from work-related stress, back pain, repetitive strain injury etc; employers need to have a greater level of awareness of the health risks as well as the safety risks within their organisations; and finally legal professionals need a greater level of understanding of work-related health concerns.

It is also apparent from our survey that the level of enforcement, especially prosecutions, for health related offences is relatively very low compared to safety related matters. Given that health related absence and disease is relatively significant, this may suggest that the EPS's principle of proportionality has not yet been achieved for health risks. It was felt during the exploratory discussions that safety issues were generally easier to enforce and for the duty holder to comply with as they were generally more visible, measurable and therefore provable and immediate.

This suggests that consideration should be given to enforcement tools and measures that could be developed to increase the level of notices and prosecutions for health matters. Further work is probably needed on this to fully understand the reasons but one example might be developing EMM guidance on the 'risk gap' for different types of health related matters (chronic, acute, fatal risks etc) including judging this where the risk is from long term exposure. There may well be other reasons why enforcement is at a low level – e.g. practical difficulties with gathering sufficient evidence on risk for a breach of criminal law – and this could be further explored.

4.4.4 Targeting of enforcement

Duty holders and inspectors do agree that enforcement focuses on priority risks. However the research suggests that the EPS and EMM are not perceived to have greatly influenced or assisted with targeting. Whilst it is reported that the targeting of inspection (as stated in the EPS) has not been assisted by the EMM, it is uncertain from this study whether inspections are targeted well or not. The perception of workers and victims is that targeting is not appropriate unless it is fully evidence based; and unless it does not lead to certain groups being excluded from protection by the HSE.

There may be value in further researching the targeting of inspections and enforcement, whether it is targeted well, is further assistance needed by inspectors to target and how best to balance targeting with workers wish for all groups to be protected.

4.4.5 Fairness (proportionality) of prosecutions

A significant minority (~25%) of prosecutions are regarded by duty holders to be unfair. This may suggest that it would be appropriate to review if or how to improve the perceived fairness of prosecutions, to reduce the frequency (already low) of prosecutions detrimentally affecting relations with the enforcing authority.

Something to consider might be the potential role of increased information about decision-making in this regard. We also note that under the transparency principle of enforcement in the EPS it states that “Transparency means helping duty holders to understand what is expected of them, and what they should expect from the enforcing authorities” (para 24). The EPS does not explicitly require an explanation of why this enforcement decision has been arrived at. This could be interpreted as limiting the accountability of the enforcer as they do not have to ‘account’ (explain) for their decisions.

4.4.6 Forcing inappropriate enforcement (proportionality)

The survey finding that 47% of inspectors found the EMM forces inappropriate enforcement in some cases is supported by the exploratory interviews. The interviews with duty holders found that some felt that HSE were becoming more bureaucratic and were more likely to focus on ‘technicalities’. However, only 12% of duty holder survey respondents agreed with this. In addition, the interviews did find that inspectors feared that the EMM could lead to over-enforcement, where the process led to an increasing level of enforcement over time for a company due to consideration of a duty holder’s enforcement history.

In addition, duty holders interviewed in the exploratory discussions felt that as non-compliance was generally unintentional most duty holders reported feeling that enforcement action was either unfair or unnecessary in their case, although the survey did not find this. In this context the increased consistency that the EMM brings to enforcement decisions may be seen negatively by those duty holders who would appreciate flexibility to recognise their “particular circumstances”.

Thus, there does appear to be some difficulties in balancing the need for consistency with a desire to avoid ‘inappropriate enforcement’ in ‘particular circumstances’. Therefore, consideration might be given to whether further guidance is needed to help inspectors apply their discretion and how to take account of previous advice/enforcement.

4.5 OTHER POTENTIAL CHANGES IN ENFORCEMENT

4.5.1 Survey results

We also asked more generally about possible improvements to enforcement to make it more effective. A list of suggestions for improvement (over 30) was developed from the literature review, exploratory discussions and piloting and respondents were asked to rate them from 0 (= not effective) to 3 (Very effective).

The top ten ranked improvements differ between inspectors and duty holders, as shown in Table 3. Duty holders seek more advice whilst inspectors seek more publicity of enforcement and stronger penalties. Indeed, the top 7 improvements cited by duty holders relate to improvement in one or another form of advice or guidance. Also, whilst inspectors agree that breaches of H&S law should be treated as criminal, duty holders do not.

Care must be taken though in supposing duty holders do not cite support for changes in penalties or their application, as they also:

- Rate banning directors who neglect H&S as ‘quite effective’, and
- Rate more prosecutions of employees for not following safety rules as just below ‘quite effective’, along with prosecutions of all work related deaths.

Inspectors rank banning directors as an effective option, ranked fourth. This again highlights the need to provide support to inspectors on how to pursue this penalty.

The duty holders wish for further guidance, standards agreed with industry and advice is consistent with other studies and hence is not elaborated here, as has the need for larger fines and corporate manslaughter prosecutions.

Table 3: Top ten suggested improvements to enforcement

Duty holders	Inspectors
The HSE/LAs spending more time helping organisations prevent accidents & less time enforcing	Increased use of media to publicise serious incidents, notices and prosecutions
The HSE/LA first providing formal written advice and only enforcing if employers/duty holders ignore this advice	Significant increase in fines
Making more people aware that health & safety offences are criminal offences	The possibility of a prosecution should be considered for all work related deaths
HSE/LA inspectors being more consistent in deciding when to enforce	Company directors who neglect health and safety management are banned from practicing for a period of time
The government creating a H&S advisory service which does not enforce	Provision of sector specific guidelines for accepted H&S practices and management systems
The HSE/LA better explaining their enforcement policy	Making it easier to get corporate manslaughter/corporate culpable homicide convictions
HSE making more use of standards they have agreed with industry when enforcing in my sector	Making more people aware that health and safety offences are criminal offences
Company directors who neglect health and safety management are banned from practicing for a period of time	Wider publicity of offender databases and list of offenders
Increasing worker involvement during inspections	Wider publicity by the HSE/LA of the names of those people and organisations who have been prosecuted
More prosecutions of employees for not following H&S rules	More prosecutions of <u>individuals</u> in charge of organisations, e.g. owners, partners, directors

4.5.2 Provision of information and support for workers/victims

There was a range of support and information services suggested by workers and victims' representatives.

Non-unionised workers said they would like the HSE to provide a service similar to that provided by unions for non-unionised workplaces; they wanted the HSE to provide information to workers/victims about available sources of support e.g. relevant victim support groups, lawyer or

agencies; they wanted GPs to be able to report instances of diagnosed work-related injuries or illnesses; and they wanted more training and/or information to be made available to workers e.g. better use made of the HSE website.

Workers also suggested that the HSE could make better use of advertising to help raise awareness among workers of their duties and rights, and the role of the HSE in prevention/protection as well as with enforcement in relation to breaches; and that they could play a role in the education of older school children concerning H&S legislation, in time for their entry into work.

Both victims' representatives and workers felt that accredited training in organisational H&S enforcement was essential for trade union representatives and lawyers. It was also felt that inspectors should receive training to help them communicate better with emotional and distressed individuals. This could benefit victims by decreasing (or not increasing) their levels of distress; and could decrease the stress for inspectors of having to deal with emotionally charged situations.

Many victim representatives felt that there needs to be a greater provision of advisory support, rather than enforcement, which could be provided by appropriately trained inspectors, support groups, unions or other individuals. Finally, as a means to aid worker/victim involvement, a number of workers suggested that the HSE could recommend that all employees have a clause in their employment contracts requiring them to report breaches to the HSE or to management, and to provide full co-operation when requested by an HSE official.

Use of mediation

Clinical negligence cases have shown the importance of mediation in reaching a satisfactory resolution. Findings from the literature review on what victims want in clinical negligence cases indicated that there are similarities with what victims want where their injury/ill-health is as a result of occupational H&S breaches. For example, it has been identified that victims feel there is a lack of formalised or publicised mechanisms through which victims can pursue their concerns and seek suitable remedies; the process is too slow, expensive and distressing; and the process does not provide an adequate range of remedies. As with H&S breaches, victims of clinical negligence cases want an opportunity to voice their feelings and opinions; a choice of informal or formal routes to discuss concerns; and access to information concerning their rights and duties. They also want this process to take place within an agreed timeframe.

Research by the Centre for Effective Dispute Resolution (CEDR) has indicated that the use of mediation can reduce some of the negative impacts of litigation on businesses including cost of management time; contribution to failure to meet targets; a decrease in employee morale; effects on business reputation; and high staff turnover. In addition, many of the 'most wanted' outcomes discussed in the previous paragraph are not available via litigation.

If mediation were to be more highly utilised with occupational H&S incidents, it may be helpful to consider work that the NHS has already done in this area, such as the use of their dedicated liaison service known as PALS (Patient Advice and Liaison Service). This service aims to seek early resolution of any problems identified to reduce the number of formal complaints and legal claims. This is achieved through listening fully to individual concerns and helping to identify appropriate solutions. The service is not independent from the NHS (being paid for, managed and accountable to the NHS), but this has the advantage of advice being informed, accurate and realistic. The service is available online, via the telephone and in person, and is well-publicised.

4.5.3 More inspections

It is felt by both workers and victims that there are not enough routine inspections, or ‘spot checks’ to follow up a prosecution or notice to ensure that changes have been implemented (although our survey of duty holders and inspectors indicates that notices are followed up). Routine inspections are felt to act as a deterrent to companies by ensuring that they always keep on top of their H&S action plans; and as an excellent source of advice for companies – particularly small organisations. Many workers and victim representatives have stated that routine inspections need not necessarily be provided by the HSE, and indeed many victim support groups carry out inspections for small organisations as part of their consultancy services, to advise and support employers in making the required changes to their processes, systems and sites.

4.5.4 Blame culture

Finally, there was concern among many workers that the UK is beginning to develop a greater blame culture (e.g. with increased encouragement from ‘no win no fee’ legal services) and that this is not conducive to safe and healthy working environments – it was felt that trying to find someone or something to blame would not resolve an issue or facilitate a solution. Perhaps through raising awareness of employees’ duties and rights, the HSE could facilitate prevention of a movement towards ‘placing blame’ over ‘taking responsibility’. It is also pertinent to note victims wish for restorative justice, a duty for care and rehabilitation, evidence that the duty holder has learnt the lesson and taken action to prevent re-occurrence. Such expressed wishes point to a wish for a less punitive more ‘restorative’ outcome.

4.6 ALTERNATIVE PENALTIES

Greater originality when imposing penalties, including use of individual sanctions

Respondents indicate that making a wider range of penalties an option when prosecuting would enable the sanction to fit the crime more effectively. Suggestions have included using alternative sentencing such as corporate probation to require evidence-based improvements to be implemented by organisations: and a greater use of individual sanctions and restorative justice.

The HSE outlined and consulted on a number of alternative penalties in 2005. Table 4 provides a summary of implications of our findings for the cited alternative penalties. The strongest finding is the extent to which workers and victims express a wish for an enforcement outcome akin to restorative justice.

Table 4: Study implications for alternative penalties

Penalty	Implication of findings from this study
Administrative fines	Not raised by respondents. Commonly observed that fines are low and not proportionate.
Restorative justice (RJ)	Strong spontaneous support for restorative justice from victims and workers who want emotional closure, recognition of harm done and evidence of improvements. Meets victims wish for a role in outcomes of enforcement. Also meets concern that adversarial prosecution (especially of individuals) may not prompt 'systematic' improvements in management. RJ may help ensure prosecution prompts cultural change.
Conditional cautioning (with restorative actions)	Use of conditional cautioning for those organisations with 'good records' may help improve perceived proportionality of prosecution amongst duty holders and avoidance of 'inappropriate' escalation of enforcement.
Enforceable undertakings	May help meet concern that prosecution may not address wider managerial causes of incidents by stipulating improvements, and provide alternative penalty to a fine etc for organisations with 'good records' and thereby help improve perceived proportionality of prosecution amongst duty holders.
Fixed penalties	Review of on the spot fines in other countries cites concern about 'trivialising' offences and on spot fines being used wrongly as an alternative to more appropriate penalties (such as notices) that are more resource intensive for inspectors.
Remedial orders	No specific findings
Probation for companies and directors	Strong support for greater enforcement against culpable individuals but not at expense of learning lessons and creation of a blame culture. May help improve perceived proportionality of prosecution amongst duty holders by providing an alternative to prosecution.
Adverse publicity orders	Survey findings provide strong support for role of publicity in (1) motivating the offending organisation to improve H&S, (2) motivating/alerting other organisations to improve their H&S and (3) helping workers understand what is and is not acceptable and should be reported by them to inspectors or safety representatives. Review of experience in other countries raises concerns about timing of publicity (long after the offence) and whether media reaction will be proportionate. This survey finds that whilst publicity is a strong motivator for organisations, they do not want publicity of their offences.

Individual penalties

Findings indicate that fear of individual sanctions (such as fines, imprisonment, dismissal, disqualification from practice, licence removal etc) is not currently the greatest compliance motivator; and that only a minority of duty holders report that enforcement increases the fear of personal penalties. This may reflect the perceived risk of such sanctions at this moment, rather than any inherent limit to the influence of individual sanctions. Indeed, duty holders do report that individuals' fear of personal penalties is an important aspect of deterrence. In addition, both inspectors and duty holder cite banning negligent directors as one of the top ten improvements to enforcement.

Individual sanctions are also sought by both workers and victims, particularly in circumstances where offences are repeated or deliberate. However, it is felt that current penalties are not proportionate to offences (e.g. fines are not large enough) and therefore do not currently act as effective deterrents.

It is pertinent to note that whilst the EPS urges disqualification of directors under the Company Directors Disqualification Act 1986, there is no guidance in the EMM about when or how to seek disqualification of directors. The EMM refers to other (unreferenced) guidance regarding the prosecution of individual directors or managers. However, the HSE has developed other guidance since this survey was conducted that advises inspectors on the Directors' Disqualification process. Consideration could be given to including the latter guidance on when and how to seek Directors disqualification under the 1986 Company Directors Disqualification Act for health and safety offences into the EMM.

However, our literature review identified a body of opinion that argued that effective health and safety management requires the sustained commitment of an organisation and systematic health and safety management. It is suggested that prosecution, which is an adversarial process, can undermine trust and focuses on individual liability and fault. This leads to a concern about the criminalisation of employers undermining the preventive aspect of enforcement. These concerns have led to the suggestion (e.g. Johnstone, 2003) that criminal sanctions should promote systems-based approaches to occupational health and safety (OHS), such as requiring sound OHS management.

It is also important to note that, other than in the case of repeat and deliberate offences, victims express a desire for restorative forms of sanction rather than blame or litigation.

These findings suggest a need for further research into the role of individual sanctions, restorative justice and how these could be changed. Other HSE commissioned studies are already exploring options for individual sanctions against directors. This could be complemented by further research into restorative justice and the balance of individual sanctions with restorative justice.

Increased publicity of offences and incidents

There are a number of findings indicating that there is a strong case for increasing the level of publicity awarded offences. On the one hand, duty holders report that they are highly motivated by the wish to avoid the adverse publicity of enforcement, and inspectors rate increased use of the media as the top improvement to enforcement. Duty holders also report that they do (on the

whole) respond to news of enforcement elsewhere, where the news is perceived as relevant to them. On the other hand, duty holders report a variable level of hearing about enforcement elsewhere and that inspectors (esp. HSE ones) rarely advise them during inspections of enforcement in similar organisations. Thus, it appears that publicity of offences is an important but under utilised tactic.

Victims and workers feel that an additional benefit to publicising offences and incidents is that it would enable them to understand what is and what is not acceptable within the workplace; and would help them to understand more about their own rights and duties under H&S legislation. Many feel that knowing about previous convictions would also help them make decisions concerning whether to go down an informal or formal route when dealing with an incident in their own workplaces.

The exact nature of and method for increasing awareness of offences has not been elaborated in this study. There was concern within exploratory interviews about using Notices and Prosecutions (as per the Offenders Database) as a measure of company safety performance as the relative levels of non-compliance between companies are not immediately apparent on inspecting the database. Also evidence regarding media based adverse publicity (as opposed to inspectors, regulators and intermediary organisations disseminating news) reviewed in Wright et al (2005) indicates that there are a series of concerns about publicising offences and prosecutions in particular, such as the long time delay between the offence and the conclusion of a prosecution.

- Some interviewees suggested that a dedicated web portal could be developed so that progress of investigations and prosecutions could be tracked by those involved and/or members of the public. It is important that the site is jargon-free and open (in terms of style and access). However it is recognised that some elements may need to be restricted at certain times until specific aspects of the investigation are complete.
- Others suggested that user-friendly 'layman' guides on the EPS and the enforcement process would be helpful, available from the HSE, but also perhaps through GP surgeries and/or schools for school-leavers about to enter work.

Clearly, further work is required to identify and assess how best to publicise serious incidents and offences. The methods and scope for publicising enforcement actions, particularly the possibility of disseminating information about enforcement action during inspections and the need to make the information 'meaningful' to duty holders could be explored further. Such work could then elaborate in the EMM how to increase publicity of offences, enforcement actions and incidents so that they are more effective in influencing other duty holders to improve health and safety.

4.7 SUMMARY OF POINTS FOR REVIEW

4.7.1 Areas for review

A summary of potential areas for review is given below.

Enforcement of health

1. Explore why there is little enforcement of health and how best to increase the proportionality of health enforcement.

Inappropriate enforcement

2. Review the EMM and its application regarding 'individual discretion' with respect to avoiding inappropriate enforcement.

Involving senior management, workers and victims in enforcement

3. Consider giving greater weight in the EPS and guidance on the involvement of duty holder senior officers in the enforcement;
4. Review whether and how best to address victims' expressed desire to be more involved in enforcement, including selection of events to investigate;
5. Also explore how best to meet victims' need for support and the potential for mediation and potential for occupational schemes equivalent to PALS as a means of meeting victims needs in the event of injury/ill health;
6. Review adequacy of HSE guidance on how to involve workers (esp in non-union workplaces) in the inspection and enforcement process;
7. Consider how best to address workers concerns about being involved in enforcement, such as:
 - Consider the case for either altering the targeting policy and/or consider how best to enable workers/victims to communicate with the HSE/LA concerns – to ensure that all workers have adequate protection – one option could be to examine whether the process for workers (especially non-unionised) to request an inspection could be further developed;
 - The adequacy of current arrangements for workers/victims (especially in non-union workplaces) to communicate to the HSE/LA events (not just deaths) that they think should be considered for investigation/enforcement and to discuss these with the HSE;
 - A workers/victims leaflet on the enforcement process and criteria;
 - Increasing awareness of the Public Interest Disclosure Act 1998 and the role of Public Concern at Work (who provide free advice and assistance to individuals who are concerned about apparent danger or malpractice in the workplace)

- Review application of the Health and Safety (Consultation with Employees) Regulations 1996, to see if it covers the concerns of workers about reporting incidents.

Explaining EPS to workers and duty holders

8. Considering producing ‘EPS for workers and victims’ and ‘EPS for employers’ leaflets, explaining it in terms that enable inspectors to use the leaflet as part of their communications;

Restorative justice and other alternative penalties

9. Consider the case for a restorative justice penalty and the potential for an ‘employers’ guide to responding responsibly to injuries and ill-health’ (drawing on principle of the NHS’s PALS), covering investigation, explaining events to victims, apologising, communicating what they are going to do to prevent re-occurrence, and attending to care and rehabilitation of victims;
10. Consider alternative penalties such as conditional probation so that the duty holders perceptions of the proportionality of prosecution are addressed;
11. Consider giving greater weight to publicity of offences and to reviewing the methods of publicity, including potential for publicity during inspections, wider use of the media and elaboration of information about the nature of the offence/operation on the offenders database.

Directors’ disqualification

12. Consider providing greater support in the EMM or other HSE guidance on the application of directors’ disqualification.

4.7.2 Further research

Issues for further research include:

1. There would be value in completing further research designed to ascertain whether taking action against controlling minds would have greater or lesser effect than actions against the organisation. Any such research needs to control for the size and sector of organisations, so as to avoid size and sector compounding the effect of who is the subject of enforcement.
2. A larger scale research exercise regarding workers and victims view of their role in enforcement and their preferred outcomes and process;

As part of this, it may be sensible to consider the reasons why duty holders and inspectors do not feel it would be appropriate to involve them more. It would then be possible to ascertain whether the concerns are relevant and if so, how to alleviate them or whether they assume victims are already involved enough. For example, inspectors and duty holders fear that victims will seek retribution. However the strong message from victims is that they do not want retribution – in the vast majority of cases victims rate an apology and resolution (or restorative justice) much more highly than punishment or blame.

Inspectors have also expressed apprehension concerning managing highly emotional situations – perhaps inspectors would benefit from communication or victims support skills training, or the use of mediators may be beneficial as with clinical negligence cases.

There is clear scope for further research into victim involvement, such as establishing (perhaps through case studies) how victims are currently involved, directly interviewing a larger sample of victims, reviewing how victims are involved in other areas such as clinical negligence and what forms of sanction (such as an apology, remedial actions and explanation of incidents) victims want from duty holders.

3. Verifying whether enforcement is targeted and whether the EMM has assisted with targeting;
4. Complete further statistical review of the association between rates of enforcing activity and health and safety performance, to further establish the extent to which the level of enforcement is important.

5 CONCLUSIONS

The first conclusion from this study is that enforcement does prompt duty holders to improve health and safety to a degree, both in response to specific enforcement actions and by hearing about enforcement in other organisations. The extent to which enforcement influences duty holders varies according to a series of factors, including the form of enforcement, its perceived fairness, the size of the organisation and whether senior management become involved. It is less clear how the level of enforcement, such as the rate of notices per 100,000 organisations, impacts health and safety performance, and whether there is a simple linear relationship between the level of enforcement and its impact.

The study has also shown that the EPS principles are, with one exception, considered to be important and relevant by all stakeholders, the exception being the form and extent of targeting. The principles are found to be important aspects of achieving sustained compliance due to the need to achieve and maintain a sense of trust and confidence in the proportionality, fairness and consistency of enforcement. Such issues are important both for enforcement to be effective but also for duty holders to have an effective dialogue with enforcers, with respect to seeking and acting on their advice. The EPS and EMM are reported by respondents to have helped improve enforcement with respect to consistency for example, but not with targeting. Victims and workers are concerned that targeting should not be achieved at the expense of leaving some workers 'unprotected'.

However, there are apparent differences in the perceptions of stakeholders. Whilst duty holders and workers tend to agree that enforcement is consistent, transparent and mostly proportionate, the small number of victims' representatives consulted in this study do not think that enforcement is effective. Also, whilst duty holders tend to say that H&S offences are mostly due to lack of understanding and should not be regarded as criminal offences, inspectors, victims and workers do agree that H&S offences should be treated as criminal.

Although the scope of the EPS and EMM is 'as good as far as it goes', it could benefit from review on a number of points. Some key issues include the form and extent of worker and victim involvement, publicity of offences and targeting. In addition, this review does highlight concerns with a number of detailed aspects of the EPS and EMM, such as how to take account of prior duty holder history and the application of discretion/judgement by inspectors.

It is also clear that the EPS and EMM are not designed to be passed on directly to duty holders and workers, as they were written for inspectors. Consideration could therefore be given to producing versions that help communication with other stakeholders.

Finally, this study does raise the issue of alternative penalties. There appears to be a strong 'appetite' for alternative penalties, especially restorative justice, publicity of offences and enforceable undertakings. A strong finding is that 'restorative justice', whether via a statutory or voluntary process, is consistently supported by our review of previous research and discussions with workers and victims, and may also help address some of the concerns about the punitive nature of prosecutions and enforcement. We strongly recommend that the matter of restorative justice is further considered.

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Evaluation of EPS and enforcement action

Main Report

This report provides a summary of the first and second phases of a study that researched how enforcement influences duty holders and evaluated the Enforcement Policy Statement (EPS). The first phase included a literature review, exploratory discussions with stakeholders and a survey of inspectors and duty holders. The survey of duty holders includes those that have been subject to improvement notices, prohibition notices and prosecution. The results outline if, how and some of the reasons why, enforcement impacts duty holders' health and safety management. It also examines evidence about how hearing of enforcement action or incidents in other organisations influences duty holders, and summarises respondents' view of potential improvements. The second phase of work involved a further literature review, exploratory discussions with workers, employers and inspectors, worker focus groups and discussions with victims' representatives. The report concludes by drawing out the implications for the EPS (and one of its tools – the enforcement management model (EMM)).

Two supplementary reports provide appendices covering in detail each of the Phase 1 and 2 pieces of work. These are available on HSE's website at <http://www.hse.gov.uk/research/rrhtm/rr519.htm>.

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