

Enforcement Decision-making Model

*A FRAMEWORK THAT
GUIDES INSPECTORS
THROUGH THE THOUGHT
PROCESS TO DECIDE ON AN
ENFORCEMENT RESPONSE*

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Te Kāwanatanga o Aotearoa
New Zealand Government

WORKSAFE
Mahi Haumarū Aotearoa

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Introduction

Purpose

The Enforcement Decision-making Model (EDM) provides a framework that guides WorkSafe New Zealand's inspectors through the necessary thought process to decide on an enforcement response appropriate to the circumstances. Capturing the enforcement decision-making process in this way supports inspectors to reach enforcement decisions that align with WorkSafe's *How we make enforcement decisions* and *How we make prosecution decisions* policies.

EDM is designed to:

- promote enforcement consistency by setting out a structured and logical pathway for enforcement decision-making
- promote proportionality and targeting by setting out the criteria against which decisions are made
- provide a transparent and accountable process by setting out the approach inspectors will use when arriving at enforcement decisions.

It will also provide a basis for management and peer review of enforcement decisions.

Background

EDM is aligned to WorkSafe's *How we make enforcement decisions* and *How we make prosecution decisions* policies. WorkSafe's *How we make enforcement decisions* policy sets out our approach to enforcing work health and safety and energy safety legislation. WorkSafe's *How we make prosecution decisions* policy sets out what we consider when we make prosecution decisions and who makes those decisions.

The model was originally based on the Enforcement Management Model designed and used by the UK's Health and Safety Executive.

Application and scope

EDM will be used by WorkSafe Health and Safety inspectors when enforcing the Health and Safety at Work Act 2015 (HSWA) and its associated regulations, and any person reviewing enforcement decisions made by an inspector on behalf of WorkSafe. EDM is presently applicable to enforcement decisions made under the HSWA and its regulations, although the principles contained in it may be applied to enforcement decisions made under other legislation that WorkSafe administers, for example, the Electricity Act 1992 and the Geothermal Energy Regulations.

EDM supports WorkSafe to:

- achieve our strategic outcomes
- focus on risks to work health and safety
- maintain public confidence in how we regulate.

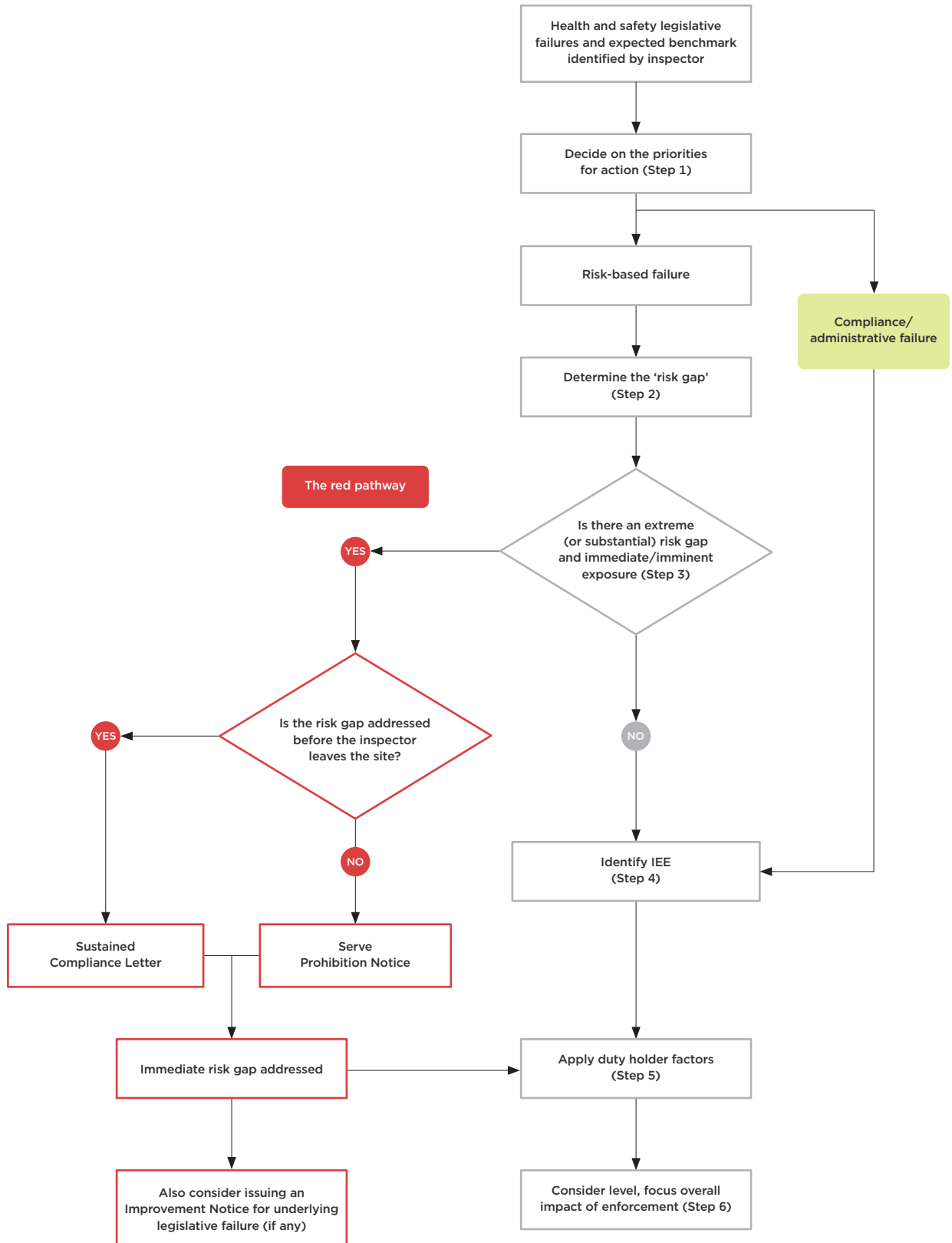
In routine situations, EDM may be applied as a thought-process rather than a documented process. However, there are specific circumstances in which WorkSafe requires inspectors to create a formal record of their EDM decision-making process, in an approved EDM Record Form.

EDM cannot capture all the complexities and nuances of discretionary decision making and is therefore supported by a review process that also requires inspectors and managers to consider whether the proposed enforcement response meets WorkSafe's *How we make enforcement decisions* policy, its *How we make prosecution decisions* policy and the Solicitor-General's Prosecution Guidelines.

Key messages

WorkSafe intervenes through enforcement to make sure persons with responsibilities under our legislation:

- manage risk effectively
 - address breaches, and
 - are held to account when necessary.
1. WorkSafe aims to be consistent, proportionate, transparent, and accountable in its enforcement activities.
 2. Inspectors will apply the principles of EDM to their enforcement decisions.
 3. A formal record of the way in which the decisions are reached is kept in specified circumstances.
 4. Managers and others in WorkSafe use EDM when reviewing enforcement decisions.



FLOWCHART 1: Overview of the EDM process

STEP 1

Identifying the priorities for action

IN THIS SECTION:

1.1 Risk-based or compliance/administrative-based failures

During an investigation, assessment or inspection, inspectors gather information about the nature of the risk and the level of non-compliance through observation, talking with people and looking at documents.

Before considering EDM a health and safety legislative failure must be established, and the relevant expected benchmark/control identified.

In reality, there is rarely a single issue to deal with. Inspectors will use their judgement to decide what failures to address, in what order, and the appropriate enforcement responses in the circumstances. From these judgements the inspector decides the priorities for action.

They should consider:

- the specific hazards, control measures and the level of risk
- any absence of, or failure in, health and safety management
- how best to achieve ongoing compliance
- WorkSafe's strategic outcomes
- whether any punitive action may be required.

1.1 Risk-based or compliance/administrative-based failures

Each priority for action is considered individually by applying EDM steps 2-6 (as relevant). For matters that are risk-based, inspectors will next apply step 2 (determine the risk gap). Identifying the priorities for action also involves determining whether the failure is risk-based or not.

Risk-based failures are those that directly involve or give rise to risk to any person's health or safety. Other failures are likely to be based on non-compliance with other requirements, such as administrative requirements, and are referred to in EDM as 'compliance/administrative based'.

Examples of risk-based failures include inadequate guarding of machinery, no edge protection for workers working at height. For health-related risk-based failures refer to section 2.2.

Examples of compliance/administrative failures include failing to consult or coordinate work activities, failing to provide facilities, failing to notify etc.

For compliance/administrative based matters it is neither appropriate or required to determine the risk gap, so Inspectors next apply Step 4, (arriving at an Initial Enforcement Expectation (IEE)) and use Table 5.

Compliance/administrative (or non-risk-based) failures are caused by a failure to comply with specific requirements including required administrative arrangements or other indirect controls. In practice, many compliance/administrative based failures may have an element of risk or risk management. However, inspectors should regard a matter as compliance/administrative based where it is not possible to determine a specific consequence or likelihood directly attributable to the failure.

Some examples of HSWA failures that are compliance based include:

- a. failure to preserve a site at which a notifiable event has occurred (HSWA section 55)
- b. no hazardous substances inventory when required (HSWA Haz Subs Regulation 3.1.1)
- c. hindering or obstructing an inspector (HSWA section 179)
- d. non-compliance with worker engagement, participation, and representation requirements (HSWA Part 3).

STEP 2

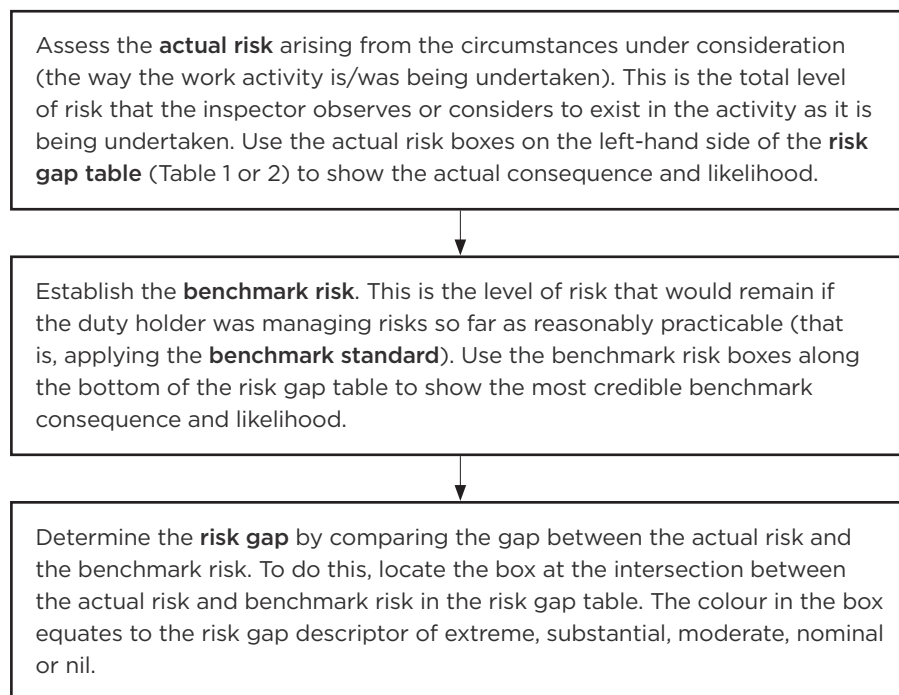
Determining the risk gap

IN THIS SECTION:

- 2.1 Consequence and likelihood
- 2.2 Health-related failures
- 2.3 Number of persons exposed to the risk

For risk-based failures the next step is to determine the risk gap. Broadly speaking, the risk gap is determined by comparing where the duty holder is, with where the duty holder should be if they were complying with the law (that is, managing risks so far as reasonably practicable). The risk gap is therefore the degree of risk that exists because of the duty holder's non-compliance.

Identifying the risk gap requires the inspector to follow a three stage process:



To determine the benchmark risk (second stage), inspectors will need to decide what the appropriate benchmark standard¹ is. This is the standard that represents legal compliance (for example, the standard specifying the management of risks that is reasonably practicable in the circumstances). In most cases, this will be a written document though in some cases, where there is no applicable formal standard, it will need to be determined by applying health and safety principles.

For both the actual and benchmark risks (first and second stages), determine the consequence first, and then the likelihood that the consequence will occur. Inspectors should always consider the **most credible** consequence.

The most credible consequence will be the level of harm that would **reasonably** be expected to occur, not an unusual or unexpected outcome. For example, a person slipping on a wet floor in a retail outlet and hitting their head against a shelf, suffering a fatal head injury (severe consequence) is not the most credible consequence for this event. The most credible consequence would be a bruise, minor laceration, or sprain (minor consequence).

Where the most credible consequence is different from the actual consequence that occurred, inspectors should use the most credible consequence as the measure of actual risk. The actual 'level of harm that occurred' will be considered separately as a duty holder factor when applying Step 5 in EDM.

¹ See guidance about benchmark standards in Section 4.1.

2.1 Consequence and likelihood

Risk is often expressed in terms of a combination of the consequences of an event and the associated likelihood of occurrence² In EDM:

- consequence is the most credible outcome of the event occurring.
- likelihood is the chance of the consequence occurring.

Inspectors need to ensure they consider the consequence and likelihood separately when determining the actual and the benchmark risk. Some controls address the consequence of an event. For example, safety nets or a fall-arrest system will not reduce the likelihood that someone will fall but it will reduce the consequences of the fall.

Other controls address the likelihood of an event. For example, guardrails on a scaffold do not affect the consequence of a fall. A person will suffer the same consequence if they fall from a platform whether it has handrails on it or not. However, the guardrails will reduce the likelihood that the fall will occur.

Some controls address both consequence and likelihood. For example, fitting speed limiters to lift trucks will make it less likely there is a collision and will make the consequences of any collision less severe.

An explanation of the consequence categorisation is set out in Appendix 1. Not every consequence can be specified and categorised and the table should be used as a guide rather than a definitive list.

When determining the potential consequence of the benchmark risk, consider whether the nature of the consequence would be changed if the duty holder was managing risks so far as reasonably practicable. For example, isolation or engineering controls will rarely change the nature of the hazard, so, if a person is exposed to the hazard, the benchmark consequence will be unchanged from the actual consequence. Substitution or elimination may, however, result in a different consequence than the actual consequence.

An explanation of likelihood is set out in Appendix 2. Inspectors should rely on their judgement, the judgement of their experienced colleagues and any relevant guidance when determining the likelihood for both actual and benchmark risk.

Likelihood is influenced by the hierarchy of controls. In general, isolating a person from the hazard or relying on engineering controls will result in a nil or negligible likelihood that the consequence will be realised. Reliance on administrative controls or PPE may, at best, reduce the likelihood to remote.

2.2 Health-related failures

EDM should be applied to enforcement decisions for health-related failures (includes physical and mental health) in the same way as safety related failures.

Below are examples of how to determine whether health risks are risk based or compliance/administrative based failures:

- A PCBU has failed to control exposure to lead-based paint dust to their workers who were removing paint. This is a risk-based failure.
- A PCBU has identified their workers are exposed to a health risk (*campylobacter*) but has not provided appropriate level of RPE. This is a risk-based failure.
- A PCBU has failed to have a process to monitor the health of workers in relation to the risk of noise. This is a compliance/administrative based failure.
- A PCBU is failing to provide lifting equipment or implement other suitable controls for workers required to lift 50kg boxes as part of work activities. This is exposing the workers to the risk of work-related musculoskeletal disorders (WRMSD). This is a risk based-failure.

² AS/NZS ISO 31000:2018.

For health-related failures that are risk based, consideration must be given to the most likely typical end health effects from occupational exposure. There will be circumstances where lesser health effects might be the outcome. Conversely, worse outcomes may be possible, but the approach taken should not reflect the 'worst case scenario'. In general, no account should be taken of 'specific individuals' resilience or susceptibility as this will not be known. The effect of exposure to a health risk should be determined by the likely response to the working population as a whole.

- When thinking about the most credible health consequence, consideration needs to be given that the exposure has resulted in a health effect, and what is likely to be the most credible consequence (health outcome), regardless of individual susceptibility or resilience.
- Many health effects may take months or years to present, however no consideration should be given to this when determining the most credible consequence.

Refer to Step 3 for explanation on immediate or imminent exposure to health risks.

The explanation of consequence in Appendix 1 gives descriptors with supporting examples for health risks comparable to those used for safety risks. For example, there are defined serious health effects under the category of 'serious personal injury'. These should be used to determine the risk gap for health failures. Specific operational guidance may also provide information to determine actual and benchmark risk.

If required, seek technical advice from the appropriate team (Kaimahi Hauora, Technical etc).

2.3 Number of persons exposed to the risk

The number of persons exposed to the risk is taken into account through the use of two risk tables:

- Table 1 for single or low number of persons exposed to the risk, and
- Table 2 for multiple people exposed to the risk.

Inspectors should use the single/low number of persons table even if more than one person is at risk. The multiple persons table should generally be used where multiple workers are exposed to the risk simultaneously and/or for off-site risks where a number of members of the public may be at risk, for example exposure to *Legionella* from cooling towers, a scaffold above a public place, an explosion in a chemical factory or a contractor (PCBU) has been working on a residential house and asbestos fibres have contaminated a number of neighbouring occupied properties.

Risk gap table: Single or low number of persons exposed to the risk

Measure of actual risk (where the duty holder is)	Consequence	Likelihood													
	Nil	Nil													
	Minor	Remote													
		Possible													
		Probable													
	Significant	Remote													
		Possible													
		Probable													
	Severe	Remote													
		Possible													
Probable															
Benchmark Likelihood			Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg		
Benchmark Consequence			Severe			Significant				Minor/Nil					
Benchmark risk (where the duty holder should be)															

TABLE 1:
Single or low number of persons exposed to the risk

Risk gap
 ● Extreme ● Substantial ● Moderate ● Nominal ● Nil - complies or exceeds legal standards

STEP 3

Dealing with serious risk from imminent/immediate hazards

IN THIS SECTION:

3.1 The red pathway

3.1 The red pathway

Once the risk gap has been determined, the first priority for enforcement is addressing any circumstances that involve a serious risk to health and safety arising from immediate or imminent exposure to a hazard. This will then direct the need for issuing a Prohibition Notice. However if the duty holder addresses the serious risk before the inspector leaves the site, the inspector will write to the duty holder to request they ensure ongoing compliance (that is, issue a Sustained Compliance Letter).

For risk based failures that involve a serious risk to health and safety that are not arising from an immediate/imminent exposure to a hazard go to step 4 and apply Table 4. The risk gap tables (Tables 1 and 2) help inspectors to decide when a Prohibition Notice should be issued. An extreme or substantial risk gap will indicate that a Prohibition Notice should be issued if the risk cannot be immediately addressed. A Prohibition Notice should not be issued where there is a moderate or nominal risk gap.

Inspectors should only issue Prohibition Notices where the circumstances which give rise to the risk are ongoing (that is, the exposure to the hazard is imminent or immediate) including where the plant or process is not in use, but it is foreseeable that it will be used. Equally, inspectors should bear in mind, particularly for health risks, that a serious risk meets the threshold for a Prohibition Notice where exposure to the hazard is imminent/immediate.

Immediate is defined as 'occurring'. For instance, the operator is currently using the unguarded machine and so is exposed to the hazard of the rotating blade. Imminent is defined as 'about to happen'. This includes situations where the plant or process is not in use, but it is foreseeable that it will be used. For example, the scaffold is not currently being used but there is work that needs to be done from the scaffold, or workers have got down from the roof when you arrive on site, but they need to return to the roof to finish the job.

When dealing with work-related health failures, it is important to consider whether the exposure is immediate or imminent, and not the consequence.

- For example, when dealing with asbestos, there is an immediate or imminent exposure if people are at risk of breathing in fibres while at work. This is regardless of the fact that they might not suffer any consequence for months or years. This can be the same for noise if there is exposure to high levels of noise without appropriate protection/controls.

After a Prohibition Notice (or Sustained Compliance Letter) has been issued, consideration should be given to issuing an Improvement Notice to address any underlying failures that led to the serious risk arising. Due to the seriousness of the risk presented, an Improvement Notice is the only appropriate enforcement response.

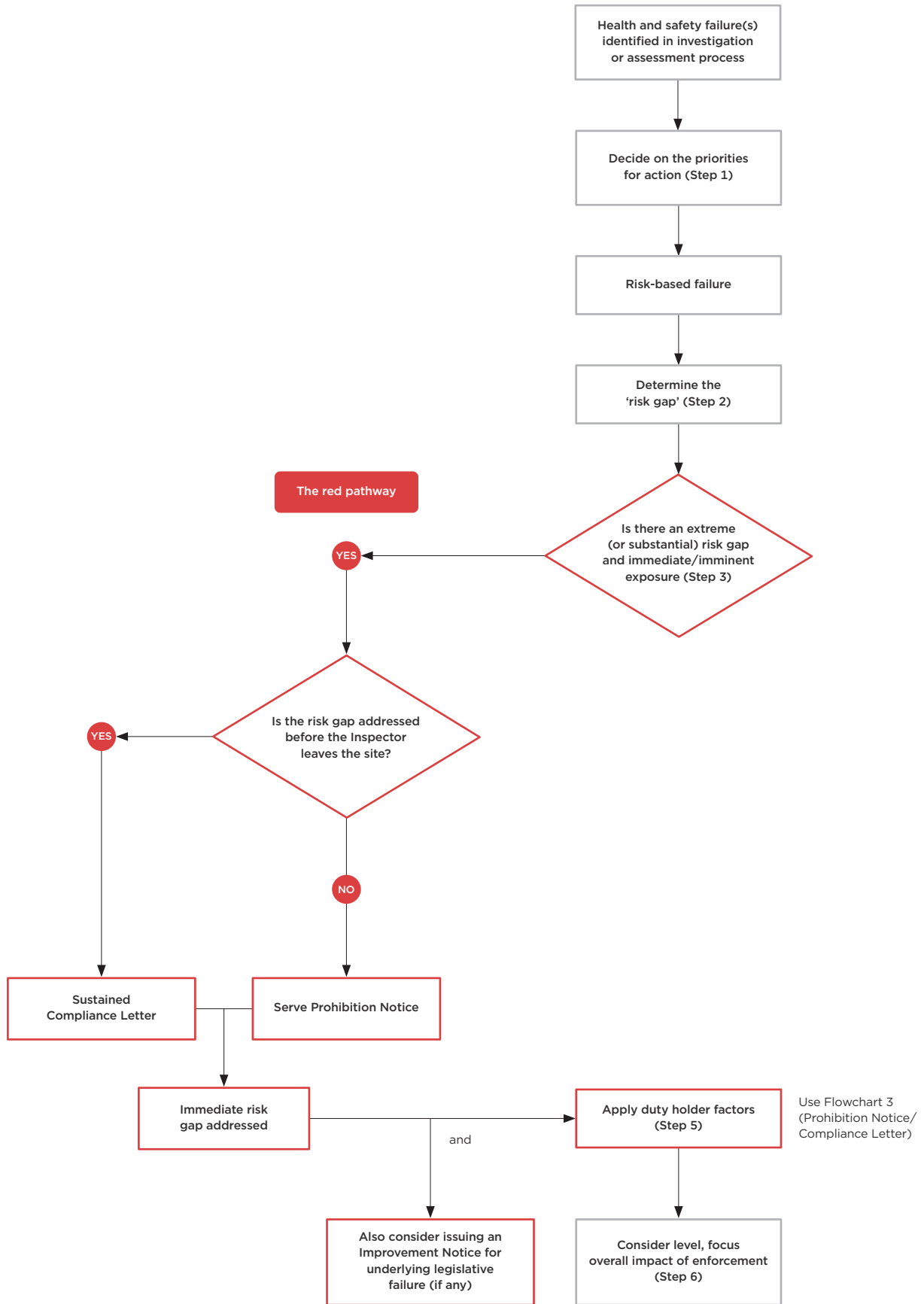
Note: To achieve ongoing compliance, underlying causes should be considered if applicable where any legislative health and safety failure is identified.

In addition (Step 5), inspectors should determine whether punitive action (that is, Infringement Notice or consider prosecution) is appropriate by applying the Flowchart 3: Duty holder factors – Prohibition Notice/Sustained Compliance Letter served and then continue onto Step 6.³

Prohibition Notices issued under HSWA section 105(1)(b) (authorised workplace, plant, substance, or work that is required to be authorised by a license, permit, registration, consent, certificate or other authority as required by regulations or a mining operation) do not require an imminent/immediate exposure to be established. However, they must only be used in circumstances where there is an extreme or substantial risk gap.

An overview of this part of the EDM process is set out in the red pathway, Flowchart 2: Summary of Step 3.

³ There may also be very exceptional circumstances where prosecution may be considered (subject to meeting the evidential sufficiency and public interest tests set out in the Solicitor-General's Prosecution Guidelines) without applying the duty holder factors. This is restricted to circumstances where the risk gap is extreme and there has been failure to meet an explicit standard that is very well known and obvious. See section 4.4 for general guidance about these circumstances.



FLOWCHART 2: Summary of Step 3

STEP 4

Arriving at an Initial Enforcement Expectation (IEE)

IN THIS SECTION:

- 4.1 Benchmark standards
- 4.2 IEE for risk-based failures
- 4.3 IEE for compliance/administrative-based failures
- 4.4 Prosecution

Step 4 does not apply to:

- activities that involve a serious risk to health and safety arising from an immediate/imminent exposure to a hazard (at step 3)
- activities that involve a serious risk to health and safety covered by HSWA section 105(1)(b).

At step 4, inspectors should determine the initial enforcement expectation (IEE) relevant to the matter. IEEs incorporate WorkSafe's expectations about the general threshold for each enforcement tool from Verbal Direction to Improvement Notice. IEEs represent only initial thresholds – they may then be varied by the inspector taking account of matters specific to the circumstances (duty holder factors) at step 5.

4.1 Benchmark standards

IEEs are determined by considering the risk gap or level of compliance against the status or strength of the benchmark standard that has been applied.

A benchmark standard sets out what a duty holder has to do to achieve legal compliance, such as specifying the risk controls that are reasonably practicable in the circumstances. In most situations, benchmark standard will be a written document, although in some situations, where there is no specific guidance, the duty holder and inspector will have to apply the general principles of health and safety management (for example, the hierarchy of controls).

A higher level of enforcement is expected where a duty holder has failed to meet benchmark standards that are well known and readily available compared to situations where there is very little information or specific guidance available.

Benchmark standards are divided into three categories to capture their general status in Table 3.

What is the status of the benchmark standard?

DESCRIPTOR	DEFINITION
Defined standard	Minimum standard is specified in Acts, Regulation, Safe Work Instruments, ACOPs or WorkSafe best/good practice guidelines
Established standard	Information that is known or accepted in New Zealand and/or in the specific industry, such as: <ul style="list-style-type: none"> – fact sheets/quick guides/technical bulletins/safety alerts or other material published by WorkSafe. – codes of practice (other than ACOPs) – material freely available in similar overseas jurisdictions (for example, Australia, UK or Canada) – readily available Standards (for example, NZS/AS/ISO/ILO/BS/CEN/IEC/API) providing specific advice on health and safety controls – guidance or good practice from industry or other organisations if it is common and well-known.
Interpretative standard	Any other standards, including interpreted from first principles and/or not published or available generally.

TABLE 3:
Status of the
appropriate standard

Inspectors should choose the benchmark standard that best describes what the duty holder has to do to reduce the level of risk and/or achieve compliance.

Inspectors should not use HSWA sections that do not adequately prescribe what the duty holder needs to do. For example HSWA section 36(1) or section 36(2) should not be used as a benchmark standard as they are performance objectives. HSWA section 36(3) should also not be used as it merely lists particular ways a duty holder can comply with their duties under HSWA section 36(1) or section

36(2). In these circumstances the inspector would use Regulations, ACOP's or best or good practice guidelines (BPG or GPG) or the most relevant guidance that identifies the specific controls.

An example where HSWA could be used as a defined standard is, for example, HSWA section 56 – Duty to notify notifiable event and HSWA section 58 Duty to engage with workers (WEPR).

4.2 IEE for risk-based failures

For risk-based failures where Step 3 does not apply (that is, there is no serious risk to health and safety arising from immediate/imminent exposure to a hazard) use Table 4 to IEE.

Risk gap	Status of the standard	Initial enforcement expectation	Consider prosecution
Extreme	Defined	Improvement Notice	Yes ⁴
	Established	Improvement Notice	Yes ⁴
	Interpretative	Improvement Notice	
Substantial	Defined	Improvement Notice	
	Established	Improvement Notice	
	Interpretative	Improvement Notice	
Moderate	Defined	Improvement Notice	
	Established	Directive Letter	
	Interpretative	Directive Letter	
Nominal	Defined	Verbal Direction	
	Established	Verbal Direction	
	Interpretative	Verbal Direction	

TABLE 4:
Health and safety risks: IEE

4.3 IEE for compliance/administrative-based failures

For compliance/administrative failures, apply Table 5 to establish the initial enforcement expectation (IEE).

Compliance/administrative failures will also generally include the inadequate provision of welfare facilities, unless the absence of welfare facilities directly influences the level of risk (for example, where there is a lack of hand washing facilities for persons working with lead).

Since the risk gap tables (1 and 2) are not appropriate for compliance/administrative failures that do not directly result in the control of risk, inspectors should use the compliance/administrative failures table below (Table 5) to determine what action should be taken.

Compliance/administrative failures can be defined by both law and supporting ACOPs and guidelines that expand on the general requirements contained in law. The IEE is determined by combining the level of non-compliance with the status of the benchmark standard (as described in section 4.1) using Table 5 below. The descriptors in Table 5 are explained in Appendix 3.

⁴ There may be very exceptional circumstances where prosecution may be considered (subject to meeting the evidential sufficiency and public interest tests set out in the Solicitor-General's Prosecution Guidelines) without applying the duty holder factors. This is restricted to circumstances where WorkSafe has an explicit policy to immediately consider prosecution due to the seriousness of the situation. See section 4.4 for general guidance about these circumstances.

Standard	Descriptor	Initial enforcement expectation	Also consider prosecution
Defined	Absent or never	Improvement Notice	Yes ⁵ potentially for offences specified in policy/positions
	Inadequate or occasional	Improvement Notice	
	Minor or short term lapse	Directive Letter	
Established	Absent or never	Directive Letter	
	Inadequate or occasional	Directive Letter	
	Minor or short term lapse	Verbal Direction	
Interpretative	Absent or never	Verbal Direction	
	Inadequate or occasional	Verbal Direction	
	Minor or short term lapse	Verbal Direction	

TABLE 5:
Compliance/administrative failures: IEE

4.4 Prosecution

An IEE may identify an Improvement Notice, Directive Letter or Verbal Direction. Generally, these may be varied to obtain final enforcement expectations based on specific (duty holder) factors at step 5. For example, a duty holder's previous compliance history may make it appropriate to also consider prosecution alongside an Improvement Notice.

However, Tables 4 and 5 also identify situations where prosecution may be considered, in exceptional circumstances, subject to meeting the evidential sufficiency and public interest tests set out in the *Solicitor-General's Prosecution Guidelines*. These are matters where an issue is so serious that it is appropriate to consider prosecution as a matter of policy. The decision to prosecute in these circumstances will not necessarily be affected by factors such as the duty holder's previous record or other duty holder factors specific to the case.

For risk-based matters, prosecution may only be considered in these circumstances where there is a combination of an extreme risk gap and a failure to meet an explicit standard which is well-known and obvious.

For compliance/administrative based failures, prosecution may be considered in circumstances where the level of compliance is 'absent or never', the requirement is well-known and obvious, and the non-compliance is of a nature or seriousness that warrants particular attention/emphasis.

The *How we make prosecution decisions policy* identifies public interest factors that are specific to WorkSafe. These are considered in addition to the public interest factors in the *Solicitor-Generals Prosecution Guidelines*.

They include where:

- non-compliance has resulted in serious injury or death.
- There has been a failure to comply with an Improvement or Prohibition Notice,⁵ or
- inspectors have been obstructed in the lawful course of their duties⁶

⁵ There may be very exceptional circumstances where prosecution may be considered (subject to meeting the evidential sufficiency and public interest tests set out in the *Solicitor-General's Prosecution Guidelines*) without applying the duty holder factors. This is restricted to circumstances where WorkSafe has an explicit policy to immediately consider prosecution due to the seriousness of the situation. See section 4.4 for general guidance about these circumstances.

⁶ Our Policies identify that prosecution will always be considered even when EDM may not direct the Inspector to consider this response.

STEP 5

Taking account of duty holder factors

IN THIS SECTION:

- 5.1 Applying the duty holder factors
- 5.2 Considering prosecution and issuing Infringement Notices

5.1 Applying the duty holder factors

Duty holder factors are the factors specific to the circumstances and activities of the duty holder. EDM allows these factors to be considered and applied to enforcement decisions in a transparent and consistent way. Considering duty holder factors will either confirm the IEE or vary the IEE. The duty holder factors are:

- the duty holder's compliance history
- where actual harm has occurred, the level of harm
- whether the duty holder has deliberately sought economic advantage
- whether vulnerable people/vulnerable worker groups have been put at risk
- the overall standard of health and safety management of the duty holder, and
- the inspector's confidence that the duty holder will comply with advice or direction that is not formal statutory enforcement.

The duty holder factors are further explained in Appendix 4. They are applied to the IEE using the relevant flowcharts. These are:

- for an IEE of Improvement Notice (Flowchart 4) - page 23
- for an IEE of Directive Letter (Flowchart 5) - page 24
- for an IEE of Verbal Direction (Flowchart 6) - page 25.

Where a Prohibition Notice has been issued (or a Sustained Compliance Letter sent), the Prohibition Notice/Sustained Compliance Letter flowchart (Flowchart 3) on page 22 should be applied.

Not all duty holder factors are given equal weighting, and this is reflected in the flowcharts.

As per the operational guidance, where the final enforcement recommendation is an Improvement Notice, a Sustained Compliance Letter can be used instead if the breach is rectified before the inspector is able to issue the notice.

5.2 Considering prosecution and issuing Infringement Notices (enforcement action)

Consideration of duty holder factors may also lead an inspector to additionally consider enforcement action (HSWA s141 - meaning of enforcement action) prosecution or the issue of an Infringement Notice in addition to the IEE (as confirmed or varied).

Guidance may specify what is required for an inspector to have adequately 'considered prosecution'. Further enquiries may be warranted in order to justify a decision to recommend or not recommend prosecution.

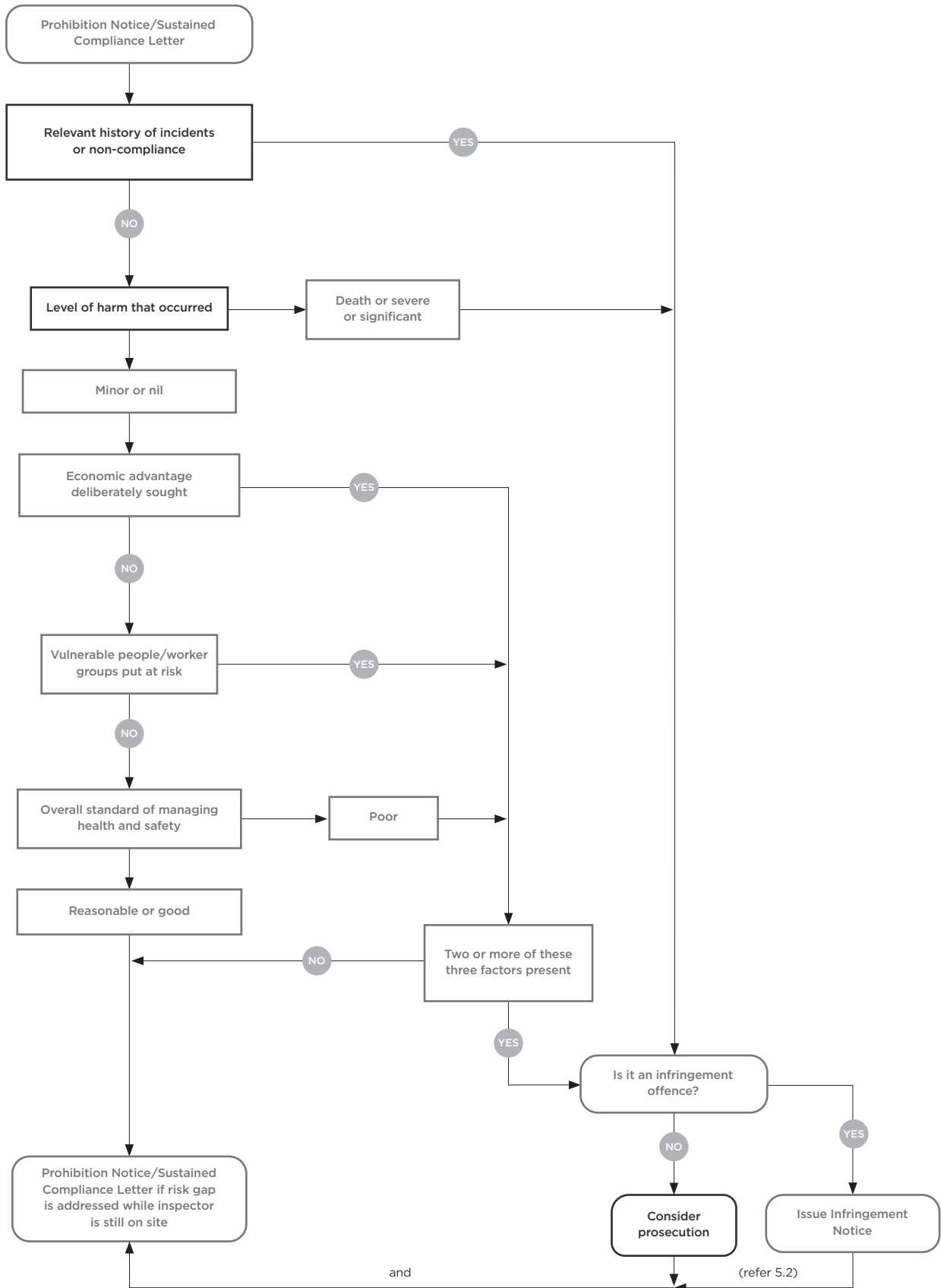
The duty holder factors that lead an inspector to consider issuing an Infringement Notice are the same as those which aggravate a matter to 'consider prosecution', for example, a relevant compliance history. Issuing an Infringement Notice appears as an alternative to 'considering prosecution' to reflect these are alternate means of addressing offending. Issuing an Infringement Notice⁷ should be preferred to recommending prosecution if the matter is an Infringement offence, unless there is or may be an investigation, or there is a victim and/or a notification of interest (so as not to infringe their right to private prosecution).⁸

⁷ Refer to Infringement Notice Guidance when EDM directs to issue an Infringement Notice.

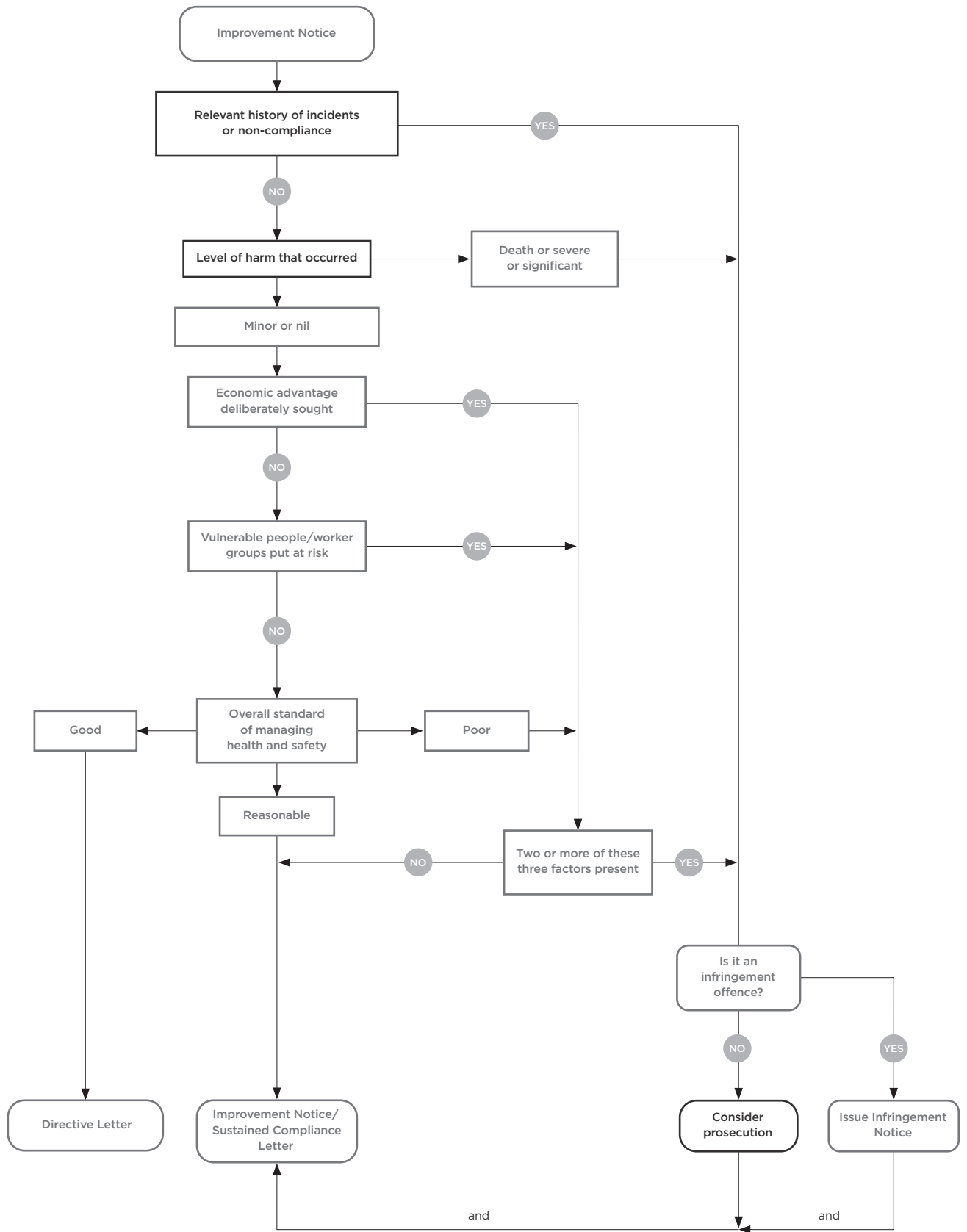
⁸ Note that other relevant factors (including unusual or particular circumstances) that affect the particular situation may still be considered at step 6.

When EDM directs inspectors to consider prosecution, a discussion must occur between relevant parties, that is, Manager/Team Leader/Principal Inspector/Investigation Principal, a record of what was discussed, who was involved in the discussion and outcome must be recorded on the EDM Record Form and uploaded into the case management system. (When the consideration is lengthy or complex, an Inspector should attach an additional appendix into the case management system to ensure the record is complete regarding the considerations made.)

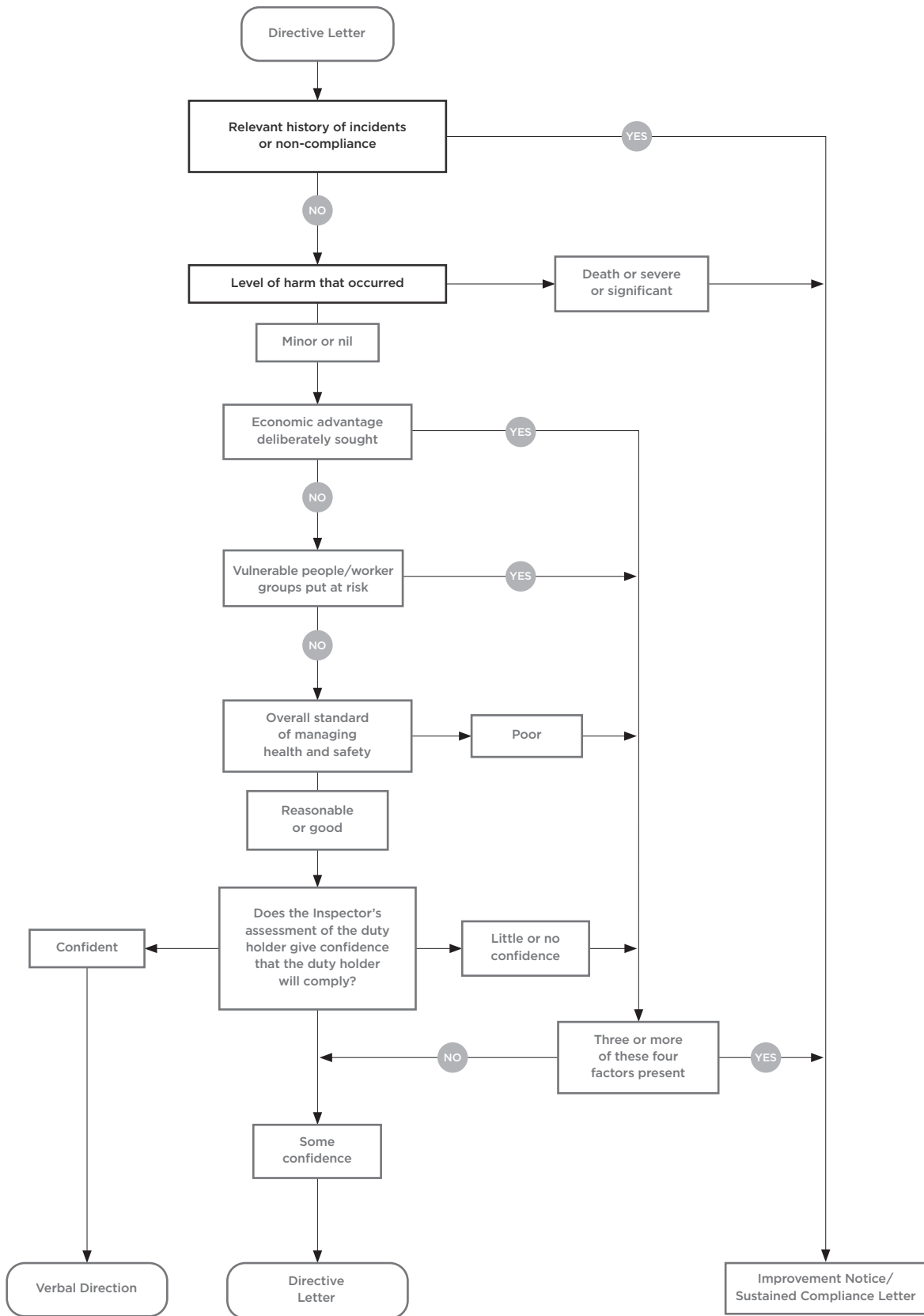
When considering prosecution any applicable guidance or procedures should be referred to.



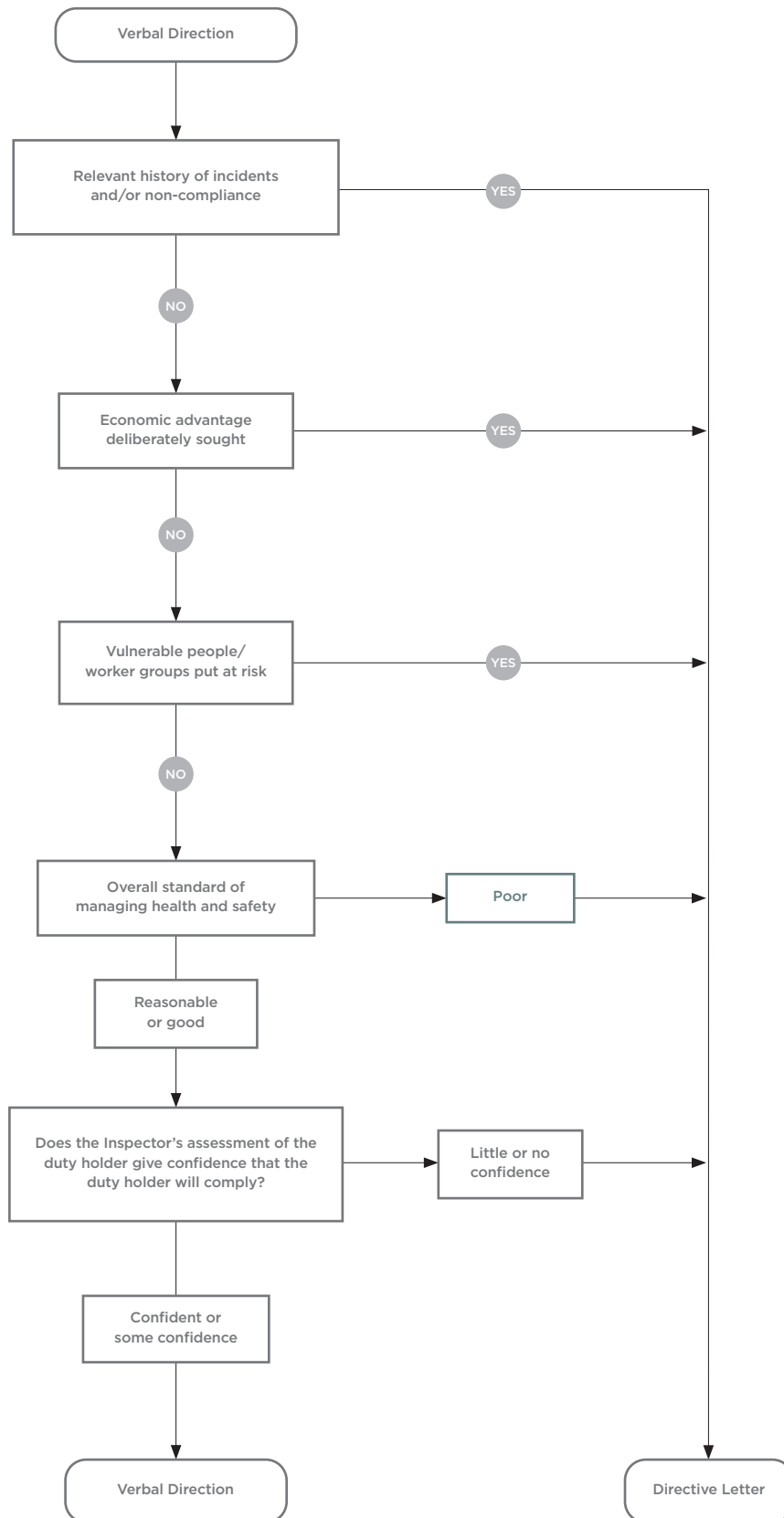
FLOWCHART 3: Duty holder factors - Prohibition Notice/Sustained Compliance Letter issued



FLOWCHART 4: Duty holder factors - Improvement Notice



FLOWCHART 5: Duty holder factors - Directive Letter



FLOWCHART 6: Duty holder factors - Verbal Direction

STEP 6

Considering the level, focus and overall impact of enforcement

IN THIS SECTION:

- 6.1 Considering overall enforcement approach
- 6.2 Manager approval
- 6.3 Record keeping
- 6.4 Permissioning

6.1 Considering overall enforcement approach

Step 5 of EDM is used to arrive at a final enforcement expectation for each significant issue identified. Whether there is a single issue, or multiple failures that result in a number of enforcement decisions, the inspector needs to consider the overall impact of the enforcement decisions to check that the level and focus of enforcement is appropriate.

In the first instance, inspectors should consider whether the overall enforcement accords with WorkSafe's policies: *How we make prosecution decisions* and *How we make enforcement decisions*. However, while WorkSafe's policies and the EDM are intended to provide guidance to inspectors on how they should apply their discretion, they should not be applied inflexibly to enforcement decisions. Inspectors should always take account of the particular circumstances and should not apply the final enforcement expectation if doing so would be an unfair or otherwise incorrect decision.

Consideration should be given to gaining additional support and advice from an appropriate subject matter expert if required.

In checking the level and focus of enforcement, the inspector should consider whether, in the particular circumstances, the overall enforcement approach will:

- manage risk effectively:
 - takes account of the scale of the failures and provides a proportionate response
 - deals with the most serious risk in order of priority and in appropriate time scales
- addresses the breach:
 - adequately addresses underlying problems and common causation factors
 - secures sustained compliance
 - influences positive change and deters other duty holders in the same industry.

And helps WorkSafe to achieve:

- our strategic outcomes, and
- public confidence in how we regulate.

If the answer to any of these questions is no or not clear then the inspector should discuss the decision with their manager.

6.2 Manager approval

If circumstances permit, managers/team leaders (after consultation with the relevant Senior Inspector or Principal Inspector/Investigation Principal if required) should approve any enforcement proposed where it is not consistent with the final enforcement expectation after considering and applying EDM.

Any manager involvement should be recorded on the EDM Record Form to make it clear how the final decision was reached and who was involved. This is also to ensure that decisions are able to be reviewed independently in the event that an internal or other review is required.

6.3 Record keeping

Inspectors should record any enforcement decision in the WorkSafe approved EDM Record Form where it falls within circumstances required by WorkSafe to be recorded. WorkSafe may vary these circumstances from time to time.

When EDM record form is required to be completed

- All recommendations for prosecution.
- All decisions to issue an Infringement Notice.
- Investigation enforcement decisions (including where a failure has been established and no enforcement action has been recommended).
- All files where an internal review has been requested (either completed proactively or retrospectively).
- All decisions to issue a Prohibition Notice (including where a Sustained Compliance Letter was issued in lieu of a Prohibition Notice).
- All enforcement decisions made by newly warranted inspectors, (all level 1 Inspectors - unless cleared by their manager or principal).
- When otherwise required by a manager or principal.
- For all files where a QC/QA is being undertaken and enforcement was undertaken.
- When EDM has directed to consider prosecution.

6.4 Permissioning

WorkSafe issues a range of regulatory permissions, such as licenses and certificates in workplaces using hazardous substances and safety cases in high hazard industries. The terms and conditions of granting permission are set out in the permissioning documents.

When dealing with a duty holder that is operating under a permissioning regime, the overall enforcement approach should also involve a review of the permissioning document.

A risk gap analysis is used when considering possible enforcement if an operator has failed to adhere to conditions set out in the permissioning documents relevant to their activities. The resultant risk gap is then considered in conjunction with the level of deviation from the permissioning document to arrive at an initial enforcement expectation using Table 6.

In most circumstances, the risk arising out of the operator's activity cannot be dealt with quickly enough through the permissioning document. In these cases the Table 4 Health and safety risks: Initial Enforcement Expectations should be used to indicate the appropriate immediate level of enforcement. Separate action should then be considered in relation to the permissioning document using Table 6 Permissioning: additional enforcement expectations.

There may also be compliance or administrative matters associated with permissioning, for example the requirement to notify the relevant authority of the permissioned activity. In this situation the Table 5 Compliance and administrative arrangements: IEE can be used where the matter cannot be dealt with adequately through the permissioning regime.

The enforcement action to secure compliance in permissioning regimes is usually achieved through the permissioning document. This may be through modification of the permissioning document including re-issue, its revocation/ refusal, or the use of a specific enforcement powers provided by the permissioning regime.

Note that any immediate risk of serious personal injury associated with the permissioning regime will be considered and dealt with in Step 2.

The six enforcement expectations used in the table below are:

- consider prosecution for the breach of safety case
- withdraw acceptance/reject permissioning document
- vary the permissioning document to place conditions on the operator
- request that the operator revises the permissioning document
- send a letter to the operator recording the breach of safety case
- the operator is verbally informed of the breach of safety case.

Deviation from permissioning document

RISK GAP	MAJOR DEVIATION FROM PERMISSIONING DOCUMENT	MINOR DEVIATION/ FEW SAFETY CASE COMMITMENTS	NONE
Extreme	Withdraw acceptance/reject and consider prosecution	Reject/vary/revise	Revise
Substantial	Withdraw acceptance/reject	Reject/vary/revise	Revise
Moderate	Reject/vary/revise	Vary/revise	Revise
Nominal	Revise	Letter	Letter/Verbal Direction
Nil/negligable	Revise	Letter/Verbal Direction	Nil

TABLE 6:
Permissioning:
additional enforcement
expectations

The descriptor 'None' is included in the table as it is possible to have full compliance with the permissioning document and still identify a 'risk gap'. In this situation it may be necessary to review the permissioning document to prevent a reoccurrence. Similarly, the operator may be deviating from the permissioning document but not be creating a risk gap.

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

Appendices

IN THIS SECTION:

Appendix 1: Categories of consequence

Appendix 2: Explanation of likelihood

Appendix 3: Compliance and administrative arrangements

Appendix 4: Duty holder factors

Appendix 1: Categories of consequence

CONSEQUENCES CATEGORY IN RISK GAP TABLE	GENERAL PRINCIPLE	SPECIFIC EXAMPLES Note: These are examples only. Inspectors should apply the general principle
Death and severe	<p>It is most credible that a fatality or injury that results in a permanent or irreversible disabling condition could occur.</p> <p>It is most credible that a severe health effect could develop that causes death; or a health effect could develop that results in a permanent, progressive, or irreversible condition; or permanent disablement such as a lifelong restriction of work capability or a major reduction in quality of life.</p>	<p>Death.</p> <p>Permanent blinding of one or both eyes; serious multiple fractures; head injuries involving permanent brain damage; amputation of hand/arm or foot/leg; burns and scalds covering more than 40% of the surface area of the body; crush injuries leading to permanent internal organ damage, permanent paralysis from a spinal injury.</p> <p>Severe health effects due to physical agents such as decompression illness; barotrauma resulting in lung or other organ damage; hand-arm vibration syndrome; noise-induced hearing loss. Severe infections due to biological agents such as <i>Legionella pneumophila</i> and <i>Leptospirosis</i>.</p> <p>Severe conditions due to exposure to hazardous substances such as cancer of a bronchus or lung; primary carcinoma of the lung where there is accompanying evidence of silicosis; cancer of the urinary tract or the bladder; angiosarcoma of the liver; skin cancer; mesothelioma; cancer of the nasal cavity or associated air sinuses; peripheral neuropathy; chrome ulceration of the nose or throat; pneumoconiosis; asbestosis; occupational asthma; extrinsic alveolitis (including farmer's lung).</p>
Significant	<p>It is most credible that an injury could occur to a person that is not permanent, disabling, or irreversible but results in that person being unable to perform his/her normal work for more than seven days.</p> <p>It is most credible that a health effect could develop that is not-permanent, irreversible, or a progressive condition but still results in a temporary disability or restriction of work capability or quality of life.</p>	<p>Burns and scalds covering more than 10%; amputation of a digit past the first joint or more than one digit; head injuries leading to a loss of consciousness; crush injuries leading to temporary internal organ damage; any degree of scalping or de-gloving; asphyxiation; hospitalisation for more than 48 hours; complex fracture or fracture of a long bone.</p> <p>Health effects such as conditions due to physical agents and the physical demands of work, for example, traumatic inflammation of the tendons of the hand or forearm or of the associated tendon sheaths; carpal tunnel syndrome. Diagnosed affective disorders such as depression and anxiety and stress/trauma related disorders.</p> <p>Infections due to biological agents such as <i>Salmonella spp</i> (food poisoning) and <i>Campylobacter spp</i>. Conditions due to substances such as chrome ulceration of the skin of the hands or forearm, allergic contact dermatitis (for example, where SDS contains risk phrase R43/H317/6.5B; may cause sensitisation by skin contact).</p>
Minor	<p>It is most credible that injuries not included above could occur, that is, injuries resulting in less than seven days restriction of work capability and from which there will be recovery without ongoing disablement or impairment.</p> <p>It is most credible that health effects not included above could develop, that is, effects which there will be recovery and there is no restriction of work capability or quality of life.</p>	<p>Loss of end of single digit to first joint (excluding the thumb), simple fracture of wrist, ankles and digits, acute strains and sprains and health effects not listed above.</p> <p>Irritant contact dermatitis (for example, where SDS contains risk phrase R38/ H315/6.3A; Irritating to skin).</p>
Nil	No injury or health effects	

Appendix 2: Explanation of likelihood

DESCRIPTOR	EXPLANATION
Probable	A similar consequence has been realised on repeated occasions in the past in these circumstances and it will probably occur again somewhere. It is not a surprise.
Possible	A similar consequence has been realised infrequently in similar circumstances and it is possible it may happen again in these circumstances. It is not a total surprise.
Remote	A similar consequence hasn't occurred in these circumstances, but it has occurred in quite different circumstances, for example in an entirely different industry. It is unexpected.
Nil/negligible	This has not been known to occur. In practice the consequence shouldn't be realised. It is a complete surprise.

Appendix 3: Compliance and administrative arrangements

What is the level of non-compliance with the standard or administrative arrangements?

DESCRIPTOR	DEFINITION	SPECIFIC EXAMPLES
Absent or never	<p>Total absence or no implementation of this specific compliance or administrative arrangement.</p> <p>The duty holder has never complied with the requirement or has made no attempt to comply with the requirement.</p>	<p>Accidents are not notified or recorded; scaffolding over 5m is never inspected and is not erected by a COC holder; there are no toilets or hand washing facilities; notifiable work is regularly carried out and never notified; no certification of inspection is obtained for a crane; removing more than 10m² of ACM and not having a Class B or A asbestos removal license.</p> <p>Safety case not submitted, failure to notify, failure to provide information required by permissioning regime, assessment of risk not done.</p>
Inadequate or occasional	<p>Only occasional observance with the standard or inadequate/rudimentary compliance. The duty holder occasionally complies with the requirement.</p>	<p>Very inadequate first aid arrangements; occasionally when busy, scaffolding over 5m is not erected by a COC holder; occasionally carrying out notifiable work and not notifying; only notifying the most serious of accidents; a certificate of inspection for a crane has been expired for months.</p> <p>Very poor-quality submissions supplied for permissioning, key information missing from safety case.</p>
Minor or short term lapse	<p>Any deficiencies or inadequacies are minor, have little material impact and can be remedied easily.</p> <p>The duty holder usually or almost complies with the requirement but did not comply in this case.</p>	<p>A one-off situation where scaffolding over 5m was erected by a scaffolder with an expired (not current) COC. Minor defects in the information supplied for permissioning, gaps in the safety case prompting requests for further information.</p>

Appendix 4: Duty holder factors

DESCRIPTOR	DEFINITION
Is there a relevant compliance history?	
Yes	<p>Factors Inspectors should consider when assessing duty holders' relevant compliance history. Relevant compliance history includes, but may not be limited to, one or more of the following circumstances:</p> <ul style="list-style-type: none"> - The number, type and nature of previous legislative (statutory) enforcement. This needs to be considered in the overall context. - Where there has been a failure to comply with a notice or direction given by an Inspector or WorkSafe. - The size of the company. For example, a very large or complex organization with multiple sites (other than in a high hazard industry) an inspector may consider if there has been minimal previous legislative notices (that have been complied with), will not trigger a relevant compliance history. Conversely a small number of notices for a small PCBU could be considered relevant compliance history. - Is the previous enforcement for similar failures. This includes similar conduct and/or the same processes, plant etc. Regardless of where the failure occurred. - When there has been a reckless and/or grossly negligent disregard of health and safety requirements. - Duty holder has a history of related or similar harm.
No	No. There is no compliance history that is relevant, recent, or significant.
Are vulnerable people put at risk?	
Yes	The duty holder's actions have harmed or put vulnerable people at risk. Depending on the circumstances, these may include children, elderly, members of public, young workers, pregnant people, or disabled people, vulnerable worker groups such as Māori and Pacific people and migrant workers.
No	The duty holder's actions have not put vulnerable people at risk.
Is the duty holder deliberately seeking economic advantage?	
Yes	The duty holder is deliberately avoiding minimum legal requirements for commercial gain. This factor is generally only applied where there is evidence to show the commercial gain was sought knowingly by the duty holder.
No	Failure to comply is not commercially motivated.
What's the level of actual harm that occurred in this case?	
Death or severe or significant	<p>A severe personal injury or severe health effect or death has occurred as a result of the matter under consideration.</p> <p>Note: WorkSafe may release policy/positions stating that they will treat certain high levels of exposure as actual harm.</p>
Not death, severe or significant	There has been no actual harm, or the harm has been no greater than a minor personal injury or health effect.
What is the overall standard of the management of health and safety?	
Poor	The overall standard of managing work-related health and safety is far below what is required by health and safety law and gives rise to other significant risks.
Reasonable	The overall standard of managing work-related health and safety is reasonable with no other significant risks.
Good	The overall standard of managing work-related health and safety is good with all other failures addressed.

DESCRIPTOR	DEFINITION
Does the inspector’s assessment of the duty holder give confidence the duty holder can and will comply?*	
Confident	It is clear that the duty holder is both fully capable of, and is strongly committed to, compliance with the law through the effective management of health and safety and can be trusted to put the matter(s) right without formal enforcement measures.
Some confidence	The duty holder demonstrates some capability and commitment to compliance with the law through the effective management of health and safety.
Little or no confidence	There is concern that the duty holder does not have the capability or commitment to comply with the law and ensure the effective management of health and safety.

* This duty holder factor is only applied in Flowcharts 5 and 6.

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