

# Regulatory Enforcement - Differences between England and Scotland

All businesses are subject to regulatory regimes where mandatory provisions and prohibitions are often enforced via the criminal law. The laws are usually similar throughout the UK, but the way in which regulatory laws are enforced in Scotland differs from the rest of the UK.

The table below indicates some of the key ways in which the enforcement process differs in Scotland, compared to England & Wales.

	ENGLAND & WALES	SCOTLAND
Responsibilities	<p>In England, responsibility for enforcing regulatory requirements lies with the applicable regulator: for example the Health and Safety Executive, the Environment Agency, local authorities.</p> <p>The regulator deals with all stages of enforcement action including, investigation, issuing enforcement notices, deciding whether to prosecute and prosecuting the alleged offender in court.</p>	<p>In Scotland, regulators investigate regulatory breaches and issue enforcement notices, but they do not have the power to prosecute regulatory breaches.</p> <p>The regulator must submit a report to the Procurator Fiscal (PF).</p> <p>The decision on whether to prosecute an offence is made by the PF.</p>
The Interview process	<p>A witness may be interviewed on a voluntary basis or on a compulsory basis pursuant to a statutory power given to a regulator.</p> <p>Where a "compulsory" interview is carried out, the person being interviewed is provided with some protection in that the information they provide may not be used against them in subsequent criminal proceedings (although it may be used against others, including their employer).</p> <p>Where a person is suspected of an offence they must be interviewed "under caution", as required by the Police and Criminal Evidence Act 1984 (PACE), or their evidence may be inadmissible in court.</p> <p>The caution warns the person being interviewed that anything he or she says may be used as evidence in court. It also warns that an adverse inference may be drawn from anything the interviewee fails to mention which he or she later seeks to rely on in court.</p>	<p>In Scotland, a witness may be interviewed either voluntarily or on a compulsory basis.</p> <p>PACE does not apply in Scotland. However, where someone who is suspected of an offence is being questioned, a caution should be administered before a suspect is questioned as a matter of fairness. A failure to do so may make the answers inadmissible in court. The authorities tend to err on the side of cautioning in Scotland and commonly administer cautions to individuals following regulatory breaches.</p> <p>In Scotland, an adverse inference cannot be drawn from a suspect's failure to answer any question put to him. The person being interviewed is only required to provide their name and address.</p> <p>In serious cases, the PF may summon a witness to provide a form of statement called a "precognition" for the purposes of assisting with the PF's investigation. The witness is not entitled to be represented at an interview with the PF. However, a precognition cannot subsequently be used in court.</p>

	ENGLAND & WALES	SCOTLAND
The Interview process continued...	<p>Companies are often invited to nominate a director or other person to attend an interview under caution to speak on behalf of the company.</p> <p>Alternatively, companies may be asked questions in writing under caution.</p> <p>There is guidance from the Law Society of England &amp; Wales which states that solicitors for a company should not attend interviews of employees.</p>	<p>Companies are not usually interviewed under caution or asked questions in writing under caution.</p> <p>No guidance on the attendance by a solicitor for the company at interviews of employees has been issued by the Law Society of Scotland.</p>
Witness Statements	<p>A witness statement is a document recording the evidence a person gives during a voluntary interview. Providing a witness statement is a very important part of the criminal process in England.</p> <p>One type of witness statement is a "section 9" witness statement - this is a voluntary statement taken from a witness under section 9 of the Criminal Justice Act 1967 which is signed by the witness to confirm that the contents of the statement are true.</p> <p>The witness statement can subsequently act as that person's evidence in court proceedings (although a defendant can insist on the witness attending to be cross-examined on his/her evidence in court, subject to certain exceptions).</p> <p>Because of the evidential value of a witness statement given voluntarily, regulators prefer to interview witnesses on a voluntary basis and will resist having to use any statutory power to take a statement on a compulsory basis.</p>	<p>In Scotland, witness statements are not usually treated as providing a person's evidence in court proceedings.</p> <p>There are a few limited exceptions to this rule (for example, where the witness has died, the witness cannot be found, or where the witness is out side of the UK and it is not reasonably practical for him/ her to attend).</p> <p>In addition, if a witness changes their evidence, a witness statement can be used to demonstrate that a witness has previously provided a different version of events.</p> <p>Because witness statements are of little evidential value, regulators are more open to using their statutory powers to conduct interviews of witnesses on a compulsory basis.</p>
Formal Cautions	<p>Regulators have the power to issue formal cautions instead of prosecuting.</p> <p>A formal caution is a statement by a regulator that the dutyholder has committed an offence for which there is a realistic prospect of conviction. The duty holder must accept the statement in writing or risk being prosecuted.</p>	<p>Formal cautions are not issued in Scotland.</p>

	ENGLAND & WALES	SCOTLAND
Prosecutions	<p>Regulatory offences are tried either by "summary trial" in the Magistrates' Court or by "trial on indictment" in the Crown Court.</p> <p>In the Magistrates' Court, the maximum fines are usually restricted by statute.</p> <p>In the Crown Court, the maximum fines are usually unlimited.</p> <p>Almost all cases start in the Magistrates' Court.</p> <p>Where an accused has been charged with an "either way" offence (an offence which is capable of being tried either in the Magistrates' Court or the Crown Court), the defendant must first appear at a "mode of trial" hearing in the Magistrates' Court at which the Magistrates will decide whether the case will be heard in the Magistrates' Court or the Crown Court depending on how seriously the Magistrates view the alleged offence.</p> <p>The accused also has a right to elect for the case to be heard in the Crown Court in front of a jury.</p> <p>Cases can be transferred from the Magistrates' Court to the Crown Court for sentencing.</p> <p>Only barristers and solicitor- advocates are allowed to appear in the Crown Court.</p>	<p>In Scotland, regulatory offences are tried either by "summary procedure" or "solemn procedure". It is the PF who decides which procedure should be followed.</p> <p>"Summary procedure" is where a case is either heard in the District Court or in the Sheriff Court, without a jury. The maximum fines are usually restricted by statute.</p> <p>"Solemn procedure" is where the case is heard by a judge sitting with a jury in either the Sheriff Court or the High Court of Justiciary. Most serious regulatory breaches which proceed on solemn procedure will be heard in the Sheriff Court in front of jury. The maximum fines are usually unlimited.</p> <p>A case on summary procedure cannot be transferred to a higher court for the purpose of sentencing.</p> <p>An accused does not have the right to elect to be tried in front of a jury.</p> <p>Solicitors have the right to appear in all courts, except the High Court of Justiciary.</p>
Charges against the accused	<p>The charges are generally set out in a short and simple manner and are normally accompanied by a separate summary of the case alleged against the accused.</p>	<p>All the particulars of the offence must be set out in the charges. This means that there is more scope to challenge the charges at the preliminary stages.</p>
Evidence	<p>In England, an offence can be proved from evidence from a single source (with a few limited exceptions).</p>	<p>In Scotland, no case can be proved unless there is evidence from more than one source as to the essential elements of the offence (often referred to as "corroboration").</p>

© Pinsent Masons LLP 2009

If you require further information, please contact **Tom Stocker, Senior Associate**, T: 0131 225 0043 E: [tom.stocker@pinsentmasons.com](mailto:tom.stocker@pinsentmasons.com)

**This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.**

LONDON DUBAI BEIJING SHANGHAI HONG KONG SINGAPORE

OTHER UK LOCATIONS: BIRMINGHAM BRISTOL EDINBURGH GLASGOW LEEDS MANCHESTER

T 0845 300 32 32

Pinsent Masons LLP is a limited liability partnership registered in England & Wales (registered number: OC333653) and regulated by the Solicitors Regulation Authority. The word 'partner', used in relation to the LLP, refers to a member of the LLP or an employee or consultant of the LLP or any affiliated firm who is a lawyer with equivalent standing and qualifications. Singapore location in association with MPillay. A list of members of the LLP, and of those non-members who are designated as partners, is displayed at the LLP's registered office: CityPoint, One Ropemaker Street, London, EC2Y 9AH, United Kingdom. We use 'Pinsent Masons' to refer to Pinsent Masons LLP and affiliated entities that practise under the name 'Pinsent Masons' or a name that incorporates those words. Reference to 'Pinsent Masons' is to Pinsent Masons LLP and/or one or more of those affiliated entities as the context requires. For important regulatory information please visit: [www.pinsentmasons.com](http://www.pinsentmasons.com)



**Pinsent Masons**

[www.pinsentmasons.com](http://www.pinsentmasons.com)