



**Government
of South Australia**

SafeWork SA

GENERAL GUIDELINES FOR PROSECUTIONS

Date: January 2013

Background

These guidelines provide information about the way Work Health and Safety (WHS) prosecutions are conducted by SafeWork SA. These guidelines are published in accordance with section 230(3)(a) of the *Work Health and Safety Act 2012* (SA).

SafeWork SA administers work health and safety laws South Australia. These laws include the:

- *Work Health and Safety Act 2012* (SA); and
- *Work Health and Safety Regulations 2012* (SA).

The laws can be accessed at www.safework.sa.gov.au

The National Compliance and Enforcement Policy

The National Compliance and Enforcement Policy (NCEP) outlines the aims of compliance and enforcement as well as the compliance and enforcement tools available to work health and safety regulators. The NCEP also sets out general information about prosecutions, including the criteria used by regulators to determine whether or not to initiate prosecution and the timeframes for initiating such action. The NCEP can be accessed at http://www.safework.sa.gov.au/uploaded_files/enforcement_policy.pdf or by contacting the SafeWork SA Help Centre during business hours on telephone 1300 365 255.

The decision to prosecute

The question of whether to bring a prosecution for a breach of work health and safety laws is a significant one, as the effect on those impacted by the decision (the defendant, worker or family of a deceased worker for instance) will be considerable. In determining whether or not to prosecute, SafeWork SA considers three common principles as defined by the South Australian Director of Public Prosecutions, specifically:

1. The existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of proceedings; and
2. A reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court (taking into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, the admissibility of any confession or other evidence, and any lines of defence available to the defendant); and
3. A public interest test which may include the following considerations:
 - the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature
 - any mitigating or aggravating circumstances
 - the characteristics of the duty holder—any special infirmities, prior compliance history and background
 - the age of the alleged offence
 - the degree of culpability of the alleged offender

- whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
- the efficacy of any alternatives to prosecution
- the prevalence of the alleged offence and the need for deterrence, both specific and general, and
- whether the alleged offence is of considerable public concern.

The South Australian Director of Public Prosecutions policy on prosecutions can be accessed at http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf

Courts

Prosecutions for work health and safety laws are heard in the Magistrates Court (Industrial Offences Jurisdiction). In the case of the more serious offences, prosecutions may be finalised in the District Court (see 'Steps in the Court Process' section for further detail).

Prosecution initiation

The Executive Director of SafeWork SA is authorised to bring prosecution proceedings for criminal offences under the WHS Act, and may also authorise inspectors to bring prosecution proceedings. The Executive Director of SafeWork SA has given this written authorisation to certain SafeWork SA inspectors.

Summary offences are charged on complaint, and are initiated by a complaint being laid and filed with the Industrial Relations Court's registry. SafeWork SA will serve a copy of the complaint and summons on the defendant.

Minor indictable charges are charged on information, and are initiated by an information and summons being laid and filed with the Industrial Relations Court's registry. SafeWork SA will serve a copy of the information and summons on the defendant.

Service will be affected by way of delivery in-person, or by leaving the documentation at the person's usual abode or place of business. The summons will indicate the return date and place that the defendant is required to appear i.e. the applicable Courthouse, court room, physical address, time and date.

Court response

A prosecution comes before the court for the first time at what is known as a "callover" hearing. This is usually a fairly short hearing. Both parties are required to present at the court, and the court will govern the course the matter will take. This will depend on the court and what approach the parties take to the matter.

Prosecutions are usually adjourned to a future date at the first callover hearing. This is to allow the defendant to consider the case against it. The court will usually order the exchange of materials between the parties at this first hearing. At a later hearing date, the defendant may choose to enter a guilty plea, in which case the matter is usually set down for sentence hearing on another day. If the defendant enters a plea of not guilty, the matter is set down for a trial.

A case may be adjourned a number of times before it is resolved. These mentions or call-overs are then referred to by way of number, for example, second, third, fourth mention etc.

Depending on the matter to be heard, a trial may take a day, several days or longer and may be split during a period of weeks or months. For example, the matter may be part heard in May and then adjourned until August for further hearing.

If a trial is held, the court may choose to deliver its decision on the final day of the trial or may reserve the decision for a later time, dependent on the complexity of the matter and the court's availability.

Steps in the court process

- **Category 1 offences** are minor indictable offences – all prosecutions commence in the Magistrates Court (Industrial Offences Jurisdiction). These prosecutions will also be finalised in the Magistrates Court (Industrial Offences Jurisdiction) unless (1) the defendant elects to be tried in the District Court, or (2) upon conviction, the Industrial Magistrate considers that a penalty in excess of \$300,000 should be imposed, in which case the matter will be referred to the District Court for sentencing;
- **Category 2 offences involving a body corporate** are minor indictable offences – all prosecutions commence in the Magistrates Court (Industrial Offences Jurisdiction). These prosecutions will also be finalised in the Magistrates Court (Industrial Offences Jurisdiction) unless (1) the defendant elects to be tried in the District Court, or (2) upon conviction, the Industrial Magistrate considers that a penalty in excess of \$300,000 should be imposed, in which case the matter will be referred to the District Court for sentencing
- **Category 2 offences involving an individual** are summary offences, and are dealt with in the Magistrates Court (Industrial Offences Jurisdiction).
- **Category 3 offences involving a body corporate** are minor indictable offences – all prosecutions commence in the Magistrates Court (Industrial Offences Jurisdiction). These prosecutions will also be finalised in the Magistrates Court (Industrial Offences Jurisdiction) unless (1) the defendant elects to be tried in the District Court, or (2) upon conviction, the Industrial Magistrate considers that a penalty in excess of \$300,000 should be imposed, in which case the matter will be referred to the District Court for sentencing
- **Category 3 offences involving an individual** are summary offences, and are dealt with in the Magistrates Court (Industrial Offences Jurisdiction).
- **Offences involving body corporate contravening an enforceable undertaking** are minor indictable offences – all prosecutions commence in the Magistrates Court (Industrial Offences Jurisdiction). These prosecutions will also be finalised in the Magistrates Court (Industrial Offences Jurisdiction) unless the defendant elects to be tried in the District Court;
- **Offences involving an individual contravening an enforceable undertaking** are summary offences, and are dealt with in the Magistrates Court (Industrial Offences Jurisdiction).
- Proceedings against civil penalty provisions are dealt with in the Industrial Relations Court.

In the case of minor indictable offences, if the defendant chooses to be tried in the District Court, a preliminary examination is first conducted by a single Industrial Magistrate in the Magistrates Court (Industrial Offences Jurisdiction).

This hearing is to determine whether there is sufficient evidence to commit the defendant for trial. Trials that are heard in the District Court are heard before a Judge and jury.

Victims of offences that have been proved under the WHS Act may provide the sentencing court with a written personal statement (called a victim impact statement) about the impact of the injury, loss or damage suffered as a result of the offence. If the victim wishes they will be allowed an opportunity to read their statement aloud to the court.

Sentencing options

The *Work Health and Safety Act 2012 (SA)* imposes penalties for offences in the form of monetary fines, and in some cases, imprisonment. The Act also provides for the following orders, which can be made in addition to any penalty imposed for an offence:

- adverse publicity orders;
- orders for restoration;
- work health and safety project orders;
- court-ordered work health and safety undertakings; and
- training orders.

Appeals

An appeal lies from a decision of Industrial Magistrate to a single Judge of the Industrial Relations Court. A further right of appeal is available to the Full Court of the Industrial Relations Court. These appeals must be lodged within 14 days of the handing down of the decision in relation to which an appeal is sought.

In some cases an application can be made seeking permission to appeal to the Full Court of the Supreme Court from an appeal decision of the Full Court of the Industrial Relations Court. The Supreme Court decides on a case-by-case basis whether to grant this permission and hear the further appeal. Such applications seeking permission to appeal must be lodged within 14 days of the handing down of the decision in relation to which an appeal is sought.

An appeal lies from a decision of the District Court to the Full Court of the Supreme Court. These appeals must be lodged within 21 days of the handing down of the decision in relation to which an appeal is sought.

Records of court process and decisions

Decisions handed down by Industrial Magistrates and Industrial Relations Court Judges are published online at the Industrial Court's website at:

<http://www.industrialcourt.sa.gov.au/index.cfm?objectid=51CF7B64-E7F2-2F96-3A3C118FA354104C>

All sentencing remarks for District Court cases are available on the SA Courts website at:

<http://www.courts.sa.gov.au/SentencingRemarks/Pages/default.aspx>

For copies of District Court trial decisions, contact the District Court Registry on 8204 0289.

Copies of Supreme Court appeal decisions are available on the SA Courts website at:
<http://www.courts.sa.gov.au/Judgments/Pages/default.aspx>

Publication of prosecution outcomes

Prosecution outcomes are published by SafeWork SA in accordance with their publishing policy, which can be obtained at

http://www.safework.sa.gov.au/uploaded_files/prosecutions_publishing_policy.pdf

Prosecution summaries are available at http://www.safework.sa.gov.au/show_page.jsp?id=2463

Recording of convictions

It is part of the Magistrate's or Judge's discretion to record a conviction in accordance with section 16 of the *Criminal Law (Sentencing) Act 1988*.

Requests for a prosecution to be brought

The work health and safety laws outline certain circumstances in which a person may request SafeWork SA to bring a prosecution. Information about the circumstances in which such requests can be made and the process for initiating such request can be obtained from

http://www.safework.sa.gov.au/show_page.jsp?id=2463

Information about the status of court proceedings

SafeWork SA through its Investigation and Legal and Team and/or the investigating inspector will keep victims of a workplace incident updated on the progress of the investigation, and any subsequent court proceedings.

Further Information

Telephone SafeWork SA Help Centre: 1300 365 255

SafeWork SA: GPO Box 465, ADELAIDE SA 5001

Country offices: Berri, Mount Gambier, Port Lincoln, Port Pirie and Whyalla

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