

# MODEL OPERATIONAL PROCEDURE

## Power to require production of documents & answers to questions

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### 2. DEFINITIONS

<b>Document</b>	Is described in <a href="#">appendix 1 guidance section</a> of this procedure
<b>Line Manager</b>	Means an inspector’s team manager or delegate such as a principal inspector
<b>PCBU</b>	Means person conducting a business or undertaking
<b>PCMW</b>	Means person with management and control of a workplace
<b>Reasonable Excuse</b>	Is described in <a href="#">appendix 4 guidance section</a> of this procedure
<b>Regulator</b>	Means the Executive Director of SafeWork SA or their delegate. Click <a href="#">here</a> to access the table of delegates under the WHS Act and search for s171.
<b>SWSA</b>	Means SafeWork SA
<b>WHS Act</b>	Means <i>Work Health &amp; Safety Act 2012 (SA)</i>

<b>Definitions continued</b>	
<b>Workplace</b>	Means a <i>place</i> where work is carried out for a business or undertaking and includes any <i>place</i> where a worker goes, or is likely to be, while at work, including: <ul style="list-style-type: none"> <li>• A vehicle, vessel, aircraft or other mobile structure, and</li> <li>• Any waters and any installation on land, on the bed of any waters or floating on any waters, and</li> <li>• Any place that the Act extends to vide Schedule 1 of the WHS Act where dangerous substances and high risk plant are located</li> </ul>

### 3. PURPOSE

This procedure provides guidance to inspectors when exercising powers relating to documents; or asking questions; or requiring a person to provide their name and address under the WHS Act.

Abbreviated references to WHS legislation in this procedure are read as follows (for example):

- Section 123 of the WHS Act is written as Section 123 or s123;
- Regulation 456 of the WHS Regulations is written as Regulation 456 or r456.

### 4. POLICY SECTION

#### 4.1 Questions

Section 165(1)(a) provides that an inspector who enters a workplace under s163 may inspect, examine and make inquiries at the workplace. Making inquiries involves the asking of questions.

#### 4.2 Documents

Section 165(1)(b) provides that an inspector who enters a workplace may inspect and examine anything (including a document) at the workplace. For example, the inspector may examine a document and then ask questions about the document using their general powers under s165(1)(a).

#### 4.3 Reasonable help

Section 165(2) provides that a person must not without [reasonable excuse](#), refuse or fail to comply with a request from the inspector for reasonable help in exercising their powers under s165(1) (a) – (e).

#### 4.4 Coercive Powers

Pursuant to s171(1), an inspector who enters a workplace may require a person to:

- *tell the inspector who has custody of, or access to a document; or*
- *produce a document (that the person has custody of or access to) while the inspector is present at the workplace or within a specified time; or*
- *answer any questions put by the inspector.*

#### ***Regulator's policy***

It is the regulator's policy that inspectors requiring production of documents or answers to questions should first exercise their power under s165(1)(a) to make inquiries and (b) to inspect and examine documents, and only if the person fails to give reasonable help to the inspector following a requirement, the inspector shall exercise their coercive power under s171(1)(b) or (c) to produce documents or require answers to questions.

Section 171(2) provides that an inspector requiring production of documents under s171(1)(b) must make this request by **written notice** unless circumstances require the inspector to have immediate access to the document.

#### 4.5 Warning and informing

Before requiring a person to answer any question, provide information or produce a document under Part 9 of the WHS Act, the inspector must warn and inform the person as required by s173(1).

Section 172 provides that 'an individual is excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate that individual or expose that individual to a penalty'.

Section 173 further provides that **before** exercising their statutory powers under Part 9 to require a person to answer to question, provide information or a document, the inspector must (among other things) advise the person of the effects of section 172.

There is potential for lawyers representing corporate clients to argue that the privilege against self-incrimination (established by s172) extends to companies.

The protection against self-incrimination s172 extends to individuals only, and NOT to bodies corporate. Practically speaking, all that an inspector can do if encountering such opposition when dealing with a company is to reiterate that the requirement is a lawful one, and to point out that a refusal or failure to comply with a requirement under s171 is an offence.

***WARNING to be given to a person representing a body corporate –***  
*My name is [John Smith]. I am an inspector appointed under the Work Health and Safety Act. Here is my identity card [SHOW CARD]. I require you to answer my questions pursuant to Section 171 of the Work Health and Safety Act. I may also require you to provide information to me, and I may require you to provide documents to me. I warn you that if you fail to answer my questions /provide information/produce documents you will commit an offence against the Act. Do you understand this?*

*I also advise that you do not have to disclose or provide information that is the subject of legal professional privilege. Do you understand this?*

*Can you tell me what you understand of the warning and advice that I have just given you?*

***WARNING to be given to a Natural person / sole trader / individual partners of a partnership***

*My name is [John Smith]. I am an inspector appointed under the Work Health and Safety Act. Here is my identity card [SHOW CARD]. I require you to answer my questions pursuant to Section 171 of the Work Health and Safety Act. I may also require you to provide information to me, and I may require you to provide documents to me. I warn you that if you fail to answer my questions /provide information/produce documents you will commit an offence against the Act. Do you understand this?*

*I also warn you that you **are** excused from answering a question or providing information or a document on the ground that your answer, the information or document may tend to incriminate you or expose you to a penalty. Do you understand this?*

*I also advise that you do not have to disclose or provide information that is the subject of legal professional privilege. Do you understand this?*

*Can you tell me what you understand of the warning and advice that I have just given you?*

If this warning has not been provided, then a person does not commit an offence in refusing to answer a question put by the inspector or in refusing to provide information or a document to the inspector on the grounds that it may tend to incriminate them.

Nothing prevents the inspector from obtaining and using evidence that was given voluntarily to them.

### **SA Jurisdictional Guidance Note**

It is a reasonable excuse if the material is covered by legal professional privilege. It is a reasonable excuse for failing to answer questions, or for failing to provide information or documents, if the material may incriminate the person.

#### **What are other examples of a ‘reasonable excuse’?**

- legal professional privilege;
- illness;
- mental disability;
- duress by a senior officer of the company;
- apparent intoxication;
- pending legal advice;
- genuine personal circumstances that prevent the person from complying;
- a significant disruption to transport arrangements beyond the control of the person;
- a significant disruption to public order that prevents the person from attending at the appointed time and place or an obstacle that limits or denies access to the place (e.g. floods, fires) at the appointed time.

#### **What is ‘legal professional privilege’?**

It is a legal principle that a person does not have to disclose certain communications between a person and their lawyer. To attract the protection, the communication must be intended to be confidential **and** must relate either to a request for legal advice or a request for representation in current or anticipated civil or criminal legal proceedings.

### **4.6 Privacy**

When requiring the answer to any questions under s171(1)(c), the interview must be conducted in private, as provided by s171(3), if:

- *the inspector considers it appropriate, or*
- *the person being interviewed requests privacy.*

The requirement for privacy does not prevent a representative of the person from being present at the interview nor someone assisting the inspector under s166.

The request for privacy may arise at any time during the interview and the obligation to provide privacy is the inspector’s responsibility from that point in time.

### **4.7 Making copies of documents**

Section 174(1) empowers an inspector to make copies of, or take extracts from, a document that is given to them in accordance with a requirement made by the inspector under s165 or s171.

Section 174(1)(b) allows the inspector to keep the document as long as he/she considers necessary.

*The “as long as necessary” period will depend on the purpose the document serves – such as evidence for proceedings (noting the statutory time limitations for prosecution of offences) or to assist making any other decision under the WHS Act.]*

Section 174(2) provides that, while the inspector retains custody of the document, it must be made available at all reasonable times for inspection or copying by the person who produced the document, its owner, or a person authorised by either the previously noted two persons.

### **4.8 Seizing a document**

Sections 175 to 181 provide powers and obligations relating to seizure of things, including documents.

- *Refer to MOP SAFE 11/0835 Powers of seizure*

#### 4.9 Offence to give false or misleading information

Section 268 provides that it is an offence for a person to give information that they know to be false or misleading (including by omission where that makes the information provided misleading in some way) in complying or purportedly complying with the Act.

A person **must not** produce a document that they know is false or misleading in a material particular without;

- *indicating in what respect it is false or misleading, and if practicable providing the correct information; or*
- *providing a written statement with the document signed by the person or competent officer of the body corporate to the effect that they know the document to be false and misleading and setting out or referring to the material particular in which the person knows the document to be false or misleading*

Section 268(3) places an evidential burden on the person accused of giving false or misleading information to show that they had indicated the extent to which the document was false or misleading or that they had sufficiently explained this fact in the accompanying explanatory document.

#### 4.10 Require name and address

In making inquiries under s165 an inspector may reasonably require the name and address of a person at the workplace. If that information is not provided voluntarily, or the inspector requires this information from someone not at a workplace, then s185(1) enables an inspector to ask a person to state their name and residential address if the inspector:

- *finds the person committing an offence against the Act; or*
- *finds the person in circumstances that lead, or has information that leads the inspector to reasonably suspect the person has committed an offence against the Act; or*
- *reasonably believes that the person may be able to assist them in the investigation of an offence against the Act.*

When exercising the power to require a person's name and residential address, s185(2) provides that an inspector must:

- *inform the person of the reason and requirement for provision of their name and residential address; and*
- *warn the person that it is an offence to fail to state their name and residential address unless they have a reasonable excuse not to do so.*

#### **Regulator's policy**

It is the WHS regulators' policy that an inspector will show their inspector identification card when exercising the power to require a person's name and address under s185.

Section 185(3) provides that an inspector who reasonably believes that the name or residential address given is false may require the person to give evidence of its correctness.

#### **Note: Privacy laws do not affect the powers of inspectors under the WHS Act.**

State, Territory and Commonwealth privacy laws regulate how government bodies and many private sector organisations collect, use, disclose and otherwise handle personal and health information about individuals. Under these privacy laws, personal and health information about an individual can be used and disclosed if required or authorised by law. The WHS Act is such a law.

Disclosing personal and health information to inspectors who are exercising powers in accordance with the WHS Act to require answers to questions, including name and address, or require documents to be produced is not prohibited by the privacy laws.

## 5. PROCEDURE

### 5.1 Procedure – Part A – Documents

Responsibility	Description
<p><b>Inspector</b></p>	<p><b>Inspect or examine a document</b></p> <p>Having entered the workplace, if you see a document (e.g. in the possession of someone you are dealing with or on a notice board), or reasonably believe there is a document in existence that you wish to examine to assist you in your inquiries, you may examine the document under s165(1)(b) whether or not you have asked for it.</p> <p>If a document you are seeking is not immediately accessible to you, you may request that it be provided to you.</p> <p><b>Search warrant</b></p> <p>If you have difficulty the obtaining documents you requested, you have two options:</p> <ul style="list-style-type: none"> <li>• issue an s171(2) written notice to provide documents (<i>see ‘Requiring Documents to be Produced...’</i> section on page 7 of this MOP); or</li> <li>• if you have a reasonable belief such documents exist and where they are or may be held, you should discuss with your line manager, the obtaining of a search warrant to locate and seize the documents. <ul style="list-style-type: none"> <li>○ See MOP SAFE 11/0808 Search Warrants; and</li> <li>○ MOP SAFE 11/0835 Powers of Seizure; and</li> <li>○ SOP WKP 06/0454 Exhibit Property</li> </ul> </li> </ul>
<p><b>Inspector</b></p>	<p><b>Person refuses to tell you who has custody of or access to a required document or fails to provide you with a requested document</b></p> <p>If a person refuses to tell you who has custody of or access to a document or refuses or fails to comply with your request to inspect and examine a document under s165, consider exercising your coercive power under s171(1). (Note: This refusal may constitute a breach of s165(2).</p> <p>Before requiring a person (<b><u>on behalf of a PCBU</u></b>) to provide information about a document, or to produce a document, or to answer any of your questions about the document, you must pursuant to s173(1):</p> <ul style="list-style-type: none"> <li>• identify yourself to the person as an inspector by producing your identity card or in some other way</li> <li>• warn the person that a failure to comply with the requirement to produce the document without reasonable excuse, is an offence;</li> <li>• inform the person that they are not required to produce any document that is subject to legal professional privilege.</li> </ul> <p>Before requiring a <b><u>natural</u></b> person to provide information about a document, or to produce a document, or to answer any of your questions about the document, you must pursuant to s173(1):</p> <ul style="list-style-type: none"> <li>• identify yourself to the person as an inspector by producing your identity card or in some other way</li> <li>• warn the person that a failure to comply with the requirement to produce the document without reasonable excuse, is an offence;</li> <li>• warn the person that they are excused from providing information or a document on the grounds that to do so may tend to incriminate them; &amp;</li> <li>• inform the person that they are not required to produce any document that is subject to legal professional privilege.</li> </ul>

Responsibility	Description
<p><b>Inspector</b></p> <p><i>Continued from previous page</i></p>	<p>For further information relating to your obligation to producer inspector identification, refer to <a href="#">appendix 2</a> of this procedure.</p> <p><b>Requiring document(s) to be produced at a later time</b></p> <p>In relation to requiring document(s) to be produced under s171(1)(b), complete the notice to provide documents (<a href="#">appendix 3</a>) or use you hard copy notice books as provided, and specify the date/time by when the documents are to be provided to you. The time period specified should allow sufficient time for the person to whom the request is made to locate and compile the document(s), taking into account the number of documents requested and whether or not they are located at the workplace. (Note that the person may also need to seek advice on whether any of the documents are subject to legal professional privilege.)</p> <p><b>Requiring document(s) to be produced while you are present</b></p> <p>If you require the document(s) to be produced while you are still at the workplace, a written notice requiring them to be produced will need to be provided to the person at the time the request is made. The notice to provide documents is shown at <a href="#">appendix 3</a> of this procedure, and all inspectors are provided with hard copy books of these notices.</p> <p><b>Requiring immediate access to document(s)</b></p> <p>Section 171(2) provides that written notice of a request to produce documents is not required if you need immediate access to the documents. For example, you might request to see a Safe Work Method Statement to form a belief as to whether a task is to be conducted in a manner that gives rise to a serious risk emanating from an immediate or imminent exposure to a hazard.</p> <p>Ensure you make adequate field notes to justify your reasons why immediate access to a document was required. Do not record these reasons on the inspection report.</p> <p><b>Continuation of identification and warnings</b></p> <p>During your inspection, if you have already shown your inspector identification and warned and informed the person regarding the abrogation of the privilege against self incrimination and the availability of legal professional privilege, and you wish to see other documents, it is sufficient to remind the person that you have previously warned and informed them of this, and you need not repeat the process.</p> <p><b>Multiple documents</b></p> <p>If you know there are multiple documents you wish to see, you may list them together in one written request (<a href="#">appendix 3</a>) of this procedure for example notice of document provision whilst at the workplace, or list the required documents for later collection on the inspection report).</p> <p><b>Search warrant</b></p> <p>If you have difficulty the obtaining documents you require and you have a reasonable belief such documents exist and where they are or may be held, you should consider obtaining a search warrant to locate and seize the documents.</p> <ul style="list-style-type: none"> <li>○ <i>See MOP SAFE 11/0808 Search Warrants; and</i></li> <li>○ <i>MOP SAFE 11/0835 Powers of Seizure; and</i></li> <li>○ <i>SOP WKP 06/0454 Exhibit Property</i></li> </ul>

Responsibility	Description
Inspector	<p><b>Person fails to comply with s 171</b></p> <p>If the person continues to refuse or fails to comply with your requirement to produce document(s) under s171, explain again that it is an offence to not provide the requested document(s) without a <a href="#">reasonable excuse</a>, and ask why they are refusing to do so.</p> <p>If not already known, obtain the person's name and residential address, exercising your power under s185 if so required.</p> <ul style="list-style-type: none"> <li>• Refer to <a href="#">Section 5.3</a> of this procedure</li> </ul> <p>Contact your line manager and consider referring the matter for comprehensive investigation in relation to the person failing to provide documents.</p> <ul style="list-style-type: none"> <li>• Refer to SOP WKP 05/0172 Investigations; and</li> <li>• SOP WKP05/0109 Case Conference</li> </ul> <p>Consult with your line manager and consider obtaining a search warrant to obtain the documents you require.</p> <ul style="list-style-type: none"> <li>○ See MOP SAFE 11/0808 Search Warrants; and</li> <li>○ MOP SAFE 11/0835 Powers of Seizure; and</li> <li>○ SOP WKP 06/0454 Exhibit Property</li> </ul>
Inspector	<p><b>Legal professional privilege is claimed</b></p> <p>You are not required to determine or form judgement about legal professional privilege claims made under s269. Generally such a claim would ultimately be determined in a court unless resolved earlier with the party claiming the privilege.</p> <p>Inform the person that:</p> <ul style="list-style-type: none"> <li>• if they agree to produce a privileged document, ask the person to complete and sign a <a href="#">privilege waiver form</a>. Ensure the waiver form is signed before taking possession of the document; (Note: the person is not obliged to sign the privilege waiver form and you do not have power to compel this be done. Explain their purpose as providing clarity in relation to the inspector's request and response provided).</li> </ul> <p>Or</p> <ul style="list-style-type: none"> <li>• if they claim legal professional privilege on the document(s): <ul style="list-style-type: none"> <li>○ detail the document on the <a href="#">Privileged Document Register</a>, and</li> <li>○ seek to obtain the claimants signature on the relevant place on the Register(Note: the person is not obliged to sign the privileged document register and you do not have power to compel this be done. Explain their purpose as providing clarity in relation to the inspector's request and response provided.) and</li> <li>○ use your power to require reasonable help under s165(1)(f) and direct the person to secure the document, and</li> <li>○ advise the person you will refer the matter to the regulator to consider applying for a search warrant to seize the documents, and</li> <li>○ Allow the person reasonable time to seek legal advice, and</li> <li>○ Discuss the matter with your line manager with respect to determining what actions, if any, will be taken to obtain the document; e.g. decide if a search warrant be obtained. <ul style="list-style-type: none"> <li>▪ Refer MOP SAFE 11/0808 Search Warrants</li> <li>▪ Refer SOP WKP05/0109 Case Conference</li> </ul> </li> </ul> </li> </ul>

Responsibility	Description
<p><b>Inspector</b></p> <p><i>Continued from previous page</i></p>	<div style="border: 1px solid black; padding: 10px;"> <p><b>SA Jurisdictional Guidance Note</b></p> <p>It is a basic rule of evidence that original documents be seized, and a copy is given to the provider to continue business operations. This is particularly important for matters that may proceed to prosecution</p> <p>If the matter being investigated is of a minor or routine nature such as a complaint, audit, licensing matter etc.; and progression of the matter to the Industrial Relations Court of South Australia is not or is unlikely to be contemplated; a copy of an original document will suffice.</p> </div>
<p><b>Inspector</b></p>	<p><b>Make a copy of a document</b></p> <p>You have the power to make a copy of a document under s174(1)(a)</p> <p>If the place does not have the facilities to make a copy of a document, the following options are available to you:</p> <ul style="list-style-type: none"> <li>• use your powers under s174(1)(a) and save an electronic copy to a portable USB storage device or CD;</li> <li>• keep the document under s174(1)(b) and remove it from the place, copy it, and return the original document as soon as possible;</li> <li>• if there is a facsimile machine at the place, exercise your powers under s165(1)(g) and fax the document could be faxed to your local office;</li> <li>• take a photograph using your digital camera; or</li> <li>• return at another time and take (if available) a portable copier to make the copy you require.</li> </ul> <p>While you retain custody of a document, under s181(1) it must be made available at all reasonable times for inspection or copying to the person who produced the document, the document owner or a person authorised by either of them. You may instead provide a copy directly to the person if that is their preference.</p> <p>If a person voluntarily provides a copy of a document to the inspector to take away, the inspector is not exercising a power in accepting that document. A receipt is not required under s178 in this circumstance however you must record the voluntary provision of the document this in your notebook and on the Inspection Report.</p>
<p><b>Inspector</b></p>	<p><b>Seize a document</b></p> <p>You have the power to keep (seize) document under s174(1)(b)</p> <ul style="list-style-type: none"> <li>• <i>Refer to MOP 11/0835 Powers of Seizure</i></li> </ul>
<p><b>Inspector</b></p>	<p><b>Notebook entries</b></p> <p>Take detailed notes of all inspector activities in your inspector notebook.</p> <p>For information on what should be included in notebooks, refer to:</p> <ul style="list-style-type: none"> <li>• MOP 11/ 0844 <i>Entry to workplaces and related powers and obligations;</i> and</li> <li>• <i>Compliance &amp; Investigation Manual;</i> and</li> <li>• <i>Operational Guidance Note – Contemporaneous Notes (when developed)</i></li> </ul>

Responsibility	Description
Inspector	<p><b>Prepare and issue Inspection Report</b></p> <p>Actions taken under this procedure should be recorded in your Inspection Report for the visit.</p> <p>Ensure, where you have exercised the s171(1)(b) power to require document(s) to be produced that your Inspection Report includes one of the following references (as relevant):</p> <ul style="list-style-type: none"> <li>• that you provided a written notice under s171(2) requiring document(s) to be produced by a specified date and time;</li> <li>• that you provided a written notice under s171(2) to a person requiring document(s) be produced while you were present at the workplace; or</li> <li>• that, during the inspection, you required immediate access to document(s) (for which written notice was not required).</li> </ul>
Inspector	<p><b>Records and evidence management</b></p> <p>All documents and copies taken associated with the visit must be readily accessible and retrievable.</p> <p>Documents or copies that may be used as evidence require chain of custody to be maintained. Refer to:</p> <ul style="list-style-type: none"> <li>• <i>State Records Act 1997; and</i></li> <li>• <i>MOP 11/0835 Powers of Seizure; and</i></li> <li>• <i>SOP WKP 06/0454 Exhibit Property</i></li> </ul>

## 5.2 Procedure Part B – Questions

Responsibility	Description
<b>Inspector</b>	<p><b>Ask questions – s 165(1)(a)</b></p> <p>Having entered a defined workplace, you can make enquires as appropriate by exercising your powers under s 165(1)(a). This includes asking questions in relation to anything (including questions about a document).</p> <p>If you are voluntarily provided with a document whilst you are not at a defined workplace (eg either receiving it in person or by mail, fax or email), you may ask questions about the document by telephone or other method as necessary. You are not exercising a power under s165 in doing so, so you have no power to require compliance in this case. Make notes of the document receipt, any questions asked and responses provided.</p> <p>If you cannot get the required answers via telephone or any other method, you must enter a workplace under s165, and ask questions about the document under s171(1)(c).</p>
<b>Inspector</b>	<p><b>Person fails to answer your questions</b></p> <p>If the person refuses or fails to answer the questions you ask under s165(1)(a), consider exercising your coercive power under s171(1)(c) . This power can only be exercised when you have entered a workplace.</p> <p>Before requiring a person (<b>representing<sup>1</sup> a body corporate</b> to answer any questions under 171(1)(c), you <b>must</b> under s173(1):</p> <ul style="list-style-type: none"> <li>• identify yourself to the person as an inspector by producing your identity card or in some other way</li> <li>• warn the person that a failure to comply with the requirement to produce the document without reasonable excuse, is an offence;</li> <li>• inform the person that they are not required to produce any document that is subject to legal professional privilege.</li> </ul> <p>Before requiring a <b>natural</b> person or person who is a sole trader or partner in a partnership to answer any questions under 171(1)(c), you <b>must</b> under s173(1):</p> <ul style="list-style-type: none"> <li>• identify yourself to the person as an inspector by producing your identity card or in some other way</li> <li>• warn the person that a failure to comply with the requirement to produce the document without reasonable excuse, is an offence;</li> <li>• warn the person that they are excused from providing information or a document on the grounds that to do so may tend to incriminate them;</li> <li>• inform the person that they are not required to produce any document that is subject to legal professional privilege.</li> </ul> <p>Repeat your question again and seek the answer to your question.</p> <p>For further information in relation to your obligation to produce inspector identification and warn and inform the person, refer to <a href="#">appendix 2</a> of this procedure.</p> <p>Note: The tendency to self-incriminate does not excuse any person from answering an inspector’s questions, whether that person is a worker, a management representative or an officer (or any other natural person). The self-incrimination privilege is not available to corporations, and nor can anyone speaking on behalf of a corporation claim the privilege.</p>

<sup>1</sup> ‘Representing’ in this case is not limited to a person speaking on behalf of the body corporate under the auspices of a ‘Confirmation of Authority’ at Record of Interview. It also includes a person who can provide information and documents on behalf of the body corporate, for example a supervisor, manager or safety advisor.

Responsibility	Description
	<p>If you have already shown your inspector identity card and warned and informed the person, and you need to ask additional questions, it is sufficient to remind the person that you have previously warned and informed them of this, and you need not repeat the process</p>
<b>Inspector</b>	<p><b>Person fails to comply with s 171</b></p> <p>If a person representing a body corporate continues to refuse or fails to comply with your requirement to answer question(s), explain again that it is an offence to not provide the requested answer(s) without a <a href="#">reasonable excuse</a>, and ask why they are refusing to do so.</p> <p>If you do not already have the person's name and residential address, exercise your power under s185 and obtain them.</p> <ul style="list-style-type: none"> <li>• Refer to <a href="#">Section 5.3</a> of this procedure</li> </ul> <p>Contact your line manager and consider referring the matter for comprehensive investigation in relation to the person failing to answer questions.</p> <ul style="list-style-type: none"> <li>• Refer to SOP WKP 05/0172 Investigations</li> <li>• Refer SOP WKP05/0109 Case Conference</li> </ul>
<b>Inspector</b>	<p><b>Notebook entries</b></p> <p>Take detailed notes in your inspector notebook.</p> <p>For information on what should be included in notebooks</p> <ul style="list-style-type: none"> <li>• Refer to MOP 11/ 0844 <i>Entry to workplaces and related powers and obligations</i>, and</li> <li>• <i>Compliance &amp; Investigation Manual</i></li> <li>• <i>Operational Guidance Note – Contemporaneous Notes (when developed)</i></li> </ul>
<b>Inspector</b>	<p><b>Prepare and issue Inspection Report</b></p> <p>Actions taken under this procedure should be recorded in your Inspection Report for the visit.</p>

### 5.3 Procedure – Part C - Name And Address

Responsibility	Description
<b>Inspector</b>	<p><b>Seeking a persons name and residential address</b></p> <p>Section 185 (1) provides that if you observe a person committing an offence against the WHS Act; or reasonably suspect that they have done so; or you reasonably believe that they can assist you in an investigation of an offence, you have the power to :</p> <ul style="list-style-type: none"> <li>• seek their name and address under s165(1)(a) [if you are at a workplace]; or</li> <li>• exercise your coercive power under s 185(1) to direct the person to state their name and residential address;</li> </ul> <p>And you must</p> <ul style="list-style-type: none"> <li>• under s185(2)(a) inform the person of the reason for the requirement; and</li> <li>• under s185(2)(b) warn the person that it is an offence to fail to state their name and residential address unless they have a reasonable excuse not to do so.</li> </ul> <p>For information on the meaning of “reasonable suspicion” and “reasonable belief” in the context of seeking a person’s name and address, refer to <a href="#">appendix 8</a> of this procedure.</p>
<b>Inspector</b>	<p><b>Person fails to provide their name and residential address</b></p> <p>If the person refuses or fails to provide their name and address, explain again that it is an offence to not provide the requested answer(s) without a reasonable excuse, and ask why they are refusing to do so.</p> <p>Explain to the person it is their responsibility to prove that the excuse for not providing their name and residential address is a reasonable excuse.</p> <p>For information on “reasonable excuse”, refer to <a href="#">appendix 4</a> of this procedure.</p> <p>Seek to independently identify the person, for example, by asking a work colleague or supervisor at the workplace.</p> <p>Record as many identifying details of the person as possible in your inspector notebook, for example, a description of their physical features, clothing worn including any logos, location in the workplace and the date and time when discussions took place and if possible car registration details.</p>
<b>Inspector</b>	<p><b>You consider the information provided is false</b></p> <p>If you reasonably believe the name or residential address provided to you is false, you may require the person, under s185(3), to give evidence of its correctness.</p> <p>This may be through requiring to see the person’s driver’s licence or other form of identification.</p>
<b>Inspector</b>	<p><b>Person continues to refuse to provide name and residential address or you continue to suspect false details have been provided</b></p> <p>If the person continues to refuse to provide their name and residential address or you suspect they have provided false or incorrect details, advise the person that the matter may be referred for comprehensive investigation.</p> <p>Contact your line manager for further advice or assistance and consider referring the matter for comprehensive investigation.</p> <ul style="list-style-type: none"> <li>• <i>Refer to SOP WKP 05/0172 Investigations</i></li> </ul>

Responsibility	Description
Inspector	<p><b>Notebook entries</b></p> <p>Take detailed notes in your inspector notebook.</p> <p>For information on what should be included in notebooks</p> <ul style="list-style-type: none"> <li>• Refer to MOP 11/ 0844 <i>Entry to workplaces and related powers and obligations</i>, and</li> <li>• <i>Compliance &amp; Investigation Manual</i></li> </ul>
Inspector	<p><b>Prepare and issue Inspection Report</b></p> <p>Actions taken under this procedure should be recorded in your Inspection Report for the visit.</p>

## 6. FURTHER INFORMATION

- Related SOP's and MOP's are detailed in the body of this procedure
- Compliance and Enforcement Policy
- Framework For a Common Approach to Inspection Work
- Principles of Operation for the WHS Inspector

## 7. REVIEW

This SOP must be reviewed two (2) years after the date of issue. However, this document must be immediately modified if practices and/or procedures change.

**Document owner:** Operational Support Team

**Contact:** [REDACTED]

### Version control information:

- V1 – Approved 25 Jan 2012
- V2 – 31 Dec 2012

## **8: Appendix 1: Guidance – Part 1 – What is a “document”?**

“Document” means any record of information and includes, in addition to a document in writing —

- any book, map, plan, graph, or drawing;
- any photograph;
- anything on which there is writing;
- anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and
- anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them.

A reference to a document includes a reference to:

- any part of the document; or
- any copy, reproduction or duplicate of the document or of any part of the document; or
- any part of such a copy, reproduction or duplicate.

## 9. Appendix 2: Guidance – Part 2 - Inspector identification and warn & inform requirements when requiring documents to be produced and answers to questions under s. 171

Before requiring a person to answer a question, provide information or produce a document under s171, an inspector must identify themselves as an inspector by producing their inspector identity card or in some other way.

**WHS Regulators have determined that the preferred and usual method of identification is your inspector identity card.** (Because s157(2) requires that inspectors produce their identity card upon request when they exercise compliance powers, it is expected that inspectors will carry their identity card with them at all times when likely to exercise their powers.)

However, other than your inspector identity card, other means of identification as an inspector which could be used in exceptional circumstances, include:

- a copy of the instrument by which your WHS regulator appointed you as an inspector;
- a business card with the WHS regulator branding which identifies you as an inspector appointed under the WHS Act; and
- making arrangements for the person with whom you are dealing to make contact with the WHS regulator (e.g. your line manager or other WHS regulator officer known to the person) and seek confirmation you are who you say you are.

Note, though, that even if you use any of the other means of identification, you may still be required to produce your identity card when you exercise your compliance powers under s171 (as for any other power).

Before requiring a person (**on behalf of a body corporate**) to answer any questions, provide information or produce a document, an inspector **must**:

- identify yourself to the person as an inspector by producing your identity card or in some other way
- warn the person that a failure to comply with the requirement to produce the document without reasonable excuse, is an offence;
- inform the person that they are not required to produce any document that is subject to legal professional privilege.

Before requiring a **natural** person (including sole traders and partners in a partnership) to answer a question, provide information or produce a document, an inspector **must**:

- identify yourself to the person as an inspector by producing your identity card or in some other way
- warn the person that a failure to comply with the requirement to produce the document without reasonable excuse, is an offence;
- warn the person that they are excused from providing information or a document on the grounds that to do so may tend to incriminate them;
- inform the person that they are not required to produce any document that is subject to legal professional privilege.

If the warning under s 173(1) has not been provided by the inspector, then a person cannot be found guilty of an offence in refusing to answer a question put by the inspector or provide information or a document on the grounds that it may tend to incriminate them.

\* The warning required under s171 is different from the General Caution (Judges Rule) given to persons whom are suspected of committing an offence.

Nothing prevents the inspector from obtaining and using evidence that was given voluntarily to them.

**Warning to be used when requiring production of a document or an answer to question(s)**

***WARNING to be given to a person representing a body corporate***

*My name is [John Smith]. I am an inspector appointed under the Work Health and Safety Act. Here is my identity card [SHOW CARD]. I require you to answer my questions pursuant to Section 171 of the Work Health and Safety Act. I may also require you to provide information to me, and I may require you to provide documents to me. I warn you that if you fail to answer my questions /provide information/produce documents you will commit an offence against the Act. Do you understand this?*

*I also advise that you do not have to disclose or provide information that is the subject of legal professional privilege. Do you understand this?*

*Can you tell me what you understand of the warning and advice that I have just given you?*

***WARNING to be given to a Natural person / sole trader / individual partners of a partnership***

*My name is [John Smith]. I am an inspector appointed under the Work Health and Safety Act. Here is my identity card [SHOW CARD]. I require you to answer my questions pursuant to Section 171 of the Work Health and Safety Act. I may also require you to provide information to me, and I may require you to provide documents to me. I warn you that if you fail to answer my questions /provide information/produce documents you will commit an offence against the Act. Do you understand this?*

*I also warn you that you **are** excused from answering a question or providing information or a document on the ground that your answer, the information or document may tend to incriminate you or expose you to a penalty. Do you understand this?*

*I also advise that you do not have to disclose or provide information that is the subject of legal professional privilege. Do you understand this?*

*Can you tell me what you understand of the warning and advice that I have just given you?*

**10. Appendix 3: Guidance – Part 3 – Written notice template for requiring documents to be produced while an inspector is present at a workplace**

This form available electronically via InfoNET “add activity” menu, and hard copy books are provided to each inspector via Operational Support Team



Government of South Australia  
SafeWork SA

*Work Health and Safety Act 2012 (SA)*

Section 171(2)

**NOTICE TO PROVIDE DOCUMENTS TO AN INSPECTOR**

To name of person this notice is being given to: .....  
Name of workplace: .....  
ABN or ACN of workplace: .....  
Address of workplace: .....  
Suburb/Town of workplace: .....  
Postcode of workplace: .....  
State: .....

I, ..... being an inspector appointed under section 156(1) of the *Work Health and Safety Act 2012 (SA)*, and having entered the above detailed workplace pursuant to section 163(1) of the *Work Health and Safety Act 2012 (SA)*, require you, as a person having custody of or access to the following document(s), to produce that / those\* (\*delete inapplicable) document(s) to me *forthwith or within a specified period, namely.....am/pm on...../...../.....*

1. ....
2. ....
3. ....
4. ....
5. ....
6. ....
7. ....
8. ....
9. ....
10. ....

Signed: ..... Inspector *Work Health & Safety Act 2012 (SA)*  
Date: ..... Telephone: .....

Reverse side of section 171(2) notice

### **Privacy collection statement**

SafeWork SA collects, uses, discloses and stores information in accordance with the Work Health and Safety Act 2012 (SA), other legislation administered by SafeWork SA and all applicable privacy laws. This includes information collected by SafeWork SA inspectors or authorised officers. Note that privacy laws do not apply if other laws conflict or allow or require the collection of information, and do not apply to the collection of information by SafeWork SA to the extent that it is exercising its law enforcement functions and non-compliance with privacy legislation is deemed necessary to fulfil those functions. SafeWork SA's privacy information is on our website at [www.safework.sa.gov.au](http://www.safework.sa.gov.au)

### **Penalties**

You must comply with this notice within the period specified. Failure to comply may incur a maximum penalty of:

- \$10,000 for an individual; or
- \$50,000 for a body corporate.

## **11. Appendix 4: Guidance – Part 4 – Definition of Reasonable Excuse for not providing documents, answers to questions or name and address**

Section 171(6) of the WHS Act provides that a person must not, without reasonable excuse, refuse or fail to comply with an inspector's request for information, answers to questions or production of documents.

A Court will ultimately determine whether an excuse is reasonable on a case by case basis depending on the circumstances and the context in which the inspector's request is made. If a person fails to comply with an Inspectors request, Inspectors should put questions to the person to explore whether or not the person has a reasonable excuse.

Generally a "reasonable excuse" will be in a situation where it is not within a person's power or control to comply with an inspector's request.

**It may be considered a reasonable excuse for a person to fail to assist you, answer questions or provide information if you do not produce your identification prior to exercising a compliance power.**

For example: a "reasonable excuse" could be that the person:

- may not have access to the document requested;
- does not know who has access to or custody to the document requested;
- may not know the answer to the question;
- may have no direct knowledge of the information sought and may be being asked to speculate;
- needs time to gather information to be able to answer the question put by the inspector; or
- the document requested is subject to legal professional privilege (Note: a person is still required to inform an inspector who has access to or control of privileged documents).

Inconvenience does not amount to "reasonable excuse".

The following information is aimed at helping determine whether a person has "access to" or "custody of" a document.

"Access to" is beyond the notion of possession, in that persons who have access to a document are not necessarily in possession of it. Many persons within a workplace would likely have access to a document.

However, in practical terms, and given an exercise of power under section 171(1) will require the provision of a written notice under section 171(2) in most instances, a requirement to provide a document will generally be limited to persons who could be *expected*, because of their role or responsibilities in the workplace, to have access to a particular document.

A determination as to whether someone has access to a document will involve considerations such as what the document is, what purpose the document serves, as well as its availability within a workplace. A document that is a general workplace policy or procedure would be expected to have broad distribution, and hence accessibility within a workplace. For such a document, the question of access to such a document would be relatively straightforward.

continued next page..

The sorts of questions that might assist an inspector to determine whether a person has “access to” a document include:

- whether a person had any role in preparing, developing, authorising or approving a document;
- whether a person had any responsibility to administer a process or policy set out in a document or undertake any function arising from a document; or
- whether a person’s role would, in and of itself, mean that they are likely to know where a document is kept, such as an administrative assistant.

The reference to “custody of” in section 171(1) includes ‘having the care of’. Accordingly, an assessment by an inspector that a person could be expected to have “custody of” will be appropriate where a person has responsibility for:

- the safe keeping or filing of that document;
- ensuring dissemination of that document; or
- maintaining the currency of that document.

Inspectors should frame their questions to establish who has custody of a required document around the above factors.

The person accused of failure to comply with the request of an inspector under s 171 bears the onus of proof to show that they had a reasonable excuse not to comply.

Section 185(4) of the WHS Act provides that a person must not, without reasonable excuse, refuse or fail to comply with an inspector’s request for their name and address or – if the inspector reasonable believes the name and address given is false – a request to give evidence of its correctness.

A “reasonable excuse” could be that the person is:

- homeless;
- an international tourist staying in a hotel; or
- under Diplomatic Immunity.

Inconvenience does not amount to “reasonable excuse”.

The burden of proof lies with the person accused of failing to comply with the request to show that they had a reasonable excuse to do so.

## 12A. Appendix 5: Guidance – Part 5 - Legal professional privilege

Legal professional privilege is a rule of law that protects the confidentiality of communications made between a lawyer and his or her client. **The privilege belongs to the client** and may only be waived by the client.

Legal professional privilege protects **confidential communications** between a lawyer and his or her client made for the **dominant purpose** of -

- seeking or giving legal advice or professional legal assistance; or
- use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

Legal professional privilege also protects **confidential communications** between the client or the client's lawyers (including communications through employees or agents) and **third parties** made for the dominant purpose of use, or obtaining material for use, in legal proceedings that had commenced, or were reasonably anticipated, at the time of the relevant communication.

Examples of documents that may be protected by legal professional privilege include:

- letters to lawyers seeking legal advice and letters from lawyers providing legal advice;
- file notes or memoranda made by the client or the client's lawyer which relate to the legal advice sought;
- drafts of documents subsequently filed in court;
- statements of witnesses obtained by lawyers or their agents, for the dominant purpose of use in legal proceedings; and
- documents created in response to requests by the client's lawyer to enable him or her to advise the client or to conduct litigation on behalf of the client.

Examples of documents that may not be protected by legal professional privilege are witness statements or other investigative material which would have been created for administrative purposes in any event, irrespective of possible legal proceedings.

Note: This procedure relates to an inspector's power to require documents under s171 of the WHS Act where documents that are claimed to be the subject of legal professional privilege are not examined or taken by inspectors. However, there is also a power under s175 of the WHS that an inspector may seize a document for escalated investigation purposes even if it is claimed to be the subject of legal professional privilege.

If seizing such a document is contemplated:

- *Refer to MOP 11/0835 Powers of Seizure, and*
- *SOP WKP 06/0454 Seizure & Storage of Exhibit Property*

Electronic form only  
 Available from this SOP at:

- Q:\Shared Data (RO) (SWSA)\Laptops\WHS\MOPs\WHS s171Documents and Questions MOP; or
- SWSA Intranet>>WHS Tools and Information>>MOPs>> WHS s171Documents and Questions MOP; or
- Inspector laptops C:\Resources>>WHS>> MOPs>> WHS s171Documents and Questions MOP

**12B: Appendix 6: Privileged Document Register**

Details of any documents claimed to be the subject of legal professional privilege should be recorded on this pro-forma template:

File Name: WHS .....				Filecode:.....		Page: ..... of .....	
Doc. ID no.	In whose name privilege is claimed	General Description	Date of Document	Typed (T) H/Written (HW)	Original (O) Photocopy of original (P/C) Copy of a copy (C)	Grounds of privilege claim	Signature of claimant
	A. Jones	Letter to A Jones from X providing advice in relation to subject matter Z.	1/10/90	Typed	P/C	Communication of advice from Solicitor to client	
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9.							
10.							

**12C. Appendix 7: Template Privilege Waiver Form**

Is used when document which was previously the subject of a claim for legal professional privilege is subsequently made available to you, you should obtain a waiver of privilege form for the document.

Hard copy books only and are available to each inspector via Operational Support Team



Government of South Australia  
SafeWork SA

*Work Health and Safety Act 2012 (SA)*

**WAIVER OF PRIVILEGE**

---

DATE: .....

TO: ..... (name of inspector)

I, ..... release the following document(s) and I hereby waive any privilege which may attach to them.

- 1. ....
- 2. ....
- 3. ....
- 4. ....
- 5. ....
- 6. ....
- 7. ....
- 8. ....
- 9. ....
- 10. ....

Signature of person waiving privilege: ..... Date: .....

Name of person waiving privilege: .....

Signature of Inspector (Witness): ..... Date: .....

Name of Inspector (Witness): .....

### 13 Appendix 8: Guidance – Part 6 – “Reasonable suspicion” and “reasonable belief” when asking for name and address

A person’s name and address can be requested under s185(1) of the WHS Act if they are observed committing an offence against the Act or the inspector:

- **reasonably suspects** they have done so; or
- **reasonably believes** they can assist in the investigation of an offence.

“Reasonable suspicion” and “reasonable belief” have different legal meanings, each requiring a different state of mind on the part of an inspector.

#### Reasonable suspicion

*“A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to ‘a slight opinion, but without sufficient evidence’”.*

- *Kitto J in Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266*
- *Endorsed in George v Rockett (1990) 170 CLR 104*

There must be a positive feeling that the person has committed an offence. Judgment needs to be exercised by inspectors on a case by case basis.

#### Reasonable belief

This requires a higher degree of certainty than a reasonable suspicion.

*“Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.”*

*George v Rockett (1990) 170 CLR 104*

The inspector would need more than a “hunch” and would tend to accept rather than reject the possibility that a person can assist the investigation of an offence, but concrete evidence that this is so is not required.