

# STANDARD OPERATING PROCEDURE

## Use of Expert Witnesses

February 2018

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## DOCUMENT CONTROL SHEET

### Review

This document must be modified if legislation, practices and/or procedures change and impacts on the accuracy of this SOP. This SOP must be reviewed every 36 months from the date of issue. However,

### Document Details

<b>Responsible Officer</b>	Executive Director, SafeWork SA
<b>Approval</b>	9 February 2018
<b>Version</b>	3
<b>Issued (date)</b>	February 2018
<b>Next Review</b>	February 2021
<b>RecFind Number</b>	SAFE 18/0095 PT 1

### Change History

Previous		Change from previous version	Author
Version	Issue Date		
1	Sept 2008		CALI
2	June 2013	Update in line with WHS Act	Investigation and Legal Team
3	January 2018	Current process	Corporate Services

### Contact Person

<b>Name</b>	[REDACTED]
<b>Position</b>	Principal Skills Support Officer – Resources, Corporate Services
<b>Telephone</b>	[REDACTED]
<b>Email Address</b>	[REDACTED]

### Endorsed

[REDACTED]  
Executive Director  
SafeWork SA  
9 / 2 / 2018

## PURPOSE

This Standard Operating Procedure is to be used when considering the engagement of an expert witness, who is not a worker of SafeWork SA (SWSA), to assist with any part of an investigation.

## BACKGROUND

Inspectors may require specialist technical assistance with an investigation. Assistance may be needed before the site and evidence is disturbed, for example, a land survey and geotechnical assessment of an earthworks site may be required before work continues. In other cases, physical evidence can be seized and examined later, for example, a sheet of roofing material that a person has fallen through.

Employees of SafeWork SA with the required expertise can provide significant technical assistance to an investigation. However, where an investigation leads to prosecution, it is likely an independent expert opinion report will be needed.

Expert witness selection is critical to the success of an investigation. The field of expertise required may be highly specialised, and an expert's professional experience in that field should be current. It is highly desirable that the person has experience writing expert opinion reports and giving evidence in court. Additionally they must be prepared and able to give evidence in Court if the investigation proceeds to prosecution.

Expert witness selection must also comply with the Attorney-General's Department procurement principles and procedures, and the public sector code of conduct.

Section 166 of *the Work Health and Safety Act 2012* (SA) provides a legal mechanism by which expert witnesses can enter workplaces. It provides that a person may accompany an inspector entering a workplace under section 163 of the Act if the inspector considers the assistance is necessary. Section 27(4) of the *Dangerous Substances Act 1979* contains a similar provision.

## PROCEDURE

In most situations, the need to engage an expert witness will be considered:

- at the Incident de-brief;
- during the development of the Investigation Plan and Evidence Matrix (within 48 hours of the incident);
- at the initial Case Conference (within 2 weeks post incident);
- at the Investigation Review (3 months post incident); and/or
- Legal Case Conference

If it is agreed to proceed with engaging an expert witness, the Lead Investigator will start the process of sourcing an expert witness – giving consideration to the following:

- the PCBU under investigation;
- any potential candidates known to have a conflict of interest;
- the field of expertise;
- the name and contact details of preferred candidates, if any; and
- the timeframe, particularly if urgent.

The Lead Investigator (with assistance from internal personnel as required) will identify potential expert witnesses and may make preliminary contact to obtain the candidates' availability, interest, hourly rate and curriculum vitae. The Lead Investigator will not release information about the incident, the issues to be addressed, or the identity of the PCBU/s under investigation to the

potential expert witness. They will rather focus on whether the potential witness has the expertise, and capability of undertaking whatever work is involved.

The Lead Inspector will obtain agreement from the candidate/s to maintain confidentiality<sup>1</sup>, and then may discuss the incident and issues to be addressed with the candidate/s to determine the candidate's suitability and to enable the candidate to calculate a cost estimate and delivery timeframe.

When contacting an expert witness for any reason, care must be taken to avoid any discussion that may influence the expert's opinion. A record should be kept of any the information provided to and discussions had with any expert witness.

Once a preferred candidate is selected, the Lead Inspector will draft the standard suite of engagement documents, which includes:

- a briefing minute to the Executive Director;
- a contract for the provision of services in the form of a letter of engagement between SafeWork SA and the selected expert that includes:
  - guidelines and the format, content and principles to be applied when forming a report;
  - the materials provided to them for consideration and to assist them in preparing a report;
  - any necessary factual background on the incident that may be necessary in order for them to form an opinion;
  - a list of matters on which an expert opinion is required;
  - the acceptance of the quote for the necessary work to form an opinion and subsequent production of a report;
  - other relevant acceptance conditions e.g. confidentiality, delivery of the report by a certain date and willingness to give evidence in court if necessary;
  - a pro forma contract acceptance for the expert to sign and return; and
  - a 'Confirmation of Authority for a Person to Assist an Inspector' document, if required (see template at [Appendix 1](#)).

The Policy and Governance Team will arrange for approval and signing of the documentation by the Executive Director or delegate. Approval is required before the expert witness commences any work.

The signed original letter of engagement and other contractual correspondence will be mailed by the Policy and Governance Team and recorded by them. Additionally a copy of the signed letter will be provided to the Lead Inspector for placement in the investigation file. The Inspector may email a scanned copy of the signed correspondence to the expert, particularly if the matter is urgent.

Any investigation material required by the expert witness will be provided by the Inspector. A cover letter clearly identifying all material provided will accompany the material.

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<sup>1</sup> This is done formally via the engagement letter, however it may be prudent to obtain a preliminary agreement prior to releasing any information that the candidate might need to determine suitability, identify any conflicts of interest, and estimate cost and delivery time.

Any material evidence removed from exhibit storage by the Inspector for the purposes of examination by the expert witness will be recorded in the relevant property register.

### Initial Scene Investigation

Where an Inspector attends an incident scene and believes that an expert witness is required on site at short notice, they should immediately contact the Manager, Investigations. The Manager, Investigations or delegate will facilitate the engagement of a suitable expert witness, and may seek assistance from the Primary Industries, Country Compliance, Resources and Utilities Team (PIRCCE) or other SafeWork SA personnel with particular expertise and/or capacity to assist.

In these circumstances, approval may be sought from the Executive Director for a site inspection only. It must be made clear to the expert that they are there to assistance as per sS166 and do not have approval to commence report writing or other off site activities. The expert witness must not commence these off-site activities until the letter of engagement, with issues to be addressed, cost estimate and timeframe included, has been signed by the Executive Director.

Technical investigation of an accident may require an exhibit to be seized (and usually removed from the accident site) for inspection and testing with specialist equipment<sup>2</sup>. Any exhibit seized must be managed as detailed in the *Evidence Management SOP*.

The following matters must be taken into account when determining the extent of inspection and testing of any accident site or exhibit.

- Determine what outcome is required from the inspection and testing
- Determine the processes required for such inspection and testing
- The owner of the site or exhibit must be advised when inspection and testing of any accident site or exhibit is required. The owner must also be given the opportunity to observe any inspections or testing procedures in the presence of an inspector.
- Testing must be conducted and samples must be obtained as per the requirements of any relevant Australian Standards..

Destructive testing requires special consideration. Should any seized evidence require destructive testing, the investigating **Inspector** is to seek approval from the Manager Investigation Team.

### Crown Solicitor's Office – Request for Expert

A solicitor of the Crown Solicitor's Office (CSO) may request the engagement of an expert witness after considering a Brief of Evidence.

The solicitor will usually:

- specify the field of expertise and the issues to be addressed, usually in an advice on evidence;
- determine the reference documents to be provided to the expert;
- liaise with the Inspector to determine the most suitable candidate; and
- draft the letter formally instructing the expert while the Lead Inspector drafts the letter of engagement.

The Lead Inspector will, as usual, discuss the matter with the preferred candidate and request a cost estimate. The Inspector should confirm that the solicitor has provided a final list of issues so the expert's cost estimate is an accurate reflection of the issues to be addressed.

The CSO may ask the Inspector to arrange the photocopying of material from the file, and/or provision of exhibits for consideration by the expert. It is important that this is undertaken according to the instructions of the solicitor. Only the material requested by the solicitor is to be provided to the expert. If the Inspector considers that additional information should be given to the expert witness, they shall contact the solicitor before disclosure to the expert is made.

The Lead Inspector will ensure that provision of the letters of engagement and instruction to the expert are coordinated and occur at approximately the same time.

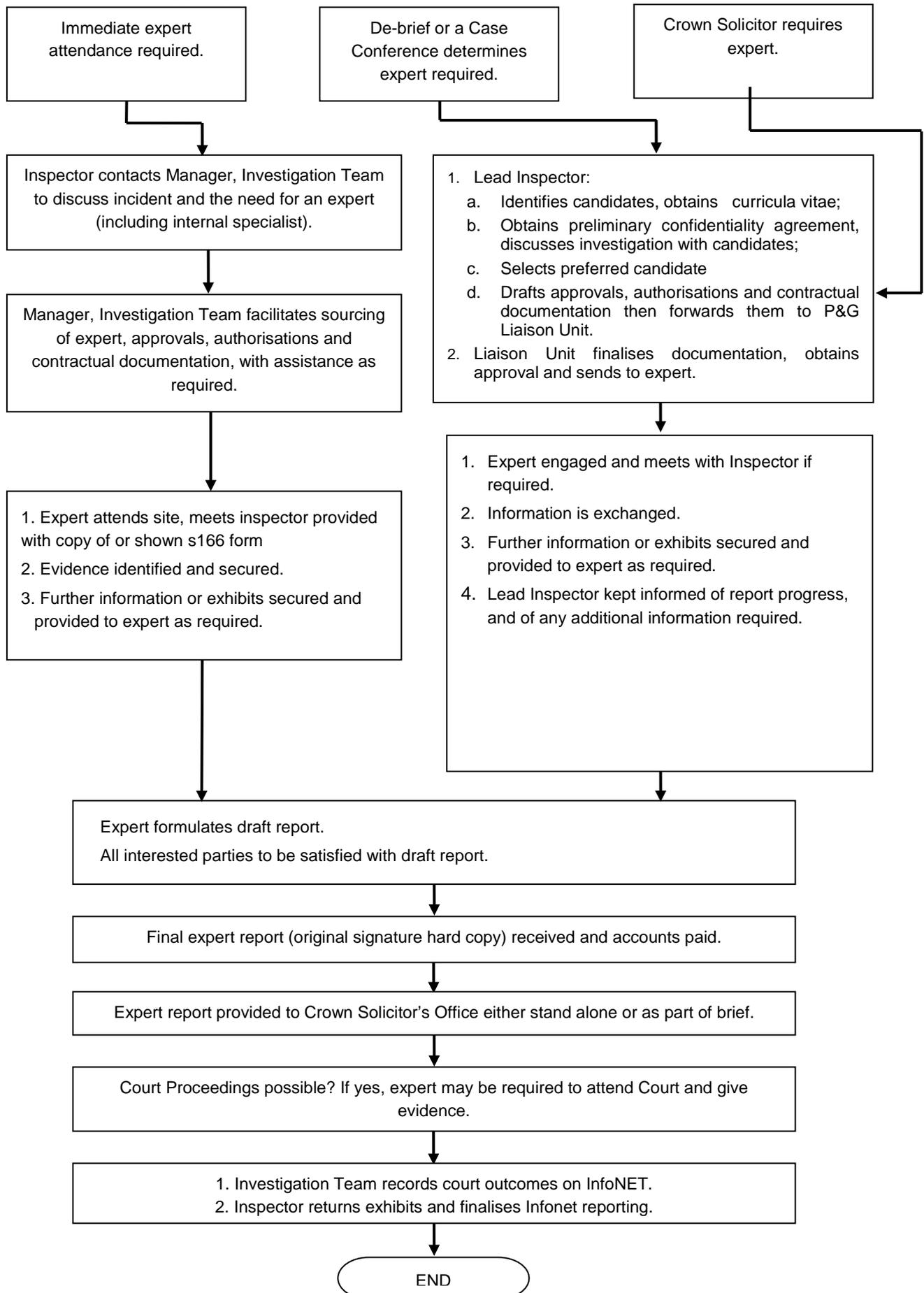
Any request for additional information from the CSO will be treated as a priority.

## **FURTHER INFORMATION**

Other related documents, SOPs or SWPs:

- Investigation SOP
- Evidence Management SOP

## APPENDIX 1 - Process Chart



## APPENDIX 2 - Confirmation of Authority for a Person to Accompany an Inspector



Government of South Australia  
SafeWork SA

### WORK HEALTH AND SAFETY ACT 2012 (SA)

#### Confirmation of Authority for a Person to Accompany an Inspector

This document confirms that the person identified below is an *assistant* (as defined by section 166 of the *Work Health and Safety Act 2012 (SA)*) who may accompany an inspector to a workplace to provide the inspector with such assistance the inspector may consider necessary.

A copy of section 166 of the *Work Health and Safety Act 2012 (SA)* is set out below.

Name of Assistant:	
Address:	
Date of Appointment:	
Date Appointment Ends:	

Signed: .....

Print or Type Name: .....

Date: ...../...../20.....

**INSPECTOR, WORK HEALTH AND SAFETY  
SAFEWORK SA**

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#### *Work Health and Safety Act 2012 (SA)*

##### *166—Persons assisting inspectors*

*(1) A person (the assistant), including an interpreter, may accompany the inspector entering a workplace under section 163 to assist the inspector if the inspector considers the assistance is necessary.*

*(2) The assistant—*

*(a) may do the things at the place and in the manner that the inspector reasonably requires to assist the inspector to exercise compliance powers; but*

*(b) must not do anything that the inspector does not have power to do, except as permitted under a search warrant.*

*(3) Anything done lawfully by the assistant is taken for all purposes to have been done by the inspector.*

## APPENDIX 3 - Summary of Responsibilities

### Lead Inspector

The Lead Inspector is responsible for:

- identifying the need for technical assistance and determining the field of expertise and list of issues to be addressed (unless done by CSO);
- determining the reference materials to be provided to the expert (unless done by CSO);
- selecting the preferred candidate from shortlist (may be done in consultation with the CSO);
- obtaining written agreement from the candidate/s to maintain confidentiality<sup>3</sup> before releasing details of incident;
- discussing details of the incident, report requirements and responsibilities with the candidate/s;
- drafting all necessary documents for engagement;
- providing details of engagement, including signed letter of engagement and signed contract acceptance pro forma, to the Liaison Team in Policy and Governance;
- contacting unsuccessful candidates once engagement is finalised;
- coordinating site visits and access to seized evidence;
- coordinating the sourcing, supply and delivery of reference material and exhibits for the expert;
- maintaining the chain of evidence for all exhibits provided to the expert;
- making notes of the expert witness' actions during inspection and ensuring evidence identified by the expert is secured as per the Evidence Management SOP;
- ensuring that no evidence is removed or retained by the expert witness during the initial investigation process (this can only occur after all approval documentation has been completed);
- ensuring the expert's report is provided on time, meets the required standard and addresses all issues (the latter two points may be done by the CSO);
- submitting expert's invoice for payment; and
- returning all information, documents or exhibits provided to the expert to the appropriate evidence storage facility when no longer required by the expert.

### Manager, Investigations

The Manager, Investigations Team is responsible for:

- assisting the Inspector to decide on the most suitable candidate, determine the list of issues and documentation to provide;
- seeking approval from the Executive Director for urgent attendance on site by an expert witness.

### Crown Solicitor's Office

When involved, Crown Solicitor's Office is responsible for:

- identifying the need for technical assistance;
- determining the field of expertise and list of issues to be addressed;
- determining the reference materials to be provided to the expert;
- selecting the preferred candidate from the shortlist; and
- determining whether the report is satisfactory.

The Solicitor may also request an addendum report where further clarification is required from the expert witness.

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<sup>3</sup> This is done formally via the engagement letter, however it may be prudent to obtain a preliminary agreement prior to releasing any information that the candidate might need to determine suitability, identify any conflicts of interest, and estimate cost and delivery time.