

AUDIO RECORDINGS

Inspectors who wish to make audio recordings of conversations with persons
Work Health and Safety Act 2012 only

The purpose of this guideline is to provide guidance and clarification to Inspectors when using audio recording devices to record conversations with a person. An audio recording device is any device used to record any conversation or interaction and includes, but is not limited to, tape recorders, digital voice recorders, mobile phone or cameras.

References:

Work Health and Safety Act 2012 (SA) (WHS Act) [s163](#), [s165\(1\) \(d\)](#) and [s171](#).
Listening and Surveillance Device Act 1972.

Standard Operating Procedures for:

- [Digital Evidence Management](#)
- [Evidence Management](#)

Model Operating Procedures for:

- [Powers of Entry](#)
- [Power to Require the Production of Documents and Ask Questions](#)

1. The Legislation

Section [165 \(1\) \(d\)](#) of the WHS Act permits an Inspector who has entered a workplace under [s163](#) to take measurements, conduct tests and make sketches or recordings (including photographs, films, audio, video, digital and other recordings).

The *Listening and Surveillance Devices Act 1972 (SA) (LSDA)* prohibits the recording of a *private conversation* unless **all** parties consent to the conversation being recorded.

However, this general prohibition does not apply to SafeWork SA Inspectors who are acting in their role as a public officer, who have entered a workplace under s163 of the WHS Act and are requiring a person to answer questions under s171 of the WHS Act. See Part 3. Recording Conversations Under Coercive Powers.

2. Recording Conversations Without Use of Coercive Powers (Voluntary)

You may enter a workplace and wish to make an audio recording of a conversation, but are not using coercive powers to require the person to answer questions e.g. to take a statement with the intention of transcribing the conversation into a narrative statement at a later date.

2.1 Prior to commencing recording

- It is essential that you advise the person that you intend to record the conversation and the questions asked and the answers provided will be recorded and may be relied on as evidence in any court proceedings.
- Then ask the person if they consent to the audio recording being made.
- If the person consents to an audio recording being made, then you may record the conversation.

2.2 When Recording

When an Inspector commences recording they **must**:

- advise the person that you intend to record the conversation and it may be relied on as evidence in any court proceedings; and
- confirm the person consents to the conversation being recorded.

2.3 If the person objects to the conversation being recorded

An Inspector should first:

- Explain the reason for audio recording i.e. provides a true and accurate record of the conversation and is more efficient (less time required) etc.

- Advise that as an Inspector s165 (1) (d) of the *WHS Act* empowers Inspectors to make recordings (including audio and video).

If the person still objects you audio recording you have two practical options.

1. Do not audio record the conversation. Record the conversation in your field notebook as a as a statement or, an 'I said, He said'. Statements can also be typed using the witness statement template.
2. If you consider that it is necessary to record the conversation, then consider requiring questions to be answered through the use of s171 inspector coercive powers. (See Part 3. below). However voluntary answers are always preferred.

3. Recording Conversations Under Your Coercive Powers (s171)

An Inspector **must** make a person aware that s165 (1) (d) and s171 of the *WHS Act* allows an Inspector may make an audio recording of a conversation (interview) and the person is compelled to answer questions unless they have a '*reasonable excuse*' not to. An objection to the interview being recorded does not constitute a '*reasonable excuse*' to refuse to answer questions. A '*reasonable excuse*' would be s172 or s269.

3.1 Prior to commencing recording

Prior to the use of s171 coercive powers an Inspector is required to also comply with s173 of the *WHS Act* and take the following actions:

- Advise that you are an Inspector under the *WHS Act*;
- Show the person your Inspector identification;
- Advise of s172 (individuals only, right to not self-incriminate)
- Give advice that they do not have to produce information covered by s269 – legal professional privilege; and
- Give warning that failing to comply without reasonable excuse, is an offence which is punishable by conviction and a maximum \$10,000 fine.

It is recommended that the Inspector follow the [Compel Script](#) to ensure all legal requirements are met.

3.2 When Recording

When an Inspector commences recording they **must** confirm with the person that they have taken the actions above.

3.3 If the person refuses to answer questions

Once recording has commenced and a person refuses to answer questions an Inspector **must**:

- ask them to explain why they are refusing to answer the question. If you do not believe the reason given constitutes a reasonable excuse then tell them so and advise them that you will repeat the questions again to give them the opportunity to answer;
- if the person still continues to refuses to answer questions, ask further questions to establish why they are refusing to answer your questions, to establish that the person is refusing to answer questions without a *reasonable excuse*; and
- if the person continues to refuses to answer there is nothing further that you may do other than to terminate the interview and seek advice on how to proceed.

4. Covert Audio Recording

It is SafeWork SA position that it is **never** appropriate to secretly (covertly) record any conversations.

5. Practical Considerations

A copy of the audio recording must be kept. Refer to [s3 of the SOP for Digital Evidence Management](#).

If you record any conversation it is important to remember that it may be disclosed to the defence. Therefore, you must be prepared that the conversation and that **everything** that is said by both yourself and the witness may be subject to scrutiny.