

Enforcement Policy

Occupational Health, Safety and Welfare Act 1986

Department for Administrative and Information Services

SafeWork SA

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Occupational Health, Safety and Welfare Act 1986

1. FOREWORD

SafeWork SA is the business unit of the Department for Administrative and Information Services responsible for the administration and enforcement of the *Occupational Health, Safety and Welfare Act 1986*.

SafeWork SA recognises that enforcement and prosecution activities play a vital role in the enhancement of workplace and public safety. The role of the enforcement process must be considered as complementing a range of strategies which, together, are designed to improve the State's workplace and public safety performance.

SafeWork SA is committed to promoting improvements through education and industry specific support whilst recognising that resorting to legal enforcement powers will inevitably be necessary under some circumstances.

Fundamental to this approach is the recognition that consistency, appropriateness and transparency in investigation and prosecution issues are the highest priorities whilst recognising that the decision about enforcement activities in any particular case will depend upon a number of variables. In total, these must ultimately demonstrate a just and fair treatment for all those with whom SafeWork SA deals.

SafeWork SA, through its staff, is committed to ensuring that:

- a decision on whether to prosecute is made as early as possible.
- prosecution cases are dealt with in the shortest possible time.

The pursuit of fairness and consistency will be furthered by this policy, training of our managers and staff, and the simplification of processes ensuring that responsibility for decision making is appropriately delegated and bureaucratic processes eliminated.

Michele Patterson
EXECUTIVE DIRECTOR
SAFEWORK SA

2. ENFORCEMENT POLICY OVERVIEW

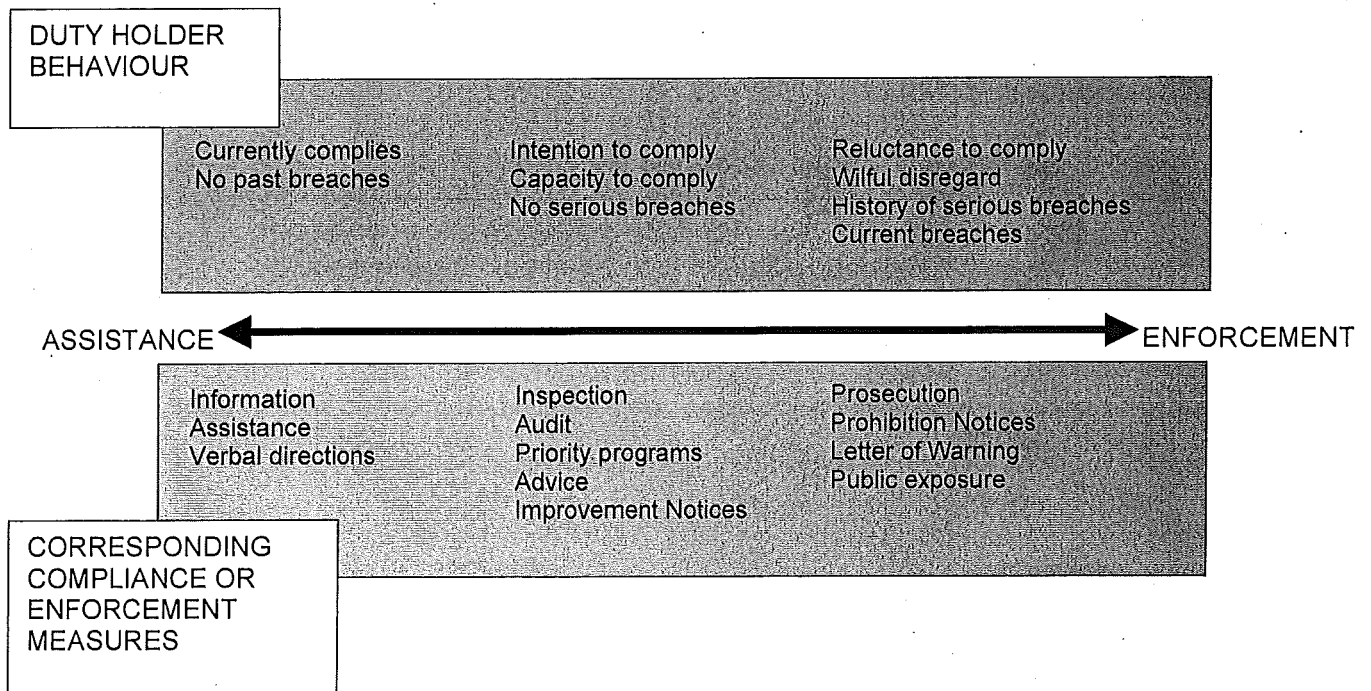
Occupational Health, Safety and Welfare Act 1986

Our objective is to work towards **safe, fair, productive working lives and high standards of public safety.**

SafeWork SA recognises the underpinning principles of the Act which place general duties of care on various people and requires them to take action to satisfy their duties.

Our general enforcement policy is to **take the steps necessary to ensure all parties act on their duties.** These steps will include educating and assisting as well as requiring compliance.

THE COMPLIANCE CONTINUUM



3. PURPOSE AND SCOPE OF POLICY

3.1 Purpose

This policy outlines the circumstances in which SafeWork SA will take enforcement or prosecution action for breaches of the *Occupational Health, Safety and Welfare Act 1986* (the OHSW Act), which is administered by SafeWork SA.

The purpose of the policy is to ensure that, as far as is reasonably possible, enforcement decisions taken by SafeWork SA are consistent, equitable and in the public interest.

3.2 Scope of Policy

This policy applies to actions and decisions taken by inspectors and other staff of SafeWork SA in pursuit of its objective of ensuring compliance with the OHSW Act. The actions and decisions covered by this policy include:

- verbal directions (only in situations where the hazard can be controlled while the inspector is present);
- improvement notices;
- prohibition notices;
- expiation notices, or "on-the-spot fines", (where the legislation allows);
- decisions to prosecute under the Act or to recommend referral of a matter to the Director of Public Prosecutions for consideration of prosecution.

The policy applies only to SafeWork SA's activities under the OHSW Act.

4. GENERAL ENFORCEMENT POLICY

SafeWork SA regards all the legislation it is responsible for as important and requiring attention by those who are bound by the laws. Our overarching enforcement objective is to ensure as an outcome of our work **safe, fair, productive working lives and high standards of public safety**.

In the Second Reading speech for the Bill which created the OHSW Act, the then Minister of Labour succinctly stated the duties on employers and others, together with the role of inspectors and prosecutions:

"... employers will be required to ensure so far as is reasonably practicable that their workers are, while at work, safe from injury and risks to health. This duty extends to all things under the employer's control in the workplace. It applies to the use and maintenance of plant and machinery, the environmental conditions under which work is carried out, the substances used and the manner in which work is organised and performed. This general duty of care is limited by what is

reasonably practicable. In practice this will mean that account must be taken of the seriousness of a hazard and the availability of methods for removing or minimising it.

The duty of workers has also been spelt out in detail. Workers are required to exercise reasonable care to protect the health and safety of themselves and other people. They are also under a duty not to interfere with anything provided in the interests of health and safety. The Bill provides inspectors with comprehensive powers to enable them to adequately enforce the measures contained under the Bill. However, the prime objective of this Bill is to put emphasis on workplace mechanisms which prevent hazards from arising, thus minimising the need for the Act to be enforced by inspectors.”¹

Consistent with this statutory intent, the actions SafeWork SA take to ensure compliance with the legislation include:

- the provision of comprehensive information and education about the Occupational Health, Safety and Welfare legislation to help people achieve compliance.
- a targeted approach to the inspection and auditing of high risk industries and registered equipment or competencies to ensure the requisite standards are being maintained.
- working closely with industry stakeholders, employer and employee associations, and the general public to identify areas of greatest problem and to identify mutually acceptable solutions.

5. THE DECISION TO TAKE COMPLIANCE OR ENFORCEMENT ACTION

The decision to take compliance action such as issuing improvement or prohibition notices may be taken when an inspector is of the opinion that:

- a provision of the OHSW Act is being contravened.
- a provision of the OHSW Act has been contravened in circumstances that make it likely that the contravention will be repeated.
- activity is occurring in a workplace which involves an immediate risk to the health and safety of a person at work.
- the safety issue cannot be immediately rectified in the presence of the inspector.

¹ Second Reading Speech of the Occupational Health, Safety and Welfare Bill, *Hon. Frank Blevins, Minister of Labour*, 17 September 1986

6. ENFORCEMENT ACTION OPTIONS

The alternatives available to inspectors are discussed below (other than information and education). Inspectors choose which alternative should be implemented in accordance with SafeWork SA's Investigation and Compliance Manual.

6.1 Verbal Directives

When an inspector forms an opinion that a person is in breach of the legislation and that remedial action is necessary, the use of notices as authorised by the OHSW Act (ie improvement or prohibition) is preferred over verbal directions. However, where an identified risk or breach can be immediately corrected while the Inspector is still present, a verbal directive may be issued. Reference to the directions are noted in the Inspector's Note Book.

This action should be considered for issues of a less serious nature that are unlikely to lead to further action.²

6.2 Improvement Notices

An Improvement Notice may be issued to address a breach of legislation identified in a private or public sector agency, which does not constitute an immediate risk to health and safety, but which may develop into a serious situation if the risk is not rectified in the near future.

An improvement notice may be issued pursuant to section 39 of the OHSW where an Inspector is of the opinion that a person:

- is contravening a provision of the Act;
- has contravened a provision of the Act in circumstances that make it likely that the contravention will be repeated

Under section 42 of the OHSW Act, a person affected by an Improvement Notice may have the notice reviewed by a Review Committee appointed by the Industrial Relations Court.

6.3 Prohibition Notices

A Prohibition Notice may be issued to address a serious breach of legislation, identified, where an Inspector is of the opinion that there is an immediate risk to the health and safety of a person at work. The inspector may issue the Notice "to the person apparently in control of the activity or situation from which the risk

² It should be noted however that immediate rectification of the safety issue in the presence of the inspector does not necessarily preclude subsequent prosecution action.

arises"³, prohibiting the carrying on of the activity until the Inspector is satisfied that adequate measures have been taken to avert, eliminate or minimise the risk.

Under section 42 of the OHSW Act, a person affected by an Prohibition Notice may have the notice reviewed by a Review Committee appointed by the Industrial Relations Court.

6.4 Expiation Notices

The *Expiation of Offences Act 1996* provides that in the case of certain offences, an expiation notice may be issued in lieu of commencing prosecution action. The alleged offender may then avoid prosecution by payment of an expiation fee within the allocated period.

Within the OHSW Act there are two offence provisions where there is the option to issue an expiation notice in lieu of commencing prosecution action. These offences are:

- Failure to comply with improvement notice - section 39 (4), and
- Failure to return improvement notice statement of compliance - section 39 (5).

6.5 Prosecution

The OHSW Act prescribes penalties for a breach of many sections and establishes a process for prosecution of offences against the Act.

Section 58(1) provides that:

"(1) A person who contravenes or fails to comply with a provision of this Act is guilty of an offence."

Proceedings for an offence against the OHSW Act may be brought by:

- the Minister
- the Director of Public Prosecutions
- the Director of SafeWork SA
- an inspector
- an employee who has been injured as a result of an alleged offence where proceedings have not been commenced by any of the above mentioned parties within one year of the date of the alleged offence.⁴

³ *Occupational Health, Safety and Welfare Act 1986*, s40(1)

⁴ *Occupational Health, Safety and Welfare Act 1986*, s58(7)

Proceedings must be commenced within two years after the date on which the offence is alleged to have been committed. In the case of expiable offences, proceedings must be commenced within six months.

The DPP may extend the time limit for the commencement of proceedings if satisfied that '...a prosecution could not reasonably be commenced within the relevant period due to a delay in the onset or manifestation of an injury or disease, a condition or defect of any kind, or any other relevant factor or circumstance'.

Offences against the OHSW Act are summary offences, and are heard in the Industrial Relations Court.⁵

Investigations that may lead to a prosecution are subject to a case conferencing process. The case conference process provides a forum in which legal issues can be canvassed, and determinations made about which matters will be further investigated with a view to commencing prosecution action.

Generally when SafeWork SA wishes to refer a matter for prosecution, it is sent to the Crown Solicitor's Office. However some cases may arise where it would not be appropriate for the Crown Solicitor's Office to act as prosecutor. This scenario is most likely to occur if SafeWork SA investigates an alleged breach of the Act by a Department or agency within the State Public Service. In such a situation, the Crown Solicitor's Office may be called upon to represent that Department or agency in any prosecution action that SafeWork SA may bring. In these circumstances SafeWork SA will refer the matter to the Director of Public Prosecutions for further advice and, if appropriate, prosecution.

7. DECISIONS TO PROSECUTE

7.1 General Policy

The general policy of SafeWork SA is that prosecutions will apply to serious cases where less formal enforcement actions are not desirable. Investigations chosen for prosecution will generally meet each of 3 criteria:

- The breach is a serious one in which alternative enforcement action is inappropriate; AND
- There is a prima facie case with a reasonable prospect of success; AND
- A prosecution is considered to be in the public interest.

Each of these criteria is briefly explained in the sections below.

⁵ However section 59 of the Act establishes an aggravated offence, which is classified as a minor indictable offence.

7.2 A Serious Breach

A decision to prosecute will be considered whenever there is a serious breach of the OHSW Act. Circumstances where this might apply include:

- where a fatality or serious injury or illness has resulted;
- where there is a risk of a fatality, serious injury or illness occurring;
- the failure to comply with an improvement, prohibition or expiation notice;
- hindrance or obstruction of an inspector;
- a refusal or failure to answer an Inspector's questions or provide information to an Inspector;
- where a person or organisation has repeated the same offence;
- instances of discrimination, or threats of discrimination against an employee on the basis of their OHS activities;
- breaches of consultative provisions of the OHSW Act.

7.3 A Prima Facie Case

Whether there is a prima facie case and a reasonable prospect of success are legal issues which will be highly dependent on the facts of particular cases. Paramount in SafeWork SA's consideration will be the standard of proof required of a prosecutor. That is, the facts of the matter must be capable of being proven **beyond reasonable doubt**.

Each case considered for prosecution is assessed by SafeWork SA as meeting these criteria and then referred to the Crown Solicitor for advice on these specific points. As part of this assessment, it may be that the case is referred back for the collection of additional evidence before a final determination that the case does or does not meet this criterion. Detailed consideration will be given to the availability and expected reliability of witnesses to prove the case. SafeWork SA does not proceed with a prosecution if the Crown Solicitor's advises that the case does not demonstrate a prima facie case or cannot be proven beyond reasonable doubt.

7.4 The Public Interest

Whether or not a prosecution is considered to be in the public interest, is determined on well settled principles. Even though a case may be capable of being proven to a Court beyond reasonable doubt, there will often be factors peculiar to the case which lead to the conclusion that a prosecution should not be commenced. These may include one or more of the following:

- the breach is of a trivial nature;
- the liable party has suffered significant adverse consequences as a result of the alleged offence;
- compassionate reasons.

An example of how these factors have been taken into account in the past include:

- the decision not to prosecute a farmer whose child was killed as a result of his actions whilst at work. In this case, it was determined that the personal tragedy suffered by the farmer should not be compounded by his having to defend a prosecution action.

In such cases, where the instigation of a prosecution is not considered appropriate, SafeWork SA will issue a letter of warning. The letter will indicate that although there is sufficient evidence to support prosecution action after a breach of the legislation has been detected, SafeWork SA has determined that prosecution is not warranted because of extenuating circumstances or public policy issues.