



SafeWork NSW incident response and investigations – what to expect

Customer Service Standard

Investigations – Customer Service Standard

At SafeWork NSW¹, we aim to make sure our regulatory approach promotes a competitive, confident and protected NSW.²

This Customer Service Standard outlines the investigation process and what you can expect from us when we undertake an investigation under the Work Health and Safety Act 2011.

Investigations by SafeWork NSW are most commonly undertaken in response to workplace incidents that result in the serious or fatal injury of workers, but may also be in response to dangerous occurrences, serious safety risks or work – related illnesses. For the purpose of this document these will all be referred to as an ‘incident’.

This Customer Service Standard also outlines how we will communicate with those directly affected by or involved in the investigation process, such as:

- persons seriously injured and/or their next of kin
- next of kin for persons fatally injured; and
- businesses, workers and other duty holders involved in the incident

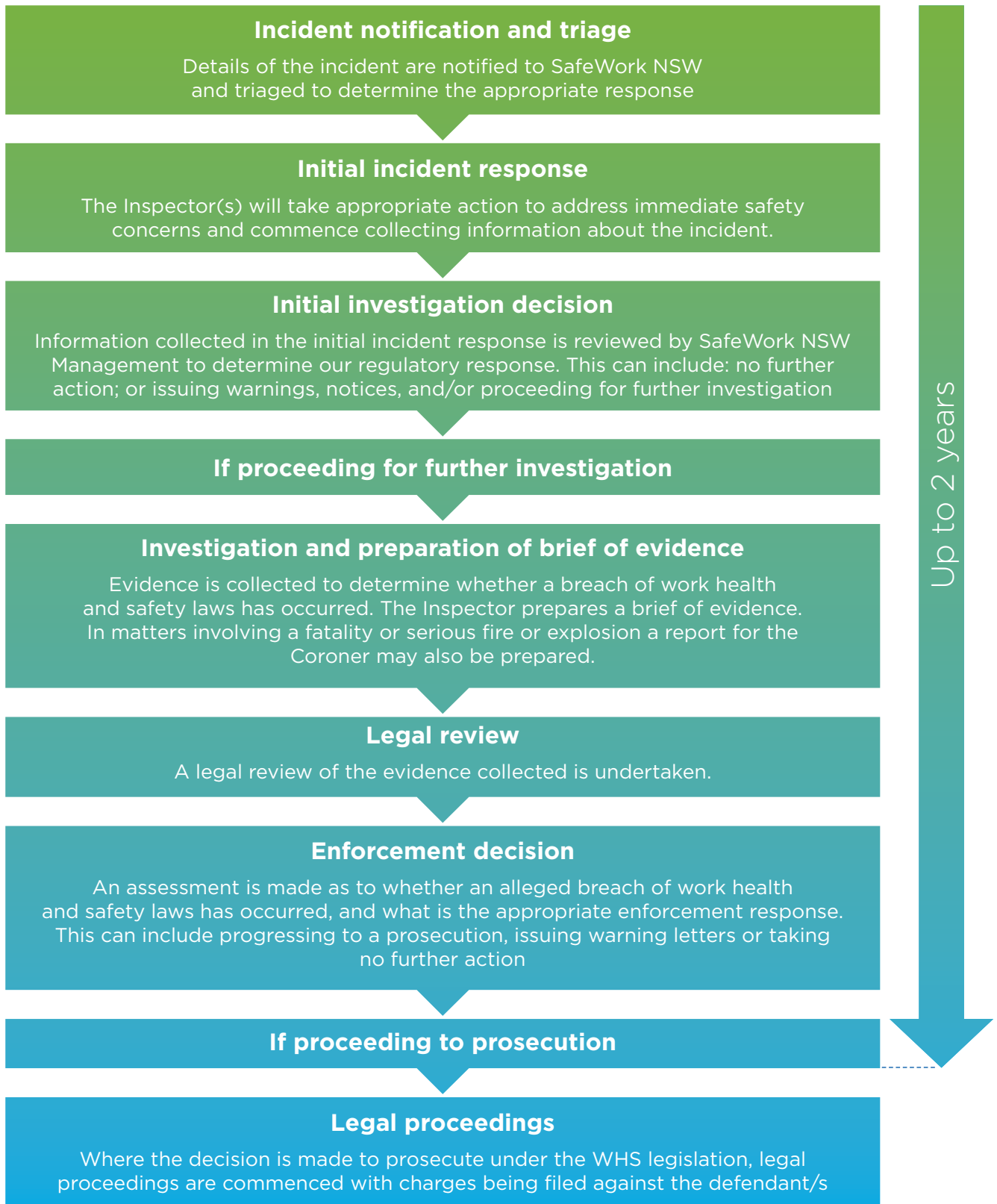


¹ SafeWork NSW is an agency in the Better Regulation Division within the Department of Customer Service.

² Our approach to work health and safety regulation (Catalogue no:SW08027)

The process flow of an investigation

The following diagram gives you an overview of the process undertaken when SafeWork NSW is notified of a workplace incident.



Why do we investigate work-related incidents?

The purpose of an investigation is to gather information about what happened and determine the cause of the incident. This is important to prevent similar incidents from occurring again. Investigating an incident also assists us to determine if a breach of work health and safety laws has occurred and the appropriate regulatory response.

What happens when we are notified of an incident?

The information we receive is assessed to determine the appropriate response. A serious or high - risk incident will generally see an inspector attending the site within one day of notification. Where the risk is moderate to high an inspector will generally respond within three to five days³.

At the site of an incident, the Inspector(s) will take appropriate action to address any immediate safety concerns and this may include prohibiting unsafe work, issuing notices or fines. In some instances, an inspector may be unable to attend an incident site due to circumstances such as remote or difficult access and the response will need to occur remotely. In these rare cases, inspectors continue to gather information to investigate the incident, this may include talking with people at the site.

Once immediate safety concerns have been addressed, the inspector(s) will commence collecting information about the incident. The inspector may speak to people that witnessed or were involved in the incident, take photos or measurements, samples of materials, inspect equipment, substances or other objects and take control of evidence including documents or other records relevant to the incident.

What happens after an inspector has attended the incident site?

Following the initial incident response by the Inspector/s, the information gathered is holistically reviewed by SafeWork NSW to determine the regulatory response.

Our regulatory response may include one or more of the following:

- to take no further action
- to issue warnings or notices
- to proceed for further investigation⁴

What happens if we proceed to further investigation?

Where a decision has been made to conduct further investigation into the incident, additional information gathering will generally be required. This may include:

- interviewing injured persons, when they are fit to do so
- gathering documentation, information and records from other parties such as businesses, manufacturers or suppliers, NSW Police, NSW Ambulance and health care providers
- interviewing people who may assist us in better understanding the circumstances leading up to the incident, including witnesses, co-workers, supervisors and business representatives
- collecting further physical evidence; and
- assistance or advice from technical experts

Once all the information has been gathered, the inspector will prepare a brief of evidence, which includes documents, records of interviews, responses to notices and photographs that may later be used in a Court of Law. The inspector may also prepare a report for the Coroner based on the evidence gathered during the investigation in matters involving a fatality, fire or explosion.

³ CSS Notifying a WH&S Incident and Incident Notification fact sheet

⁴ SWA National Compliance and Enforcement Policy and SWNSW Investigation Decision Making Policy

What can result after this further investigation?

The brief of evidence is reviewed by SafeWork NSW to consider if a breach of Work Health and Safety laws has occurred. Where an alleged breach has occurred, a determination is made as to the appropriate enforcement action.

There are several factors taken into consideration by SafeWork NSW in making this decision including the significance of the alleged breach, whether or not there are reasonable prospects of obtaining a conviction and whether it is in the public interest to commence a prosecution. Further information is available in our SafeWork NSW prosecution guidelines.

Once these factors have been considered, the enforcement decision will include one or more of the following actions:

- no further action
- warning(s) issued
- legal proceedings commenced

What happens when legal proceedings are commenced?

As with any legal proceeding, charges are filed against the defendant. Charges may be filed in the Local Court or District Court.

The matter goes before the Court and if the defendant pleads not guilty to the offence, the matter is listed for hearing. During the hearing, injured persons and witnesses may be required to attend the hearing to give evidence.

Legal proceedings, particularly where a hearing is required, can take some considerable time to complete.

If the defendant pleads guilty or is convicted after their hearing, the matter progresses to sentencing. Injured persons or family members of fatality injured workers may have an entitlement to provide a Victim Impact Statement to the Court which will be considered by the Judge on sentencing⁵.

Where a defendant is convicted, the court may impose a fine and other orders such as training orders, adverse publicity orders or Court ordered safety projects (Reference: WHS Act 2011, Part 13, Division 2). The defendant has 28 days from the date of judgment to appeal the judgment or orders.

In certain circumstances, SafeWork NSW may enter into a public and legally binding agreement with the defendant as an alternative to prosecution, which outlines specific work health and safety related strategies (projects) the defendant will undertake. This is called an enforceable undertaking (EU).

In determining whether or not to accept an EU, SafeWork NSW will first assess whether the defendant is eligible by considering a range of factors including those related to the incident, the defendant's capability to meet the terms of an EU (if accepted), as well as their work health and safety compliance history. If eligible for an EU, the defendant will then prepare an EU proposal and SafeWork NSW will assess the merit (or benefit) of the proposed work health and safety strategies contained within the EU as well as any other relevant information. Throughout the process of assessment for an EU, SafeWork NSW will liaise with the injured person or their family, or next of kin (in the event of a fatality). More information on EUs is available in the *Enforceable undertakings guidelines* and *Enforceable undertakings customer service standard*.

Can I take my own legal action?

If you are thinking about making a civil claim in relation to the incident, you should speak with an independent legal representative to find out what your legal rights are and any time limitation to commence a claim.

⁵ CSS Notifying a WH&S Incident and Incident Notification fact sheet

What can I do if I think SafeWork should prosecute someone for a serious offence but SafeWork hasn't commenced a prosecution?

Section 231 of the WHS Act allows a person to make a formal written request to SafeWork NSW asking that a prosecution be commenced if SafeWork NSW has not commenced a prosecution within six months after the relevant act or incident occurred. Such a request can only be made in relation to certain serious types of offences, and it cannot be made more than 18 months after the relevant act or incident. Further information for a person considering making a request to commence a prosecution under section 231 is available on the SafeWork NSW website.

What can you expect from SafeWork NSW?

We will work to complete investigations in a timely manner. It is important to understand investigations of this nature can be complex, and it may take up to two years until the enforcement decision is reached. There are several factors that may impact the time to complete an investigation such as the:

- amount of time it took for SafeWork to be notified of the incident
- complexity of the incident
- number of businesses or other duty holders involved
- availability of witnesses and other evidence
- evidence collection process
- cooperation of people involved; and
- the need to seek expert or technical opinions

How will I be kept informed?

We understand the importance of keeping those directly affected by or involved in the incident investigation process informed whilst at the same time ensuring the integrity of the investigation.

We will communicate with you:

- to advise on the outcome of the initial inspector response and what further action, if any, will be taken
- where further investigation is undertaken, an update will be provided at least once in every three months; and
- when an enforcement decision is made, we will inform you of the outcome.

We will also communicate with families and injured workers to:

- provide support and updates during proceedings before the Court
- advise of Court decisions, even in the event where no conviction is recorded against the defendant
- provide support and updates in the event of an appeal; and
- advise if an application for an Enforceable Undertaking is received.

You can advise us at any stage how you prefer to be kept informed e.g. by phone or email. If you do not wish to be kept informed during the progress of the investigation, you can advise us of this at any time.

Due to privacy legislation and other legal requirements, SafeWork NSW will only be able to provide limited information in relation to investigations that are active or where legal proceedings are before the Courts. If information or evidence is disclosed prior to an investigation being completed, it may prejudice the investigation or lead to evidence contamination.

How can you help us?

We understand this can be a stressful time. We ask that you are respectful when dealing with our staff. They are there to help you.

For businesses, workers and other duty holders involved in an investigation, we encourage you to:

- engage with us as soon as possible after the incident occurs
- participate in the investigation process and meet agreed timeframes
- be respectful in interactions with people from SafeWork NSW
- support workers and witnesses to participate in the investigation process.

For injured workers and their families, families of deceased workers and others affected by an incident or its investigation, we encourage you to:

- provide information and participate in the investigation process as required
- let us know if you need support.

What support is available?

For injured workers and families of deceased or seriously injured workers, the SafeWork NSW Coordinator Family Liaison is available to:

- provide information on counselling and other support available to injured workers and close family members of a relative who has died or been seriously injured in a workplace incident
- assist families or injured people to prepare victim impact statements
- accompany injured workers and/or families attending court proceedings
- If eligible, arrange logistical support for injured workers and families attending matters at court.

The Coordinator Family Liaison can be contacted on 1800 806 626.

What other resources are available?

For more information about our investigations, the following resources are available on our website www.safework.nsw.gov.au, by phoning us on 131 050 or by clicking the links below:

- Investigations: what they mean for you (catalogue no. SW08530).
 - Our approach to work health and safety regulation (catalogue no. SW08027).
 - Enforceable Undertakings
 - Enforceable Undertakings guidelines
 - EU Customer Service Standard, April 2019
 - SafeWork NSW Prosecution guidelines
 - Incident notification fact sheet
 - Request for SafeWork NSW to commence a prosecution under the Work Health and Safety Act 2011: Fact Sheet
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