



# SafeWork NSW Prosecution Guidelines

Guidelines to providing a transparent and consistent approach to prosecution and compliance related activities in relation to work health and safety.

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# 1 Introduction

SafeWork NSW is the primary work health and safety regulator in New South Wales. It operates under the legislative mandate of the *Work Health and Safety Act 2011* (WHS Act) and is responsible for engaging with the NSW community to prevent work-related fatalities, serious injuries, illnesses and securing compliance with Work Health and Safety Laws.

On 1 July 2025, amendments to the [\*Work Health and Safety Act 2011\*](#) (WHS Act) and associated legislation commenced operation, establishing SafeWork NSW as a standalone regulatory agency. The SafeWork Commissioner is the head of SafeWork NSW and is the “regulator” under the WHS Act, to be known as SafeWork NSW, supported by the agency.

SafeWork NSW (hereinafter “SafeWork”) has a legislative mandate as the regulator under the WHS Act. That Act, the Work Health and Safety Regulation 2017 (WHS Regulation), and supporting codes of practice are part of a harmonised national scheme for work health and safety (WHS) legislation that commenced on 1 January 2012.

SafeWork carries out its regulatory responsibilities through:

Education and engagement (including advisory services)



Licensing and registration for high-risk work



Safety testing services



Compliance and enforcement



As part of its mandate, SafeWork NSW ensures adherence to work health and safety laws, applying regulatory best practices to promote fairness, transparency, and trust with the NSW community

We offer advice on improving work health and safety, provide licensing and registration for potentially dangerous work, provide safety testing services, and take action to ensure the laws we administer are followed. Where necessary, we enforce compliance and undertake investigations and prosecutions to help secure safe and healthy workplaces.

In addition to the WHS Act and WHS Regulation, SafeWork also exercises powers, authorities, duties and functions under the:

- [\*Explosives Act 2003 \(Explosives Act\) and its Regulation\*](#), and
- [\*Dangerous Goods \(Road and Rail Transport\) Act 2008\*](#) (Dangerous Goods Act) and its Regulation (jointly administered with the Environment Protection Authority).

## 2 National compliance and enforcement policy

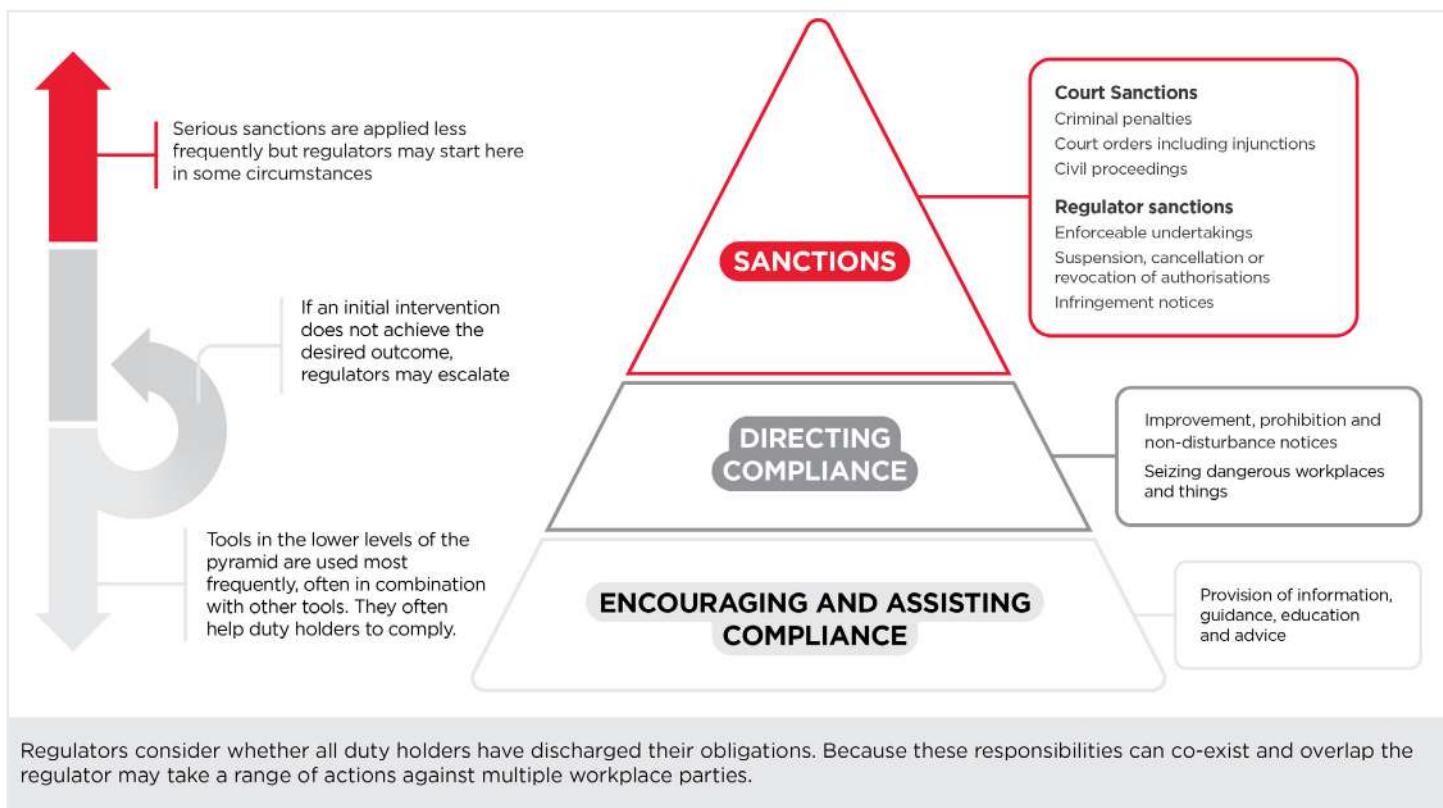
All Australian WHS regulators, including SafeWork, are signatories to Safe Work Australia's [National Compliance and Enforcement Policy](#) (NCEP).

The NCEP is intended to support consistency in approaches and outcomes by WHS authorities in all Australian jurisdictions. It promotes an effective mix of positive motivators and strong deterrents to achieve compliance with the law and improve work health and safety.

The NCEP has been endorsed as a NSW WHS Compliance Policy as part of the implementation of the nationally harmonised WHS laws. It sets out the approach SafeWork and other work health and safety regulators will take to compliance and enforcement under the WHS Act and WHS Regulation.

The NCEP is available at [Safe Work Australia](#).

The NCEP includes the following diagram which represents how WHS regulators can use compliance and enforcement tools in a proportionate way, and the ability to escalate if an initial intervention does not achieve the desired outcome.



NCEP diagram (Safe Work Australia)

More information on SafeWork's approach to work health and safety regulation and how it is guided by the NCEP, can be found in the publication "Our Approach to Work Health and Safety Regulation", available on the SafeWork website [www.safework.nsw.gov.au](http://www.safework.nsw.gov.au).

These Prosecution Guidelines supplement the NCEP in respect of the application of the WHS legislation in New South Wales. The Prosecution Guidelines are published pursuant to section 230(4)(a) of the WHS Act.

# 3 Prosecution guidelines

SafeWork adopts and applies the Prosecution Guidelines of the NSW Office of the Director of Public Prosecutions (the [ODPP Guidelines](#)).

These Prosecution Guidelines supplement the ODPP Guidelines with respect to the decision to prosecute, and other aspects of undertaking prosecutions, under the legislation SafeWork administers.

For more information: refer to the [ODPP Guidelines](#) published on the ODPP website at [odpp.nsw.gov.au](http://odpp.nsw.gov.au).

## 3.1 The decision to prosecute

Prosecution for an offence is one of several options available to SafeWork under the legislation it administers. It is a discretionary action. Not every breach of the laws passed by Parliament proceeds to a criminal prosecution. The dominant consideration in deciding whether or not to prosecute is whether it is in the public interest.

By commencing a prosecution, SafeWork aims to change the behavior of the alleged offender and deter future offenders. Prosecution in appropriate circumstances sends a message to the community that failure of legislative responsibilities will be enforced through the courts. The decision to prosecute is made on the basis of the applicable law at the time and public interest considerations.

Consistent with the NCEP, SafeWork is committed to a policy of prosecuting whenever significant breaches of WHS legislation occur. The type of matters that SafeWork considers to be serious breaches of WHS legislation are discussed under “Priority matters” below.

The decision to commence a prosecution is separate from the political arena. While SafeWork is subject to the direction and control of the Minister responsible for the WHS Act, the Minister cannot direct the agency in relation to any decision that relates to proceedings for an offence under the Act. The factors applicable to determining whether to prosecute set out below have continuing application throughout the prosecution process.

## 3.2 Time limits for proceedings

### **WHS Act**

Proceedings for an offence under the WHS Act, other than industrial manslaughter, must generally be commenced within two years after the offence first comes to the notice of SafeWork.

There are very limited exceptions to this two-year timeframe for matters where: a WHS undertaking has been accepted; Coronial proceedings have revealed an offence against the Act; or, fresh evidence in relation to a Category 1 offence has been discovered. For more information: Refer to [section 232 of the WHS Act](#).

The offence of industrial manslaughter has no limitation period for proceedings.

### **Other legislation administered by SafeWork**

Proceedings for an offence under the Explosives Act or its Regulation must be commenced within 2 years after the act or omission alleged to constitute the offence.

Proceedings for an offence under the Dangerous Goods Act or its Regulation must be commenced within 2 years after: the date the offence is alleged to have been committed; or, the date on which evidence of the alleged offence first came to the attention of the regulator.

### 3.3 Factors taken into account in the decision to prosecute

As provided for in the [ODPP Guidelines](#), the question of whether or not to prosecute is resolved by determining:

- whether or not it can be said that there is no reasonable prospect of conviction on the basis of the admissible evidence, and
- whether or not a prosecution would be in the public interest?

For more information: refer to Chapter 1 of the [ODPP Guidelines](#).

#### **Reasonable prospect of conviction**

As a starting point, before any prosecution is considered, there must be enough evidence to establish a *prima facie* case against the alleged offender.

If there is a *prima facie* case, determining whether or not there are reasonable prospects for conviction requires evaluating the likely strength of the admissible evidence the prosecution can present to a court, bearing in mind the prosecution has to prove each element of the offence beyond a reasonable doubt.

The following factors are to be taken into account:

- whether or not the evidence is admissible or might be excluded
- availability, competence, compellability and reliability of the prosecution witnesses and other evidence in the prosecution case
- any defence open to, or indicated by, the alleged offender.

Consideration should also be given to:

- any inferences that may be drawn from circumstantial evidence
- whether the alleged offender ensured, so far as reasonably practicable, that the alleged risk was addressed
- the availability and strength of any technical evidence and the capabilities and expertise of any expert witness
- the existence or otherwise of evidence to support, or rebut, any defence that may be raised by the alleged offender.

#### **Public interest**

In considering the public interest, the main criteria taken into account will be similar to those adopted by the [ODPP Guidelines](#) as set out below.

The following is not an exhaustive list. The weight to be given to any particular public interest factor will depend on the circumstances of the case.

<b>Offence related factors</b>	<ul style="list-style-type: none"><li>• the seriousness or the triviality, of the alleged offence and/or whether the breach is of a minor nature only</li><li>• the prevalence of the offence and whether it is of considerable public concern</li><li>• the need for deterrence both specific and general</li><li>• the passage of time since the offence, having regard to its seriousness and the reasons for the delay</li><li>• the seriousness of the risk to safety posed by the alleged offence</li><li>• any mitigating or aggravating circumstances of the offence.</li></ul>
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<b>Factors related to the alleged offender</b>	<ul style="list-style-type: none"> <li>the degree of culpability of the alleged offender in relation to the offence</li> <li>the alleged offender's criminal history and background, particularly any prior breaches of, or convictions under, the WHS legislation</li> <li>the age, physical or mental health or special infirmity of the alleged offender.</li> </ul>
<b>Other factors</b>	<ul style="list-style-type: none"> <li>the availability and efficacy of any alternatives to prosecution, including alternative compliance measures</li> <li>the likely length and expense of a trial</li> <li>whether any precedent may be set by instituting or not instituting proceedings</li> <li>whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute</li> <li>whether proceedings are to be instituted against others arising out of the same incident</li> <li>whether another agency is taking legal action for the same matter</li> <li>the strategic value of the potential prosecution</li> <li>any special circumstances that would prevent a fair trial from being conducted</li> <li>whether the prosecution may have an adverse physical or emotional impact on the victim</li> <li>the age, physical health, mental health or special infirmity of an essential witness.</li> </ul>

The applicability of and weight to be given to these and other factors will vary and depend on the particular circumstances of each case.

The resources available to SafeWork to conduct prosecutions are finite and careful consideration needs to be given to the public interest in deciding to proceed with them.

## 3.4 Irrelevant considerations

SafeWork adopts the principle that a prosecution must not be brought for improper purposes. A decision whether or not to prosecute will not be influenced by:

- any discriminatory factor – for example race, nationality, political associations
- personal empathy or antipathy towards a person
- the political or other affiliations of those responsible for the prosecution decision
- possible political advantage or disadvantage to the government or any political party, group or individual.

## 3.5 Priority matters

SafeWork prosecution policy requires giving priority to prosecuting offences involving:

- target industries and or hazards as identified in SafeWork's Annual Regulatory Statement and the SafeWork Strategy 2024-2029
- serious injury and illness types and fatalities, and matters involving high risk of serious injury or illness or fatality
- alleged failure to comply with a prohibition notice
- interfering with inspectors or authorised officers so as to prevent them from exercising their powers.

## 4 Categories of offences

While the WHS Act creates other offences, these Guidelines focus on offences in Part 2 and 2A of the Act relating to industrial manslaughter and health and safety duties. They are the most serious offences in the WHS Act and the duty offences are the most commonly prosecuted by SafeWork.

### 4.1 Industrial manslaughter

The offence of industrial manslaughter was introduced in September 2024.

<p><b>A person commits industrial manslaughter if they:</b></p>	<ul style="list-style-type: none"><li>• have a health and safety duty, and are:<ol style="list-style-type: none"><li>i. a person conducting a business or undertaking (PCBU), or</li><li>ii. an officer of a PCBU, and</li></ol></li><li>• they engage in conduct that:<ol style="list-style-type: none"><li>iii. for a PCBU, constitutes a failure to comply with their health and safety duty, and causes the death of a worker or another individual to whom that duty is owed, or</li><li>iv. for an officer of a PCBU — constitutes a failure to comply with their health and safety duty, and causes the death of a worker or another individual to whom the PCBU owes a health and safety duty, and</li></ol></li><li>• they engage in the conduct with gross negligence.</li></ul>
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For more information: Refer to [section 34C of the WHS Act](#).

Under the WHS Act, there are three categories of offences for breach of a duty which are defined by the relative seriousness of the breach:

### 4.2 Category 1 offence – Gross negligence or reckless conduct

<p><b>A person commits a Category 1 offence if they:</b></p>	<ul style="list-style-type: none"><li>• have a health and safety duty, and</li><li>• without reasonable excuse, engage in conduct that:<ol style="list-style-type: none"><li>i. exposes an individual to whom the duty is owed to a risk of death or serious injury or illness,</li><li>ii. if the person is an officer of a PCBU — exposes an individual, to whom the PCBU owes a health and safety duty, to a risk of death or serious injury or illness, and</li></ol></li><li>• engage in the conduct with gross negligence, or, are reckless as to the risk to an individual of death or serious injury or illness.</li></ul>
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For more information: Refer to [section 31 of the WHS Act](#).

## 4.3 Category 2 offence–Failure to comply with health and safety duty

A person commits a Category 2 offence if they:

- have a health and safety duty, and
- fail to comply with that duty, and
- the failure exposes an individual to a risk of death or serious injury or illness.

For more information: Refer to [section 32 of the WHS Act](#).

## 4.4 Category 3 offence–Failure to comply with health and safety duty

A person commits a Category 3 offence if they:

- have a health and safety duty, and
- fail to comply with that duty.

For more information: Refer to [section 33 of the WHS Act](#).

# 5 Who may prosecute

Subject to the exceptions noted below, for offences under the WHS Act and WHS Regulation, prosecution proceedings may be instituted by:

- SafeWork as the regulator, or
- an inspector with the written authorisation of SafeWork, or
- the secretary of an employee industrial organisation, any member(s) of which are concerned in the matter to which the proceedings relate. However, for a Category 1 or 2 offence a secretary of such an organisation can only instigate proceedings after the regulator has declined to follow the advice of the ODPP to bring proceedings.

For more information: Refer to [section 230 of the WHS Act](#).

For offences under the below Act and Regulations prosecution proceedings may be instituted by SafeWork.

- [Explosives Act 2003](#)
- [Dangerous Goods \(Road and Rail Transport\) Act 2008](#).

## 5.1 Prosecution of individual persons for certain offences under the WHS Act

The WHS Act states that:

- an industrial manslaughter (IM) offence committed by an individual, and
- a Category 1 offence committed by an individual must be prosecuted on indictment.

In New South Wales, only the Attorney General or the Director of Public Prosecutions (DPP) can present an indictment in a prosecution.<sup>1</sup>

<sup>1</sup> Criminal Procedure Act 1986 s 8

This means that IM and Category 1 offences, when alleged against individuals, can only be prosecuted to finality by the Attorney General or the DPP although in practice these prosecutions will be undertaken by the ODPP.

If SafeWork proposes that a prosecution for an IM or Category 1 offence be brought against an individual under the WHS Act, it will refer the matter to the ODPP for advice on prospects for a prosecution.

## 6 Selecting defendants

### 6.1 General principles

General considerations that may be taken into account in choosing the appropriate defendant in a particular case include:

- who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention
- what was the role and culpability of the alleged offender
- the likely effectiveness of any court order that might be made against the alleged offender.

For WHS Act matters, PCBs, including those that manage or control a workplace, those that manufacture, supply, design etc, plant and structures used at workplaces, officers of PCBs, workers of PCBs, and other people at workplaces, can be defendants. This means that a number of people can concurrently commit offences arising out of the same incident.

### 6.2 Corporate and director/manager liability

SafeWork's policy is to prosecute duty holders, including corporations and their officers, for breaches of the WHS Act and other legislation it administers where it is in the public interest to do so. In considering whether such prosecutions are in the public interest, regard will be had to the factors set out in these Guidelines.

When making decisions concerning prosecution of officers of corporations under the WHS Act, particular regard will be paid to the steps taken by such persons to ensure compliance by the corporation with the Act. Officers of a PCB must exercise due diligence to ensure that the PCB complies with its WHS duties and obligations. To meet this obligation, officers are required to take reasonable steps to exercise due diligence including, for example, keeping up to date with WHS matters, and having appropriate processes and systems in place.

For more information: Refer to [section 27\(5\) of the WHS Act](#).

### 6.3 Public authorities

The legislation administered by SafeWork binds the Crown and Government authorities. The law applies with equal force to both the private and public sectors.

SafeWork recognises that deciding whether to prosecute public authorities for breaches of the WHS legislation attracts specific public interest considerations. There are two competing public interests in relation to the prosecution of public authorities being that:

- the public has an interest in Government authorities abiding by the law, and
- it is the taxpayer that bears the cost of any prosecution of public authorities. Such expenditure needs to be justified on the basis that it is in the public interest.

Public authorities are usually under the control and direction of a Minister who can direct compliance with relevant legislation. However, this position does not always achieve the requisite compliance. In the interests of general deterrence there will be instances where it is important that a failure to comply by a public authority attracts an enforcement response including prosecution.

In prosecuting Government authorities, the current Premier's Memorandum No. 97-26: "Litigation Involving Government Authorities" (the Premiers Memorandum), applies to the parties because they are both Government agencies.

The aims of the Premier's Memorandum are to ensure that:

- the cost to the taxpayer of one government authority prosecuting another is kept to a minimum
- only appropriate prosecution action is taken
- inappropriate or irrelevant defences are not pleaded
- the court's time spent resolving the matter is kept to a minimum
- responsible Ministers are kept informed, and
- government authorities act as model litigants before the court.

SafeWork takes into account the requirements and intent of the Premiers Memorandum in progressing all potential prosecutions.

For more information: Refer to [Premier's Memorandum No. 97-26](#).

## 7 Charges

### 7.1 General principle

Once a decision is made to deal with an incident by way of prosecution, it is SafeWork's responsibility to select appropriate charges where there is a reasonable prospect of conviction. The charges must clearly reflect the seriousness of the alleged criminal conduct. The charges laid, and any statement of facts, must adequately reflect the nature and extent of the conduct disclosed by the evidence with the aim of providing a basis for the court to impose an appropriate penalty.

### 7.2 Similar charges for the same offence

SafeWork has a duty to refine its case to avoid laying either duplicitous or unnecessary charges. There will be instances where the same conduct is prohibited by two pieces of legislation and an offence can be made out under each. Where there is another prosecuting authority involved, SafeWork will liaise with the other authority to ensure the most appropriate charge(s) are laid.

### 7.3 Specific considerations for matters involving a work-related fatality

When undertaking an investigation in response to a work-related fatality, SafeWork will engage an independent expert to provide a report on causation and/or what was "reasonably practicable", prior to making its enforcement decision.

A decision not to engage an independent expert in such a matter will only occur in limited circumstances with the approval of the Executive Director, Operations and Enforcement, SafeWork.

Where there has been a breach of the law leading to a work-related fatality, SafeWork will consider whether the circumstances of the case might justify a charge of industrial manslaughter or a charge under sections 31 (Category 1) or 32 (Category 2) of the WHS Act. Where the NSW Police Force (Police) is involved, that agency may also give consideration to a potential charge of manslaughter under the *Crimes Act 1900*.

Where they are both involved in responding to a work-related fatality, the Police and SafeWork have agreed on certain investigative principles, aimed at maximising the expertise and resources of each agency to ensure that the most appropriate response is provided. The decision as to which agency will lead an investigation is to be made at the commencement of the process. Both agencies, on completion of their respective investigations, will provide the Coroner with a brief of evidence to assist the Coroner in his or her deliberation as to whether an inquest is to be held.

## 7.4 Charge negotiation

Charge negotiation involves discussions between the defence and the prosecution in relation to which charges the defence are prepared to plead guilty to and which will proceed to hearing. Charge negotiation will sometimes result in the defence entering a plea of guilty to fewer charges than those initially laid, or to a lesser charge, in return for the prosecution withdrawing remaining charges. If appropriate charges are laid initially, there may be little scope for charge negotiation.

Acceptance of a charge negotiation proposal will not be considered by SafeWork unless:

- the charges the defendant will plead to adequately reflect the nature of their criminal conduct and the plea provides adequate scope for sentencing, and/or
- the evidence available to support the prosecution case is weak in any material respect, and/or
- the saving of time and cost weighed against the likely outcome of the matter if it proceeded to trial is substantial.

While it is uncommon for SafeWork to discontinue proceedings, outside of charge negotiations, it may occur from time to time. In determining whether to discontinue a prosecution, SafeWork will consider the same factors relevant to the decision to prosecute set out above and any change in circumstances since the prosecution was commenced.

## 8 Disclosure

SafeWork as a prosecuting authority is under a continuing obligation to fully disclose to the alleged offender all material known to it in a timely manner that on a sensible appraisal:

- is relevant or possibly relevant to an issue in the case
- raises or possibly raises a new issue in the case
- holds out a real prospect of providing a lead to evidence that goes to either of the above.

The duty of disclosure continues after trial and the conclusion of any appeal.

## 9 Mode of trial

Under the WHS Act:

- proceedings for an Industrial Manslaughter or Category 1 offence committed by an individual are to be taken on indictment in either the District or Supreme Courts.
- proceedings for all other offences under the Act or the Regulation are to be dealt with summarily before the Industrial Court or Local Court.

Proceedings for an offence under the Explosives Act or its Regulation are to be dealt with summarily in the Local Court or the Industrial Court.

Proceedings for an offence under the Dangerous Goods Act or its Regulation are to be dealt with summarily in the Local Court or the Industrial Court.

Where SafeWork has a choice as to the jurisdiction in which it will commence a prosecution, it will determine the appropriate jurisdiction having regard to factors including:

- the seriousness of the alleged offence
- the available sentencing scope of the respective court jurisdictions and whether they provide sufficient sentencing scope to reflect the seriousness of the alleged offence.

## 10 Sentencing options and responsive sentencing under the WHS Act

Where a court finds that a WHS Act offence is proved, there are a number of sentencing options available:

- Imprisonment – For a small number of offences under the WHS Act a penalty of imprisonment is available.
- Monetary penalty/fine – The Court can impose a monetary penalty with maximum fine amounts prescribed for all offences in the Act.
- Other orders – Part 13, Division 2 of the WHS Act sets out a number of sentencing orders that can be imposed by the Court in addition to a monetary penalty.

These orders, referred to in these Guidelines as “Responsive Sentencing Orders” include:

An Adverse Publicity Order (s236)	The Court can make an order requiring the offender to publish information about the offence they committed including its consequences and the penalty imposed. SafeWork considers that the benefit of an adverse publicity order is that it involves a public denunciation by the offender whilst also assisting to deter other potential offenders. For example, if the behavior of an offender is of significant concern, and/or there was a strong need to deter others from committing similar offences SafeWork could recommend to the Court that it imposes an adverse publicity order on the defendant.
A Restoration Order (s237)	The Court can make an order requiring the offender to remedy anything caused by the commission of the offence that appears to be within the offender's power to remedy. SafeWork considers that the benefit of a restoration order is that it can assist in restoring the harm caused to an injured worker or others involved in the incident, particularly where that harm has not already been addressed by other means.
A WHS Project Order (s238)	The Court can order the offender to undertake a specified project for the general improvement of work health and safety. SafeWork considers the benefit of a WHS Project order is that it can be used to facilitate projects that increase WHS knowledge and capability for the relevant business and the wider industry in relation to the risk involved in the incident. For example, if there is a need to improve management of risk and harm within the business, or across industry, or where the cause of the incident would not be well known, SafeWork could recommend that the court orders the offender to undertake a specific WHS project that will promote this knowledge e.g. publication of an animation about the incident.

<b>A Training Order (s241)</b>	<p>The Court can make an order requiring the offender to undertake or arrange for workers to undertake a specified course of training. SafeWork considers the benefit of a training order is to build understanding, capability, and further educate duty holders in WHS. For example, if there has been a lack of willingness or capability of an offender to enhance their knowledge and understanding, SafeWork can recommend to the Court a training order that may be general or specific in nature. Training orders can require that a business funds training for particular staff e.g. supervisors and managers within their business.</p>
<b>A Court-ordered WHS undertaking (s239)</b>	<p>The Court can make an order adjourning the proceeding for a period of up to 2 years and releasing the offender on an undertaking with specified conditions SafeWork considers the benefit of a WHS undertaking is that it allows the Court to provide the offender with an opportunity to demonstrate that it can be of good behavior for an extended period and, where appropriate, undertake action to demonstrate rehabilitation and safety improvement. For example, SafeWork can recommend that the Court impose an order that prohibits the business or individual from committing further WHS offences for a specific period of time. If they do commit a further offence during the period of the undertaking they can be called back before the court for re-sentencing. This could provide a strong level of deterrence, and encouragement towards improvement, for higher risk and repeat offenders.</p>

In considering the appropriate orders to recommend on sentence, SafeWork must ensure that penalties for non-compliant behavior best achieve the purposes of sentencing noted above, including promoting rehabilitation of the offender and deterrence both specific and general.

SafeWork considers that the best penalty is one that aids in driving behavioral change. Therefore, where an alleged contravention of WHS laws is of a serious nature, and we have commenced a prosecution, on a case-by-case basis we will consider if a Responsive Sentencing Order recommendation to the Court is appropriate.

Any recommendation we put to the Court for a Responsive Sentencing Order should reflect the purposes of sentencing as well as:

- be relevant to the risk involved in the incident,
- enable the expected WHS outcomes to be achieved from the order,
- be within the capability of the offender to deliver

SafeWork may consider recommending a combination of sentencing options depending on the circumstances of the offence.

A defendant can also propose a Responsive Sentencing Order to SafeWork during the negotiation of a plea, or prior to sentencing. If this occurs, SafeWork will consider the same criteria noted above in determining its response to the proposed Order.

SafeWork may decide either to support or oppose a Responsive Sentencing Order proposed by a defendant, or to recommend that there be some variation to the Order if it is imposed.

Ultimately the decision to impose a Responsive Sentencing Order is a decision for the Court. It can accept, alter or decline a responsive sentence recommendation made by SafeWork or a defendant. Orders can be made in addition to any other penalty that may be imposed by the Court, or any other action that the Court may take in relation to the offence.

# 11 Sentencing

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In New South Wales, the purposes of sentencing are set out in [sections 3A](#) of the Crimes (Sentencing Procedure) Act 1999 (Sentencing Act) as follows:

- to ensure that the offender is adequately punished for the offence
- to prevent crime by deterring the offender and other persons from committing similar offences
- to protect the community from the offender
- to promote the rehabilitation of the offender
- to make the offender accountable for his or her actions
- to denounce the conduct of the offender
- to recognise the harm done to the victim of the crime and the community.

Section 21A of the Sentencing Act states that in determining the appropriate sentence the court is to take into account the aggravating and mitigating factors set out in that section, as well as any other objective or subjective factor that affects the relative seriousness of the offence.

For further information: [Refer to sections 21A\(2\) –\(6\) of the Sentencing Act.](#)

# 12 Sentencing – role of the prosecutor

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The role of the prosecutor in the sentencing process is set out in:

- Rule 29.12 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015
- Rule 95 of the Legal Profession Uniform Conduct (Barristers) Rules 2015.

The relevant requirements are identical and state that a prosecutor:

- must correct any error made by the opponent in address on sentence,
- must inform the court of any relevant authority or legislation bearing on the appropriate sentence,
- must assist the court to avoid appealable error on the issue of sentence, and
- may submit that a custodial or non-custodial sentence is appropriate.

SafeWork will generally make submissions on sentence where it will assist the court, or if it is otherwise invited to do so. In making such submissions, SafeWork takes into account the relevant sentencing principles. In addition to the matters referred to above, where appropriate, SafeWork may make submissions as to:

- the objective seriousness of the offence including where the offence falls on the range of seriousness for like offences
- the subjective circumstances of the offender where known
- the outcome of proceedings against any co-offender
- the evidence or assertions advanced for the offender where necessary

A prosecutor may also provide statistical material and details of comparable cases where it would assist the court, indicating how the court would be assisted.

# 13 Role of the SafeWork Coordinator, Family Liaison

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For matters that SafeWork NSW investigate, the Family Liaison Team assist bereaved family members and injured workers throughout the entire process, including the investigation and/or legal proceedings. For more information on the Family Liaison Team and its functions, please refer to the [Customer Service Standard](#).

## 14 Victim impact statements

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Victim impact statements can be provided in certain circumstances by a person who is a ‘primary victim’ or ‘family victim’ in relation to an offence (as those terms are defined in section 26 of the Sentencing Act).

A victim impact statement must be prepared in accordance with, and comply with the requirements set out in, sections 28 to 30 of the Sentencing Act and its Regulation.

The statement must not contain anything that is offensive, threatening, intimidating or harassing. Victims should be consulted as to any amendments that may be required to ensure that the statement complies with the legislation.

A victim impact statement may be received and considered by the court after the offender has been convicted, but prior to sentencing. A victim or victim’s representative may choose to attend the sentence hearing and read out the victim statement to the court.

## 15 Costs

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SafeWork generally seeks costs in successful prosecutions.

## 16 Appeals

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SafeWork has power to commence appeals against certain decisions of the Courts in relation to its prosecutions. SafeWork will only commence an appeal if:

- all applicable statutory requirements for the appeal are established
- there is a reasonable prospect that the appeal will succeed
- the appeal is in the public interest.

In deciding whether to lodge or seek an appeal against a court outcome, SafeWork will otherwise be guided by the relevant principles set out in the [ODPP Guidelines](#).

In relation to Crown sentence appeals, which are the most common type of appeal SafeWork is required to consider, the key factors to be taken into account are:

- appeals should only be brought to establish and maintain adequate standards of punishment for offences under the legislation SafeWork administers or to correct sentences that are so disproportionate to the seriousness of the offence as to lead to a loss of confidence in the administration of justice, and
- appellate courts will intervene only where it is clear that the sentencing judge has made a material error of fact or law or has imposed a sentence that is manifestly inadequate.

Any appeal should be brought promptly.

For more information: Refer to Chapter 10 of the [ODPP Guidelines](#).

# 17 Enforceable undertakings

Part 11 of the WHS Act allows SafeWork to accept a written undertaking, known as a WHS undertaking or enforceable undertaking, given by a person in connection with a contravention or alleged contravention of the WHS Act, in lieu of a prosecution.

SafeWork has separate [Enforceable Undertakings guidelines](#) applicable to consideration of these undertakings

# 18 Procedure if prosecution is not brought

Section 231 of the WHS Act provides for a person to request that SafeWork bring a [prosecution in certain circumstances](#).

Section 231 allows a person to request that SafeWork bring a prosecution if:

- they reasonably consider that the occurrence of an act, matter or thing constitutes a Category 1 offence or a Category 2 offence under the WHS Act, and
- no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 18 months after it occurred.

*NB: The elements that need to be established for a Category 1 or 2 offence are set out under “Categories of offences” above.*

Section 231 does not apply if those criteria are not present.

If a request for a prosecution is made under section 231, SafeWork is obliged to provide a response within three months of the request:

- confirming whether the investigation is complete, and
- if it is complete, whether or not a prosecution will be brought in the matter including reasons if one is not being brought.

SafeWork is also obliged to advise the person who the requestor believes committed the offence of the request and of the outcome set out above.

[Please see SafeWork’s separate policy for making a request to the regulator to bring a prosecution.](#)

# 19 Conclusion

These Guidelines do not attempt to cover all considerations and questions that can arise in the prosecution process for breaches of the legislation administered by SafeWork. They address those issues which SafeWork considers are significant to the process and in respect of which clarity and guidance is desirable. These Guidelines will be reviewed regularly, and any changes will be made public.

**For more information visit:**

[safework.nsw.gov.au/resource-library/prosecutions/safe-work-nsw-prosecution-guidelines](http://safework.nsw.gov.au/resource-library/prosecutions/safe-work-nsw-prosecution-guidelines)

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