



SAFEWORK NSW PROSECUTION GUIDELINES

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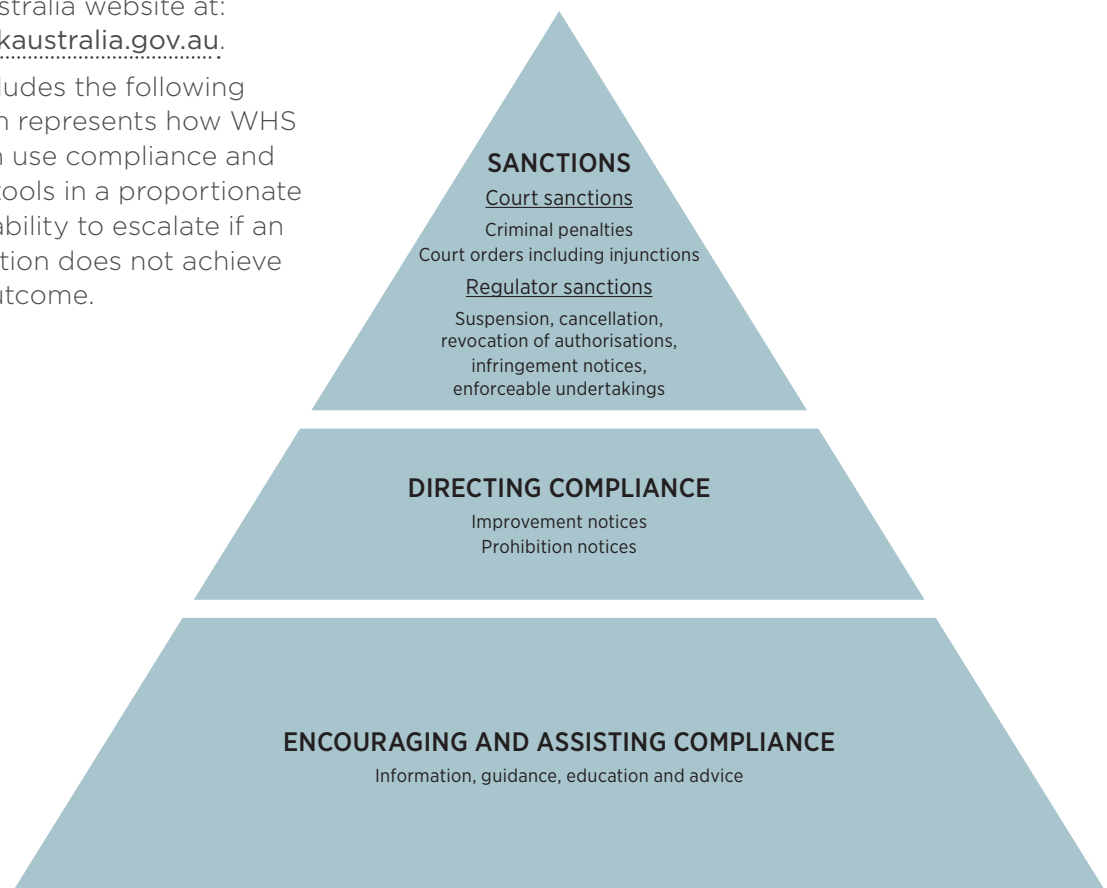
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1. INTRODUCTION

- 1.1 SafeWork NSW is the state's work health and safety regulator. We work with the NSW community to reduce work related fatalities, serious injuries and illnesses and make it easier to do business safely.
- 1.2 At SafeWork NSW, we aim to make sure our regulatory approaches promote a competitive, confident and protected NSW. See *Our approach to work health and safety regulation* (catalogue no. SW08027).
- 1.3 SafeWork NSW is committed to providing a transparent and consistent approach to its compliance and prosecution activities in relation to work health and safety.
- 1.4 The *Work Health and Safety Act 2011* (WHS Act), *Work Health and Safety Regulation 2011* (WHS Regulation), and supporting codes of practice are part of a harmonised national scheme for work health and safety (WHS) legislation that commenced in New South Wales, Queensland, the A.C.T., the Commonwealth and the Northern Territory on 1 January 2012.
- 1.5 The harmonised WHS legislation was enacted pursuant to the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, signed by the Council of Australian Governments in July 2008. Safe Work Australia is the national policy body responsible for developing the model WHS legislation and associated policy.
- 1.6 The WHS Act appoints the Secretary of the Department of Finance, Services and Innovation as the NSW WHS Regulator, to be known as SafeWork NSW. In addition to its role as regulator for the WHS Act, SafeWork NSW (hereinafter "SafeWork") exercises powers and authorities and has duties and functions under other WHS-related legislation in NSW.
- 1.7 The legislation under which SafeWork exercises functions as regulator includes the:
 - WHS Act, regulation and codes of practice made under the Act (SafeWork is a co-regulator with the Department of Planning and Environment who administers the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*);
 - *Explosives Act 2003* and its regulation;
 - *Rural Workers Accommodation Act 1969*;
 - *Dangerous Goods (Road and Rail Transport) Act 2008* and its regulation (jointly administered with the Environment Protection Authority).

2. NATIONAL COMPLIANCE AND ENFORCEMENT POLICY

- 2.1 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.
- 2.2 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.
- 2.3 The NCEP is available on the Safe Work Australia website at: www.safeworkaustralia.gov.au.
- 2.4 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.
- 2.5 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).
- 2.6 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.



Source: Safe Work Australia; National Work Health and Safety Compliance and Enforcement Policy.

3. PROSECUTION GUIDELINES

- 3.1 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 under the WHS legislation.

For more information: Refer to the ODPP Guidelines available at www.odpp.nsw.gov.au/prosecution-guidelines

The decision to prosecute

- 3.2 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 in the public interest.
- 3.3 By commencing a prosecution, SafeWork aims to change the behaviour 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.
- 3.4 Consistent with the NCEP, SafeWork is committed to a policy of prosecuting whenever significant breaches of WHS legislation occur. Significant breaches generally include cases involving fatalities and/or serious injury or where potential risks to health and safety are high.

Factors taken into account

- 3.5 The general public interest is the paramount consideration to be taken into account in the decision to prosecute. As provided for in the ODPP Guidelines, the question of whether or not the public interest requires that a matter be prosecuted is resolved by determining:
- whether or not the admissible evidence available is capable of establishing each element of the offence
 - whether or not it can be said that there is no reasonable prospect of conviction; and if not,
 - whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

For more information: Refer to Guideline 4 of the ODPP Guidelines available at www.odpp.nsw.gov.au/prosecution-guidelines

Prima facie case

- 3.6 Before any prosecution is considered, there must be enough evidence to establish a prima facie case against the alleged offender.

Reasonable prospect of conviction

- 3.7 As noted in the ODPP Guidelines, this consideration requires an exercise of judgment which will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place.
- 3.8 A relevant consideration in the evaluation of the strength of a prosecution case will be whether the alleged offender ensured, so far as reasonably practicable, that the alleged risk was addressed, and the existence or otherwise of evidence to support any defence that may be raised.

Public interest

- 3.9 In considering the public interest, the main criteria taken into account will be similar to those adopted by the ODPP Guidelines including:
- (a) the seriousness or triviality of the alleged offence and/or whether the breach is of a minor nature only. (Consistent with this consideration, SafeWork is more likely to prosecute when a death has occurred, or there has been a serious injury or illness, or when there has been a risk of fatal or serious injury or illness – see paragraph 3.13);
 - (b) any mitigating or aggravating circumstances;
 - (c) the length of time since the alleged offence;
 - (d) the degree of culpability of the alleged offender in relation to the offence;
 - (e) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
 - (f) the prevalence of the alleged offence and the need for deterrence both specific and general;
 - (g) any prior breaches of, or convictions under, the WHS legislation;
 - (h) whether the alleged offence is of considerable public concern;
 - (i) any precedent which may be set by not instituting proceedings;
 - (j) the age, physical or mental health or special infirmity of the alleged offenders or witnesses;
 - (k) the length and expense of a Court hearing;
 - (l) whether proceedings are to be instituted against others arising out of the same incident;
 - (m) the availability and efficacy of any alternatives to prosecution.
 - (n) Another Agency is taking legal action for the same matter.

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

3.11 The resources available to SafeWork to conduct prosecutions are finite. They will not be expended in pursuing inappropriate cases.

Irrelevant considerations

- 3.12 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:
- (a) any discriminatory factor – for example race, nationality, political associations; or
 - (b) personal empathy or antipathy towards a person; or
 - (c) the political or other affiliations of those responsible for the prosecution decision; or
 - (d) possible political advantage or disadvantage to the government or any political party, group or individual.

Priority matters

- 3.13 SafeWork prosecution policy requires giving priority to prosecuting offences involving:
- (a) target industries and or hazards;
 - (b) serious injury types and fatalities;
 - (c) alleged failure to comply with a prohibition notice;
 - (d) interfering with inspectors or authorised officers so as to prevent them from exercising their powers;
 - (e) impersonating an inspector.
 - (f) failure of accredited Assessors to conduct full and proper assessments for those applying for High Risk Work Licenses.

Categories of offences

- 3.14 While the WHS Act creates other offences, these Guidelines focus on offences in Part 2 of the Act relating to health and safety duties, as they are the most serious.
- 3.15 Under the WHS Act, there are three categories of offences for breach of a health and safety duty which are defined by the relative seriousness of the breach:

Category 1 offence – Reckless conduct

This is the most serious category of offence. A person commits a Category 1 offence if they:

- (a) Have a health and safety duty, and
- (b) Without reasonable excuse, engage in conduct that exposes an individual to whom the duty is owed to a risk of death or serious injury or illness, and
- (c) Are reckless as to the risk to an individual of death or serious injury or illness.

For more information: Refer to section 31 of the WHS Act.

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

A person commits a Category 2 offence if they:

- (a) Have a health and safety duty, and
- (b) Fail to comply with that duty, and
- (c) 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.

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

A person commits a Category 3 offence if they:

- (a) Have a health and safety duty, and
- (b) Fail to comply with that duty.

For more information: Refer to section 33 of the WHS Act.

Who may prosecute

- 3.16 For general offences under the WHS Act and WHS Regulation, proceedings may only be instituted by:
- (a) the regulator, or
 - (b) an inspector with the written authorisation of the regulator, or
 - (c) 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 can only instigate proceedings after the regulator has declined to follow the advice of the Director of Public Prosecutions (ODPP) to bring proceedings.

For more information: Refer to section 230 of the WHS Act.

Selecting defendants

General principles

- 3.17 Persons conducting a business or undertaking (PCBUs), including those that manage or control a workplace, those that manufacture, supply, design etc, plant and structures used at workplaces, workers of PCBUs, 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.
- 3.18 In addition to the factors set out at above, general considerations that may be taken into account in choosing the appropriate defendant in a particular case are:
- (a) 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;
 - (b) in relation to (a) above, what was the culpability of the alleged offender;
 - (c) the likely effectiveness of any Court order that might be made against the alleged offender.

Corporate and director/manager liability

3.19 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.

3.20 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 PCBU must exercise due diligence to ensure that the PCBU 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.

Public authorities

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

3.22 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:

- (a) the public has an interest in Government authorities abiding by the law; and
- (b) 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.

3.23 Public authorities are usually under the control and direction of a Minister who can direct compliance with 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 attracts an enforcement response including prosecution.

3.24 In prosecuting Government authorities, the current Premier’s Memorandum No. 97-26: *“Guidelines for litigation involving or between Government departments and authorities”*, applies to the parties because they are both Government agencies. This procedure is designed to minimise the adversarial nature of those proceedings by, for example, requiring the resolution of factual and legal issues between the parties, and opportunities for open and frank discussion.

For more information: Refer to Premier’s Memorandum No. 97-26 at: www.arp.nsw.gov.au/m1997-26-litigation-involving-government-authorities

Charges

General principle

3.25 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.

Similar charges for the same offence

3.26 SafeWork has a duty to refine its case to avoid laying either duplicitous or unnecessary charges.

3.27 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.

Death at work

3.28 Where there has been a breach of the law leading to a work-related death, the NSW Police Force (Police) and SafeWork should consider whether the circumstances of the case might justify a charge of manslaughter under the *Crimes Act 1900* or a charge under sections 31 (Category 1) or 32 (Category 2) of the WHS Act. 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 charges are laid in the circumstances. The decision as to which agency will lead an investigation is to be made at the commencement of the process, and where the facts support a charge of manslaughter, the Police may seek the opinion of the ODPP. 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.

Charge negotiation

3.29 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 and hence there will only be limited circumstances where it will be considered.

3.30 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.

Mode of trial

3.31 Under the WHS Act, proceedings for a Category 1 offence committed by an individual are to be taken on indictment in either the District or Supreme Courts. Proceedings for Category 2 and 3 offences are to be dealt with summarily before the Local Court or District Court in its summary jurisdiction.

Sentencing options

3.32 Where a Court finds that a WHS offence is proved, there are a number of sentencing options available. These include:

- Adverse publicity orders (section 236, WHS Act);
- Orders for restoration (section 237);
- Work Health and Safety Project Orders (section 238);
- Release of the offender on providing a WHS undertaking (section 239);
- Injunctions (section 240);
- Training Orders (section 241);
- Monetary penalty; and
- Imprisonment (for a small number of serious offences).

Sentencing

3.33 In New South Wales, the purposes of sentencing and a list of relevant factors on sentence are set out in sections 3A and 21A of the *Crimes (Sentencing Procedure) Act 1999* (Sentencing Act). Section 3A provides that the purposes for which a court may sentence an offender are 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.

3.34 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.

Sentencing – role of the prosecutor

3.35 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:

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

As part of its duty to assist the court and represent the public interest, 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, and its submissions cannot depart from those principles. Where appropriate SafeWork may submit that an offence is at the upper or lower end of the range of seriousness.

Role of the SafeWork Coordinator, Family Liaison

3.36 The role of the Coordinator, Family Liaison is to provide support, information and referral to family members when a person dies in a workplace incident or suffers a serious injury in the workplace. People witnessing fatalities or serious incidents may receive counselling through the Coordinator in the initial stages following an incident and also later, if they are required to attend Court as witnesses for SafeWork. As noted below, the Coordinator is also able to assist families or injured people prepare Victim impact statements. The Coordinator also provides court support for families attending matters at court, and can arrange for support to be provided to families attending coronial inquests.

Victim impact statements

- 3.37 Victim impact statements can be provided in certain circumstances by a person who is a 'primary victim' or 'family victim' as defined by s 26 of the Sentencing Act. A victim impact statement must be prepared in accordance with, and comply with the requirements set out in, sections 27-30A of the Sentencing Act and the accompanying regulation.
- 3.38 Victims should be consulted as to any amendments that may be required to ensure that the statement complies with the legislation. The statement must not contain anything that is offensive, threatening, intimidating or harassing.
- 3.39 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 their statement to the court.

Appeals

- 3.40 A person convicted of a Category 2 or 3 offence under sections 32 or 33 of the WHS Act in the Local Court can appeal to the District Court under the *Crimes (Appeal and Review) Act 2001*.
- 3.41 A person convicted of a Category 2 or 3 offence in the District Court in its summary jurisdiction may appeal to the Court of Criminal Appeal under section 5AA of the *Criminal Appeal Act 1912*.
- 3.42 A person convicted of a Category 1 offence under section 31 of the WHS Act on indictment in the District Court or Supreme Court may appeal to the Court of Criminal Appeal under section 5 of the *Criminal Appeal Act 1912*.
- 3.43 In deciding whether to lodge or seek an appeal against a sentence imposed, SafeWork will be guided by the relevant principles set out in the ODPP Guidelines. The key factors to be taken into account are:
- (a) appeals should only be brought to establish and maintain adequate standards of punishment for offences under the WHS legislation 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
 - (b) 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.
- 3.44 In general, an appeal will only be instituted where it is considered likely to succeed. Any such appeal should be brought promptly.
- For more information:** Refer to Guideline 4 of the ODPP Guidelines

Enforceable undertakings

- 3.45 Part 11 of the WHS Act allows SafeWork to accept a written undertaking, known as a WHS undertaking, given by a person in connection with a contravention or alleged contravention of the WHS Act. SafeWork has a separate Enforceable Undertaking Policy which can be found at www.safework.nsw.gov.au/law-and-policy/enforcement/enforceable-undertakings

Procedure if prosecution is not brought

- 3.46 Section 231 of the WHS Act provides for a person to request that the regulator bring a prosecution in certain circumstances. Please see SafeWork's [separate policy for making a request to the regulator to bring a prosecution](#).

Conclusion

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

