



General Guidelines for Prosecutions

Version: 2.0 Effective Date: March 2024

Background

These guidelines provide information about the way Work Health and Safety (WHS) prosecutions are conducted by SafeWork SA. These guidelines are published in accordance with section 230(3)(a) of the *Work Health and Safety Act 2012* (SA).

SafeWork SA administers South Australian WHS legislation which includes:

- ♦ Work Health and Safety Act 2012 (SA); and
- ♦ Work Health and Safety Regulations 2012 (SA).

This legislation can be accessed at www.safework.sa.gov.au.

The National Compliance and Enforcement Policy

The National Compliance and Enforcement Policy (NCEP) outlines the aims of the policy and the tools available to WHS regulators. The NCEP also sets out general information about prosecutions, including the criteria used by regulators to determine whether or not to initiate prosecution action and relevant timeframes. The NCEP can be accessed at [national_compliance_and_enforcement_policy.pdf \(safeworkaustralia.gov.au\)](http://national_compliance_and_enforcement_policy.pdf(safeworkaustralia.gov.au)) or by contacting the SafeWork SA Help Centre during business hours via telephone on 1300 365 255.

The decision to prosecute

The question of whether to initiate a prosecution for a breach of WHS laws is a significant one, as the effect on those impacted by the decision (the defendant, worker or family of a deceased worker for instance) will be considerable. In determining whether or not to prosecute, SafeWork SA is legally bound by the Director of Public Prosecutions South Australia Statement of Prosecution Policy & Guidelines, specifically:

1. Whether a prima facie case exists, that is, where the evidence is sufficient to initiate proceedings; and
2. Whether a reasonable prospect of conviction exists based on an evaluation of the available evidence that takes into account such matters as
 - ♦ the availability, reliability and credibility of witnesses
 - ♦ their likely impression on the court or tribunal that will determine the matter
 - ♦ the admissibility of any confession or other evidence
 - ♦ any lines of defence available to the defendant; and



3. Whether it is in the public interest to prosecute based on the following considerations:

- ◆ the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature
- ◆ any mitigating or aggravating circumstances
- ◆ the characteristics of the duty holder, including any special infirmities, prior compliance history and background
- ◆ the age of the alleged offence
- ◆ the degree of culpability of the alleged offender
- ◆ whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
- ◆ the efficacy of any alternatives to prosecution
- ◆ the prevalence of the alleged offence and the need for deterrence, both specific and general, and
- ◆ whether the alleged offence is of considerable public concern.

The South Australian Director of Public Prosecutions policy on prosecutions can be accessed at [Guidelines | Office of the Director of Public Prosecutions \(dpp.sa.gov.au\)](https://www.dpp.sa.gov.au/Guidelines).

Courts

Prosecutions for breaches of the WHS laws are generally heard in the South Australian Employment Tribunal (SAET). A more serious offence may first be heard in the Magistrates Court and finalised in the District Court (see 'Steps in the Court Process' section for further detail).

Prosecution initiation

The Executive Director of SafeWork SA is authorised to bring prosecution proceedings for criminal offences under the WHS Act. They may also give written authorisation for Inspectors to bring prosecution proceedings.

Summary offences are charged on Information and Summons, and are initiated by an Information being laid and filed with the SAET registry. SafeWork SA will serve a copy of the Information and Summons on the defendant.

Minor indictable offences are also charged on Information and Summons, and are initiated by an Information being laid and filed with the SAET registry. SafeWork SA will serve a copy of the Information and Summons on the defendant.

Major indictable offences are charged on Information and Summons, and initiated by an Information being laid and filed with the Magistrates Court registry. SafeWork SA will serve a copy of the Information and Summons on the defendant.

Service will be affected by way of delivery in-person, a process server, via email or by leaving the documentation at the person's usual abode or place of business. The summons will indicate the return date and place the defendant is required to appear i.e. the applicable Court, date and time.



Court response

A prosecution comes before the court for the first time at what is known as a Directions Hearing. This is usually a short hearing at which both parties are required to present at the court, and determine the course the matter will take. This will depend on the court and what approach the parties take to the matter.

Prosecutions are usually adjourned to a future date at a further Directions Hearing. This is to allow the defendants an opportunity to consider the case against them. The court will usually order the exchange of materials between the parties at this first hearing. At a later hearing date, the defendant may choose to enter a guilty plea, in which case the matter is usually set down for sentence submissions on another day. If the defendant enters a plea of not guilty, the matter is set down for a trial.

A case may be adjourned a number of times before it is ultimately resolved.

A trial's length may depend on multiple factors and may be split during a period of weeks or months. For example, the matter may be part heard in May and then adjourned until August for further hearing.

The court may choose to deliver its decision on the final day of the trial or may reserve the decision for a later time, dependent on the complexity of the matter and the court's availability.

The court process

The court process differs depending on the category of offence charged and whether it is an individual or a body corporate being charged.

There are three categories of offences for a breach of the WHS Act:

- ♦ **Category 1** – Reckless conduct. A person commits a Category 1 offence if the person has a health and safety duty and the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness and the person is reckless as to the risk to an individual of death or serious injury or illness.
- ♦ **Category 2** – Failure to comply with health and safety duty. A person commits a Category 2 offence if the person has a health and safety duty and the person fails to comply with that duty and the failure exposes an individual to a risk of death or serious injury or illness.
- ♦ **Category 3** – Failure to comply with health and safety duty. A person commits a Category 3 offence if the person has a health and safety duty and the person fails to comply with that duty.

All categories of offences are commenced in the SAET. A prosecution will normally be finalised in the SAET unless the defendant elects to be tried in the District Court.

Industrial manslaughter

Industrial manslaughter is a major indictable offence. Prosecution commences in the Magistrates Court but will proceed to a superior Court for trial. An indictable offence grants the defendant the right to a trial by jury or by Judge alone.



Minor or summary offences may be joined with a charge of industrial manslaughter and will follow the same procedural process as the major indictable charge. This is to ensure that matters that are charged on the same information can be dealt with in the same way that is applicable to major indictable offences under the *Criminal Procedure Act 1921*; the criminal procedure applicable to the most serious offence on the Information is followed.

If the court is not satisfied that a person is guilty of industrial manslaughter but is satisfied they are guilty of a lower tier offence, then an alternative verdict of guilt for a Category 1, Category 2 or Category 3 offence under the WHS Act is available. However, alternative verdicts are only available if an industrial manslaughter prosecution is brought within the same limitation period that applies to the lower category offence, which is two years.

If found guilty of industrial manslaughter, individuals face a maximum penalty of 20 years imprisonment, whilst an offence committed by a body corporate is a maximum \$18,000,000 fine.

Maximum Penalties

Duty Holder	Industrial Manslaughter	Category 1	Category 2	Category 3
Individual worker or other person at the workplace	Does not apply	\$300,000 or 5 years imprisonment or both	\$150,000	\$50,000
Person conducting a business or undertaking (PCBU) or officer of a PCBU	20 years imprisonment	\$600,000 or 5 years imprisonment or both	\$300,000	\$100,000
Body corporate or government body	\$18,000,000	\$3,000,000	\$1,500,000	\$500,000

Civil Proceedings

Proceedings for civil penalty provisions are dealt with in the SAET.

The Tribunal may transfer proceedings to another tribunal or court if satisfied that it is more appropriate to do so. The Supreme Court may order that civil proceedings before the Tribunal be transferred to the Supreme Court or conversely, transfer civil proceedings to the Tribunal if within its jurisdiction. Similarly, the District Court may transfer civil proceedings to the Tribunal if within its jurisdiction.

Victim Impact Statements

Victims or families of victims of offences under the WHS Act may provide the sentencing court with a written personal statement (called a victim impact statement) about the impact of the injury, loss or damage they have suffered as a result of the offence. The Court may allow the victim to read their



statement aloud to the court, cause the statement to be read aloud or give consideration to the statement without it being read aloud.

Sentencing options

The WHS Act allows for the imposition of penalties for offences in the form of monetary fines, and in some cases, imprisonment. The Act also provides for the following orders, which can be made in addition to any penalty imposed for an offence:

- ◆ adverse publicity orders;
- ◆ orders for restoration;
- ◆ WHS project orders;
- ◆ court-ordered WHS undertakings; and
- ◆ training orders.

Appeals

South Australian Employment Tribunal

A person seeking to appeal must file and serve a Notice of Appeal, using the approved form, within 28 days of conviction or sentence.

The Court may suspend the operation of an order until the determination of an appeal.

An appeal lies against a decision of the Tribunal, other than a decision of a Full Bench, to a Full Bench of the SAET. An appeal will be by way of a rehearing.

The Full Bench may draw inferences from evidence or other material before the Tribunal and may allow further evidence or material to be presented.

The Full Bench may

- ◆ affirm the original decision; or
- ◆ vary the original decision; or
- ◆ set aside the original decision and return the matter to the Tribunal for reconsideration, in accordance with any directions the Full Bench considers appropriate.

A final appeal to the Court of Appeal can only commence with the Court of Appeal's permission. The appeal lies on a question of law against a decision of the Full Bench of the Tribunal. The Court of Appeal may decide the question of law, refer the matter back to the Tribunal with directions the Court of Appeal considers appropriate or make consequential or related orders.

Criminal Courts

Criminal matters, such as a charge for industrial manslaughter, may be heard in the Magistrates, District or Supreme Court.

Appeals can be against a conviction and/or the severity of the sentence.



An appeal, in most cases, is based on a question of law. Special permission of the Court must be granted to re-argue a question of fact.

If a defendant attends a Magistrate Court hearing and pleads guilty to a major indictable offence (industrial manslaughter) and is sentenced (as approved by prosecution and defence), an appeal against that sentence can be made to the Court of Appeal division of the Supreme Court, with the permission of the Court of Appeal.

If a defendant receives a conviction or sentence handed down by the District or Supreme Court, an appeal is heard by the Court of Appeal, the appellate division of the Supreme Court. This involves at least three specially appointed judges sitting together.

Records of court process and decisions

Decisions handed down by the SAET are published online at the AustLii website at: [South Australian Employment Tribunal \(austlii.edu.au\)](http://SouthAustralianEmploymentTribunal.austlii.edu.au)

All sentencing remarks for District Court cases are available on the SA Courts website at: [Sentencing remarks - CAA \(courts.sa.gov.au\)](http://Sentencingremarks-CAA.courts.sa.gov.au).

For copies of District Court trial decisions, contact the District Court Registry on 8204 0289.

Copies of Supreme Court appeal decisions are available on the SA Courts website at: [Supreme Court of South Australia - Court of Appeal \(austlii.edu.au\)](http://SupremeCourtofSouthAustralia-CourtofAppeal.austlii.edu.au).

Publication of prosecution outcomes

Prosecution outcomes are published by SafeWork SA in accordance with their publishing policy, which can be obtained at [Prosecutions-Publishing-policy.pdf \(safework.sa.gov.au\)](http://Prosecutions-Publishing-policy.pdf).

Prosecution summaries are available at [Prosecutions | SafeWork SA](http://Prosecutions|SafeWorkSA).

Recording of convictions

It is at the Magistrate's or Judge's discretion whether to record a conviction in accordance with section 24 of the *Sentencing Act 2017*.

Further Information

Telephone SafeWork SA Help Centre: 1300 365 255

SafeWork SA: GPO Box 465, ADELAIDE SA 5001

Country offices: Mount Gambier, Port Lincoln, Port Pirie and Whyalla



Guideline Governance

Category	Compliance and Enforcement			
Version	2.0			
Status	Approved			
Effective date	March 2024			
Review date	March 2025			
Document Owner	Regulator (SafeWork SA Executive Director)			
Risk rating	<input type="checkbox"/> Low	<input type="checkbox"/> Medium	<input checked="" type="checkbox"/> High	<input type="checkbox"/> Extreme
Regulator document number	SWSA - REG DOC - 001			

Superseded versions

Version	Change history
1.0	Original version
2.0	Major review to reflect the new Industrial Manslaughter provisions Supersedes General Guidelines for Prosecutions version 1.0 January 2013