



Victoria Government Gazette

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THE VICTORIAN WORKCOVER AUTHORITY'S GENERAL PROSECUTION GUIDELINES

The Victorian WorkCover Authority (VWA) issues the following general guidelines about the prosecution of offences under Victoria's occupational health and safety and workers compensation laws.

The Victorian WorkCover Authority's constructive compliance strategy

Constructive compliance recognises the importance of providing all participants with comprehensive information and education about their duties and responsibilities. This approach combines encouraging good practices with deterring unacceptable performance.

The VWA balances the use of positive motivators and deterrence measures to improve workplace health and safety and return to work, and to prevent abuse of the workers compensation scheme.

The VWA provides advice, information, education and financial and other incentives to encourage compliance with Victoria's health and safety and compensation laws.

Where compliance is not achieved, enforcement tools may be used to secure compliance. In some cases, a prosecution will be initiated to deal with a breach.

The VWA also has a range of other enforcement tools it can use depending on the nature and type of the breach.

For example:

- seeking voluntary compliance;
- issuing a letter of caution;
- accepting an enforceable undertaking; or
- referring matters to professional, registration or disciplinary bodies or other agencies.

Further details about the range of enforcement tools that can be used by the VWA can be found in the VWA's Compliance and Enforcement Policy (a broader policy document that places these guidelines in context, as part of the VWA's overall compliance and enforcement functions).

Consistent with the VWA's organisational values, its compliance and enforcement activities should be constructive, accountable, transparent and effective, and its enforcement actions should be targeted, proportionate, consistent and fair.

Victoria's occupational health and safety and workers compensation laws

Victoria's occupational health and safety and workers compensation laws include the following Acts of Parliament and the regulations made under those Acts:

- **Occupational Health and Safety Act 1985** (the old OHS Act)
- **Occupational Health and Safety Act 2004** (the OHS Act)
- **Dangerous Goods Act 1985** (the DG Act)
- **Road Transport (Dangerous Goods) Act 1995** (the RT Act)
- **Equipment (Public Safety) Act 1994** (the EPS Act)

In these guidelines, the above Acts are collectively referred to as Victoria's 'health and safety' laws.

- **Accident Compensation Act 1985** (the AC Act)
- **Workplace Injury Rehabilitation and Compensation Act 2013** (the WIRC Act)
- **Accident Compensation (WorkCover Insurance) Act 1993** (the ACWI Act)

In these guidelines, the above Acts are collectively referred to as Victoria's 'compensation' laws.

SPECIAL

These general guidelines are intended to guide the VWA in the exercise of its prosecutorial discretion. Failure by the VWA to act in accordance with these guidelines does not affect the validity of the VWA's prosecutions.

These general guidelines are published in the Victoria Government Gazette in accordance with the requirements of Victoria's health and safety and compensation laws. They are also published on the VWA's website, www.vwa.vic.gov.au, and incorporated in the VWA's Compliance and Enforcement Policy.

Key aim of prosecutions

The key aim of the VWA's health and safety prosecutions is to deter non-compliance with Victoria's health and safety laws and to prevent workplace and work-related deaths, injuries and disease.

Prosecution action may be taken whether or not a breach has resulted in death, injury or disease. Related aims of prosecution action include the promotion of good occupational health and safety (OHS) values and practices.

The key aim of the VWA's workers compensation prosecutions is to deter non-compliance and to maintain the integrity of the workers compensation scheme.

Strategic enforcement priorities – target areas

Prior to determining whether to prosecute (or take any other form of enforcement action), the VWA will undertake inquiries to determine whether a breach has occurred and to gather information that may assist in preventing future breaches.

In the case of compensation matters, inquiries may also be aimed at determining the VWA's liability to pay compensation.

An inquiry or investigation may be triggered by a range of sources, including complaints, referrals from other agencies and the VWA's proactive activities, for example, education campaigns and workplace inspections.

The VWA sets strategic priorities for its compliance and enforcement activities. Inquiries or investigations and any appropriate enforcement actions will usually occur in the following target areas:

Target areas for prosecutions under health and safety laws

1. Work-related fatalities.
2. Incidents involving serious injury or an immediate risk to health and safety where there appears to be a high degree of culpability; for example, cases involving:
 - reckless conduct that endangers or may endanger persons at work
 - failure to control risks despite previous warnings or knowledge
 - repeat offending
 - significant departures from widely known or accepted safe systems of work.
3. The VWA's focus areas for prevention, as determined by the VWA in its published strategies and business plans; for example:
 - high-hazard and high-risk industries and occupations (eg construction, farming and transport)
 - common injury types (eg musculoskeletal injuries).
4. Failure to comply with a notice or direction given by an inspector or the VWA, especially where the risk that was the subject of the notice or direction:
 - still exists at the workplace
 - was 'passed on' to others without adequate warning (eg supplied to another worksite without adequate warning), or
 - was not remedied until a significant time after the date specified in the notice or direction.

5. Offences against inspectors:
 - hindering, obstructing, concealing evidence from an inspector or preventing a person from assisting an inspector
 - assaulting, intimidating, threatening an inspector or a person assisting an inspector
 - impersonating an inspector.
6. Offences against Health and Safety representatives (or committees), including refusals by employers to:
 - allow OHS training as specified in a VWA determination
 - meet the obligations to health and safety representatives (eg access to information, interviews, time and facilities)
 - establish a health and safety committee.
7. Offences against, or by, authorised representatives of registered employee organisations such as hindering, obstructing, intimidating or impersonating an authorised representative.
8. Discrimination or threats to discriminate against employees or potential employees for any action in relation to occupational health and safety; for example, being a health and safety representative.
9. Coercion in negotiations relating to the establishment of designated workgroups of workers.
10. Failure to notify the VWA of ‘notifiable incidents’ and failing to preserve incident sites when required to do so.
11. DG Act offences that involve:
 - substantial damage to property
 - high consequence dangerous goods
 - breaches of Governor-in-Council orders that impose an absolute prohibition in relation to dangerous goods.
12. EPS Act offences, especially breaches of Governor-in-Council orders that impose an absolute prohibition in relation to prescribed equipment.
13. Other target areas as published from time to time by the VWA.

Target areas for prosecutions under workers compensation laws:

1. Offences involving dishonesty by workers, employers and those who provide services to injured workers (eg health professionals).
2. Failures by employers to comply with the return to work obligations set out in Part VIIB of the AC Act and Part 4 of the WIRC Act, eg to plan a worker’s return to work, to consult about a worker’s return to work and to provide employment to injured workers to the extent that it is reasonable to do so.
3. Offences by employers that unduly delay or complicate a worker’s access to entitlements or appropriate treatment, eg failing to make weekly payments.
4. Discrimination or threats to discriminate against workers for making or pursuing claims for compensation or giving notice of injury.
5. Offences against return to work inspectors and other persons authorised to exercise powers for the VWA.
6. Breaches by self-insurers.
7. Premium evasion.

Compensation and health and safety laws impose a range of obligations on a range of people. In considering whether the legislation has been complied with, the VWA considers the conduct of all duty holders.

In relation to many offences, the time for the VWA to bring charges against a person for an offence is limited; for example:

- The VWA is required to bring charges for indictable offences against the OHS Act within two years of the offence being committed or the VWA becoming aware that an offence has been committed, unless the Director of Public Prosecutions (DPP) authorises an extension of time.
- The VWA is required to bring charges for certain offences under the WIRC Act and the AC Act within three years from the date of the alleged offence.
- Prosecutions for summary offences must be brought within 12 months of the alleged offence, except where otherwise provided by law.

Enforcement criteria

Where a VWA investigation reveals evidence of a breach, the VWA will consider whether a prosecution should be commenced or another form of enforcement action should be taken.

The VWA may decide to seek advice from, or consult with, the DPP when considering what, if any, enforcement action should be taken. When appropriate, the VWA can also refer matters to the DPP for a decision whether or not to prosecute.

In deciding on the most appropriate enforcement action to take, the VWA is guided by the following two paramount considerations:

- whether there is sufficient evidence to support enforcement action, and
- the public interest.

Sufficient evidence

When considering whether there is sufficient evidence to support a prosecution (as opposed to other forms of enforcement action), the VWA adopts the considerations, as published from time to time, in the Prosecution Policy of the Commonwealth (PPC), in particular:

Reasonable prospect of conviction

‘The initial consideration...is whether the evidence is sufficient to justify the institution or continuation of a prosecution.’ (PPC 2.4)

‘A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender... a bare prima facie case is not sufficient’ (PPC 2.4 and 2.5)

‘Once it is established that there is a prima facie case, it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.’

(PPC 2.5)

Matters to be taken into account

‘The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction.’ (PPC 2.6)

Evaluation of the evidence

When evaluating the evidence, regard should be given to the following matters (PPC 2.7):

Grounds for exclusion of evidence

- (a) Are there grounds for believing the evidence might be excluded bearing in mind the principles of admissibility at common law and under statute?’

Admissions

- ‘(b) If the case depends in part on admissions by the defendant, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the defendant?’

Reliability and credibility of witnesses

- ‘(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?’
- ‘(d) Has a witness a motive for telling less than the whole truth?’
- ‘(e) Are there matters that might properly be put to a witness by the defence to attack his or her credibility?’
- ‘(f) What impression is the witness likely to make on the arbiter of fact? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?’
- ‘(g) If there is a conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case?’
- ‘(h) If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?’

Availability of witnesses

- ‘(i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?’

Child witnesses

- ‘(j) Where child witnesses are involved, are they likely to be able to give sworn evidence?’

Identification issues

- ‘(k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the defendant?’

Multiple defendants

- ‘(l) Where two or more defendants are charged together, is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each defendant should separate trials be ordered?’

When considering whether there is sufficient evidence to support other forms of enforcement action, the VWA is guided by its legal advisers on a case by case basis.

Public interest

Where the VWA believes there is sufficient evidence to support enforcement action being taken, consideration will then be given to whether it is in the public interest for the VWA to take such action.

The VWA adopts the considerations as published from time to time in the PPC, in particular:

- ‘The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system’ (PPC 2.2)
- ‘Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.’ (PPC 2.8)

- ‘... generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued’ (PPC 2.9)
- ‘As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the Court at sentence in mitigation. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued’ (PPC 2.11)

The VWA takes into account the following when deciding whether enforcement action is appropriate and in the public interest:

1. The nature and circumstances of the alleged offence, including:
 - the seriousness of the alleged offence and the level of public concern about the alleged offence
 - the extent of the risk posed by the alleged offence to workers, employers or the scheme generally
 - the actual or potential consequences of the alleged offence (eg in the case of a health and safety offence, the extent of any injury caused to a person)
 - the prevalence of the alleged offence
 - any mitigating or aggravating features of the alleged offending.
2. The characteristics of the alleged offender, including:
 - the extent to which the alleged offender has acted in accordance with any advice given by the VWA in relation to its obligations
 - the alleged offender’s compliance history (including the alleged offender’s response to any previous VWA enforcement and prevention activities)
 - the attitude of the alleged offender(s) (including any proactive steps taken to comply or efforts to make restitution for any loss caused by the offence)
 - the alleged offender’s age, intelligence, health and any special infirmity
 - whether the alleged offender co-operated in the investigation or prosecution of the case, including the investigation or prosecution of others or is prepared to do so.
3. The impact of the alleged offence on others; for example:
 - any person who has been injured or exposed to risk
 - the family of any person who has died as a result of the alleged offence
 - any witnesses.
4. The impact of the alleged offence on the scheme, eg the extent of any financial losses suffered by the scheme as a result of the alleged offence.
5. The need for general deterrence – reducing the likelihood that others will commit similar offences.
6. The need for specific deterrence – reducing the likelihood that the alleged offender will commit further breaches.
7. The effect of prosecution, including:
 - the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court
 - the availability and efficacy of alternatives to prosecution
 - whether the consequences of any resulting finding of guilt would be unduly harsh or oppressive
 - any entitlement to criminal compensation, reparation or forfeiture if prosecution action is taken.

8. The need to maintain public confidence in the administration of the law and the scheme, including considering whether enforcement action could be perceived as counter-productive, eg by bringing the law into disrepute.
9. The likely length and cost of taking enforcement action.
10. When the alleged offence occurred.

Notification of the VWA's enforcement decisions

When the VWA makes a decision as to what, if any, enforcement action will be taken following an investigation, the VWA will generally notify the following parties of the decision:

- the alleged offender
- the complainant
- the person who was injured or exposed to an immediate risk (health and safety)
- the family of a person who died as a result of the alleged breach (health and safety).

If a prosecution is brought, the VWA will also notify these parties of the outcome.

Sentencing options

Where a prosecution results in a finding of guilt, a range of sentencing options is available to the court. Depending on the nature of the offence, these may include fines, imprisonment, adverse publicity orders and orders to undertake improvement projects. The VWA will seek sentencing dispositions that balance its aims of general and specific deterrence with the circumstances of each individual case.

Where appropriate, the VWA will also:

- apply for other orders – eg restitution orders, compensation orders, forfeiture/disposal and costs orders
- upon request by or on behalf of a victim, read aloud in open court during the sentencing hearing any admissible parts of a victim impact statement that are relevant to sentencing.

Where appropriate, the VWA will provide information in relation to these ancillary orders and submissions to affected parties.

Challenging the VWA's enforcement decisions

If the VWA has not brought a prosecution within six months of an alleged health and safety, return to work or discrimination offence, any person may request that the VWA bring a prosecution. Following a request to bring a prosecution, the VWA must – within three months – investigate the matter and advise whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought.

If the VWA advises that a prosecution will not be brought, the VWA must refer the matter to the DPP if the person requests in writing that the VWA do so.

The DPP must consider the matter and advise in writing whether or not the Director considers that a prosecution should be brought. The VWA must send a copy of the Director's advice to the person who requested the DPP's review. If the VWA declines to follow the advice of the DPP to bring a prosecution, the VWA must give reasons for its decision.

Publication of enforcement actions and outcomes

Publishing the nature and outcome of enforcement actions draws attention to the consequences of violating the law. It is a valuable tool for both educating duty holders and deterring non-compliance.

The VWA will publish and use enforcement data and information to maximise the outcome of its inspection, investigation and enforcement activity.

For example, the VWA:

- publishes information as to the nature and outcome of prosecutions (and where appropriate, other enforcement actions such as enforceable undertakings) to support specific and general deterrence

- informs duty holders in the same or similar industries of the nature and outcome of prosecutions (and, where appropriate, other enforcement actions) and provides advice as to how to prevent similar breaches
- uses information resulting from inspections, investigations and enforcement actions to inform its targeting.

More information about compliance and enforcement

In addition to these general guidelines, the VWA publishes further details about its compliance and enforcement program through its Compliance & Enforcement Policy, which can be found at www.vwa.vic.gov.au

From time to time, the VWA may publish supplementary compliance and enforcement policies, which provide further information about particular aspects of the VWA's compliance and enforcement activities. An up-to-date list of all supplementary compliance and enforcement policies is available at www.vwa.vic.gov.au

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