



SA Health Public Health Services Enforcement Framework

April 2015



Government
of South Australia

SA Health

1.Preamble

State Government is charged with legislative responsibilities which protect individuals and the community as a whole. While it is ultimately the responsibility of individuals and organisations to comply with public health law, authorised officers from State Government are required to carry out activities which may include enforcement of compliance.

Examples of regulated activities subject to this enforcement policy include:

- Management of Legionella in manufactured water systems (cooling towers and warm water systems)
- Installation and operation of wastewater systems
- Handling and sale of food for human consumption
- Implementation of risk management plans by suppliers of drinking water to the public
- Manufacture, sale and supply of controlled substances (medicines and poisons)
- Sale, supply and use of tobacco products.

2.Scope

This framework outlines SA Health's approach to enforcement and provides authorised officers with guidance about the manner in which enforcement activities are to be undertaken.

This framework does not override or limit the discretion of SA Health to take action as it sees fit under legislation.

This framework outlines the approach to enforcement taken by SA Health under the following Acts and subordinate legislation:

- Food Act 2001
- South Australian Public Health Act 2011
- Safe Drinking Water Act 2011
- Controlled Substances Act 1984
- Tobacco Products Regulation Act 1997.

3.Purpose

The purpose of this framework is to:

- promote consistent enforcement action in response to non-compliance
- uphold transparency, natural justice and precautionary principles
- ensure that enforcement action is proportionate to the alleged offence in each case
- advocate a risk based approach to enforcement through adoption of a graduation and proportionate response to non-compliance.

4. Defining Enforcement

SA Health adopts a broad definition of enforcement which combines the provision of advice with formal action where necessary. This is intended to encourage higher levels of voluntary compliance with legal requirements by individuals, businesses and other bodies. Notwithstanding this, SA Health will take immediate action when required and take firm action against those who act unlawfully when circumstances warrant it.

For the purposes of this framework, enforcement is distinguished from compliance as the possible actions a regulator can take after a breach of legislation has been identified. Compliance is defined as the ability of a person, business or organisation to fulfil the requirements of legislation.

5. Principles of Good Enforcement

Enforcement action is taken within the context of both a legal and policy framework. Regulators will carry out their enforcement related work with due regard to the following principles.

Graduated

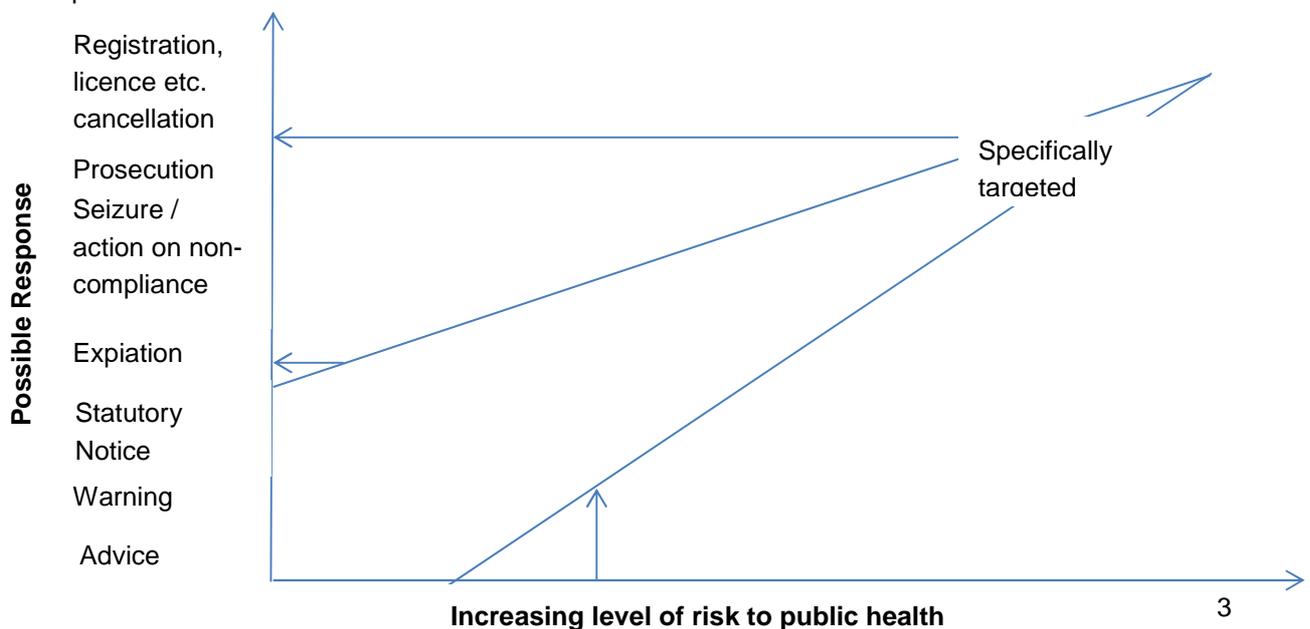
A graduated enforcement approach involves the initial use of mild enforcement options such as education, verbal advice and written warnings. SA Health recognises that most individuals want to comply with the law and will assist compliance by being open and helpful, offering informal advice and providing the chance to discuss compliance problems.

When compliance is not achieved SA Health will pursue more significant enforcement options such as orders, expiation notices and prosecution.

Proportionality

Decisions about a graduated response must be balanced by the potential threat to public health. A proportionate response means that SA Health's actions will be scaled to the seriousness of the breach (see Figure 1). A serious risk to public health needs immediate action to ensure compliance.

Figure 1 - Graduated nature of enforcement responses scaled with the seriousness of the non-compliance.



Attention will be focussed on those activities that give rise to the most serious risks, or where potential hazards are least well controlled.

Depending on the seriousness and persistence of the non-compliance, SA Health will minimise the impact on the person or body contravening the law by enforcing the minimum action necessary to secure compliance.

Consistency

SA Health will take a similar approach in similar cases to achieve similar outcomes.

While enforcement decisions require the use of professional judgement and discretion to assess varying circumstances, officers will:

- follow standard operating procedures wherever possible
- ensure fair, equitable and non-discriminatory treatment
- record any deviation from standard operating procedures and the reasons.

Transparency

SA Health will be open and transparent about the manner in which it undertakes enforcement activities and the laws it enforces.

When educating the community at large and dealing with duty holders, SA Health will make a clear distinction between what is legally required and what is desirable but not compulsory.

When remedial action is needed SA Health will explain clearly and in plain language why the action is necessary. Where practicable, it will give notice of its intent to commence formal action. It will point out what action is required to achieve compliance and the timeframe for undertaking that action. Advice will be provided on the process for seeking a review of, or how to appeal against that decision.

Where it is not practical to give notice, the reasons why will be recorded.

Precautionary

The overriding consideration by SA Health when taking enforcement action is the protection of public health. The Precautionary Principle states that if there is a perceived risk to public health, lack of full scientific certainty should not be used as a reason for postponing measures to prevent, control or abate that risk.

6. Delegation

A delegation transfers a specific power or duty under an Act from a person identified in the legislation (e.g the Minister) to a person holding a particular position in SA Health so that position can exercise those particular functions.

The delegation of powers will be based on the requirements of the Act, legal advice and operational factors such as the frequency the power needs to be exercised, the potential impact of the power and the amount of discretion required in exercising the power.

Officers must know and understand the powers delegated to their position in their instrument of delegation and must not act beyond these powers.

7. Authorisation of Officers

Authorised officers appointed by SA Health will act within their legal remit of statutory power when undertaking enforcement activity. Only officers who are competent by training, qualification and/or experience will be authorised to take enforcement action. Officers will have sufficient understanding of SA Health's policies and procedures to ensure a consistent approach to their duties.

Any decision to act other than in accordance with this framework must have approval from the relevant Manager and the reasons for action recorded in accordance with records management protocols.

Officers are required to show their authorisation on demand.

8. Decision Making

Enforcement decisions are dependent on a number of variables and must demonstrate just and fair treatment for all, consistent with the Code of Ethics for the South Australian Public Sector.

All matters should be approached and considered on their merits and the evidence available. The implementation of enforcement action ultimately seeks to achieve the following outcomes:

- public health is protected
- long term compliance is achieved through a change in behaviour
- breaches are eliminated, controlled or prevented
- persons who fail to comply are held accountable
- non-compliance across the sector is deterred.

In coming to a decision on the most appropriate means of enforcement, the officer shall consider, amongst other relevant factors:

- the objectives of the legislation
- the seriousness of the offence
- the particular circumstances of the offence and the individual circumstances of the persons/business
- the degree of wilfulness involved
- past history
- the consequences of non-compliance
- the likely effectiveness of the various enforcement options
- deterrence
- the effect on the community and other people
- consistency of approach to similar breaches/offences.

- the extent of powers conferred by authorisation or delegation under the relevant legislation

The following factors shall not influence the choice of enforcement strategy:

- any element of discrimination or bias against the person on the basis of ethnicity, nationality, political association, religion, gender, sexuality or beliefs
- possible political advantage or disadvantage to a government, person holding (or a candidate for) public office, or any political group or party.

Where a personal association or relationship with the alleged offender or any other person involved exists:

- an alternative person will make decisions where possible
- the facts about any conflict/relationship will be recorded in accordance with Records management protocols.

Written documentation will:

- Provide a record of all actions taken relevant to the breach to ensure decision making is auditable and withstands scrutiny.
- Include all the information necessary to make clear what needs to be done to comply with legal requirements, the reasons for these actions and the required time frame.
- State the legislation contravened, measures necessary to ensure compliance and the consequences of non-compliance, such as the potential penalties for failing to comply.
- Clearly differentiate between legal requirements and recommendations of good practice.

9. Enforcement Options

Figure 2 charts the specific enforcement options available to SA Health under different statutes. The following actions are provided in escalating order of seriousness.

No Action

No action will be taken when, after investigation, no breaches of the legislation are discovered.

It may also be appropriate to take no action when:

- the complaint is frivolous, vexatious or trivial in nature
- the alleged offence is outside SA Health's area of authority
- taking action may prejudice other major investigations.

Where a decision is made not to take action, the decision and reasons will be recorded.

Figure 2 - Enforcement options available under legislation administered by SA Health

		Enforcement Option	Legislation					
			Food Act 2001	South Australian Public Health Act 2011	Safe Drinking Water Act 2011	Controlled Substances Act 1984	Tobacco Products Regulation Act 1997	
Stages of Enforcement	Encourage	No action	✓	✓	✓	✓	✓	
		Advice	✓	✓	✓	✓	✓	
		Warning	✓	✓	✓	✓	✓	
		Mediation	✓	✓	✓	✓	✓	
	Direct	Notice / Order 'Statutory Notices'	Improvement Notice Prohibition Order Emergency Order	Preliminary Notice Notice Emergency Notice	Notice Emergency Notice	Notice Prohibition Oder	✗	
		Conditions on Registration, Licence, Authority, Permit	✗	✗	Registration	Licence Authority Permit	Licence	
	Enforce	Seizure	✓	✗	✓	✓	✓	
		Action on Non-compliance	✗	✓	✓	✗	✗	
		Cancellation of Registration, Licence, Authority, Permit	✗	✗	Registration	Licence Authority Permit	Licence	
		Punitive Responses						
		Expiation	✓	✓	✓	✓	✓	✓
		Prosecution	✓	✓	✓	✓	✓	✓

Advice and Warnings

Action to achieve compliance with legislation may include:

- offering verbal or written advice
- verbal warnings and requests for action
- written warnings.

Advice from officers will be put clearly and simply and will be confirmed in writing. The circumstances in which advice and warnings may be appropriate include:

- the act or omission is not serious enough to warrant more severe action
- the past history of the individual or entity reasonably suggests that informal action will secure compliance
- confidence in the individual or entity is high
- the consequences of non-compliance will not pose a significant risk
- where advice and warnings may prove more effective than a more severe approach.

Mediation

Where practical and appropriate, SA Health will make mediation available. Mediation is a possible alternative where, after investigation, an officer determines that the problem does not warrant more serious action and is unlikely to be resolved through warnings or advice. The use of mediation services may also be appropriate where an aggrieved individual has no wish to pursue action to resolve a complaint by legal means.

Statutory Notices and Orders

Various pieces of legislation specify the procedures which SA Health must follow, in order to:

- advise of the intention to issue a Notice
- invite submissions with respect to the matter
- order a person to do or refrain from doing a thing under specified circumstances
- issue directions specifying how the Notice may be complied with.

Officers will use professional judgement and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by a Notice and the timeframe to comply.

In circumstances such as an immediate threat to public health a Notice may be made without giving notice of intention. In these circumstances immediate compliance to resolve a situation can be required.

In most cases the person receiving the Notice has a right of appeal if the Notice is considered unreasonable. If a Notice is served for which an appeal is possible, SA Health will advise the recipient in writing of the right to appeal and the relevant legal provisions at the time of serving the Notice.

Action on Non-Compliance with a Notice

Failure to comply with Notices will incur further enforcement action. Where action in regard to a default is provided for by legislation and the necessary work has not been carried out in the time allowed without good reason, SA Health may undertake the required work. Before doing the work SA Health will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken SA Health will seek to recover all costs over a fair period, using all statutory means available.

The decision to carry out action in default will be made by the Director, Public Health.

Expiation Notice

A person receiving an Expiation Notice is entitled to elect to be prosecuted for the alleged offence. Hence there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words, there must be sufficient evidence to enable a conclusion to be reached that there is a reasonable prospect of being able to prove an offence beyond reasonable doubt.

The following circumstances are likely to warrant an Expiation Notice:

- failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer
- failure to comply with the requirements of a Notice
- confidence in the individual or entity is low
- a written warning has previously been given to the individual or entity for a similar offence
- a flagrant breach of the law such that public health may be put at risk, albeit it not necessarily to the extent to justify prosecution.

Prosecution

A prosecution will only proceed where there is a reasonable prospect that an offence can be proven beyond reasonable doubt.

Prosecution is likely to be warranted when any of the following circumstances occur:

- a flagrant breach of the law such that public health has been put at risk
- the alleged breach is too serious or the risks too great to be dealt with by means of an expiation
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so
- a failure to comply with the requirements of a Notice
- an established and recorded history of similar offences
- an unwillingness, on the part of the individual or entity, to prevent a recurrence of the problem.

Where circumstances warrant a prosecution all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.

Before a prosecution is recommended there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the offence.

A decision to prosecute must be in the public interest. In considering whether a prosecution is in the public interest, the following additional factors will be considered:

- whether the offence was premeditated
- the need to influence the offender's future behaviour
- the effect on the offender's or witness' physical or mental health, balanced against the seriousness of the offence
- the availability and efficacy of any alternatives to prosecution

- the prevalence of the alleged offence and the need for deterrence, both personal and general
- the likely length, expense and outcome of a trial.

The final decision to prosecute will be made by the Director, Public Health.

Registration, Licence, Authority, Permit

In accordance with legislation, certain activities require registration or a licence, permit or authority. Without such, conduct of the activity is an offence.

Where an activity which requires a licence is being carried out without such a licence, an appropriate enforcement action should be undertaken with consideration of the factors set out above.

Applications to SA Health may be refused where the applicant does not satisfy officers that they have the necessary capacity, experience or qualifications to safely conduct the activity without risk to public health.

Businesses that fail to comply with registration conditions or conditions of a licence, authority or permit imposed by legislation will be subject to enforcement action. SA Health may impose additional conditions not limited to, but including, limiting or otherwise controlling the activity or suspending or cancelling the registration, licence, authority or permit. The following circumstances are likely to warrant such action:

- a flagrant breach of the law such that public health has been put at risk
- the alleged breach is too serious or the risks too great to allow the activity to continue
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so
- an unwillingness on the part of the individual or entity to prevent a recurrence of the problem.

The decision to suspend or cancel the registration, licence, authority or permit is a serious level of enforcement action and will be made consistent with SA Health delegations.

Multiple Enforcement Actions

Circumstances that warrant a statutory notice may also constitute an offence that could be expiated or prosecuted. Further, failure to comply with a statutory notice may cause an additional offence, thereby providing SA Health with the option to issue an Expiation Notice or launch a prosecution in addition to taking action to fulfil the statutory notice.

10.Related Documents

General

Appointment and Administration of Authorised Officers Policy Directive (2014)

SA Health, Public Health Services: Guidance Manual for Enforcement and Investigation (2013)

Food Act 2001

Memorandum of Understanding between the Minister for Health and Ageing and Local Government Association of SA for the Exercise of Functions under the Food Act 2001 (2013)

Australian & New Zealand Food Regulation Enforcement Guideline (2009)

South Australian Public Health Act 2011

South Australian Public Health Act 2011: Draft Guidelines - Principles to be Observed under the Act

South Australian Public Health Act 2011: Draft Guidelines - General Duty, Notices and Emergency Situations, Offences

For more information

Food Safety and Nutrition Branch
SA Health
Telephone: 08 8226 7100
www.sahealth.sa.gov.au

For Public Use I1-A1



www.ausgoal.gov.au/creative-commons

