

## A-Z Guide

# Private Health and Safety Prosecutions



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## Use This Guide to Understand

- How people other than WorkSafe New Zealand inspectors can prosecute for health and safety breaches
- That the same burdens and standards of proof that apply to WorkSafe New Zealand (or other regulator) prosecutions also apply to private prosecutions
- What type of offences could result in a private prosecution

## What is a Private Health & Safety Prosecution?

This A-Z Guide is about private prosecutions under the Health and Safety at Work Act 2015. It provides information on what is required before a private prosecution can be taken and information on what must be established by the prosecution in those proceedings.

Under the Act, prosecutions for offences against the Act can be initiated not only by the regulator (primarily Worksafe, but also other government agencies) but also other people. However, private prosecutions are only possible if the regulator does not prosecute someone in relation to the offence or the circumstances in which that agency has jurisdiction.

### When can a person make a private health & safety prosecution?

Any person may *commence a prosecution* in respect of an offence under the Act. However, there are some requirements to comply with:

- The regulator must not have taken enforcement action against any possible defendant in respect of the matter; and
- The regulator must not have taken, or does not intend to take, prosecution action under any other Act against any person in respect to the same incident, situation, or set of circumstances; and
- Any person has received notification from the regulator that it has not taken, nor does it intend to take, enforcement or prosecution action against any possible defendant in respect of the same matter.

If enforcement action has been taken, a person can still seek leave of the Court to commence a private prosecution.

### What time limits apply?

An action must be commenced within the latest of:

- a. 2 years after the date on which the incident, situation, or set of circumstances to which the offence relates first became known, or ought reasonably to have become known, to the regulator; or
- b. 6 months after the date on which a coroner completes and signs a certificate of findings if it appears from the certificate of findings (or the proceedings of an inquiry) that an offence has been committed under the Coroners Act 2006; or
- c. 3 months of the date of expiry of any extension granted to the regulator.
- d. If fresh evidence relevant to the offence is discovered, and the court is satisfied that the evidence could not reasonably have been discovered within the limitations periods above, then proceedings may be brought after the end of the limitation period.



## How do I know whether the regulator is going to prosecute?

If any person is interested in knowing whether a particular matter has been, is, or is to be, subject to the taking of an enforcement action by the regulator, that person may complete the form "Interest in knowing enforcement action" (available online from Worksafe New Zealand).

The regulator must establish whether it has made a decision to take any enforcement action in respect of the incident, situation, or set of circumstances; or any regulatory agency has made a decision to take prosecution action in respect of the same incident, situation, or set of circumstances. The regulator must then notify the person in writing of that decision, but not the reasons for the decision.

## Which Offences Could Result in Prosecution?

A private prosecution takes place in the District Court in the same manner that a prosecution taken by the regulator does. There have been no private prosecutions to date under the new Health and Safety at Work Act 2015. Under the previous health and safety legislation, there were two sections under which prosecutions could occur: section 49 (action or inaction leading to death or serious harm) and section 50 (breach of required duty). In the new Act, there are three sections establishing offences:

### 47 Offence of reckless conduct in respect of a duty

The section creates an offence where a PCBU or Officer has a duty to ensure the health and safety of workers and other persons, and without reasonable excuse, engages in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or illness, and is reckless as to the risk to an individual of death or serious injury or serious illness. The maximum fine for this type of offence is set at \$300,000 for individuals, \$600,000 for PCBUs and Officers, and \$3 million for any other person.

### 48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness

This section creates an offence where a person has a duty to ensure the health and safety of workers and other persons and fails to comply with that duty, and the failure exposes an individual to a risk of death or serious injury or serious illness. The maximum fine for this type of offence is set at \$150,000 for individuals, \$300,000 for PCBUs and Officers, and \$1.5 million for any other person.

### 49 Offence of failing to comply with duty

This section creates an offence where a person has a duty to ensure the health and safety of workers and other persons and fails to comply with that duty. The maximum fine for this type of offence is set at \$50,000 for individuals, \$100,000 for PCBUs and Officers, and \$500,000 for any other person.



## For Your Business

When facing the prospect of a private health and safety prosecution, remember that there are strict time limits, formal requirements and a burden of proof to be met before any action can be successful.

If you have reason to believe that you may face a private prosecution, you should seek specialist advice on how best to defend those proceedings.

### Remember

- Always call AdviceLine to check you have the latest guide
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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