

Other sentencing options

*OPTIONS FOR
NON-FINANCIAL
COURT ORDERS*

May 2019



CONTENTS

| | |
|--|---|
| Background | 1 |
| Meaning of ‘other sentencing’ | 1 |
| Purpose | 1 |
| Scope | 1 |
| Principles for other sentencing options | 2 |
| How we decide other sentencing options | 3 |
| How we will assess compliance with the court order | 4 |
| The types of other sentencing options | 4 |

Background

Where a prosecution under the Health and Safety at Work Act 2015 (HSWA) results in a finding of guilt, a range of sentencing options are available to the court. We will generally seek reparation, payment of costs, and a fine or imprisonment. The court may decide on other sentencing orders as part of final sentencing.

Meaning of ‘other sentencing’

The terms ‘other sentencing options’ and ‘other sentencing orders’ refer to the non-financial and non-custodial sentences provided for under HSWA *Subpart 8 – Sentencing for offences*.

Purpose

This policy describes the approach we will take when we are considering a sentencing submission to the court so that we offer an appropriate and consistent approach on other sentencing options.

It also covers our post-sentencing enforcement of court orders.

This policy aligns with WorkSafe’s Intervention Approach and should be read in conjunction with our Prosecution Policy and Enforcement Policy.

Scope

In scope

HSWA *Subpart 8 – Sentencing for offences* may be applied to offences under any part of HSWA. This policy covers the following options:

- adverse publicity orders
- orders for restoration
- work health and safety project orders
- court-ordered enforceable undertakings
- injunctions
- training orders.

Out of scope

Each of the following is covered by a separate policy or guided by precedent. They are not included in this policy but may be referenced in policy as part of considering a total sentence:

- payment of regulator’s costs in bringing prosecution
- non-compliance with a prohibition notice
- remedial actions
- fines or imprisonment
- reparations.

This policy also does not cover:

- other types of sentences or court orders provided for in the Sentencing Act 2002
- pre-sentencing processes such as restorative justice.

Principles for other sentencing options

Our purpose in seeking a sentence will be consistent with section 7 of the Sentencing Act 2002.

When we form a view on an appropriate sentence in any particular case it will meet the sentencing criteria in section 151 of HSWA.

We will apply the following principles when considering other sentencing options:

OUR SUBMISSION WILL ALIGN WITH THE SOLICITOR-GENERAL'S PROSECUTION GUIDELINES

Our sentencing submission to the court will align with the Solicitor-General's Prosecution Guidelines used for public and Crown prosecutions. This means our submission to the court on a sentencing option will provide our view on an appropriate sentence and our reasoning for this.

OUR DECISIONS ON OTHER SENTENCING OPTIONS WILL BE CONSISTENT WITH OUR PROSECUTION POLICY

We prosecute to deter non-compliance with the laws we are responsible for enforcing, and to hold those who breach those laws to account. Our Prosecution Policy provides more information on our approach.

We will seek other sentencing orders that are consistent with this approach.

We will seek sentences that:

- take into account the circumstances of the case
- are proportionate to the offending
- are consistent with precedent, and
- are aimed at reducing reoffending.

OTHER SENTENCING OPTIONS ARE NOT TO BE USED FOR MINIMUM COMPLIANCE

Other sentencing options will not be used as a way to achieve minimum compliance with health and safety requirements from a defendant. When we, or a defendant, seek one of these options, we will consider what benefits this option offers over and above minimum compliance.

A defendant may also seek one or more of the other sentencing options. In these cases, we expect a defendant to show how the option will improve health and safety over and above their minimum requirements.

WE WILL CONSIDER OTHER SENTENCING OPTIONS IN ALL SUCCESSFUL PROSECUTIONS

We will consider whether to seek other sentencing options in all successful prosecution cases under HSWA.

They will be assessed as part of the total sentence.

If the offender applies to the court for a specific sentencing order we will consider this and decide to either support, amend, or oppose it. We will use this policy to guide our decision.

OTHER SENTENCING OPTIONS WILL BE CLEARLY TARGETED

Our submission on a sentencing order will be tailored to the circumstances of the case.

Our prosecution decisions are deliberate and targeted. We will use other sentencing options in the same way. Our decision-making will be guided by:

- the purposes to be served by the proposed sentence, as in section 7 of the Sentencing Act

- the sentencing criteria in section 151 of HSWA, and
- other relevant individual defendant circumstances.

WE WILL CONSIDER FINANCIAL CAPACITY OR ABILITY TO PAY

There will be a financial cost to the defendant in complying with any of the other sentencing orders. This will be in addition to payment of a fine and/or order for the recovery of prosecution costs. In our submission to the court, we:

- will take the defendant's financial capacity and ability to pay into account
- may place more weight on other sentencing options, such as adverse publicity orders, if the defendant has limited capacity to pay
- will assess a sentence proportionate to the offending
- will not consider other sentencing options for a defendant because they provide an easier or a more convenient sentence, as a reason.

OTHER SENTENCING ORDERS WILL INCLUDE COMPLIANCE CONDITIONS

As the regulator taking a prosecution we are responsible for assessing compliance with the court order.

We will be clear about compliance conditions. In general we will expect the defendant to give us evidence of their compliance with the court order and we will assess that evidence. How we do this will vary with the type and content of the court order.

We will seek to have the following conditions specified in the court order:

- timeframes and deadlines for compliance
- the nature of the evidence that will confirm compliance, and
- how the defendant will report compliance to WorkSafe.

WE WILL ENFORCE COMPLIANCE WITH A SENTENCING ORDER

If the defendant doesn't demonstrate to us they have complied with the court order, we may seek court action under section 159 of HSWA. In the case of non-compliance with a court-ordered enforceable undertaking we may seek to bring the adjourned proceedings back to the court.

How we decide other sentencing options

The Legal Group leads the court process. This includes assessing and drafting our sentencing submission to the court. The Legal Group will use this policy as a guide, to:

- provide advice and recommendations on other sentencing options to the decision-maker, and
- confer with the monitoring team to decide what monitoring requirements will be sought as conditions to the court order.

The Operations Group will make decisions about what other sentencing order options we will seek. This will be based on advice from the Legal Group. The decision-maker will be the person who made the initial decision to take a prosecution. The decision-maker is responsible for consulting with other teams who may be affected by the proposed order.

Where it is not possible for the decision-maker to be the person who made the initial decision to take a prosecution, the alternative decision-maker will be at the same level of seniority in Operations.

How we will assess compliance with the court order

The Operations Group will monitor compliance with court orders. They will:

- administer a process to record, track progress, and receive the defendant's report on compliance with the court order
- assess evidence of compliance, and
- agree that a court order has been complied with, or not agree and refer the case to the Legal Group for further advice.

If there is a lack of evidence the defendant has complied with the court order, our Legal Group will provide recommendations to the decision-maker about court action.

We will communicate with the defendant about these matters during the compliance period.

The types of other sentencing options

Adverse publicity orders (section 153)

An adverse publicity order holds the defendant to account by directing them to inform the public of the outcome of prosecution and how they have had to change their conduct. This must be done in the manner directed by the court order.

We view an adverse publicity order as a way to promote community and business awareness of work health and safety issues and discourage further offending by the particular business and others in their sector or industry.

An adverse publicity order may be appropriate when we assess that:

- further steps are needed to ensure the publicity is properly focussed on the offence, and/or
- the work health and safety messages may gain greater impact when told by the defendant.

We may seek conditions on the order to ensure its effectiveness and to promote health and safety awareness. Conditions would also limit unintended financial consequences which may make the sentence disproportionate to the offence. Conditions will specify:

- any further information to be included in the publicity notice (in addition to the information specified in s153)
- the publication channels to be used; these may be in printed, audio and/or electronic formats, and
- that the wording and presentation are to be agreed by both parties prior to release.

Orders for restoration (section 154)

A restoration order is made by a court and requires the defendant to take specific steps, in a specified period, to remedy any matter caused by their actions. The order will address both the cause of the offence and the consequences to people. To comply with a restoration order the defendant takes responsibility for setting the issue right with tangible and practical steps.

We may seek a restoration order to require the defendant to:

- meet standards in approved codes of practice, WorkSafe published guidance, or established industry standards, and/or
- restore relationships with stakeholders, including local communities or communities of special interest that have been affected by the offending.

We will consider the following when making our decision:

- our assessment of the extent to which matters that caused, or resulted from, the offence still exist
- whether the defendant has it in their power to remedy the matter, including the ability to pay for it
- whether reasonable steps are available but not yet taken to restore matters, and
- whether the defendant has declined or failed to take those steps voluntarily.

Work health and safety project orders (section 155)

A work health and safety project order is made by a court and requires the defendant to do a specified project for the general improvement of work health and safety within the period specified in the order.

It is likely that a work health and safety project will be a comprehensive undertaking by the defendant and not limited to a specific event or location.

In assessing work health and safety project orders, we need to be satisfied that it:

- addresses the harm caused by the offence
- adds tangible value to work health and safety practice or knowledge related to the offender's work, community, sector or industry
- does not propose things which already exist or are things that would be done by the offender in the normal course of events
- includes worker engagement and participation, and
- can be achieved by the defendant (that they have the capability or a plan to achieve it).

Court-ordered enforceable undertaking (section 156)

A court-ordered enforceable undertaking (EU) is where a court (with or without recording a conviction) adjourns a proceeding for up to two years and makes an order for the release of the offender, if they complete an undertaking with specified conditions.

If the court is satisfied the conditions have been met within the adjournment time, the defendant must be discharged without any further hearing.

Notice of the court-ordered EU must be published on our website unless ordered otherwise by the court.

WORKSAFE PREFERS A HEALTH AND SAFETY PROJECT ORDER OVER A COURT-ORDERED EU

A health and safety project order can be potentially seen as a comprehensive undertaking that is comparable to a court-ordered EU, but with a court conviction.

In order to avoid public confusion between a voluntary EU agreed by WorkSafe and a court-ordered EU, we will seek a health and safety project order in preference to a court-ordered EU. We will also alert the court if we had already declined an application from the defendant for a voluntary EU.

We will assess applications for court-ordered EUs using the following criteria:

- the contravention or alleged contravention would not amount to an offence under section 47 of HWSA
- the proposed undertaking meets the assessment criteria in our Enforceable Undertakings Policy and EU Practice Guide, and
- the proposed undertaking supports WorkSafe's strategic priorities.

Injunctions (section 157)

A court may issue an Injunction to stop a person who has been found guilty of an offence from doing something that is a contravention of HSWA or regulations.

An injunction may be an effective post-conviction tool for us to manage risk against a known defendant when other enforcement measures prior to conviction have not been successful or were unable to be used.

An injunction involves a different legal process than used for other sentencing orders. As such the decision-maker will always seek advice from the Legal Group.

Training orders (section 158)

Training orders are appropriate when we want a defendant to gain knowledge and develop skills that are necessary to manage work health and safety effectively, or manage a particular risk. A training order involves the training of the defendant and/or workers at a workplace over which the defendant has control.

The training order must specify the training to be undertaken. To achieve the best outcome we will expect:

- the specified training to address the issues that led to the contravention
- the selected training provider to meet relevant standards, such as being New Zealand Qualifications Authority accredited and/or endorsed by the sector or industry, and
- the defendant to meet the cost of training.

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