

October 2016

Reviews

Sections 130-135 of the Health and Safety at Work Act 2015
Health and Safety at Work (Major Hazard Facilities) Regulations 2016
Health and Safety at Work (Asbestos) Regulations 2016
Health and safety concerns
Exemptions
Authorisations

Introduction

This policy explains the principles that underpin WorkSafe's approach to its reviews of decisions made under the Health and Safety at Work Act 2015 (HSWA) and associated regulations.

Policy purpose

This policy is for internal operational use and will guide staff in how to make good decisions when conducting reviews, which are:

- lawful
- reasonable
- fair.

Scope

This policy applies to reviews of all decisions made by WorkSafe under HSWA and associated regulations. Where the legislation requires explicit action, as is the case with internal reviews, the policy will be more specific.

In scope

- **Internal Review** (HSWA - sections 130-135)
- **Health and Safety at Work (Major Hazard Facilities) Regulations 2016**

- **Health and Safety at Work (Asbestos) Regulations 2016**
- **Health and safety concern**¹
- **Authorisations** where a worker, work activity or a workplace is authorised by licence, permit, registration, consent, certificate, or other authority as required by regulations.²

Out of scope

The following changes to a notice³ will not be subject to the internal review process:

- Minor changes to a notice can be made by an inspector in accordance with s113 of HSWA without requiring an internal review.
- The time for compliance with an improvement notice can be extended by the inspector who issued the notice but only if the compliance period has not ended (s104).

Policy objectives

By applying this policy, reviews of decisions made by staff with the appropriate delegations will:

- demonstrate consistency, accountability and transparency
- withstand scrutiny

¹ **Health and safety concerns:** When someone informs WorkSafe about a possible unsafe or unhealthy situation, with the expectation that WorkSafe will take action. A concern may relate to work health and safety (sometimes referred to as a health and safety complaint) or to energy safety.

² **Authorisations:** See appendix for full list of regulations in the Authorisations regime.

³ **Notice:** Notice means any of the following notices issued under HSWA: an improvement notice, a prohibition notice, non-disturbance notice, a suspension notice and a subsequent notice (s100).

- be in the public interest
- build legislative duty holders' capability.

Objectives of reviews

Promote good decision-making

Poor decision making and ineffective administrative processes can lead to complaints and challenges to decisions. A focus on good decision-making leads to better safety outcomes for duty holders, and can prevent applications for some reviews being made at all. It is also likely to result in fewer reviews that are made being upheld.

Having an effective review process in place can help to encourage good decision making in the first instance and reduce the need for reviews. A review process aims to:

- enable WorkSafe to test the lawfulness and the merits of decisions that affect the regulated community and
- improve the quality, efficiency and effectiveness of regulator decision making generally.

Enable quick resolution

(‘Justice delayed is justice denied’)

A good review process provides WorkSafe with an immediate opportunity to consider the matter and provide a remedy where necessary. Reviews not completed within a reasonable timeframe are unfair to the person requesting the review. Reviews that are not addressed quickly can also create significant additional workload for WorkSafe, both in terms of staff time and resources required. Completing reviews internally, promptly and close to source can avoid this.

Develop public confidence

An effective review process provides the regulated community with a direct avenue to raise their concerns with decisions made by WorkSafe. As a result of applying this policy:

- duty holders will trust WorkSafe to make sound decisions and as a consequence will positively respond by following direction, accepting guidance, seeking assistance and complying with enforcement action
- the regulated community will value WorkSafe's contribution to making work healthy and safe
- compliant duty holders will feel their actions are acknowledged because they trust WorkSafe to hold non-compliant duty holders to account.

Continuous improvement

Reviews can be a rich source of information about any problems or inefficiencies that might be occurring. WorkSafe will analyse intelligence gained from reviews to identify:

- recurring themes that may highlight systemic issues
- service, process and information inadequacies
- opportunities for improvement.

Effective monitoring of reviews provides WorkSafe with an opportunity to identify any problems and sort them out before they escalate and cause widespread concern. As a result, WorkSafe can save time and money before complaints multiply and escalate to the point where external intervention may be sought.

Policy statements

Make a good decision

The role of the reviewer is to make a good decision taking into account all relevant information and disregarding all irrelevant information.

Legislation sets out what staff must do when conducting reviews. In some situations the legislation may allow discretion to be exercised. In these situations WorkSafe policies and procedures will provide guidance for staff.

When conducting a review, reviewers must act reasonably and fairly. They must follow legislative and procedural requirements, as well as satisfy general administrative law requirements. In general, reviewers should:

- act independently, in good faith and for a proper purpose
- comply with relevant legislation
- follow any relevant policies and guidelines, unless there is reason to make an exception
- take into account all relevant matters
- ignore matters that are not relevant to the decision.

The reviewer will have sufficient knowledge of:

- HSWA and associated regulations
- WorkSafe's policies and procedures (including but not limited to the [Enforcement Policy](#), [Enforcement Decision-Making Model](#), [Response Policy](#))
- the subject area.

Verify the decision-maker's delegated authority

The legislation or WorkSafe policy will set out who has the authority to make a decision, and whether that authority may be delegated. Before taking action or making a decision, the reviewer should check they have the authority to do so, or that the authority has been delegated to them. The reviewer should ensure that they are aware of the actions they can take and the decisions they can make when conducting a review. If the situation requires a decision that is outside the reviewer's delegated authority, they must escalate the matter according to the *Authorising and Decision Making Framework for Managers*.

Act in good faith

Reviewers must act in good faith when undertaking a review of a decision. In this context, good faith refers to the reviewer's state of mind in acting or carrying out an action or transaction. It requires the reviewer to fully disclose all relevant information and to display honesty, fairness and an absence of intent to harm the applicant or document holder. Acting in good faith enhances the robustness of the decision and reduces the risk of subsequent reviews or appeals.

A key aspect of acting in good faith is maintaining impartiality. To ensure the reviewer is impartial, unbiased and independent the review will be undertaken by a staff member who was not involved in the original decision. In making the decision, the reviewer may seek advice from peers, technical experts and the legal team.

Ensure procedural fairness

Procedural fairness, or 'natural justice,' is an implied common law duty on the part of an administrative decision-maker to act fairly when exercising statutory powers that may affect a person's rights, interests or legitimate expectations. Further information should be requested if required. Applicants should be advised that the review will be based on the information available if further information is not provided.

A fair process should be followed in making a decision about a review. The following will help to ensure that a fair and correct decision is made. The decision-maker should:

- where appropriate, provide sufficient notice to enable the applicant to be heard and make submissions before the decision is finalised
- ensure full disclosure of relevant information to enable the applicant or document holder to make informed submissions (or oral presentations)
- provide a reasonable opportunity for the applicant to be heard and make submissions
- supply a full statement of the reasons for the decision
- provide clear explanation of the applicant's appeal rights.

Complete the review in a timely manner

Applicants require timely decisions to facilitate business operations and planning. WorkSafe will acknowledge receipt of all applications for review. Where regulations specify a decision-making or processing timeframe, staff are expected to meet or exceed these standards. Where this is not possible, the reviewer must advise the applicant of the reasons for the delay and date by which they can expect a decision.

For internal reviews conducted under sections 130-135 HSWA, the specified timeframes are:

- for a decision to issue an improvement notice, the period specified in the notice for compliance with the notice or 14 days, whichever is the lesser or
- in any other case, 14 days.

Where the legislation does not specify timeframes, WorkSafe expects reviews to be completed within 14 days of receiving the request to review. Applications for review should be acknowledged in a timely manner and addressed promptly; and according to order of urgency.

Keep applicants informed

It is important to keep applicants informed during the decision-making process. In particular, how the process works and if there are likely to be any delays. Once the review is complete, the person should be advised of:

- the outcome of the review
- the reasons for any decisions that have been made
- any remedy that is offered
- information about any other remedy that might be available, such as to appeal the matter to the District Court or complain to the Ombudsman.

Give reasons for the decision

Giving reasons for decisions is good administrative practice and promotes accountability and transparency. Providing reasons will help to ensure that decision-makers reach decisions that are well founded and procedurally fair. Reasons can help applicants understand and accept the decision even if the outcome is not a desired one. Conversely knowing the reasons for a decision can help applicants decide if they should appeal the decision if that option is available. For some types of reviews, the legislation will specify that reasons are to be given. WorkSafe will always give reasons for decisions made under HSWA and associated regulations.

Make it clear that staff are acting on behalf of WorkSafe

As far as possible, any communications with the applicant should focus on the actions of WorkSafe the agency as a whole and how they may have affected the applicant, rather than focusing on the actions of individual staff members. This is on the basis that staff members do not act on their own behalf, but as representatives of WorkSafe. Complaints about the way staff have undertaken their work are covered in the [Feedback and Complaints Policy](#).

Keep good records

A full record of the review should be kept.

The record should include:

- the request to review the original decision

- details of all communications with the applicant and other relevant parties
- any report that has been prepared.

The record should be stored securely to preserve confidentiality and saved in the correct place in WorkSafe's record keeping system so that it can be recovered if necessary.

Business units should keep central records of all review applications received, and their progress and outcome.

Make it easy for applicants to request a review

Worksafe will provide a form to be used when applying for a review. If the application is not received in the preferred format, WorkSafe will provide assistance to applicants to ensure that the application is completed correctly. Where applications do not contain sufficient information to identify the decision to be reviewed, additional information will be sought. The timeframe for completing the application will begin once the information received is complete and correct.

Applications for review will only be accepted in the following circumstances:

- from eligible persons (ie a person affected by the decision or their representative)
- for reviewable decisions as defined in HSWA and associated regulations
- applications for reviews received outside of the timeframe specified in legislation will only be accepted if there are extenuating or special circumstances and evidence of this is provided
- for reviews where the legislation does not specify a timeframe in which the application must be received, WorkSafe expects requests for reviews to be received within 14 days of the original decision being communicated to the applicant. Late applications will only be accepted if there are extenuating or special circumstances and evidence of this is provided
- applications will not be accepted if the applicant has already sought a review of the same decision, and this has been determined.

Internal Review (sections 130-135 of HSWA)

Managers must refer to this policy when an eligible person applies for a review of a reviewable decision made by an inspector. A reviewable decision is a decision:

- to issue a notice (including subsequent notice) under HSWA
- made by an inspector to extend the time to comply with an improvement notice

- made by an inspector in respect of a provisional improvement notice under s81 or
- of a type prescribed by regulations for the purposes of s130 of HSWA.

An eligible person is defined as a person affected by the decision or their representative (s130).

Staying a decision to issue a notice

The reviewer may identify the need to stay the notice, or the request may form part of the application for internal review.

A stay only remains in force whilst the internal review is being carried out. It is in everyone's interest for the review decision to be made quickly.

If a request to stay a notice is made, Worksafe must make a decision within **three working days**. If a decision is not made within this time, then Worksafe is taken to have made the decision to grant it.

A request to stay a notice may only be made if there is a request for internal review of the decision to issue the notice.

Each request for a stay will need to be determined on its merits. In the case of a prohibition or non-disturbance notice, a stay will not normally be granted unless there is compelling new evidence that was not available to the inspector at the time the prohibition notice was issued.

In other cases the reviewer will consider:

- the health and safety implications of granting the stay
- any other measures proposed to reduce the risk if the stay were granted
- whether a failure to grant the stay would have implications that cannot be reversed
- where the stay applies to an improvement notice where the period of time to remedy the contravention would expire before the internal review decision can be made, the stay will usually be granted.

The reviewer should ensure that an application for internal review to stay the issue of a notice is decided within three working days of receipt of the application. A stay of a prohibition notice or non-disturbance will not usually be granted unless information that was not available to the inspector is provided.

On completion of the review, the reviewer may:

- confirm the original decision
- vary the original decision or
- set aside the original decision and/or substitute another decision that the reviewer
- considers appropriate.

Appendix 1

Below is a list of the regulations covered by WorkSafe's Authorisations regime. Decisions made under these regulations are subject to review.

- Geothermal Energy Regulations 1961
- Health and Safety at Work (Adventure Activities) Regulations 2016
- Health and Safety at Work (Asbestos) Regulations 2016
- Health and Safety at Work (Hazardous Substances) Regulations 2017 (in draft at the time of writing this policy)
- Health and Safety at Work (Major Hazard Facilities) Regulations 2016
- Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016
- Health and Safety at Work (Petroleum Exploration and Extraction) Regulations 2016
- Health and Safety in Employment (Pipelines) Regulations 1999
- Health and Safety in Employment (Pressure Equipment, Cranes, and Passenger Ropeways) Regulations 1999
- Health and Safety in Employment Regulations 1995