

Prosecution Guideline

Energy Safe Victoria

Guideline

Purpose

This Prosecution Guideline communicates why and how we prosecute, including the factors we consider in determining whether prosecution is the most appropriate course of regulatory action for offences against Victoria's energy safety laws.

These guidelines do not limit our discretion to use any enforcement option deemed appropriate.

These guidelines are published on our website, www.esv.vic.gov.au and should be read in the context of our [Compliance and Enforcement Policy](#).

Victoria's energy safety laws

We can prosecute for offences against the following Acts and the regulations made under those Acts:

- *Electricity Safety Act 1998* (Vic)
- *Gas Safety Act 1997* (Vic)
- *Pipelines Act 2005* (Vic)

We also can prosecute for specific offences against the *Building Act 1993* (Vic) in relation to unlicensed gasfitting work.

In these guidelines, these laws are collectively referred to as Victoria's 'energy safety laws'.

Why we prosecute

We prosecute to deter non-compliance with Victoria's energy safety laws and hold regulated entities¹ who breach those laws to account.

We are committed to achieving the highest levels of safety to prevent death, serious injury and incidents while also meeting community expectations. We detect non-compliance and safety risks through a variety of regulatory activities and mechanisms including mandatory reporting regimes, audit and inspection programs and our complaint function.

The Victorian community and the energy industry can have confidence in the way we conduct prosecutions, and that we will enforce Victoria's energy safety laws in a consistent and appropriate manner.

When we consider prosecution

Consistent with our [Compliance and Enforcement Policy](#), we consider prosecution whenever significant breaches of Victoria's energy safety laws occur, where the offence comes within one of our compliance and

¹ The use of the term 'regulated entity' in this guideline includes the different types of persons (both natural persons and corporate entities) who are subject to compliance obligations under Victoria's energy safety laws e.g. licenced electrical workers, registered electrical contractors, gasfitters, major electrical and gas companies, suppliers of electrical equipment or gas appliances, pipeline licensees.

enforcement priorities, where there has been repeated or wilful non-compliance, or systemic or calculated breaches.

Significant breaches generally include matters involving:

- death, serious injury or property damage or loss; and/or
- significant risks to safety (for example, due to the absence of required risk mitigations).

Where there has been repeated or wilful non-compliance, we may consider prosecution in escalating our enforcement response, particularly if initial interventions did not achieve the desired outcome.

For systematic or calculated breaches (for example, multiple offences which by themselves could be considered low-level), we may consider escalating our enforcement response directly to prosecution to deter this type of behaviour.

Prosecution may also be initiated where a regulated entity chooses to have the matter of an infringement offence heard and determined by a court, or where payment of an infringement fine remains outstanding.

While we will generally consider prosecution in the above circumstances, these circumstances do not prevent us from considering prosecution in any other situation deemed appropriate.

Determining whether to prosecute

Prosecutions are discretionary and are just one of the enforcement actions available to Energy Safe Victoria to deal with non-compliance with Victoria's energy safety laws. Decisions as to whether to prosecute will be made fairly and consistently, and proportionately to the seriousness of the behaviour, in accordance with our *Compliance and Enforcement Policy* and this guideline.

We recognise that when conducting a criminal prosecution, we are functioning as a prosecution agency within the criminal justice system. In doing so, we comply with relevant sections of the:

- *Policy of the Director of Public Prosecutions for Victoria (DPP Policy)* available at www.opp.vic.gov.au. This guideline is consistent with the DPP Policy where relevant.
- *Victorian Model Litigant Guidelines* which set standards for how we behave as a party to legal proceedings.

The test for prosecution

We will only commence a prosecution if:

- there is a reasonable prospect of a conviction (the evidential test); and
- the prosecution is in the public interest (the public interest test).

Reasonable prospect of conviction

Consistent with the DPP Policy, in determining whether there is a reasonable prospect of a conviction, we will undertake a legal assessment of the following factors:

- the strength and admissibility of the evidence
- the reliability and credibility of the evidence including:
 - whether the prosecution witnesses are available, competent and compellable
 - any conflict between eye-witnesses
 - whether there is any reason to suspect that evidence may have been concocted
 - how the witnesses are likely to present in court
 - any possible contamination of evidence
- any possible defence (including statutory defences available under the energy safety laws)
- any other matter relevant to whether a jury or magistrate would find the person guilty.

Public interest

If we believe there is a reasonable prospect of conviction, we will then consider whether the prosecution is in the public interest. In doing so, we will consider the public interest factors (as published in the DPP Policy) which are relevant to the circumstances of the case.

These public interest factors include (but are not limited to):

- the nature and circumstances of the alleged offending including:
 - the seriousness of the alleged offence
 - the age of the alleged offence (when it happened)
 - community protection, including the:
 - extent of the risk posed by the alleged offence to energy safety or reliability; and
 - actual or potential consequences of the alleged offence
 - any mitigating or aggravating features of the alleged offending
- the profile and behaviour of the alleged offender including:
 - the alleged offender’s culpability
 - the alleged offender’s compliance history (including the alleged offender’s response to any previous Energy Safe enforcement actions) and background
 - the alleged offender’s age, physical health, mental health or disability and any other relevant personal circumstances
 - whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the offender has done so
 - the attitude of the alleged offender(s) (including any proactive steps taken to remedy the offence or efforts to make restitution for any loss caused by the offence)
- factors relating to the victim of the alleged offence, including:
 - the attitude of the victim to a prosecution
 - the entitlement of the victim to compensation
 - the age, physical health, mental health or disability of the victim
- other factors relevant to the case, including:
 - the prevalence of the offence and the need for:
 - specific deterrence namely, reducing the likelihood that the alleged offender will commit further breaches
 - general deterrence namely, reducing the likelihood that others will commit similar offences
 - the likely sentence, including whether the consequences of any resulting finding of guilt would be unduly harsh or oppressive
 - the need to maintain public confidence in the administration of the Victoria’s energy safety laws
 - the availability and efficacy of alternatives to prosecution
 - whether a sentence has already imposed on the offender which adequately reflects the criminality
 - the age, physical health, mental health or disability of any witnesses
 - the likely length of a trial
 - any circumstances that would prevent a fair trial
 - the obsolescence or obscurity of the law.

Improper considerations

Our decision whether to prosecute will not be influenced by:

- political pressure or interference
- the race, religion, sex, national origin, political associations, activities or beliefs of the alleged offender or any other person involved
- personal feelings concerning the offence, the alleged offender or a victim
- possible political advantage or disadvantage to the Government or any political group or party

- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Accountability

Decisions on whether to commence a prosecution are made by the Victorian Energy Safe Commission (**Commission**) or by members of the Executive Leadership Team (**Executive**) under delegation from the Commission and on the recommendation of our General Counsel.

Consultation with the Director of Public Prosecutions

We will request advice from the Director of Public Prosecutions (**DPP**) prior to commencing a criminal prosecution for an indictable offence.

Statutory time limits

There are statutory requirements which limit the time within which we may bring charges for breaches of Victoria's energy safety laws.

Legislative amendments which took effect on 16 May 2024,² mean that Energy Safe must commence a prosecution for an offence against the *Electricity Safety Act 1998* or the *Gas Safety Act 1997*, within three years after the date on which Energy Safe becomes aware of the commission of the alleged offence. Prior to 16 May 2024, the limitation period under these Acts was three years from the date that the offence occurred.

Under the *Pipelines Act 2005*, Energy Safe must commence a prosecution within one year of the offence occurring.

Under the *Building Act 1993*, Energy Safe must commence a prosecution within three years after the commission of the offence or within two years of becoming aware of the offence, whatever is longer.

How we prosecute

Ethics, obligations and duties

In conducting a prosecution, our prosecutors will:

- act independently and impartially
- act fairly to the accused, including by ensuring the disclosure of any material which:
 - is relevant or possibly relevant to an issue in the case
 - raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to rely on, or
 - is or may be exculpatory

unless the material is subject to any claim of public interest immunity or privilege or any statutory provisions to the contrary

- assist the court to avoid appealable error
- endeavour to ensure that any submissions of fact or law are soundly based
- work to facilitate the expeditious completion of criminal proceedings
- use temperate or dispassionate language
- avoid any real or potential conflict of interest
- endeavour to ensure that any conflict of interest involving a defence practitioner is acted upon

² *Energy Legislation Amendment (Energy Safety) Act 2023* available at <https://www.legislation.vic.gov.au/as-made/acts/energy-legislation-amendment-energy-safety-act-2023>

- comply with the *Legal Profession Uniform Law Application Act 2014*, the *Legal Profession Uniform General Rules 2015*, the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and the Victorian Model Litigant Guidelines, where relevant.

Treatment of victims

In conducting a prosecution, our prosecutors will:

- establish an early relationship with the victim
- treat victims with courtesy, respect, dignity and sensitivity
- address the individual priorities of a victim and not make assumptions about what is in the victim's interests.
- abide by the *Victim's Charter Act 2006* (Vic)

Resolution

We may resolve prosecutions where it is in the public interest to do so, recognising that:

- resolution of matters, particularly early resolution, is an important means of ensuring effective and efficient prosecutions
- resolution may remove the need for victims and witnesses to give evidence
- resolution provides certainty of outcome and reduces associated costs.

In determining whether a proposed resolution is in the public interest, we will consider:

- whether there is a reasonable prospect of a conviction of each offence charged
- the strength and evidence of each charge
- any defences
- the likelihood of acquittal on any of the charges
- whether the charge or charges to which accused will plead guilty:
 - adequately reflect the accused's criminality
 - allow for the imposition of an appropriate sentence
 - allow for the making of all appropriate ancillary orders
- the views of the victim and the informant about the proposed resolution.

Where practical, plea offers should be made in writing. If a verbal offer is made, we will respond in writing.

We will record any resolution in writing and provide a copy of the document to the accused or their legal representative prior to the resolution being entered at court.

Resolution of a prosecution requires the consent of the Commission or members of the Executive under delegation from the Commission and on the recommendation of our General Counsel.

Publishing enforcement outcomes

We publish information about the nature and outcome of prosecutions on our website: www.esv.vic.gov.au.

We may also publish information about the filing of charges and other enforcement actions where appropriate. This is consistent with performing our functions as the outcomes highlight and deter similar non-compliance and provide an opportunity to educate the community or regulated entities.

Publishing of such information is carried out in accordance with our Privacy Policy.

Further information

Related policy

These guidelines support our Compliance and Enforcement Policy, which is available at www.esv.vic.gov.au.

Feedback and complaints

We encourage feedback about your experience with us and invite people to contact us at info@energysafe.vic.gov.au

If you have any queries in relation to making a complaint contact us on **03 9203 9700** or at complaints@energysafe.vic.gov.au

For more information, visit www.esv.vic.gov.au

For access to Victoria's energy safety laws, visit: www.esv.vic.gov.au/about-esv/energy_regulatory_framework/legislation-and-regulations

Review of this policy

Version	Date	Revision information	Owner	Review date	Authorised by
1.0	December 2021	Policy created	General Counsel	Every 12 months	ESV Commission
2.0	September 2023	Revised to reflect changes to DPP Policy	General Counsel	Every 3 years (or as legislative change requires)	CEO
3.0	May 2024	Revised to reflect legislative amendments and evolving enforcement approach	General Counsel	Every 3 years (or as legislative change requires)	CEO

Who we are

We are Victoria's safety regulator for electricity, gas and pipelines.

Our role is to ensure that Victorian gas and electricity industries are safe and meet community expectations. We are also responsible for licensing and registering electricians and educating the community about energy safety.

**Note: The information in this document is intended for general use only. We make reasonable efforts to ensure the information in this document is accurate, complete and up to date, however, do not accept liability for any loss or damage which may be incurred by any person relying on this document.*