

# ENFORCEMENT OF PUBLIC HEALTH LEGISLATION



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# ENFORCEMENT OF PUBLIC HEALTH LEGISLATION

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## Foreword

The World Health Organization and other international organizations and bilateral donors often receive requests from countries for technical assistance in drafting and implementing new laws as part of the process of developing and reforming their health sectors. However, regardless of the drafting expertise that is applied in formulating a new law, and whether or not that law contains ideal international standards, it will only be effective if compliance with it is enforced.

Worldwide, there are many examples of laws that are ‘on the statute books’ but might as well not exist. They may not be known about, or may be outmoded and inappropriate to current conditions, and thus are ignored by both those responsible for enforcing the law and those subject to it. Or they may well be appropriate but, because they are not enforced, again might as well not exist, as compliance is not achieved. A lack of enforcement can indicate that some of the enforcement mechanisms within the law are not, in themselves, the best way to ensure compliance.

This publication examines the enforcement of public health legislation. Its underlying theme is that enforcement is not necessarily the same as the prosecution of offences. Other compliance tools should also be available that achieve the goal of enforcing the law without prosecution being necessary. However, it is also recognized that there will be instances where the only commensurate response to a failure to observe a law will be prosecution. The role and responsibilities of those officers authorized to collect evidence and bring cases to court are considered. Advice is included about the quality (standard) of evidence that must be attained in order for that evidence to be allowed to be used in court. Otherwise the evidence will not be admissible. The conduct of a prosecution, including advice on witness testimony, is also addressed.

By producing this guide, it is our aim to give more visibility to the issue of enforcement of public health legislation. We hope that it will stimulate discussions between health and law experts, policy-makers and enforcement officers, so that public health enforcement will be better understood and supported. Officers responsible for enforcement should be in a position to enforce public health laws fairly and effectively. They need laws that provide for a range of suitable options that enable best outcomes in terms of public health for each community, in the context of their own health and legal systems.

Effective and fair enforcement of public health law is a critical component of every government’s responsibility to improve and protect the public health of all people in their country. The issues and processes discussed in this guide, therefore, should serve as a resource for both enforcement officers in the field and policy-makers when laws are being developed or amended.

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# Acknowledgements

This guide was prepared by Josephine Cooper, former Director of the Centre for Health Law, Ethics and Policy at the University of Newcastle, Australia. She is an experienced consultant in the Western Pacific Region of the World Health Organization and frequently advises governments concerning health legislation policy and drafting of health laws. She seeks to encourage the passing of laws that are effective in supporting health policy and which are relevant to the problems sought to be addressed. Gratitude is expressed to Alan Freshwater and Geoff Owen, both of the Ministry of Health, New Zealand, as the initial outline of this publication was based upon materials kindly provided by them, and to David Collins, Queen's Counsel of Wellington, New Zealand, for material that contributed to the discussion of expert witnesses. Steve Anthony, Director of ACA Audit & Investigation, and David Clarke and Matthew Allen, Directors, Allen & Clarke, all of Wellington, New Zealand, are acknowledged for their review and invaluable editorial of the guide, as well as other substantial contributions, including the re-drafting of Chapter 2.

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# About this publication

## **Application in specific countries**

This guide has been written from a general perspective so that it might be useful to a number of countries in the Western Pacific Region of the World Health Organization. Unless otherwise specified, the guidance provided should be generally appropriate in most jurisdictions. Those seeking to enforce a particular piece of legislation in a specific jurisdiction should always ensure that they follow any process requirements of that legislation, and it is recommended that legal advice be sought within the jurisdiction on the procedures and requirements authorized by the law. However, even where the legislated process differs in the fine detail from that suggested, it is intended that there will be parts of the publication that are useful in understanding the enforcement of any health law and achieving compliance with it.

## **Terminology**

The terms ‘legislation’ and ‘law’ are used to refer generically to statutes, regulations and other legal instruments (e.g. ministerial decrees) that may be the forms of law used in a particular country.

It is acknowledged that responsibilities for health are sometimes vested in a Ministry of Health, while in other countries those responsibilities are given to a Department of Health. For brevity, the term ‘ministries of health’ will be used throughout the remainder of this document.

## **Audience**

The publication is intended to provide practical and realistic advice to those whose task is to ensure compliance with health laws. Ministries of health often administer and enforce a range of legislation. Those enforcing the legislation might be called enforcement officers or be given some other designation, such as authorized officers, health inspectors, town officers, wardens or sanitary inspectors. For simplification, the generic term ‘enforcement officer’ will be used throughout.

Some enforcement officers may have specialized areas of input. In other, particularly smaller, countries or where small numbers of personnel are employed across a range of areas, enforcement officers are involved in inspection, licensing and enforcement across a whole range of legislation. This guide has been written to assist enforcement officers to enforce public health laws fairly and effectively, while also informing and facilitating the work of those responsible for ensuring their training.

In addition, policy-makers require an understanding of the enforcement process in order to ensure that, when policies are being developed, particularly those that result in legislation that includes enforcement components, practical and realistic procedures will be specified within that law.

## Glossary

Readers are encouraged to familiarize themselves with the terms explained in the Glossary at the end of the publication.

## Legal citations

A few references to court cases are provided. They give the name of the case and where it can be found in a Law Report, such as *Woolmington v DPP* [1935] AC 462 (HL). Such a reference is called a ‘citation’. It gives information to the reader as to where a report of the case may be found. The citation<sup>1</sup> of a case is like giving the ‘address’ at which the particular case report can be found. This saves having to give a full written reference. The format of the address is the year or volume number, followed by the name of the law reports, followed by the page number at which the report commences in that particular volume.

Where the year is necessary to the identification of a volume of reports, the year is generally put in square [ ] brackets. Where the reference to the year is not necessary to identify the volume, then the date, if given at all, is in round brackets ( ). When a particular part of a decision is quoted, the page number of the report where the original words are found is given.

In the example given, *Woolmington’s* case was against (versus) the Director of Public Prosecutions. The report of the final appeal to the House of Lords may be found in the 1935 volume of Appeal Cases (an English series) on page 462. In the case name, the word ‘versus’ is abbreviated to *v.* although lawyers from an English tradition tend to read the name as *Woolmington ‘and’ the DPP* or *Woolmington ‘against’ the DPP*. In courts where there is a North American influence on legal tradition, the word ‘versus’ is more likely to be heard.

Before the establishment of the Office of the Director of Public Prosecutions in England, prosecutions were brought on behalf of the Crown and this was seen by the abbreviation *R.*, *Rex* or *Reg.* used in a case name. *R.* was a shortened form of *Rex* or *Regina*, depending upon whether the case was brought at a time when a King or Queen was on the throne. This abbreviation is also found in other jurisdictions which have their roots in the English legal system.

Most countries have at least one series of bound and published law reports in hard copy of cases heard at least in their higher courts. Some countries have many series, and a case may then be reported in two or more different series. Where a country’s legal roots are those of another jurisdiction (for instance when the legal system was originally based on that of a colonizing country, or where an independent nation has decided to deem the law of a particular country to be in force in the absence of sovereign law of the country) it is to be expected that the Office of the Attorney General, or equivalent, will maintain a collection of relevant reports of cases from that other jurisdiction. In addition, many more modern legal decisions are now often reported on Internet websites offering legal information services.

In some countries, reports of decisions may concern specific areas of the law (such as family law, criminal law, industrial law etc.) or they may be collections of decisions of a specific court, such as a Court of Appeal.

<sup>1</sup> For further information, see <http://library.kent.ac.uk/library/info/subjectg/law/troubleshoot/citations.htm> (accessed 24 May 2006)

Each series of law reports has a novel abbreviation of its name as part of the citation. For example, the Australian Commonwealth Law Reports are cited as C.L.R and the All England Reports as All E.R. and so on. The Internet is a rich source of information about abbreviations.<sup>2</sup>

Each report commences with a 'headnote'. This is a short summary of the decision and is entirely the work of the reporter. Usually headnotes are accurate, but they should not be relied upon as being a correct statement of the principles set out in the decision reported. Many describe the headnote to a report as being merely a signpost to what the decision contains.

<sup>2</sup> See, for instance, 'Legal abbreviations' at <http://library.kent.ac.uk/library/info/subjectg/law/abbrev.htm> and, for South Pacific materials, [http://www.paclii.org/other/Law\\_Reports\\_Index.html](http://www.paclii.org/other/Law_Reports_Index.html). Both links accessed 24 May 2006.

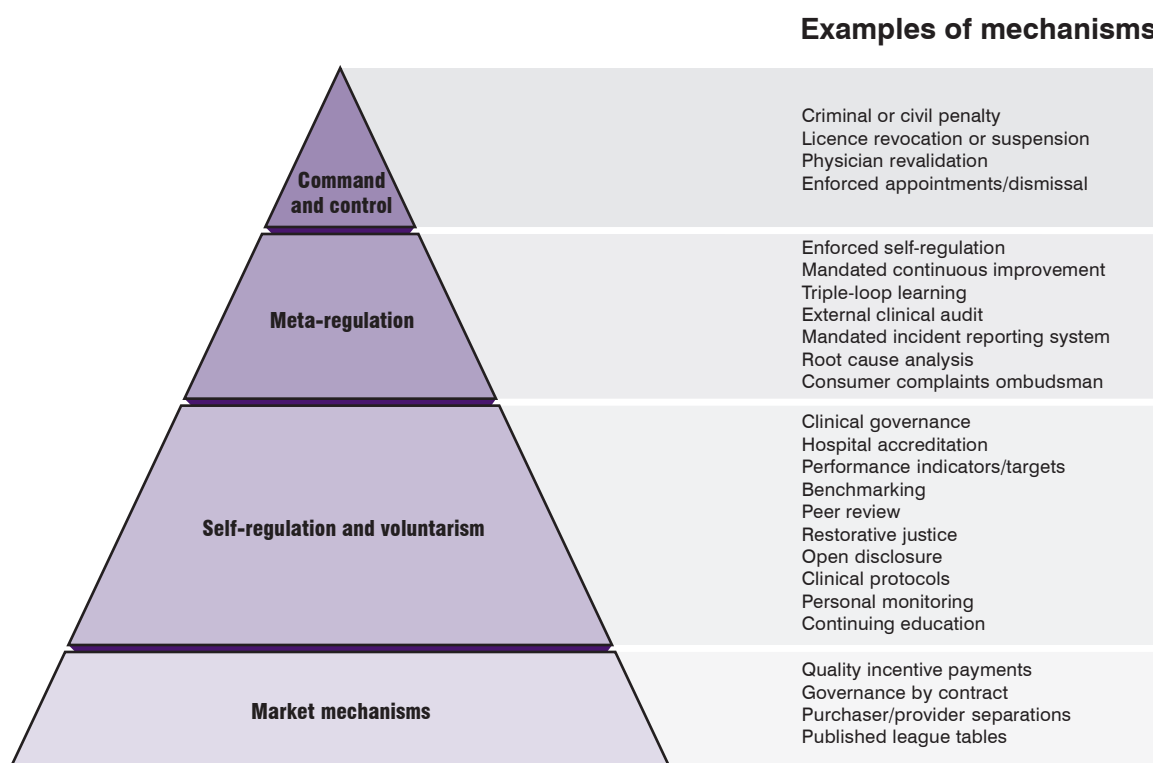


# Introduction

In general, there are a wide range of regulatory strategies that might be used to ensure people's health and safety. Increasingly, regulators are taking an approach of 'responsive regulation'. This involves using mechanisms that are responsive to the context, conduct and culture of those being regulated, providing for a range of regulatory mechanisms to achieve the behaviour desired. Where appropriate, the aim is to use incentives before sanctions. However, when those being regulated do not respond accordingly, escalating sanctions can be invoked. These strategies may be broadly classified into five groups<sup>3</sup>:

- voluntarism – voluntary compliance undertaken by an individual or organization without any coercion;
- self-regulation – for example, an organized group that regulates the behaviour of its own members through a voluntary code of practice;
- economic instruments – for example, supply-side funding sanctions or incentives for health care providers, and/or demand-side measures that give more power to consumers;
- meta-regulation – involving an external regulatory body to ensure that health care providers implement safety and quality practices and programmes; and
- command and control mechanisms – involving enforcement by government.

The idea of responsive regulation has been depicted, for example, by Braithwaite *et al*<sup>4</sup> as a 'regulatory pyramid' of mechanisms that can be utilized to ensure quality and safety with respect to the provision of health care services:



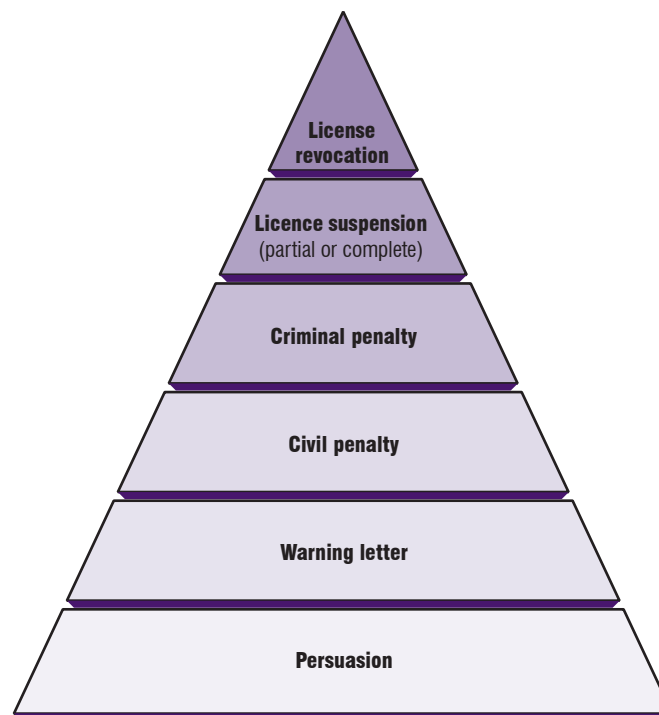
(Adapted from Braithwaite *et al*<sup>4</sup> figure 2, page 15)

<sup>3</sup> Braithwaite J, Healy J, Dwan K. *The Governance of Health Safety and Quality: A Discussion Paper*. Commonwealth of Australia, 2005. Available at <http://www.qualityandsafety.org/governance0705.pdf> (accessed 24 May 2006)

<sup>4</sup> *Ibid.*

The base of this pyramid represents a dialogue-based approach for securing compliance with a just rule or standard, where rewards apply rather than sanctions. Moving up the pyramid, more demanding and punitive strategies are invoked.

An in-depth discussion of this approach is available in Braithwaite *et al*<sup>5</sup>, where responsive regulation is contrasted with regulative formalism. Formalism is said to define in advance what problem requires which response and then write rules to mandate that response. This informative discussion includes the reproduction of a simpler ‘regulatory pyramid’ of sanctions published by Ayres and Braithwaite<sup>6</sup>. This pyramid shows sanctions that are progressively more interventionist as the apex is approached, and illustrates that the same regulatory strategy cannot be the appropriate response in all situations.



(Adapted from Ayres and Braithwaite<sup>7</sup>, page 35)

Although it is important to consider using a range of approaches to ensure appropriate types of behaviour that protect and promote the health of individuals and populations, there is no doubt that well designed legislation can play an effective and important role. There are many types of health legislation to support policies to promote good health. They can range from legislation focusing on the provision of health services, to legislation related to the environment, food, vehicles, buildings, occupational health and so forth. However, if legislation is not enforced, it may as well not exist. There are many examples of a law being ignored because no action is taken if there is non-compliance with it.

It is the aim of this publication to provide information that will assist in strengthening the enforcement of health legislation. Given that the only purpose of law enforcement is to ensure that a law is obeyed, there are a number of enforcement responses that might be provided by the law so that compliance can be achieved. In some cases all that is needed in the first instance is the application of a compliance

<sup>5</sup> *Ibid.*

<sup>6</sup> Ayres I & Braithwaite J. 1992. *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press.

<sup>7</sup> *Ibid.*

tool, such as the carrying out of regular inspections and the issue of a notice to comply with the law if an inspection reveals a failure to do so. However, where someone continues to commit an offence after a warning, or breaches a law in such a serious way that the breach cannot be ignored, the bringing of an action in a court (or other tribunal as specified in the legislation) may be the commensurate, and necessary, response. This is especially so when someone is offending the law in a way that either threatens the health of the public or creates a risk of serious harm being caused to individuals. In such an instance, sufficient powers should be available to the regulatory authority and its officers to take immediate steps to ensure the risk of harm ceases to exist (such as stopping adulterated goods from being offered for sale) or is minimized.

Where prosecution of an offender is warranted, this publication sets out the appropriate way in which to investigate, record and prepare a proper case for court action. The preparation of any case must ensure that there is objective evidence available to the court to prove the elements of the offence charged. Without proper preparation, there is a risk that a case might not satisfy the court. Scarce resources would then be wasted. Failure to prove an offence, perhaps because of a technical deficiency, can also lead to apparent justification of the conduct complained of and the occurrence of further breaches of the law.





# Enforcement and public health

## 1.1 Range of legislation

Ministries of health often administer and enforce a range of legislation. They might be concerned with legislation regulating some or all of the following fields:

- Alcohol control;
- Burials, cemeteries and cremations;
- Buildings standards;
- Environment;
- Food premises;
- Food standards;
- Hairdressers and others carrying out body piercing;
- Health facilities and services;
- Markets;
- Medical devices;
- Noise control;
- Nuisance;
- Occupational regulation;
- Offensive trades and industries;
- Pesticide use;
- Pharmaceuticals, vitamins and cosmetic products;
- Pharmacies;
- Port health;
- Public health;
- Quarantine;
- Radiation protection;
- Retail trading outlets;
- Sanitation;
- Tobacco control;
- Toxic substances;
- Vehicle standards;
- Waste management;
- Water.

No matter what area of health law is within the jurisdiction of the ministry of health, this publication is designed to assist officers to be effective in ensuring compliance with health laws. Subsequent chapters consider the process of investigation, the collection of evidence that will be admissible in a court, and the conduct of legal proceedings, including the giving of evidence.

## 1.2 Responsibility of the State

### Creation of laws and policies

Effective and fair enforcement of public health law is a critical component of every government's responsibility, as stewards of the State, to improve and protect the public health of all citizens in their country.

In developing or amending legislation in any State, each government has a responsibility to ensure that, where compliance with the law needs to be ensured, an appropriate range of options and mechanisms for enforcement are included in the relevant legislation, and that sufficient resources are allocated to achieve that enforcement. The aim should be to ensure that the response of the enforcement officer is commensurate with the health risks involved or the seriousness of the breach. Enforcement actions should be undertaken by appropriately trained persons and the approach used must be fair, effective and efficient, with due regard for appeal or other safeguards that should be in place to ensure fair application of the law and the protection of human rights. Sometimes the protection and enhancement of public health may necessitate limiting the exercise of human rights, but such rights should only be restricted when the five criteria specified in the Siracusa Principles<sup>8</sup> are met. The World Health Organization publication *25 Questions and Answers on Health & Human Rights*<sup>9</sup> provides the following valuable synopsis:

*Only as a last resort can human rights be interfered with to achieve a public health goal. Such interference can only be justified when all of the narrowly defined circumstances set out in human rights law, known as the Siracusa Principles, are met:*

- *The restriction is provided for and carried out in accordance with the law;*
- *The restriction is in the interest of a legitimate objective of general interest;*
- *The restriction is strictly necessary in a democratic society to achieve the objective;*
- *There are no less intrusive and restrictive means available to reach the same objective; and*
- *The restriction is not drafted or imposed arbitrarily, i.e. in an unreasonable or otherwise discriminatory manner.*

Even then, such limitations should be of limited duration and subject to review.

<sup>8</sup> <http://www1.umn.edu/humanrts/instate/siracusaprinciples.html> (accessed 24 May 2006)

<sup>9</sup> World Health Organization. *Health and Human Rights Publication Series: Issue No. 1*, July 2002, 18.

## Consequences of prosecution

Behaviour is only classified as criminal when it is recognized by the State as being harmful to society. The State, on behalf of all its citizens, then accepts the responsibility to investigate, prosecute and punish those behaving in that way.

The State also accepts the responsibility for ensuring, through the institutions and procedures it establishes, that those suspected or accused of conduct that is against the law are provided with the right to fair and proper process at all stages of an investigation and trial. Such responsibility is enshrined in the 'rules' or concept of natural justice, which require a minimum standard of fairness to be applied in the adjudication of a dispute. This concept has two limbs that require bodies exercising an adjudicative function, such as courts and tribunals, both to grant all parties to a dispute a fair hearing and to act without bias to any party. Remedies are available to a party denied natural justice.

To begin a prosecution against an individual has profound consequences. The individual moves from being merely suspected of wrongdoing to being someone who is formally and publicly accused of having committed an offence. Even if the person is found not to be guilty of the offence, he or she will have been subjected to public scrutiny and the stress of appearing in court. A decision to prosecute should therefore not be taken lightly, and a prosecution should only proceed where there is sufficient objective and verifiable evidence available for presentation to a court for all the elements of the offence to be proved.

The State also has a responsibility to guard against the possibility of placing an accused person in peril of being convicted of the same crime in respect of the same conduct on more than one occasion. This is known as double jeopardy. In jurisdictions based upon a common law tradition, there is usually a common law rule against a person being placed in double jeopardy. In others, the rule may be enshrined in the nation's constitution or in another law, such as one specifying the rules of procedure to be used in the conduct of criminal cases.

### 1.3 Standards of enforcement officers

It is the responsibility of ministries, departments and other agencies of the State to investigate potential breaches of the law and to take action authorized by the law to ensure compliance with the law including, if necessary, the prosecution of offenders. In carrying out their functions, enforcement officers are required to act in good faith and to exercise reasonable care in carrying out their duties.

### 1.4 Need to know the legislation

An enforcement officer must always act within the power and authority granted to him or her by the particular law. Thus, knowledge of the power and authority that has been given is an essential prerequisite. Generally, health laws may grant enforcement officers powers to:

- **Enter premises** (without and with a warrant issued by a court registrar, magistrate or judge) (This might be for the purposes of inspection, but can also be in relation to investigation of a reasonable suspicion that evidence exists that an offence has been committed.);
- **Search premises** (without and with a warrant);
- **Seize property**;

- **Remove, impound, immobilize or officially seal** a vehicle (air, sea, land; motorized/non-motorized), piece of equipment, or part of a piece of equipment;
- **Prevent entry** to premises or part of premises;
- **Gain assistance** from those authorized by the law to so assist, such as police officers, who may be asked to accompany an enforcement officer when removing an individual to a health facility for the purpose of a mental health assessment;
- **Question**;
- **Quarantine** individuals in accordance with the powers given in the law, such as when an individual has a highly infectious form of tuberculosis and is refusing treatment;
- **Access records**;
- **Issue warnings**;
- **Issue notices** requiring compliance;
- **Impose instant fines**;
- **Suspend licences**;
- **Cancel licences**;
- **Make a complaint** to a disciplinary body;
- **Lay an information** with the court to commence the court process and, sometimes, to conduct the prosecution;
- **Take no further action.**

# Achieving compliance

## 2.1 Enforcement choices

Certain tactical considerations must be taken into account when looking at solutions to the problem of how to ensure that people comply with public health laws. Prosecution is only one tool among the many that can be used to encourage compliance. It will not always be the appropriate regulatory response.

The most effective approaches to ensure compliance will vary from country to country and with the circumstances of the non-compliance. The purpose of this chapter is to outline some of the choices available for achieving enforcement without prosecution. To re-use the terminology of the Introduction, the regulatory pyramid has many options, moving from its base, before the apex is reached or invoked. The legal and policy issues these choices raise for governments and public health regulators are also addressed.

## 2.2 Approaches to enforcement

Approaches to regulatory enforcement can be divided between deterrence (or punishment) on the one hand, and persuasion (or compliance) on the other:

- A deterrent approach is based on the principle that people can be persuaded from violating a law if they believe that non-compliance will be detected and punishment will be severe and swift.
- A persuasive approach emphasizes cooperation, conciliation and negotiation between the regulator and the person or organization that is being regulated.

Increasingly, regulators are recognizing that the best enforcement strategy is to develop a responsive regulation model which uses a mix of deterrence and persuasion. This gives the regulator the flexibility to deal with a range of different subjects and situations.

Under such a responsive model, the regulator starts with the assumption that a person or organization will obey the law. Enforcement activity starts with enforcement officers providing education in the form of advice and attempting to persuade a person or organization to comply voluntarily.

If compliance is not forthcoming, the regulator increases the response through a range of sanctions or forms of punishment. These measures can include improvement and prohibition notices, withdrawal of licenses, issuing of infringement notices or instant<sup>10</sup> fines and, ultimately, prosecution.

<sup>10</sup> Sometimes referred to as 'on-the-spot' fines.

## 2.3 Educative approaches to enforcement

Before people can fully comply with the law, they must understand their obligations and the steps they must take to ensure compliance. Some people and organizations will have access to legal advice and support and will be able to understand what they are required to do to comply with the law. Others, such as small businesses, may not have access to the resources they need to fully understand their obligations. Enforcement officers and agencies can play an important role in bridging this gap by educating and supporting people and organizations to be in compliance.

Some examples of the types of initiative that can be used are:

- sending letters to affected persons and organizations to explain their legal obligations;
- providing detailed information about legal requirements, using public meetings, workshops, pamphlets, television and radio;
- distributing signs which explain aspects of the law (for example “no smoking” signs); or
- enlisting the wider community as an ally for the regulator (For instance, the media can be used to provide information about the law and to ask people to encourage compliance. Similarly, community groups, villages or neighbourhoods can be recruited to work with people and organizations that are being regulated to encourage compliance with laws. It should be remembered that, in many countries, there will be traditional methods of responding to non-compliance and these may prove an effective local solution to non-compliance with public health laws.).

Where an educative approach is not working, it will be necessary to increase the response. This could be achieved by:

- setting an absolute deadline for compliance;
- providing advance warning of enforcement action; or
- sending letters to warn offenders that their non-compliance has been noted and that enforcement action will follow.

## 2.4 Where an educative approach is not appropriate

There will be circumstances where it will not be appropriate to start with an educative approach. Instead it will be necessary to move immediately to the deterrent approach and to use sanctions. This will certainly be the case where:

- people and organizations blatantly ignore or flout their legal obligations; or
- there is an immediate risk to health and safety (In this situation, immediate action will need to be taken to remove or lessen the risk. Legal sanctions, such as improvement or prohibition notices, could be used to ensure swift action.).

## 2.5 Use of improvement and prohibition notices

Where, after discussions with a person or organization, the regulator is not confident that the person or organization in question will voluntarily comply with the

law, or in circumstances where there is a need to take urgent action to prevent or lessen a risk to public health and safety, there is a need to ensure quick enforcement action. Prosecution may not be appropriate in such circumstances, as prosecuting a person can be a complex and time-consuming process. Accordingly, a more immediate remedy is required.

A tool that is often used to address such problems is the option of providing enforcement officers with the power to issue a formal notice to require a person or organization to take specific action to bring them into compliance. There are two main forms of such notices: improvement notices and prohibition notices.

Improvement and prohibition notices are widely used in many jurisdictions to regulate conduct in areas including food control, alcohol sales, noise abatement, work place safety and noise control. Their use must be authorized by law. Most countries using such notices include a statutory power to issue them in an Act or Decree. The empowering law will usually set out:

- the circumstances under which a notice can be used, including the types of factor an enforcement officer should take into account before issuing a notice;
- the process that must be followed by the enforcement officer before issuing a notice;
- the consequences of not complying with a notice (This is usually a penalty, such as a fine.); and
- the right of the person or organization to whom a notice is issued to go to court to appeal or challenge the validity of the notice.

### **Distinction between improvement and prohibition notices**

An improvement notice requires the recipient to take some action to comply with the law or to take steps to cease unlawful behaviour and remedy any harm. An example would be a notice requiring an operator of food premises to take steps to improve the standard of hygiene in a food preparation area. The improvement notice gives a time period within which the improvements must occur in order to avoid further action being taken by the regulatory authority, such as closing down the food premises.

A prohibition notice requires a person or organization to take immediate action to comply. These notices are used in circumstances where serious harm has occurred or is likely to occur. A prohibition notice will require the recipient to stop the offending activity, machine or process immediately. Where a prohibition notice is issued, the enforcement officer is usually required to set out:

- what hazard is involved; and
- why the officer thinks that serious harm will eventuate.

Usually the legislation authorizing the use of prohibition notices will give the recipient the right to appeal to a court within a specified time-frame. However, even if the opportunity is taken to appeal, there must be compliance with the notice in the meantime, and the activity complained about must cease. The court will then decide whether or not the prohibition notice is unreasonable in the circumstances.

In some situations, the law may also allow an enforcement officer to take action to remove, impound, immobilize or officially seal a vehicle, piece of equipment, or part of a piece of equipment, or to prevent entry. Such powers are used to bring an immediate

end to a risk or nuisance. Only once compliance with the improvement or prohibition notice has been demonstrated to the satisfaction of the enforcement officer, will the vehicle, equipment or premises be unsealed or returned, or mobility or access restored.

## 2.6 Use of warnings

Another enforcement tool that can be considered to facilitate compliance is the use of warnings. Warnings may be used:

- as a tool to negotiate compliance;
- to deal quickly and simply with less serious offences;
- to avoid unnecessary appearances in criminal courts; and
- to reduce the chance of offenders re-offending.

The biggest advantage of using warnings is that their use does not require legislation. They also provide an enforcement officer with considerable discretion about their use. However, there are risks associated with the use of warnings. If a warning is issued, care should be taken to ensure that its issue does not preclude enforcement action being taken should compliance not occur. Usually warnings should only be issued when compliance has taken place or when it is apparent that compliance can be assured.

### Using warnings to negotiate compliance

A warning can be a tool to negotiate compliance when it is used as the basis for an agreement with the offender. The terms of such an agreement will be that:

- (1) the offender undertakes to take steps to resolve or mitigate a problem situation; and
- (2) in return, the enforcement authority undertakes to issue a warning, rather than commence a prosecution.

Warnings should be used in this way only when all the following conditions are satisfied:

- There is sufficient evidence of guilt to give a realistic prospect of conviction.
- The suspected offender has admitted the offence, usually by signing a declaration, and is willing to enter an agreement to rectify the situation.
- The suspected offender understands the significance of the agreement and has given informed consent to it.
- In the event that the alleged offender breaches the agreement, the enforcement authority must be in a position to bring a prosecution.

### Consistency and fairness in the use of warnings

It is important that warnings are used consistently and fairly. Thus it is important to develop policies and guidelines that set out the criteria for their use, and that enforcement officers are required to follow them. It is sometimes easier to express such policies in terms of both when a warning might be appropriate, and when it would be likely to be inappropriate.



Possible criteria to consider include:

- whether the offender has made an honest mistake ( If so, then a warning might be appropriate.);
- the prevalence of the type of offence (If the offence is common, it might not be appropriate to issue a warning and it could be better to conduct a prosecution in order to provide a deterrent.);
- the risk of danger or injury to the public (If there is a serious risk of danger or injury to the public, then a warning is not likely to be appropriate and some other form of enforcement action should be taken.);
- whether the alleged offender has failed to comply with notices or advice about legal requirements that has been given by enforcement officers (If the offender has been given information about obligations previously and has failed to comply, then other forms of enforcement action may be more appropriate than a warning.);
- whether the offender has disregarded legal requirements for financial reward or benefit (If the offender has been motivated by an opportunity to make a profit that would not have been made had the law been complied with, then a warning is not appropriate.);
- whether the offender is guilty of persistent breaches of legislation (In such a case, a warning is not appropriate.); and
- whether fraud, gross negligence or guilty knowledge is a factor (In such circumstances, a warning is not appropriate.).

When a warning is issued, the enforcement officer should record the reasons for its issue on the case file or in the process booklet so that the appropriateness of the warning, and its effectiveness, can be monitored.

## 2.7 Infringement notices imposing instant fines

An infringement notice is an administrative notice, authorized by statute. It sets out the particulars of an offence and gives the alleged offender the option of paying a penalty (often, but not always, a fixed monetary penalty, with methods of payment stated) or electing to have the matter dealt with by a court. This device, sometimes called an on-the-spot fine, was first used to control motoring and parking, but has since been expanded to many other areas of social regulation. Despite the popular name sometimes given to infringement notices, the monetary penalty is not actually exacted on the spot, and there can even be options available for penalties other than monetary fines.

The rationale for using infringement notices is that they enable enforcement of offences using a quick, easy and inexpensive process, without costly court action or the need to prove the elements of an offence. Hence it is more likely that enforcement action occurs, and that offences are officially noticed and penalized. Infringement notices may also provide a less harsh and less discriminatory way of dealing with minor offences, particularly those committed by people who may not understand the legal system and may not be aware that they have committed an offence.

An infringement notice does not involve a binding determination of liability, as is the case if an alleged offence is prosecuted. For this reason, such notices are usually reserved for clear-cut offences of a less serious nature. In addition, experience from a number of countries shows that the offences selected as suitable for infringement notices must be unambiguous. If an offence is ambiguous, substantial time and trouble may be required for enforcement officers to investigate and justify issuing an infringement notice, especially when a review or appeal is requested, thus negating the rationale for an infringement notice being issued in the first place. It is recommended that infringement notices be reserved for non-complex offences where the breach is clearly defined in law, the facts are easily verified and the evidence is non-controversial.

### **Feasibility of establishing an infringement notice scheme**

When looking at the feasibility of establishing an infringement notice scheme to deal with public health matters, the first question to consider is whether it would be the first time an infringement notice scheme has been established in the country. It is important to see whether there are pre-existing infringement notice schemes or rules about how an infringement notice scheme should work, and to ensure that the proposed new scheme is consistent with any existing scheme or rules.

Where an infringement notice scheme is proposed for the first time, it will be important for the government to set some parameters and principles around the development of such schemes. It may also be useful to consider establishing a single piece of legislation which governs the use of all infringement schemes across all enforcement areas such as the *State Penalties Enforcement Regulation 2000* made under the Australian State of Queensland's *Penalties Enforcement Act 1999*<sup>11</sup>. This step is recommended to avoid the problems that have been faced by a number of jurisdictions who have had multiple infringement schemes for some time and where there have been few controls over the proliferation of such schemes, resulting in conflicts and inconsistencies in the operation of the individual schemes.

### **Legal and policy issues in setting up an infringement notice scheme**

There are a number of policy and legal issues to be worked through before an effective infringement notice scheme can be established for public health enforcement.

#### Key features of the scheme:

It will be necessary to determine the key features and parameters of the infringement notice scheme, including:

- What sorts of conduct and offence would be punishable by infringement notice?
- In what circumstances could a notice be issued?
- What form would the notice take? Must it include a statement of the offender's rights?
- How must an infringement notice be delivered? Must it be delivered in person? Can it be posted?
- What procedures would an enforcement officer have to follow when issuing a notice?

<sup>11</sup> [http://www.austlii.edu.au/au/legis/qld/consol\\_reg/sper2000371/](http://www.austlii.edu.au/au/legis/qld/consol_reg/sper2000371/) (accessed 24 May 2006)

- Are there enough trained enforcement officers to make the scheme work?
- Would there be a right of appeal?
- Would there be a right to have the charge heard by a court instead of paying the infringement fee or accepting the infringement penalty?
- Does the court system have the capacity to hear such charges within an appropriate time-frame?

#### Form of notices:

The information contained in infringement notices should clearly set out the offence committed, the obligations imposed by the notice, the means of meeting those obligations and the right of the recipient to either challenge the notice in court or have the case heard in court in the same way as a normal prosecution. The key is to ensure that notices are simple and easy to understand.

Many countries use handwritten infringement notices. However, anecdotal evidence suggests that sections of the population may find it difficult to read and understand such handwritten notices, especially where more than one language is in use. Options for dealing with this problem include:

- using simple pre-printed infringement notice forms (The options within the notice are then limited to those printed upon it.);
- requiring enforcement officers to enter the data about an infringement notice into an automated system within a reasonable period of time after issue, and then sending a printed copy to the offender; and
- requiring all officers to use automated systems to issue infringement notices. (For example, a hand-held ticket machine that allows the relevant data to be inserted by the enforcement officer before the notice is printed/issued.)

#### Timing questions:

Under many infringement notice schemes, an infringement notice is issued at the same time as the offence is detected. Under others, there may be a delay between detection of an offence and issuance of the notice. In such cases, the notice needs to be issued soon after the offence is detected if the deterrent effect of issuing infringement notices is to be maximized. If defendants can rely upon the issuance or non-issuance of a notice within a known or usual time period, this also provides defendants with increased certainty as to whether or not the offence will be sanctioned.

#### Use of discretion:

Should enforcement staff be able to exercise any personal discretion about the application of an infringement notice scheme? The three possible types of discretion when imposing an infringement notice concern:

- whether to issue an infringement notice at all;
- the type of penalty imposed (Choices could include a monetary fine or a period of community service.); and
- the amount of penalty imposed.

Some prosecuting authorities consider it more important to encourage defendants to rectify the underlying breach than to enforce the infringement fee. Such authorities often offer to exercise discretion to cancel the infringement notice if the breach is rectified within a specified time-frame. Other authorities consider that enforcement of an infringement notice is the most cost-effective means of encouraging immediate rectification and deterring future offending. If the purpose of the infringement offence is to encourage the immediate rectification of the breach, incentives could be provided to defendants so that, for example:

- for the first offence, prosecuting authorities could offer to cancel the infringement notice if the breach is rectified within a specified time;
- if the defendant commits the same offence for a second time within a specified time, the defendant could be required to rectify the breach and to pay 20% of the infringement fee; and
- for the third offence within a specified time, defendants could be required to rectify the breach and to pay 30% of the infringement fee; and so on.

Whichever approach is adopted, it needs to be consistently applied. If discretion is to be given to enforcement officers, a policy should be developed to guide officers in exercising that discretion.

#### Payment of penalties

It is important to establish a simple and effective system for payment that also maintains the integrity of the scheme and its objectives. On-the-spot payments pose problems because an offender may not always have the means to make immediate payment and there is a risk that a payment made to an enforcement officer may be lost or misappropriated. Usually, therefore, infringement notices are payable to the government agency that has responsibility for collecting government fees or charges, or to a court registrar.

A system is also required to keep track of the notices that have been issued to make sure that the infringement fees are paid. Where the fee is not paid, enforcement action should be taken.

#### Identification of offenders

Enforcement officers may be restricted in the identifying information they can require from offenders by the lack of effective sanctions for defendants who refuse to provide such information or who provide false information. Consideration should therefore be given to requiring recipients of notices to prove their identity.

#### Issuance of notices to children and minors

Various issues need to be considered if defendants are children or minors. Should it be possible to issue infringement notices to children and minors and, if so, under what circumstances? If it is decided to impose notices on children, one option may be to subject them to a sliding scale of penalties in relation to age. For example:

- A child under the age of 10 could be given a warning, but not issued with an infringement notice.

- A child between the ages of 10 and 14 could be given a warning or, in serious cases or instances of repeat offending, issued with an infringement notice payable by his or her parents.
- A young person between the ages of 14 and 17 could be given a warning or an infringement notice with a penalty that would be a specified percentage (for example, 75%) of the standard infringement fee. In serious cases, or instances of repeat offending, he or she could be issued with a full infringement penalty.

### Evaluation of infringement notice schemes

The experience of a number of jurisdictions has been that they have not been able to properly assess the effectiveness of their infringement notice scheme or, in fact, the effectiveness of their enforcement strategies as a whole. Accordingly they often have no information about how successful their enforcement activities are.

When setting goals for enforcement, it is also important to consider how to evaluate whether those goals are being met and, in particular, whether a change in the enforcement approach being taken is required to ensure compliance.

## 2.8 Licensing

Another possible enforcement tool is the use of positive or negative licensing to control the circumstances in which a person or organization may enter and participate in a particular activity, such as operating a pharmacy. Both positive and negative licensing schemes need legislation to require compliance with public health law.

- Positive licensing requires a person who wishes to perform a particular activity, such as sell alcohol, to have a licence before he or she performs that activity.

Before gaining a licence under a positive licensing arrangement, a person must meet certain criteria. In addition, the granting of the licence usually involves an obligation to continue to meet certain terms and conditions. Usually a fee is payable for the licence. Where people fail to comply with licensing requirements, they are usually subjected to fines or to a loss of the licence.

If a country is contemplating setting up a positive licensing scheme it needs to satisfy itself that it has the resources to establish and run such a scheme. Requirements include systems for receiving and processing licences and licence fees, as well as trained staff to process applications and monitor compliance with licence conditions. Licensing systems can be costly to run, so a source of funding also needs to be secured to ensure their success.

- Negative licensing involves giving a court the power to prohibit a person who has offended from carrying out a particular activity in future. For example, a shopkeeper who sells cigarettes to minors, in breach of the law, could be prohibited from selling cigarettes in the future.



# Law relating to prosecutions

## 3.1 Elements of offences

The law does not seek to punish people merely for evil thoughts or intentions. Each offence must be looked at individually to determine what must be proved to establish its *actus reus*, i.e. the voluntary committing of a wrongful act or the bringing about of certain consequences. In the case of a statutory offence, the definition of the *actus reus* is to be found in the statute and, in common law jurisdictions, as interpreted judicially in decided cases. Generally, it is necessary to know which elements of the definition of an offence comprise the *actus reus*. The definition of an offence may prohibit acts or omissions (conduct). However, it may prohibit these only in particular circumstances and in some cases the definition of the offence requires particular consequences to flow from the conduct.

An offence may be an offence of strict liability (doing a particular act or bringing about a particular consequence, even if one does not intend to, is sufficient for the crime to be committed) or one that is committed negligently (e.g. careless driving). Where an offence is not one of strict liability or one that may be committed negligently, for a person to be found guilty of an offence he or she must, not only bring about consequences or commit the wrongful act (the *actus reus*) but must also have had the required 'guilty mind' at the time of the act (the *mens rea*).

*Mens rea* refers to the mental element necessary for a particular crime. This may differ from one crime to another, and the definition of each crime must be examined to determine what state of mind is required. Words used in offences to convey a requirement of *mens rea* include 'intentionally', 'wilfully', 'maliciously' 'knowingly' or 'recklessly'. Offences that require *mens rea* are generally regarded as being more serious than those that may be committed negligently or for which liability is strict. The term imports a notion of culpability or moral blameworthiness on the part of the offender.

## 3.2 Availability of defences

Once the *mens rea* and *actus reus* of an offence are proved, it does not necessarily mean that the accused will have criminal liability. The accused may be able to rely upon some justification or excuse to avoid criminal liability and the available justification may be indicated in the wording used in the statute. Sometimes an acceptance of the justification or excuse will lead to the prosecution failing to establish one of the required elements of the *actus reus* or *mens rea*. These justifications or excuses are more commonly referred to as defences. Some academic writers consider that defences form part of the definition of a crime, others consider that a crime is made up of three elements: the *mens rea*, the *actus reus* and, a negative element, the absence of a valid defence. In practice, which view is correct is not crucial.

There are also what is known as general defences that do not depend upon the precise elements of the offence, but are always available. Acting in self-defence or in the prevention of a crime are usually classified as general defences. When the accused pleads one of these general defences, there is a burden on him or her to lay a proper evidential foundation for the defence, so that the matter of the defence becomes a fit and proper issue to be considered. In some cases, the facts from which the defence might reasonably be inferred may emerge in the giving of evidence by prosecution witnesses. If not, the accused has what is known as an evidential burden to either give evidence himself/herself or call other witnesses to give evidence regarding the defence. Such evidence has to be proven on the balance of probabilities. Different standards of proof are further discussed in section 3.4.

If the evidential burden is discharged (meaning that the judge or magistrate decides that the accused has successfully raised the question as to whether a defence is available to him or her), the prosecution then has the burden of disproving the defence. To discharge the burden of disproving the defence, the prosecution has to prove beyond reasonable doubt that the accused was not acting in a way that was justified.

Where a defence operates as a justification, the wrongfulness of the accused person's conduct is negated, as his/her conduct is considered to have been an appropriate course of action in the circumstances in which he/she found himself/herself. Thus a successful plea of justification operates to cancel the unlawfulness of the accused's conduct and, as there is therefore no unlawful act, there is then no offence of which to convict, and the person must be acquitted.

### 3.3 Strict and absolute liability offences

If *mens rea* or negligence need not be proved in respect of one or more elements of the *actus reus* of an offence, the offence is one of strict liability. Strict liability does not mean absolute liability. If an offence is one of strict liability, the prosecution must prove that the *actus reus* was committed by the accused person, including establishing that his or her conduct was voluntary. If, however, an offence is one of absolute liability, as long as the accused person committed the *actus reus*, it does not matter whether the conduct was voluntary or not.

Offences under health law may be strict liability offences. As long as his or her conduct was voluntary, an accused person may be convicted of a strict liability offence, even if he or she caused the prohibited consequence inadvertently and in a blameless way.

While liability may be strict in respect of one element of the *actus reus*, an offence may require *mens rea* or negligence to be proved as regards another element.

### 3.4 Standards of proof

In legal systems derived from a common law tradition, different standards of proof apply depending upon the matter to be proved to the court. A higher standard attaches to criminal matters than to civil matters. The lower standard also applies when an issue has to be raised by the accused person, such as whether there is any foundation for claiming that he or she acted with a justifiable excuse.



## Criminal prosecution: beyond reasonable doubt

In a criminal case, the prosecution must, if it is to succeed, prove to the judge, magistrate or jury beyond reasonable doubt that the defendant committed the offence with which he or she has been charged. The courts of some jurisdictions have commented on a number of occasions that trial judges should not attempt to explain the meaning of ‘beyond reasonable doubt’ to juries. Normally, the trial judge merely gives a direction to the jury to the effect that the prosecution must satisfy the jury beyond a reasonable doubt of the guilt of the accused by establishing the essential ingredients of the charge to that standard, that the accused is entitled to the benefit of any reasonable doubt in their minds, and that the accused does not have to prove that he or she is innocent. However, in the New South Wales Criminal Appeal case of *Reeves*<sup>12</sup>, the Court indicated that it was preferable for the judge to add that the accused is presumed to be innocent until the prosecution has established guilt.

## Civil prosecution: on the balance of probabilities

The civil standard of proof of ‘on the balance of probabilities’ applies to civil cases and to criminal cases when a defendant seeks to establish certain defences. It is easier to prove something ‘on the balance of probabilities’ than ‘beyond reasonable doubt’. ‘On the balance of probabilities’ is often paraphrased as ‘more likely than not’.

## 3.5 Onus or burden of proof

The general rule on the onus of proof is that “He who asserts must prove”. This means that, in criminal cases, the responsibility for proving guilt lies with the prosecution, who has to satisfy the court (and jury if there is one) beyond all reasonable doubt that the evidence proves the defendant guilty of the offence as charged. The authority for this principle is the case of *Woolmington v Director of Public Prosecutions*<sup>13</sup>, in which the principle is referred to as:

*Throughout the web of the English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.*

Some commentators have noted that, although the persuasive burden may be on the prosecution, situations arise where, as a practical matter, the accused will have to give evidence in order to raise a reasonable doubt about the prosecution’s case, or to get an issue considered at all. In addition, the ‘golden thread’ has certainly been worn away by statutory provisions, such as in laws that deal with illicit drugs, where, if certain quantities of a drug are found to be in a person’s possession, they can be deemed to be possessed for the purposes of supply. There are also exceptions to the general rule on the burden of proof provided by some presumptions of law. Presumptions of law direct that certain things are to be taken for granted. These directions are either conclusive and cannot be contradicted, or disputable and can be proved incorrect.

The presumption of law that a person is innocent until proved guilty is conclusive. That presumption is also expressed in Article 11 of the Universal Declaration on Human Rights as “a person is presumed to be innocent until proved guilty”. However, the

<sup>12</sup> (1992) 29 NSWLR 109 at 117.

<sup>13</sup> [1935] AC 462 (HL).

presumption of law that a person is presumed sane at the time of committing a crime is disputable and can be proved incorrect by convincing evidence of mental illness at the time.

In some cases, Acts of Parliament place the burden of proof on the defendant. This frequently occurs with strict liability offences where a statute provides that there be no offence if the *actus reus* is done with a lawful excuse. The lawful excuse is usually set out in the style of a reasonable-steps defence, such as: “no person shall be convicted of an offence against [this Act or specified sections of this Act] if it is established that the person took such reasonable steps as practical in the circumstances to avoid the commission of the offence”. In such cases, it is for the defendant to prove that he or she acted with a lawful excuse although, where the burden of proof is placed on the defendant, the standard of proof is one of proof on the balance of probabilities, and is not beyond reasonable doubt.

Similarly, where a person is tried for an offence under a law that prohibits the doing of an act except in specified circumstances, or by persons of a specified class or with a specified qualification or licence, the defendant has the burden of proving the existence of the specified circumstances, membership of the specified class or the holding of the required qualification or licence. It is important to remember that, even in these cases, the prosecution is still required to prove all the ingredients of any offence charged.

### 3.6 Law of evidence

Law can be classified as being either substantive law or procedural law. Substantive law is law that defines rights, duties and liabilities, and creates offences. Procedural law is that part of the law whereby substantive law is applied, and includes the law of evidence. The law of evidence is that part of the procedural law that decides:

- what facts may or may not be proved;
- what sort of evidence must be given of a fact in order to prove it; and
- by whom and in what manner the evidence must be produced by which any fact is to be proved.

### 3.7 Types of evidence

Evidence includes the facts, testimony of persons and documents that may be legally received by the court or tribunal in order to prove or disprove the matter under enquiry. When evidence is presented, it is said to be adduced. Evidence is adduced in order to establish proof of the facts that meets the required standard.

Evidence may be either direct or circumstantial. Direct evidence is when a witness gives testimony as to the facts perceived. This form of evidence depends entirely on the truthfulness of the witness and on the accuracy of his or her observational powers. Circumstantial evidence means evidence, not of the actual fact to be proved, but of other facts from which that fact may be presumed with more or less certainty. Circumstantial evidence may also be called presumptive evidence.

Both direct and circumstantial evidence are equally receivable but, in assessing whether a particular fact is proved, greater weight will be given to direct evidence.

### 3.8 Proof

Proof is the establishment of the material facts that are at issue by proper means to the satisfaction of the court. When, as a result of evidence, there is undoubting assent as to the certainty of the event, then that event is said to be proved.

Apart from evidence, there may be other matters that go towards proof, such as presumptions, judicial notice and inspection. Presumptions are those things that can be inferred from other facts that have actually been proved. Judicial notice refers to the notice taken by a court of certain matters that are notorious or clearly established. Inspection can occur when something is within the view of the court or the jury, such as the demeanour of a witness or a photograph or other item admitted as an exhibit.

Conclusive proof is when such evidence is produced that the judge or magistrate is bound by law to regard some fact as proved and to exclude any evidence that is intended to disprove that fact.

### 3.9 Admissibility of evidence

Evidence is admissible if it may legally be received by a court. To be admissible, it must be relevant to the fact at issue. However, it may not be admissible if it is privileged or offends the hearsay rule, or if the appropriate means of proof was not adopted, as when a confession is obtained by an inducement that operated unfairly against the defendant. Irrelevant facts are inadmissible.

It is a fundamental condition of the admissibility of evidence against any person, including oral answers given by that person to a question put by an officer and statements made by the person, that it shall have been made voluntarily, in the sense that it was not obtained by fear of prejudice or hope of advantage exercised or held out by the person in authority. Evidence obtained by the use of threats, compulsion or promises does not satisfy this condition and will be inadmissible.

In a judicial enquiry, the facts that may be proved are:

- the facts at issue (those that must be proved);
- the facts relevant to the issue (those which directly or indirectly tend to prove the facts at issue); and
- the facts that are only indirectly relevant to the facts at issue but that affect the weight of the evidence (such as the circumstances preceding the taking of a statement).

### 3.10 Best evidence rule

This rule requires the provision of the best evidence that the circumstances allow and that the party can produce to show the nature of the facts admitted. The best evidence is primary evidence which, on a rigid application of the rule, is preferred over secondary evidence. However, this rule is said to survive only in the rule that secondary evidence of the contents of a private document (e.g. by production of a photocopy) cannot be given without accounting for the non-production of the original. Otherwise all admissible evidence is, in general, equally accepted, although its weight may be a matter of comment.

### 3.11 Parol evidence rule

Verbal evidence, or telling of a fact or facts by a witness, is called parol (or oral) evidence. As a general rule, parol evidence is not admissible with regard to anything not immediately within the knowledge of the witness. A witness must speak of facts that happened in his or her presence or within his or her hearing. This rule excludes hearsay evidence, although this is subject to some exceptions. The parol evidence rule also excludes the expression of opinion or belief by a witness, except in the case of expert witnesses (see Chapter 7).

There are necessary exceptions to the parol evidence rule on the question of identity of things or persons, or the genuineness of handwriting, where the witness is qualified to express a credible opinion or belief on the subject.

It is of particular importance when enforcing health legislation that, in matters of science or trade, an expert, or person intimately acquainted with the science or trade, may be called upon to give his or her opinion on the probable result or consequences of certain facts already proved. Expert opinion evidence is admissible.

### 3.12 Hearsay rule

Hearsay evidence is evidence of a fact not actually perceived by a witness through his or her own senses, but proved by the witness to have been stated by another person (not the defendant). Such evidence is not admissible unless what is reported to have been said was said in the presence and hearing of the defendant. Hearsay is not admitted in evidence because what the other person said was not on oath, and because the defendant had no opportunity to contradict or cross-examine the maker of the statement. Thus, the general rule is that hearsay evidence, whether oral or written, is inadmissible in criminal proceedings. However, there are a number of common law and statutory exceptions to the rule, such as the memory-refreshing rule.

In the key case of *R. v Richardson*<sup>14</sup> a distinction was drawn between a witness being allowed to read over his statement before going into court to give evidence (which is allowed), and a witness refreshing his memory from a document (whether it is a statement or otherwise) while giving evidence in the witness box. The document itself is not admissible because of the hearsay rule. Before a document can be used to refresh memory in the witness box, it must be shown that the writing was made or verified by the witness concerning, and contemporaneously with, the facts to which he or she testifies. In this context, contemporaneously means that the writing has to be made or verified at a time when the facts were still fresh in the witness's memory. This highlights the need for enforcement officers to record all pertinent facts in their notebooks in a timely manner, with entries being dated, timed and signed, to ensure that they will be available for the purpose of refreshing memory.

### 3.13 Privileged evidence

Privilege is the right claimed by witnesses to decline to give evidence on certain matters. The general rule is that every person should testify as to what he or she knows, and it is for the court to decide, subject to any legislative provision to the contrary, whether any particular evidence need not be given on the grounds that it is privileged.

<sup>14</sup> (1971) 5 CrAppR 244.

The extent of privilege will vary with the law of a given country, but privilege is often claimed:

- between husband and wife as to any communication made between them during marriage;
- in the case of anything that might amount to self-incrimination (answer any question or produce any document or thing which might, in the opinion of the court, expose him or her to the risk of any punishment, penalty or forfeiture) although this does not apply to a defendant giving evidence on his or her own behalf;
- in the case of communications between a lawyer and client;
- in the case of a confession made to a priest in his capacity as a priest (Such communications are not privileged as of right, but in practice the priest may not be required to give evidence.); and
- if it would be contrary to the public interest or would injure the public service to disclose a particular fact. (In such a case, the witness may claim privilege on the grounds of public policy.)

### 3.14 Duties to maintain confidentiality

There are three possible sources of duty to maintain confidentiality: ethical, legal and common law.

The best known duty of any health professional is the ethical duty of the medical practitioner to keep confidential the personal information he or she obtains from patients in the course of treating them. This ethical duty has a long tradition and is commonly contained within a code of ethics. Such codes now exist for many other categories of health professional in addition to medical practitioners. However, such an ethical duty is not an absolute obligation. There are recognized exceptions to the general duty, such as when disclosure is made with the patient's consent or where disclosure is required by a statute or court order. In addition, particularly in recent years, it has been affected by the passing of laws that place health professionals under an obligation to report in some circumstances, i.e. when the breach of confidentiality is required in the interests of some other person or people. For example, some ethical codes now acknowledge that it is permissible for personal information about a patient to be disclosed where the safety of another party is at risk.

The legal duty to maintain confidentiality usually arises from a statute that makes it an offence to disclose information about a patient to another party, except in certain circumstances. The legal duty might exist because of a law that controls the provision of health services by the public sector, or from a statute requiring registration or licensure of a health professional. Some jurisdictions also have privacy laws that prohibit disclosure of identifying information about patients, except in certain circumstances permitted by the law. These circumstances usually include providing information with a patient's prior consent, talking to relatives in accordance with the recognized customs of medical practice, complying with statutory obligations under other laws, such as Public Health Acts, and giving information to a court in the course of criminal proceedings. Most such laws are not intended to give the individual patient the right to sue for breach of a statutory duty. Proceedings for breach are usually undertaken by the police or another prosecuting authority.

Legal duties have also developed in some jurisdictions from the operation of common law – where cases have been won by patients who sued a health professional for disclosing information when the health professional had no lawful justification for so doing. However, worldwide, very few cases have come before the courts in which patients have sued a health professional for breach of confidentiality. It is usually argued that the legal duty according to common law arises through a contract between the health professional and the patient and from the law of negligence, in that a breach of confidentiality can amount to a breach of the duty of care owed to the patient. In such a case, a patient can seek monetary damages as compensation.

There might be no breach of a health professional's statutory and common law duties to maintain confidentiality if it can be shown that the disclosure was because:

- it was done with the consent of the patient;
- it was done with the implied consent of the patient to inform a close relative;
- the disclosure was to another health carer involved in the care of the patient;
- the intention of the health professional and the patient was that a report be made to a third party (e.g. where a doctor is engaged by an employer or insurance company to report on an individual);
- there is a statutory duty to breach confidentiality (e.g. a public health law requiring information to be given to a government health authority concerning patients with certain infectious and sexually transmitted conditions);
- where there is a court order that disclosure occur (If a court so orders, doctors and other health professionals must produce written notes and records and, if necessary, answer questions in court. Refusal to answer a question in court in such circumstances may be considered as contempt of court. However, the health professional would then be protected from an action for breach of confidence.);
- where there is a law permitting limited disclosure for the purposes of medical or social research; or
- where disclosure is in the public interest, such as when a statute provides a lawful excuse in certain circumstances, such as where a warning or disclosure is necessary to protect the patient.

# Enforcement officers

## 4.1 Recognition of enforcement officers

As enforcement officers are engaged in the investigation and prosecution of offences on behalf of the State, they are required to follow fair and proper processes in the exercise of their powers.

Enforcement officers should be recognizable as such, either through wearing a uniform or carrying some other form of identification that confirms their official status to citizens. In the past, an enforcement officer would be required to carry a warrant of appointment, which would be available to confirm his or her identity and status. Nowadays, especially where no uniform is issued, recognition might be achieved by wearing a badge that includes the name of the ministry or department, the name of the officer, the title of the position held and a photograph. The usual statutory requirement that an authorized officer shall, upon request, provide proof that he is an authorized officer can then be satisfied easily.

## 4.2 Powers of enforcement officers

Parliament will give powers to officers authorized to enforce legislation, usually by way of the particular law they are to enforce. It is less satisfactory when officers are given powers by way of a general law, such as one dealing with the appointment and role of such officers. This is because laws that are enacted later may not give the required extension of authority necessary to provide for effective enforcement of those particular laws. Providing powers to officers by some form of secondary law, such as a regulation or bye-law (also known as by-law), is even less satisfactory because of this factor. In some countries, the passing of tobacco and alcohol control legislation has highlighted the need to ensure that the range of personnel authorized to enforce the laws are extended beyond those traditionally given such authority. In order to achieve enforcement of such laws in remote or less easily accessed locations, the authority given to health officers, town officers and village wardens may need to be extended because there are insufficient numbers of officers otherwise available.

Officers should always act within the scope of the powers given to them. For example, if entry onto a particular type of property is allowed only under authority of a warrant issued by a magistrate, such a warrant should be obtained. Any evidence gained without proper authority might be ruled inadmissible in any court proceedings. In addition, the officer acting without authority risks committing a civil wrong (tort), such as trespass, if he or she enters a property without lawful authority. Should another person be detained wrongfully, such an arbitrary detention is a civil wrong arising from the tort of false imprisonment. This may occur where power of entry, search and seizure is exercised and persons on the premises feel that they are not free to leave or have been asked to provide unreasonable assistance to locate items or information.

Powers given to officers in respect of health legislation are usually powers of entry, search and seizure and power to obtain information, as well as powers to take authorized action in order to secure compliance. Examples of typical powers given by legislation to enforcement officers are included in Annex A.

### **4.3 Roles of enforcement officers**

Enforcement officers are called upon to carry out inspections and to investigate complaints. This might involve carrying out an investigation as to whether an offence has been committed, collecting evidence and interviewing potential witnesses.

While taking a course of action that is an alternative to prosecuting an offender may be appropriate and sufficient to ensure compliance with the legislation, there will be occasions, such as where the breach is serious or occurs on a number of occasions, when prosecution should ensue. The enforcement officer should then prepare a file for the prosecution and may be required to conduct the case in court or to appear in the case as a prosecution witness. The appearance of experts as witnesses is considered further in Chapter 7.

### **4.4 Investigation process**

The recognition that an investigation is necessary can arise during an inspection, or may be a consequence of receipt of a complaint from a member of the public or of information concerning the occurrence of an incident.

The decision to investigate may be influenced by the gravity and nature of the offence, the likely discovery of evidence that will meet satisfactory standards of proof, the availability of human resources competent to carry out the investigation, and having sufficient time to investigate, bearing in mind the times within which a law may require proceedings to be commenced. Once a decision has been made to conduct an investigation, its purpose must be kept in mind. The investigator is seeking to obtain evidence to establish whether there are reasonable grounds to believe an offence has been committed and, if so, whether there is sufficient reliable information to prove in a court of law how the offence was committed and by whom.

#### **Complainant interview**

If the investigation is instigated in response to a complaint, the first person to be the subject of interview should be the complainant. In seeking to establish the purported facts as reported by the complainant, the officer is given an opportunity to consider whether the behaviour or circumstances complained of could potentially constitute a breach of the law. If so, the officer is able to make an assessment about the reliability and willingness of the complainant to be a potential prosecution witness. Chapter 5 considers the conduct of interviews in detail.

#### **Initial examination and recording of the scene**

When an investigation appears warranted as a result of an inspection, the officer will usually already be at the scene. The opportunity should be taken to conduct an initial examination so that any tangible evidence is recorded in documentation if it



might be presented to a court as going towards proof of any offence. The rule is that physical evidence cannot be over-documented.

It is important to preserve the scene with minimal contamination and disturbance of physical evidence. If necessary, the scene should be isolated and guarded until a thorough examination can be conducted. Individuals should be prevented from altering or destroying physical evidence by restricting their movement, location and activity. Controlling the movement of persons at the scene and limiting the number of persons who enter the scene is often essential to maintain the integrity of the scene and thus safeguard evidence and minimize contamination.

The use of cameras to record the scene and any pieces of physical evidence should be encouraged. The camera should have a date and time feature that will appear on the resultant image. In some jurisdictions, photographic evidence produced by a digital camera is admissible as long as the person taking the image is available to the court to give evidence on the authenticity of the image presented and so that the court may consider his or her credibility. Digital images should be stored in a protected computer file, and the person taking the digital image should ensure that they have a securely kept copy of the original file so that they can be sure that their copy has not been manipulated by another party. In other jurisdictions, digital images are considered so capable of manipulation that they are not considered to be reliable and admissible evidence.

If using a non-digital camera, a new roll of film should be used for each incident, even if only a small number of photographs have been taken. This makes it easier to store the negatives as exhibits. Any subsequent statement making reference to any such photographs should include the words "I am able to produce the untouched negatives if required."

### **Taking possession of potential exhibits**

The collection of such evidence should be within the powers of the officer and should be collected lawfully and correctly. Consideration should always be given to making a search with consent to do so. If necessary, a search warrant should be obtained in the way detailed in the law. The ingredients of the offence to be proved will shape the collection of relevant potential exhibits. Once collected, the integrity of any evidence must be preserved by establishing a chain of custody of evidence, often shortened to the term a 'chain of evidence'.

The chain of evidence is constructed by proper exhibit handling, storage, labelling and recording, and must exist from the time the evidence is found until the time it is offered in evidence. Each person who takes possession of the evidence must be able to detail how it was cared for, safeguarded and preserved while under his or her control. The chain of evidence is kept as short as possible, by having as few people as possible handling exhibits. The law requires that the person presenting physical evidence prove that the evidence could not have been altered or replaced while in his or her possession.

### **Labelling and storage of exhibits**

Exhibits should be labelled fully and accurately. A securely affixed label should contain a unique serial number, with labels being issued in blocks of sequential numbers. The label should also provide for a description of the item, as well as recording of the place found and by whom, and the date and time of finding. Alternatively, property

seized as evidence should be stored in purpose-made self-sealing plastic storage bags that have a pre-printed unique serial number, place for a description of the item and the recording of details of where it was found, by whom, the date and the time, together with a movement record facility. If opened, for whatever reason, the details should be recorded on a fresh bag and the old bag sealed in the new bag together with the item. All exhibits should be securely stored to maintain the chain of evidence and to ensure that they are not tampered with in any way prior to submission to the court.

Measures should be effected to preserve or protect evidence that may be lost or compromised (e.g. to protect it from the elements or where evidence will deteriorate over time due to its perishable nature). The enforcement officer should identify and protect fragile and/or perishable evidence, ensuring that all evidence that might be compromised is immediately documented, photographed and collected. When collecting evidence, the most transient evidence should be recorded first, working to the least transient forms of physical evidence. In cases where it is impractical or dangerous to seize the evidence as an exhibit, full photographic and documentary evidence should be created as soon as possible. Such activities must be carried out in order to preserve the information, even if the physical evidence cannot be preserved.

If one of the reasons the goods have been seized is because of concern that their chemical or biological nature is in question, then documented samples should be provided to the relevant recognized testing authorities as soon as possible and under appropriate storage and transportation conditions. The relevant legislation will usually specify how such samples are to be procured, analysed and dealt with, including what certification or reporting is to be provided by the analyst. The sample should be divided into three portions: one portion for the person or business from which the sample was taken; one portion for laboratory analysis; and the last retained by the enforcement officer and stored in a freezer.

### **Recording of exhibits**

The seizing and movement of exhibits should be recorded in:

- the officer's notebook;
- an exhibit register; and
- an investigation note to be included in the file.

The initial record should contain all the information required for labelling, and the movement of exhibits should be recorded by making notes of to whom the exhibit (referred to by its unique identifying number) was handed, when and for what purpose.

### **Special treatment of documentary exhibits**

The original of any document seized as an exhibit should be photocopied. If the original was folded, it should be unfolded before photocopying. The document should not be refolded, and no new creases should be created in the paper. Care should be taken to ensure that the document is retained in its original condition. It should not be stapled, marked or damaged in any way. This includes not resting another piece of paper over the document and writing on that other piece of paper, as this can leave indentations in the original document. After photocopying, the original should be placed in a plastic sleeve and any examination of the content of the document should use only the photocopy.

If the original document is to be examined for fingerprints, such as when fraud is suspected, or otherwise subjected to forensic examination, care must be taken not to cross-contaminate the available evidence with fresh fingerprints, potential DNA traces etc.

If a document is handwritten and the identity of its writer is at issue, it will be necessary to obtain samples of handwriting, where the identity of the writer is proven, to enable comparisons to be made.

### **Photographing of exhibits**

All exhibits should be photographed *in situ* (as they are found). Once an item has been located, the photographer should be alerted prior to moving the item. The item should then be photographed using a camera with a time and date facility, as outlined above. Only after this should the exhibit be moved and placed in evidence, labelled and handled as described above. Each exhibit should be photographed subsequently against a clear non-invasive background that gives the unique identifier of the exhibit, together with some form of measurement scale from which the size of the item can be gauged. As each exhibit is photographed, a notebook entry should be made of the time, date and place of the photograph. A sequential log of all photographs should also be retained.

### **Identification of offenders**

Identification of the offender is often a contested issue and all possible effort should be made to positively establish the suspect/offender's identity. Particular care should be taken when establishing the main particulars of a suspect or offender. The following are required:

- name;
- date of birth; and
- address (both residential and business).

It can be useful to see some form of written identification, which will help to avoid spelling mistakes and errors regarding the date of birth. Consideration should also be given to obtaining written identification when dealing with people from cultures or backgrounds with which the investigator is not familiar. Some peoples have systems of passing on family names that may not be understood by the investigator, and spelling mistakes can be made more easily if the name is unfamiliar. A written document helps to alleviate such problems.

The investigation should seek to confirm identification by obtaining specific details about the offender(s), as well as any other facts known about him, her or them. These should include:

- physical characteristics and appearance;
- clothing;
- vehicle description and registration;
- any aliases used; and
- residential and business address details.

If the identity of an offender is known, the officer should consider any motivation for the offence. The officer is required to interview the suspect/offender and consider what corroborative evidence is available (either to corroborate the potential prosecution case or that of the potential defendant).

A suspect should always be treated firmly but fairly and should be given appropriate cautions before any interview is conducted. There must be compliance with any provision of the criminal law with respect to the interview and/or arrest of minors or others lacking legal competence.

## 4.5 Documentation of the investigation

### Official notebooks

Accurate records are essential and official notebooks should be issued by a supervisor to all concerned with evidence gathering. The issuing supervisor should retain a register of notebooks issued. Official notebooks should be a permanent record comprising a diary of times, dates, places, people and events. They should include notes of interviews and any statements made, as well as recording details of evidence and exhibits. They can be referred to in court proceedings. It is always prudent to read over the note to the person who is the subject of the entry and to record any comments made.

Notebooks should be numbered serially on the front cover and each page of a notebook should be numbered consecutively. Notebooks should be treated as a continuous record/diary of work for each officer. The officer should leave no blank pages or spaces in the notebook.

Investigations should always be documented by the making of contemporaneous notes in these notebooks. Any matter recorded in a notebook should be dated at the start of the entry and timed and signed at the end of the entry. Any errors made should be corrected by lining through with a single line, with the same being initialled by the officer. The original writing should remain legible and there should be no erasures or overwriting. Leaves of a notebook should not be torn out. When full, notebooks should be returned to the supervisor to be held in a central store for potential use in later proceedings.

### Statements

The officer should endeavour to obtain signed statements where the information supplied is of evidential value. Where this is not possible, full notes should be made in the officer's notebook. If a potential witness or suspected offender does not want to make a statement, the request to sign and authenticate the officer's notes can effectively make the notes into admissible evidence.

Statements are used during an inquiry to assist the determination of the extent of evidence available and, from there, to suggest further courses of action. After an inquiry, statements will be used to prepare notes of the available evidence, to assist in a determination that a *prima facie* case can be established and as a memory aid for a witness.

Annex B shows the usual format of statements. At the top, the place, date and time should be written. The statement begins with the name of the statement maker

and the word 'states'. There then follows a series of paragraphs giving the name of the person making the statement and his or her personal details, such as address, occupation and telephone number. A paragraph giving details of the person to whom the statement is being given, and why, is followed by the facts being stated. At the end of the statement the signatures of the maker and the taker of the statement appear. When a statement is taken from a potential offender, the statement records the giving of any applicable caution in a paragraph between the one recording the details of the person to whom the statement is being given, and why, and the stating of the facts.

Computer systems can also be used to provide pro forma outlines for statements, with blanks to be filled in. Once a hard copy is printed, it is signed and dated for use in proceedings etc.

### **Process booklets**

In a pocket in the back cover of this publication, an example of a process booklet is provided (the electronic file is available for down-loading from <http://www.wpro.who.int>). This has been developed as a generic example that can be adapted to the circumstances and laws of individual countries. Process booklets are capable of comprising the whole of the prosecution file. They are often used for more trivial matters where the record is not required to be extensive. They include room for the taking of statements, as well as the recording of witness details and the potential availability of exhibits. These booklets are numbered individually and serially and are issued in batches. They can contain pre-printed cautions, and plenty of space is provided for information to be written in, including the making of investigation notes, as well as creating a record of action taken, for example the issuing of a warning or an infringement notice.

### **Investigation notes**

Pre-printed investigation note forms (see Annex B) or a process booklet (or series of booklets) should be used to provide a précis of all investigations, making reference to allegations and subjects of the investigation. It should record all work undertaken, including details of persons who have been spoken to, enquiries still to be conducted, the seizing of evidence and the recording of evidence, such as exhibits. The details of the author of the notes should be recorded at the end of each part of the note.

The investigation notes should:

- identify the ingredients of the offence;
- recognize what factors of the investigation prove those ingredients;
- identify the testimony of which witnesses is necessary to prove the offence and the identity of the offender; and
- identify those exhibits that will be of evidential value.



# Interviewing

## 5.1 Interview technique

The ability to interview develops with experience due to a combination of increased knowledge and confidence. The aim of interviewing is, not only to obtain an explanation, but to make deeper enquiries. The officer will often need to interview people who are not themselves suspected of committing any offence, and he or she should seek to discover:

- what happened;
- why it happened;
- when it happened;
- where it happened;
- who was involved;
- how it happened; and
- what should be done.

An attempt should always be made to corroborate information obtained in an interview. The search must be for the truth. An immediate and persistent denial of an allegation, and any explanations given, must be recorded.

## 5.2 Before an interview

### Knowledge of the facts of the investigation

It is essential for an enforcement officer to know the facts about the investigation prior to conducting an interview. It is only through such preparation that the officer can be sure of pursuing the necessary line of questioning.

### Knowledge of offences and potential defences

It is imperative that the officer knows the ingredient(s) of the offence(s) that may be charged and these should be included in the interview. Equally important is knowledge of any potential defences, such as when a defence of acting with lawful excuse is provided.

### Cautioning the interviewee and advising of rights

Where an officer is trying to discover whether, or by whom, an offence has been committed, the officer is entitled to question any person, whether suspected or not,

from whom he or she thinks that useful information may be obtained. This is the case whether or not the person in question has been taken into custody, as long as he or she has not been charged with the offence or been informed that he or she may be prosecuted for it. Taking into custody is only possible by arrest. There must be compliance with provisions of the criminal law with respect to the interviewing of minors (such as a requirement that a child only be interviewed in the presence of his or her parent or a social worker) or others who are considered to be legally incompetent.

Care should be taken to ensure that there is no suggestion that the person's answers can only be used in evidence against him or her. Such a suggestion could prevent an innocent person from voluntarily making a statement that could show innocence in the matter.

All people who are detained must be advised at the time of the reason why they have been detained, that they have a right to consult and instruct a lawyer at any time, without delay and in private, and if they have any right to be financially assisted in retaining a lawyer. When people have been informed of their rights, they should be asked if they understand those rights. If they indicate a lack of understanding, then the explanation should be given again, using simpler terms if necessary. If a person does wish to seek advice from a lawyer, the officer should facilitate this. If necessary, the officer should desist from questioning the person further until legal advice has been obtained.

### **5.3 During the interview**

The officer should record notes of the interview in the official notebook or, if available, on pre-printed forms that prompt the recording of essential information. Such forms can be included in the process booklet. Notes should be taken during the discussion using the first person narrative and a question-and-answer format, as in 'I said' ... 'He said' ...

As soon as an officer has evidence which gives reasonable grounds for suspecting that a person has committed an offence, the officer must caution that person before putting to him or her any questions, or further questions, relating to that offence. A contemporaneous note should be made of the giving of the caution.

The actual wording of the caution may be established in law, but generally it is in terms of reminding the person being questioned that he or she is not obliged to say anything unless he or she wishes to do so, but that whatever is said will be written down and may be given in evidence. When, after being cautioned, a person is being questioned, or elects to make a statement, a record should be kept of the time and place at which any such questioning or statement began and ended, and of the persons present.

### **5.4 After the interview**

#### **Record of the interview**

At the end of the interview, the person being interviewed should be asked to read the officer's notes and to verify that they are a reasonable record of the interview. The interviewee should be asked to correct any mistakes and to initial the corrections and



the bottom of each page of the notes. At the end of the notes, the interviewee should be asked to sign them as a true record. The officer should then witness this. If the person being interviewed declines to sign off the notes, then the officer should endorse the notes to that effect. In such a case, it is desirable to have someone else witness the endorsement and the fact that the person being interviewed was given an opportunity to read, review and endorse the contents.

The officer should not be too quick to record a statement. An overview must first be gained so that the evidence can be recorded in a well ordered and logical manner.

## **Statements**

Statements are used during an inquiry to assist in the determination of the extent of evidence available and, from there, to suggest further courses of action. After an inquiry, statements will be used to prepare notes on the available evidence to assist in a determination that a *prima facie* case can be established, and as a memory aid for a witness.

The officer should endeavour to obtain signed statements where the information supplied is of evidential value. Where this is not possible, full notes should be made in the officer's notebook. If a suspected offender does not want to make a statement, the request to sign and authenticate the officer's notes effectively makes the notes into a statement.

## **First-person statements**

If a person says that he or she wants to make a statement after caution, that person must be told that a written record will be made of what he or she says. The person should always be asked if he or she wishes to write down what he or she wants to say. The person may indicate that he or she would like someone else to write the statement, such as the officer. In that case, the officer should take down the exact words spoken by the person making the statement, without putting any questions other than those that might be needed to make the statement coherent, intelligible and relevant to the material matters. The words used should never be translated into 'official language' as this may give a misleading impression of the genuineness of the statement.

Any person who wants to write his or her own statement may be advised what matters are material but otherwise should not be prompted.

## **Structure of a first-person statement**

For examples of statements, see Annex B. The place, date and time of the making of the statement should be written at the top. The statement should begin with the name of the statement maker, followed by the word 'states'. There then follows a series of paragraphs giving the name of the statement maker and personal details such as address, occupation and telephone number. A paragraph giving details of the person to whom the statement is being given, and why, is followed by the facts being stated. At the end of the statement the signatures of the maker and the taker of the statement appear.

When a statement is taken from a potential offender, the statement records the giving of any applicable caution in a paragraph after the one recording the details of

the person to whom the statement is being given and before the stating of the facts. Computer systems can also be used to provide pro forma outlines for statements, with blanks to be filled in. Once a hard copy is printed, it is signed and dated for use in proceedings etc.

### **Use of question-and-answer statements**

As an alternative to first-person statements, question-and-answer statements may be used. In such statements, the questions put to a suspected offender and the answers to the questions asked are recorded in the statement. Then the entire transcript of the statement can be admitted as evidence without the need for the defendant to give evidence. The court is thus aware of the entire context in which the interview took place.

# Prosecutions

## 6.1 Why prosecute under health legislation?

Failure to prosecute can potentially harm the credibility and integrity of the law or the ministry of health. At the most extreme, the law might be completely ignored by citizens and made completely ineffective in upholding health policy.

Prosecutions should also occur where there are breaches of the law that lead to significant public health risks and where other means of ensuring compliance have failed. Ministries of health may also develop prosecution policies detailing particular breaches that should lead to prosecution, such as where there is a serious breach, or where there is a significant degree of culpability, or repeated or persistent offending.

## 6.2 Decision to prosecute

In making the decision to initiate a prosecution, there are two major factors to be considered: evidential sufficiency and the public interest.

### Evidential sufficiency

The first question to be considered is always whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

The second question is whether the evidence is sufficiently strong to establish a *prima facie* case i.e. that, if the evidence is accepted as credible, it could find guilt proved beyond reasonable doubt.

### Public interest

It must be questioned whether it is in the public interest to proceed with prosecution, given that an evidential basis for the prosecution exists. The factors that can lead to a decision to prosecute can vary enormously and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution.

Ordinarily, it is not in the public interest to proceed unless it is more likely than not that a prosecution will result in conviction. It is often difficult, and sometimes impossible, to make an assessment of whether a conviction or an acquittal is the more likely result. In cases of such doubt, it may still be appropriate to proceed with the prosecution, relying on the premise that the final arbiter should be a court.

## Factors to consider in deciding if prosecution is in the public interest

Whether the public interest requires a prosecution may involve consideration of some or all of the following factors:

- the seriousness or, conversely, the triviality of the alleged offence (This is really questioning whether the conduct merits the intervention of criminal law.);
- any mitigating or aggravating circumstances;
- the youth, old age, physical or mental health of the alleged offender;
- the staleness of the alleged offence (i.e. how long ago the offence occurred);
- the degree of culpability of the alleged offender (i.e. how much the alleged offender contributed to or was responsible for the offence);
- the effect of a decision not to prosecute on public opinion, particularly with regard to future compliance with the law;
- the obsolescence or obscurity of the law;
- whether the prosecution might be counter-productive as, for example, where the accused might be considered as a martyr;
- the availability of proper alternatives to prosecution;
- the prevalence of the alleged offence and the need for a deterrent;
- whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- the entitlement of the State or a person to receive compensation, reparation or forfeiture as a consequence of conviction;
- the attitude of any victim of the alleged offence to prosecution;
- the likely length of a trial and the expense involved;
- whether the accused is willing to cooperate in the investigation or prosecution of others or the extent to which the accused has already done so; and
- the likely sentence that might be imposed in the event of conviction, having regard to the sentencing options available.

A decision to prosecute must not be influenced by:

- the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused;
- the prosecutor's personal views concerning the accused or any victim;
- any possible political advantage or disadvantage to the Government; or
- the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

### 6.3 Minimum conditions for a decision to prosecute

A decision to prosecute should only be made in a particular case where the prosecution is of the opinion that:

- evidence supporting the required standard of proof is available;
- the offender is culpable, in that any required *mens rea* was present;
- the date of the offence or a range of dates within which the offence was committed is known, and the charge can thus be appropriately framed;
- to bring a prosecution is consistent with policy and precedent;
- the likely cost of the prosecution is merited and the funds are available to cover those costs (particularly if the case is likely to proceed over a number of months or if there is no mechanism by which the costs can be recovered from the accused if he/she is found guilty);
- no other appropriate remedies or solutions are appropriate in the case; and
- the prosecution is satisfied that the offender is not able to avail him/herself of any statutory defences (For example, that he or she had taken reasonable steps to prevent the commission of the offence.).

## 6.4 Commencement of criminal cases

### Method 1: Laying an information, followed by issuing of a summons

The proceedings are commenced by the ‘laying of an information’. The information is the basis of the proceedings and may be laid by any person. The time within which an information should be laid is normally specified in the Act containing the offence but, if a time-frame is not stated, the general law may fix the limit, such as ‘within six months of the offence’.

The information should contain:

- details of the identity of the accused;
- the date and place of the alleged offence;
- particulars of the offence; and
- the section and name of the Act offended against.

A summons is then issued summoning the accused person to appear at court on a certain date.

Most offences where proceedings are commenced in this way are only able to be tried in a magistrates’ court (summary offences). This means that there will be no hearing conducted to determine which court should hear the case, such as occurs when a case can be heard either summarily before magistrates or upon indictment in a higher court. The question of bail does not arise and so remand hearings, where the question of bail is dealt with, do not take place.

### Method 2: Arrest and charge

The other method of commencing proceedings is to arrest and charge the suspect. The suspect is arrested and then interviewed at a police station. At the police station, the suspect is entitled to legal advice, usually provided by a solicitor. If the suspect is charged with an offence, he or she may either be granted bail by the police or else held

in custody until the next sitting of the magistrates' court (when the magistrates can be asked to grant bail to the defendant).

## 6.5 Continuing proceedings

Whether proceedings are begun by the laying of an information or by the arrest and charging of the suspect, the papers will then be considered by the office responsible for the conduct of prosecutions, if one exists, such as a Crown Prosecution Office. A Crown Prosecutor will decide whether the proceedings should be continued. In coming to a decision, the Crown Prosecutor will have regard to the strength of the evidence against the suspect and whether it is in the public interest to continue the prosecution.

In many small island nations, provision is made for a prosecution to be conducted by an enforcement officer, rather than the prosecutor necessarily being a legal practitioner or member of the police force.

If proceedings are commenced by the arrest and charging of the suspect, and police bail is withheld, the defendant may make an application for bail in the magistrates' court. If the prosecution oppose the granting of bail, the bail application is usually opposed by a representative of the Crown Prosecution Office. If that application for bail is unsuccessful, a further application may be made to the magistrates' court, subject to relevant provisions of any Bail Act. Usually, after a second application for bail has been refused, further applications can only be made when there has been a material change in circumstances or there is an appeal against the refusal of bail by the magistrate. That appeal is to a higher court.

## 6.6 Mode-of-trial hearing for offences able to be tried either way

Offences that are able to be tried either way are those that might be heard either by a magistrate after issuance of a summons or by a judge and jury in a higher court. At a mode-of-trial hearing, held within a magistrates' court, the defendant is asked to indicate whether he or she intends to plead guilty or not guilty to the 'either way' offence(s) with which he or she is charged. If the defendant gives no indication, or indicates an intention to plead not guilty, a decision has to be taken whether the case should be heard in the magistrates court or in a higher court. In some jurisdictions, the defendant has a right to elect the mode of trial to be used.

## 6.7 Committal proceedings for cases to be heard in a higher court

Committal proceedings are heard within a magistrates' court and occur when the accused is charged with an offence that is able to be tried either way and the matter is to be heard in a higher court, or where the accused is charged with an indictable offence. An indictable offence has to be heard in a higher court.

If the committal proceedings establish that there is a *prima facie* case against the accused, the case will be sent to a higher court for trial. In many countries, there is what is known as a 'paper committal', where the committal is based upon the sworn statements of witnesses, without requiring witnesses to attend to give evidence on that occasion. The prosecution hand to the magistrate(s) the statements made by the witnesses whom the prosecution intend to call in the higher court. Once the defence has confirmed that they do not wish to make a submission that the prosecution has

failed to establish a *prima facie* case, the magistrate(s) then commits the defendant to the higher court to stand trial by issuing an indictment.

In those rare cases where the defence do not accept that the witness statements establish a *prima facie* case against the accused (i.e. a reasonable court could not convict the accused on the basis of that evidence), the magistrate(s) considers the prosecution evidence at the committal proceedings. The prosecutor reads out the statements, the defence submits that there is no case to answer, and the prosecutor then makes a speech in reply. The magistrate(s) then considers whether there is sufficient evidence against the accused for him or her to be put on trial in a higher court (i.e. whether there is a case to answer).

A similar format is followed in countries where there is no paper committal process in place, but the rather more lengthy process of the calling of the prosecution witnesses and the hearing of their evidence occurs.

## 6.8 The trial process

### Summary trials and trials upon indictment

A trial will take place in the magistrates' court if the offence is a summary one or if the offence is able to be tried either way but it has been agreed at a mode-of-trial hearing that there be a summary trial. If the offence is only able to be tried on indictment, or the mode-of-trial hearing has resulted in a decision in favour of trial by indictment, the trial will take place in a higher court.

### Functions of the court

In summary proceedings, the magistrate/judge is the sole arbiter who decides questions both of fact and of law and is responsible for the orderly conduct of the business of the court. He or she must be satisfied that the prosecution has proved beyond reasonable doubt all the ingredients or elements that constitute the offence.

In proceedings only able to be tried on indictment, the judge decides questions of law and the jury decides questions of fact.

### Functions of the prosecutor

The prosecutor presents the prosecution case, ensuring that all the prosecution evidence is presented to the best advantage. Every witness must be given the opportunity to present his or her best evidence, but the prosecutor does not have a duty to protect witnesses.

### Functions of the defence counsel

Defence counsel (a solicitor, barrister or other law practitioner who is admitted to appear in the court) represents his or her client, accepting the client's version of the truth. He or she is required to take advantage of every inadequacy in the prosecution case and to inform the court of all pertinent law, while being under a duty not to mislead the court as to the facts.

## 6.9 Format of a criminal case

A criminal case has the following format:

- **The charges are read and put to the defendant.**
- **The defendant pleads ‘guilty’ or ‘not guilty’.**
- **If pleading ‘not guilty’, there is an opening address by the prosecution.** The purpose of such an address is to prepare the magistrate or jury for the evidence they are about to hear. The prosecution case is summarized so that the magistrate or jury can put the evidence they are about to hear into context.
- **The prosecution witnesses give evidence by way of an examination in chief**, where they respond to questions put by the prosecution, **followed by cross-examination** by defence counsel, and **concluding with re-examination** by the prosecution.
- **The defence presents an opening address.**
- **Defence witnesses give evidence by way of examination in chief followed by cross-examination** by the prosecution, and **re-examination** by the defence.
- **The prosecution gives a closing address.**
- **The defence gives a closing address.** In some jurisdictions, for cases heard in a magistrates’ court, the prosecutor makes an opening address but no closing address, while counsel for the defence makes a closing address but not an opening address. In higher courts, defence counsel often forgoes the right to make an opening address.
- **The case concludes with the magistrate, the judge or jury (if any) considering the decision and coming to a verdict.** If there is a ‘guilty’ finding, the accused is convicted; if ‘not guilty’, the result is an acquittal.
- Wherever an accused pleads guilty or is found guilty, there is a plea in mitigation on behalf of the defendant and a submission from the prosecution on how seriously the court should view the offence. This usually covers issues such as aggravating features of the offence, the need for a deterrent sentence, and any previous conviction of the defendant. Then **sentence is passed.**

## 6.10 Prosecution file

### Assembly of a prosecution file

In preparation for the hearing of a case, a prosecution file should be assembled. This should comprise:

- a copy of the **information** laid to commence the proceedings;
- a **caption sheet** (explained below);
- a **summary of the facts** (explained below);
- a **covering letter, if the prosecution is to be conducted other than by the enforcement officer**; and
- for a **defended hearing**:



- all **briefs of evidence**; and
- all **statements of evidence**.

### Caption sheet

The caption sheet is prepared to capture all the essential details of a case for easy reference. It should list:

- **full details of the defendant**;
- the **offence** with which the defendant is charged;
- the **Statute** under which the charge is laid;
- the **penalty**;
- the **number of witnesses**; and
- the **number of exhibits**.

### Summary of the facts

A summary of the facts should be prepared, containing sufficient detail to enable the defendant to be identified in court as the person who committed the offence, together with detail of the proof of every ingredient of the charge (noting which facts are at issue) and other relevant facts to show how the offence was committed.

The summary is best structured under the following headings:

- **Introduction** (specifying the time, date and place of the offence);
- **Circumstances** (outlining the facts of what happened and how they occurred);
- **Other relevant details**; and
- The **defendant's explanation** of what occurred.

### Previous history of offender

An offender's previous convictions must only be given as part of submissions on sentencing, unless it is by way of similar-fact evidence to show a *modus* i.e. a nearly identical mode of offending. However, the following statements can be used to give an indication of court history:

- The defendant has not previously appeared before the court (no convictions).
- The defendant has previously appeared before the court on unrelated matters (previous convictions but of a different nature).
- The defendant has previously appeared before the court on similar matters (has previous convictions on matters similar to those before the court).

## 6.11 Pre-trial disclosure of evidence

Everyone who is charged with an offence must be given adequate time and facilities to prepare a defence prior to the hearing of the charge. To facilitate this, and to clarify

what matters remain at issue, many jurisdictions now have an automatic process of pre-trial disclosure of evidence established under legislation. In other jurisdictions, disclosure occurs only upon direction of the court.

Disclosure can range from being required to disclose to the other side at least a summary of the prosecution case (especially if the defendant is faced with an initial mode-of-trial decision) to being required to provide copies of the statements made by those persons who are to be called as prosecution witnesses (especially when an indictment has been issued and it has been decided that the matter will go to trial).

The level of disclosure required is likely to vary depending upon how the charge may be heard and the stage the proceedings have reached. If an offence is able to be tried either way or upon indictment, it is usual for the prosecution to be required to disclose the witness statements prior to any committal hearing. In many jurisdictions, where a matter is eventually heard upon indictment, the prosecution may be limited to calling only those witnesses whose statements were previously disclosed.

Under criminal procedure laws, the prosecution may also be under a statutory duty to disclose material other than the statements of the persons they may be calling as witnesses. For example, in some jurisdictions the prosecution is under a duty to disclose any prosecution material that, in the prosecutor's opinion, might undermine the case for the prosecution against the accused or any prosecution material that might reasonably be used to assist the defence. In such jurisdictions, there may be the ability to withhold material if authorized by the court on the grounds of public interest.

Sometimes the defence is also under a duty of disclosure, particularly when more serious offences are involved. This enables the defence to inform the prosecution, in general terms, of the accused person's defence and to indicate the matters on which the accused takes issue with the prosecution (and why he or she takes issue with the prosecution on those matters). In addition, where the defence case includes an alibi, it is usual for there to be a statutory duty on the accused to give particulars of the alibi to the prosecution.

## **6.12 Discovery of documents**

Discovery is a term that relates to documents that are in the hands of the opposite party. Legislation frequently specifies what can be discovered. Frequently, the documents that are discoverable from the prosecution amount to any documents that the prosecution might contemplate tendering as evidence, regardless of whether a particular document is in fact eventually tendered. Discovery could therefore cover:

- notebook entries;
- file notes;
- copies of e-mails;
- statements;
- briefs of evidence; and
- any analysis results, exhibits and photographs.

In some jurisdictions, discovery is automatic; in others, discovery only occurs in response to a notice to produce.

# Witnesses

## 7.1 Witness statements

In preparation for trial, a statement of evidence (sometimes also called a brief or proof of evidence) should be prepared for each witness as, in many jurisdictions, all witnesses give evidence orally at the trial. These briefs are used by the advocate in court as the basis for questioning the witness in examination in chief. Such a brief should present clearly and concisely all the admissible evidence that can be given by a witness. Collectively, all the briefs of evidence should be capable of proving all the ingredients of the offence and should prove the offender's identity.

Although the witness statement is technically that of the witness, it is usually drafted by those representing the prosecution (for prosecution witnesses) or the defence (for defence witnesses). 'Witness coaching' must be avoided, and the witness statement has to be drafted on the basis of any instructions and other documents, including records of interviews, letters, files and attendance notes.

Witness statements should be written in narrative form in the first person, with appropriate reference to any relevant documents and items of real evidence that the witness can produce. It must also fulfil any formal requirements as to form and content. The witness signs the witness statement as an acknowledgement that he or she accepts the truth of the contents.

It is usual for the following format to be used:

- The name of the witness is followed by either the words 'to prove' or 'states'.
- It is typed in double spacing.
- Plenty of margin space is provided.
- The witness's particulars are given in the first paragraph, including a summary of the witness's job description and experience, if this is relevant to the case, which it is in respect of an enforcement officer. In respect of an expert witness, it should include a summary of the witness's qualifications and experience that qualifies him or her as an expert in relation to the matter before the court.
- Each fact is in a single paragraph, following a chronological sequence.
- Only those facts that the witness has supplied and can prove are included.
- Margin references for exhibits and photographs are made against the relevant paragraph.
- Any additional declarations or statements by the witness are included as the final paragraph.

## 7.2 What witnesses should give evidence?

The prosecution is not required to call as a witness every person from whom witness statements have been obtained. However, the prosecution should call sufficient witnesses to ensure that the full narrative of the prosecution case unfolds in evidence. Generally, witness evidence is admissible as long as it satisfies the rules of evidence and is relevant to the facts at issue. However, the magistrate or judge has the discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused.

It is said that there is ‘no property in a witness’, which means that it does not matter if a witness was originally required to give a statement by either the prosecution or the defence. Both sides are entitled, prior to the hearing, to be allowed access to witnesses or their statements.

Witnesses who are not the officer in charge of the prosecution are generally excluded from the court until after they have given evidence.

## 7.3 Compellability of witnesses

Unless protected by public policy or privilege, a witness is compelled to answer every question that is relevant to the issue. A constitutional provision that allows a citizen to decline to answer questions that lead to self-incrimination is a case of public policy protection.

## 7.4 Process of giving evidence

Prior to giving evidence, a witness is excluded from the court unless he or she is also the officer in charge of the prosecution case or is qualified as an expert and needs to consider all the evidence prior to forming a concluded expert opinion upon it.

Once taking the stand, the witness is required to take an oath (sworn) or give an affirmation to tell the truth in giving evidence.

The examination in chief of a prosecution witness comprises a series of questions put to the witness by the prosecution, the object being to get the witness to tell his or her story (answering questions such as ‘Who?’, ‘When?’, ‘What happened next?’). Care must be taken not to ‘lead’ the witness (that is, to suggest answers to the questions being put or to ask a question which can be answered with a simple ‘yes’ or ‘no’). Before going into court, the prosecutor must have decided what he or she hopes to achieve with a particular witness, since the examination in chief should only bring out evidence which is relevant to the case.

Examination in chief can also be used to anticipate questions that may be put to that witness in cross-examination. For instance, in a case involving identification evidence, the prosecutor would, in examination in chief, ask a witness who claims to have identified the defendant as the perpetrator of the offence a number of relevant matters. Relevant matters might include the distance between the witness and the observed activity, the level of lighting, whether his or her view was obstructed, etc.

The witness should be truthful, factual, unbiased, calm and professional. As the evidence will be recorded, the witness should speak slowly and clearly and should be aware that the magistrate/judge and the defence will also be making their own notes.

The witness should look to the prosecutor for guidance if he or she does not understand a question that has been put or the question is not heard. The witness may seek the court's approval to refresh his or her memory by referring to notes made contemporaneously with or soon after the event, or to refer to business records, professional works or research that has been undertaken relating to the fact at issue. Any documents that a witness wishes to use to refresh his or her memory should be shown to the defence (although defence counsel is not permitted to view entries not relevant to the facts at issue).

When a witness refers to exhibits, each exhibit is 'real' evidence in itself. A photograph is 'secondary' evidence. The witness needs to be positive about the identification of any exhibit, hence the need for a system of numbering and labelling of exhibits.

At the conclusion of the examination in chief, the opposite party cross-examines the witness. The intent of cross-examination is to probe the story told by the witness and to focus on inconsistencies, as well as to elicit any new material that might be helpful to the case. In so doing, it might destroy or weaken material parts of the examination in chief. This is the point at which credibility may also be challenged. The sorts of inconsistencies that will be explored are those:

- between what the witness is saying now and what he or she has said in the written statement;
- in the evidence that the witness has given to the court (e.g. in the course of the witness's testimony, the colour of the car changes from dark blue to black);
- between what this witness is saying and what another witness has said;
- between what the witness is saying and the theory that the opposing counsel has formed about the case he or she is presenting; and
- between what the witness is saying and what common sense suggests actually happened.

Probing the strength of the evidence can involve exploring such matters as whether the witness has a motive for misleading the court.

During cross-examination, leading questions are allowed to be put to a witness. A leading question is one that suggests the desired answer or assumes the existence of a disputed fact. Leading questions must not be put to a witness during examination in chief or during re-examination. However, the rules regarding leading questions may be relaxed at the discretion of the magistrate/judge where they relate to introductory and undisputed facts, where one witness is in fact called to contradict another or when the witness is regarded as 'hostile'.

A 'hostile' witness is one who shows himself or herself adverse to the side which has called him or her. The fact that the evidence of a witness is unfavourable to his or her side does not necessarily render the witness hostile. It is for the court (i.e. the judge or magistrate) to decide whether a witness should be treated as a hostile witness. If the court gives permission for the witness to be treated as hostile, apart from the possibility of leading questions being put, the side that has called the hostile witness can contradict him or her by other evidence and, by leave of the magistrate/judge, prove that he or she has, at other times, made a statement inconsistent with the present testimony. Before such inconsistent statements can be shown, the circumstances of the previous statement should be mentioned to the witness, who should be asked whether he or she made such a statement.

After cross-examination, the side who called the witness may re-examine him or her, but only in relation to matters that have been raised during cross-examination. Again, no leading questions may be asked.

On occasion, questions to clarify issues may be put to a witness by the magistrate/judge. After completing his or her evidence, the witness is released by leave of the court.

## **7.5 The enforcement officer as a witness**

The credibility of a professional witness (which includes enforcement officers) can be challenged by cross-examination that discloses inadequacies in knowledge, observation, memory, experience or competency, or discloses inconsistency with prior statements. The character of such a witness may also be discredited by reference to such matters as associates or character. Independent evidence may also be offered on relevant matters that challenge the credibility of the evidence of the professional witness, such as evidence of a general reputation for untruthfulness.

## **7.6 Expert witnesses**

At times, the prosecution of a case may involve the need to use one or more expert witnesses. In addition, health professionals and health protection staff may find that they are involved in providing expert testimony in cases where they or the ministry of health are not the lead agency pursuing the action.

The difference between an expert witness and an ordinary witness of fact is based upon the general principle that courts do not receive evidence which is based upon opinion. Because the function of a court is to decide guilt or innocence, or liability, on the basis of proven facts, evidence of facts is given to the court by witnesses who testify as to what they have seen or heard. In general, opinions are inadmissible because they do not prove material facts. However, the major exception to this rule is the ability of some witnesses to give expert opinion evidence.

The opinions of experts are generally admissible to assist the court to determine an issue where that issue involves knowledge that can only be acquired through training or expertise. Without the expert witness, the court is not properly equipped to draw proper inferences from the facts stated by a witness. In such circumstances, a properly qualified expert is allowed to state his or her opinion to assist the court.

### **Overriding duty of the expert witness**

An expert witness has an overriding duty to assist the court impartially on relevant matters within his or her area of expertise. Testimony given by an expert is likely to carry more weight than that of an ordinary witness, and a high standard of objectivity is required. The expert witness is not an advocate for the party who engages him or her, and should avoid adopting a partisan position. In short, expert witnesses are ‘witnesses for the court’, not witnesses for a party.

### **When is expert opinion allowed?**

Expert opinion is admissible whenever the subject is one for which the competency to form an opinion can only be acquired through a course of special study or expertise. The evidence in question must be specialized to the extent that it exceeds the skills of ordinary people engaged in ordinary pursuits.

## Fields of expertise

There are no rigid boundaries as to the fields of expertise. While some categories of expert witness are commonplace, such as pathologists, new fields of expertise often arise in response to new developments in technology and science. The field has to be sufficiently well established so as to be relevant and reliable. The court has to be satisfied that the witness is qualified to give expert evidence in the field by virtue of his or her qualifications, training or experience.

## Qualifying as an expert

To be qualified to give expert evidence in a particular field, the witness must prove that he or she possesses knowledge of that field and has an ability to use that knowledge by virtue of training and/or expertise in the field. The expert witness must 'qualify' himself or herself at the outset of giving evidence. Whether the individual is competent to give expert evidence is a question for the judge.

It is the fact of possession of the expertise which is crucial, not the manner by which the expertise was acquired. In some cases, the expertise will have been as a result of obtaining formal qualifications having followed a recognized course of study at a respected institution. In others, the expertise might have been acquired by practical first-hand involvement in the field, or through teaching, research and publications on the subject.

## Engaging an expert

Often an expert is engaged first as a consultant and a decision is made later as to whether he or she should give evidence as an expert in the proceedings. As a consultant, the work product of the consultancy is confidential but, if the expert's name is disclosed as a potential expert in the matter, then the expert's prior work product will become subject to discovery. For this reason, preliminary opinions and impressions are better not expressed in writing.

In addition to discoverable reports and writings, the following documents may be requested by the opposing party:

- any documents reflecting or relating to any communication with the expert and counsel, including such things as engagement letters;
- any documents reflecting any communication relating to the engagement, including any communication with witnesses;
- all documents reflecting or relating to any preliminary opinions or conclusions;
- all documents consulted or relied upon by the expert in connection with the engagement, including those consulted or relied upon in forming opinions;
- all documents relating to educational, employment and professional history and any other documents reflecting or relating to the expert's qualifications to give expert evidence;
- copies of all professional publications that the expert witness has written or contributed to;
- all documents reflecting other cases in which the expert has given evidence as an expert, including documents and transcripts that reflect the substance of the previous testimony; and

- all other documents relating to the engagement, the opinion expected to be given, or opinions the expert was asked to consider giving.

### **Limiting the number of experts**

Experts can differ in their opinions so, in order to prevent the disintegration of a trial into the swapping of numerous expert opinions, parties are usually each confined to a certain number of experts, normally just one or two. In addition, procedures will usually be in place to encourage the parties to limit, as far as possible, the need for experts to be called at a trial. This is often done by requiring the parties to exchange their expert reports and for the experts to meet to limit those matters that are still at issue and, if possible, to agree on their reports. Agreeing on reports can be to the extent of preparing and signing a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including their reasons for disagreement.

### **Evidence given by an expert witness**

In his or her evidence, the expert witness must:

- state his or her qualifications as an expert;
- state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise;
- state the facts and assumptions on which the opinions of the expert witness are based;
- state the reasons for the opinions given by the expert witness;
- specify any literature of other materials used or relied on in support of the opinions expressed by the expert witness;
- describe any examinations, tests, or other investigations on which the expert witness has relied and identify and give details of the qualifications of any person who carried them out;
- state any reservations about the evidence which the expert witness believes should be stated to prevent his or her opinion, or any part of it, being misleading;
- state any reason, such as insufficient research or data, which the expert witness believes prevents his or her opinion from being a concluded opinion.

### **Types of cross-examination that might be faced by expert witnesses**

Expert witnesses should be prepared to deal with:

- attacks upon their qualifications;
- attacks upon the basis of the opinion they have given (The expert should be fully aware of all of the facts upon which the opinion is based, should know which facts are significant, such that a change in the facts would necessitate a change in the opinion, and should be fully prepared to describe all of the considerations from which the opinion was formulated.);



- attacks based upon hypothetical or changed facts (The expert should be aware of key facts to determine what changes in the opinion would have to be made given certain factual changes.); and
- attempts to get him or her to agree with some or all of the premises of the opponent's case or testimony of the opponent's expert when disagreement is based upon previously stated reasons.

## 7.7 The wise witness

- (1) Be truthful.
- (2) Listen carefully to the question and wait to answer until the entire question has been asked.
- (3) Answer only the question that is asked.
- (4) Do not volunteer information that is not asked for.
- (5) Take time to answer and think before answering each question.
- (6) Never guess at an answer and, if the honest answer is that you don't know, say so. Similarly, if you don't remember, say that.
- (7) Never attempt to answer a question that you don't understand. If you don't understand the question, ask for clarification.
- (8) Be cooperative, but do not be forced into giving an inaccurate answer.
- (9) Do not show anger or impatience with the questioner.
- (10) Ask for a break if you feel you need one.



## Typical powers given to officers authorized to enforce health legislation

The following are examples of powers typically provided to authorized officers to enforce legislation related to pharmacies.

### **Powers of entry, search and seizure:**

- (1) For the purposes of this Act, an authorized officer may at all reasonable times -
  - (a) enter any pharmacy or premises in respect of which an application for a licence has been made;
  - (b) enter any premises where medicinal drugs are being kept for retail trade;
  - (c) enter any place, premises or vehicle which he or she knows or reasonably suspects -
    - (i) is or are being used for the practice of pharmacy; or
    - (ii) has been or are being or are likely to be used by any person in connection with a contravention of this Act;
  - (d) enter any premises where he or she knows or reasonably suspects that records are kept relating to the practice of pharmacy or relating to a contravention of this Act;
  - (e) in any premises entered by him or her -
    - (i) search for or examine medicinal drugs, articles, equipment or documents and take possession of any medicinal drugs, articles, equipment or documents, or samples thereof, or make copies of or extracts from records relating to the practice of pharmacy or relating to any matter the subject of an inquiry under this Act;
    - (ii) seize any medicinal drugs, articles, equipment, documents, or samples thereof, or any container or package which he or she reasonably suspects to contain any medicinal drugs, articles or equipment;
    - (iii) open any room, place, container or package that he or she knows or reasonably suspects contains any medicinal drugs, articles or equipment;
    - (iv) question with respect to matters under this Act any person he or she finds thereon; and
  - (f) make such inquiry and examination as he or she believes to be necessary or desirable to assist the discharge or exercise of any function or power under this Act or to ascertain whether any contravention of this Act has been, is being, or is likely to be committed.

- (2) Subsection (1) does not authorize forcible entry by an authorized officer to any premises except under the authority of a warrant obtained pursuant to subsection (4).
- (3) Unless he or she has the permission of the occupier of a part of the premises if that part is used as a dwelling, an authorized officer shall not enter that part without a search warrant issued by a magistrate.
- (4) A magistrate, if satisfied upon the information of an authorized officer that there is reasonable cause to suspect that any place has been or is likely to be used in connection with a contravention of this Act, or for the keeping of records relating to a contravention of this Act, may issue a search warrant directing the authorized officer to enter the place specified in the search warrant for the purpose of exercising the powers conferred on an authorized officer by this Act.
- (5) A search warrant issued under this section is, for a period of 1 month from its issue, sufficient authority -
  - (a) to allow the authorized officer to whom it is directed and all persons acting in aid of the officer to enter the place specified in the search warrant; and
  - (b) to allow the authorized officer to whom it is directed to exercise, in respect of the place specified in the search warrant, all the powers conferred on an authorized officer by this Act.
- (6) For the purpose of gaining entry to any place an authorized officer may call in aid such persons as he or she considers necessary and such persons, while acting in aid of an authorized officer in the lawful exercise of a power of entry, have a like power of entry.
- (7) If an authorized officer has taken possession of records or of other property for the purposes of this Act he or she may -
  - (a) in the case of records, retain them for as long as necessary for those purposes, but the person otherwise entitled to possession of the records, if he or she so requests, is entitled to be furnished as soon as practicable with a copy certified by the authorized officer to be a true copy and such a certified copy must be received in all courts and elsewhere as evidence of the matters contained in it as if it were the original;
  - (b) in the case of other property, subject to this Act, retain the property for as long as is necessary for those purposes, and thereafter dispose of it as the court directs.

### **Power to obtain information:**

- (1) In relation to any matter relevant to the operation or enforcement of this Act, an authorized officer may require a person (either by oral or written requisition) to furnish -
  - (a) any information;
  - (b) any records or a copy thereof,in the person's possession.

- 
- (2) For the purposes of subsection (1), a person is to be taken to be in the possession of -
    - (a) information, if the person has the information or is entitled to have access to the information;
    - (b) records, if the person has them in his or her possession or under his or her control in any place, whether for his or her own use or benefit or for another's use or benefit and although another person has the actual possession or custody of the records.
  - (3) A requisition made under subsection (1) may require that the information or records or copy thereof be furnished -
    - (a) to the authorized officer or another authorized officer or to an officer of a specified department of the Government;
    - (b) at the place the requisition is made or at another place;
    - (c) forthwith or at, by or within a time specified;
    - (d) in person, or by registered mail or in another manner specified;
    - (e) by means of, or accompanied by, verification in the form of an affidavit;
    - (f) in the case of information, orally or in writing.
  - (4) A person must not without reasonable cause -
    - (a) refuse or fail to furnish any information, records or copy as required under this section;
    - (b) in response to a requisition made under this section, furnish information records or copies that is or are false or misleading in a material particular.
  - (5) If a person records or stores any matter by means of a mechanical, electronic or other device, the duty imposed by this section to produce any records containing these matters is to be construed as including a duty to produce the matters in written form if that is so demanded.
  - (6) The duty imposed by this section to produce a copy of any records is to be construed as a duty to produce a clear reproduction.
  - (7) An authorized officer may take notes or copies of, or extracts from, records or a copy of any records produced under this section.
  - (8) Any person who fails to furnish information required under this section commits an offence.

### **Power to issue directions to secure compliance:**

- (1) If -
  - (a) any pharmacist, assistant pharmacist, medical practitioner, nurse, health officer, pharmacy premises, prescription or other person, place or thing does not comply with the provisions of this Act; or
  - (b) any provision of this Act has not been complied with,

an authorized officer may, in writing, direct any person who has contravened the provision by such non-compliance to take, within a specified time not exceeding 14 days, such steps as may be specified to prevent any further contravention and to remedy the matters in respect of which the non-compliance has occurred.

- (2) The issue of a direction under this section does not affect any proceeding under this Act that has been or may be taken for the non-compliance that gave rise to the direction.
- (3) A person to whom a direction is issued under this section and who does not comply with the direction commits an offence.

### **Offence of obstructing officers authorized to enforce health legislation**

- (1) A person shall not obstruct an authorized officer in the exercise of his or her powers under this Act.
- (2) For the purposes of this Act, a person obstructs an authorized officer if he or she—
  - (a) assaults, abuses, intimidates or insults the authorized officer or any other person assisting the authorized officer in the exercise of his or her powers under this Act;
  - (b) directly or indirectly prevents any person from being questioned by an authorized officer in the exercise of his or her powers under this Act; or
  - (c) in any way obstructs or attempts to obstruct an authorized officer in the exercise of his or her powers under this Act.

### **Power to issue and revoke improvement notices**

#### **Improvement notice — compliance**

- (1) A person to whom an improvement notice is issued shall not, without reasonable excuse, fail to comply with the notice.

Maximum penalty:

- (a) for a person who is not a utility—100 penalty units; or
- (b) for a utility—2000 penalty units.

#### **Improvement notice — issue**

- (1) This section applies where an authorized officer has reasonable grounds for believing that a person who is carrying on a public health risk activity or performing a public health risk procedure is contravening or likely to contravene this Act.
- (2) Where this section applies, the authorized officer may issue an improvement notice to the person carrying on the activity or performing the procedure, as the case may be.

- (3) If the person carrying on a public health risk activity to whom an improvement notice is issued is not in charge of the premises where that activity is carried on, the authorized officer shall give a copy of a notice under subsection (2) to the person in charge of those premises.
- (4) An improvement notice shall specify the following matters:
  - (a) the contravention that the authorized officer believes is occurring or is likely to occur and the reasons for that belief;
  - (b) a period or periods within which the person to whom the notice is given is required to rectify the matters or activities to which the notice relates.
- (5) An improvement notice may specify action that the person to whom the notice is given is to take in order to comply with the notice.
- (6) An improvement notice continues in force until revoked in accordance with section XX.

#### **Improvement notice — extension of compliance period**

- (1) Before the end of a compliance period specified in an improvement notice under section XX (y) (z), an authorized officer may extend the period.
- (2) An extension -
  - (a) may be given on the application of the person to whom the improvement notice was issued, or on the motion of the authorized officer; and
  - (b) shall be given, in writing, to the person to whom the notice was issued.
- (3) If an authorized officer refuses an application for an extension, he or she shall give written notice to the applicant of the refusal, stating the reasons for the refusal.

#### **Improvement notice — revocation**

- (1) An authorized officer shall revoke an improvement notice if satisfied, after carrying out an appropriate inspection, that the notice has been complied with.
- (2) A revocation -
  - (a) may be issued on the application of the person to whom the notice was issued, or on the motion of the authorized officer; and
  - (b) shall be given, in writing, to the person to whom the notice was issued.
- (3) An application for revocation shall –
  - (a) be made in writing;
  - (b) be addressed to the authorized officer who issued the notice;
  - (c) specify the action taken to comply with the notice by the person to whom it was issued; and
  - (d) nominate a date on or after which an inspection may be made.

- (4) If an authorized officer refuses an application for revocation, he or she shall give written notice to the applicant of the refusal, stating the reasons for the refusal.

## Prohibition notices

### Prohibition notice — issue

- (1) This section applies where an authorized officer has reasonable grounds for believing that imminent serious risk to public health is being caused by, or is likely to be caused by –
  - (a) the manner in which a public health risk activity is being carried on, or a public health risk procedure is being performed;
  - (b) the use being made of premises on which a public health risk activity is carried on; or
  - (c) the state or condition of premises on which a public health risk activity is carried on.
- (2) Where this section applies to a public health risk activity or a public health risk procedure, the authorized officer may issue a prohibition notice to the person carrying on the activity or performing the procedure.
- (3) If the person carrying on a public health risk activity, or performing a public health risk procedure to which a prohibition notice relates is not in charge of the premises where that activity or procedure is carried on or performed, the authorized officer shall give a copy of a notice under subsection (2) to the person in charge of those premises.
- (4) A prohibition notice may prohibit the person to whom it is issued from undertaking, or permitting, any or all of the following actions in relation to a public health risk activity or a public health risk procedure:
  - (a) the carrying on of the activity or the performance of the procedure;
  - (b) the carrying on of the activity or the performance of the procedure except in accordance with specified directions;
  - (c) the use of specified premises for the activity or procedure.
- (5) Without limiting the generality of subsection (4), a prohibition notice may include any or all of the following directions in relation to a public health risk activity or a public health risk procedure:
  - (a) directions that the activity or procedure, or a specified aspect of the activity or procedure, is only to be carried on or performed in a part of specified premises (or is not to be carried on or performed in a part of such premises);
  - (b) directions that any substance, compound or article is, or is not, to be used in connection with the activity or procedure;
  - (c) directions that the activity or procedure be carried on or performed in a specified manner;
  - (d) directions for the impounding or isolation of any appliance;



- (e) directions for the destruction or disposal, in a manner specified in the notice, of any appliance;
  - (f) directions specifying a period within which the person to whom the notice is given is to comply with any direction.
- (6) A prohibition notice continues in force until revoked in accordance with section XX.

### **Prohibition notice — extension of compliance period**

- (1) Before the end of a compliance period specified in a prohibition notice under section XX (y) (z), an authorized officer may extend the period.
- (2) An extension –
- (a) may be given on the application of the person to whom the prohibition notice was issued, or on the motion of the authorized officer; and
  - (b) shall be given, in writing, to the person to whom the notice was issued.
- (3) If an authorized officer refuses an application for an extension, he or she shall give written notice to the applicant of the refusal, stating the reasons for the refusal.

### **Prohibition notice — display**

- (1) A person to whom a prohibition notice has been issued shall cause a copy of that notice to be displayed, and to be kept displayed, so as to be readily visible to persons entering each premises specified in the notice by way of any public entrance to those premises.
- (2) A person shall not, without reasonable excuse, contravene subsection (1).
- Maximum penalty (subsection (2)): 10 penalty units.

### **Prohibition notice — implementation**

- (1) An authorized officer may, subject to this section, do whatever he or she has reasonable grounds for believing to be necessary to implement a prohibition notice–
- (a) after the expiration of any compliance period specified under section XX (y) (z) (as extended, if at all, under section XX); or
  - (b) if no such period is specified — after the expiration of a period the officer has reasonable grounds for considering sufficient for compliance with any positive direction in the notice, and in the interests of public health.
- (2) For the purpose of implementing a prohibition notice under subsection (1), an authorized officer may, using such reasonable force and assistance as is necessary–
- (a) enter a place to which the notice relates at any reasonable time; or
  - (b) enter a place to which the notice relates at any time, if the officer has reasonable grounds for believing that the circumstances are of such seriousness or urgency as to require such immediate entry.

- (3) An authorized officer who enters a place pursuant to subsection (2) is not entitled to remain there if, on request of the occupier, the authorized officer does not produce his or her identity card, and, unless the authorized officer is the chief health officer, his or her authorization, to the occupier.
- (4) Any costs or expenses incurred by the [State/Crown] in implementing, or attempting to implement, a prohibition notice under this section are a debt due to the [State/Crown] by the person to whom the notice was issued.

### **Prohibition notice — revocation**

- (1) An authorized officer shall revoke a prohibition notice if satisfied, after carrying out an appropriate inspection -
  - (a) that the notice has been complied with; and
  - (b) that adequate measures have been taken to prevent or remove the serious risk to public health that gave rise to the issuing of the notice.
- (2) A revocation -
  - (a) may be issued on the application of the person to whom the notice was issued, or on the motion of the authorized officer; and
  - (b) shall be given, in writing, to the person to whom the notice was issued.
- (3) An application for revocation shall -
  - (a) be made in writing;
  - (b) be addressed to the authorized officer who issued the notice;
  - (c) specify the action taken to comply with the notice by the person to whom it was issued; and
  - (d) nominate a date on or after which an inspection may be made.
- (4) If an authorized officer refuses an application for revocation, he or she shall give written notice to the applicant of the refusal, stating the reasons for the refusal.

### **Prohibition orders**

- (1) The chief health officer may apply to the Magistrates Court for an order that a person to whom a prohibition notice has been issued comply with the notice.
- (2) For the purpose of considering an application under this section, the court may adjourn the hearing (or further hearing) of the matter for the purpose of considering any relevant report from any person about the alleged risk to public health.
- (3) On an application under subsection (1), after considering any report referred to in subsection (2), and any other relevant information in relation to the application submitted by the parties, if satisfied that the action or inaction of the person to whom the prohibition notice was issued has given rise to a serious and imminent risk to public health, the court may make any of the following orders in relation to the person:
  - (a) that the person comply with the notice within a period (if any) specified in the order;

- (b) that, in order to prevent or alleviate the relevant public health risk, the person comply with any specified requirement in addition to any specified in the notice within a period (if any) specified in the order;
  - (c) that the person pay the [State/Crown] an amount equal to no more than:
    - (i) for an individual (other than a utility) — \$ 10 000;
    - (ii) for a corporation (other than a utility) — \$ 50 000;
    - (iii) for a utility who is an individual — \$ 200 000; or
    - (iv) for a utility that is a corporation — \$ 1 000 000.
  - (d) directions about the payment of all or any of the costs and expenses of the application.
- (4) A person shall comply with an order under subsection (3) (a) or (b).
- Maximum penalty for non-compliance:
- (a) for a person who is not a utility — 100 penalty units, imprisonment for 1 year or both; or
  - (b) for a utility — 2000 penalty units, imprisonment for 1 year or both.
- (5) For the purpose of implementing an order under subsection (3) (a) or (b), an authorized officer may, using such reasonable force and assistance as is necessary, enter a place to which the order relates and do whatever is necessary to implement the order —
- (a) after the expiration of any compliance period specified in the order; or
  - (b) if no such period is specified — after the expiration of a period the officer has reasonable grounds for considering sufficient for compliance with any positive direction in the order, and in the interests of public health.
- (6) Any costs or expenses incurred by the [State/Crown] in implementing, or attempting to implement, an order under subsection (5) are a debt due to the [State/Crown] by the person in relation to whom the order was issued.
- (7) A magistrates court may revoke an order under subsection (3) (a) or (b) on application by the person in relation to whom the order was made, or the chief health officer, if satisfied —
- (a) that the order has been complied with; and
  - (b) that there is no reasonable likelihood of the recurrence of the circumstances giving rise to the making of the order.

### **Power to issue an infringement notice (instant/on-the-spot fine)**

- (1) Where an authorized officer has reasonable grounds for believing that a person is committing or has committed an offence under section XX (x) (y), XX (x) (z), or XX (y) (z) of this Act, he may serve that person with a notice in the prescribed form stating that the person is alleged to have committed an offence, and specifying the offence, and that the person may, during the period of 28 days beginning on

the date of the notice, make to the authority specified in the notice a payment of the prescribed amount accompanied by the notice, and that a prosecution in respect of the alleged offence shall not be instituted during the period specified in the notice and, if the payment specified in the notice is made during that period, no prosecution in respect of the alleged offence shall be instituted.

- (2) Where notice is given under subsection (1) of this section
  - (a) a person to whom the notice applies may, during the period specified in the notice, make to the authority so specified the payment specified in the notice, accompanied by the notice;
  - (b) the authority specified in the notice may receive the payment, issue a receipt for it and retain the money so paid for disposal in accordance with this Act, and any payment so received shall not be recoverable in any circumstances by the person who made it;
  - (c) a prosecution in respect of the alleged offence shall not be instituted in the period specified in the notice, and, if the payment so specified is made during that period, no prosecution in respect of the alleged offence shall be instituted.
- (3) In a prosecution for an offence under section XX (x) (y), XX (x) (z), or XX (y) (z) of this Act, the onus of proving that a payment pursuant to a notice under this section has been made shall lie with the defendant.

# Format of statements, investigation notes and notices

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## **Format of statement from a witness who is not a suspect**

Place of statement

Date of statement

Time of statement

[Name of the person making the statement ('maker')] "states"

Personal details

Who the statement is being given to (statement 'taker')

Why the statement is being given

Series of paragraphs giving facts in chronological order

Signatures of maker and taker and time

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## **Format of statement from a witness who is a suspect**

Place of statement

Date of statement

Time of statement

[Name of the person making the statement ('maker')] "states"

Personal details

Who the statement is being given to (statement 'taker')

Why the statement is being given

### Caution

Series of paragraphs giving facts in question-and-answer format.

Sentence included "This statement is true and correct"

Signatures of maker and taker and time

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**Specimen investigation note**

Ministry of Health

File No. XXX01

Page No. 1

Subject: (Giving précis of the nature of the investigation, allegation and or subject)

<b>DATE &amp; TIME</b>	<b>RECORD OF WORK UNDERTAKEN</b>
Monday 3.9.02 9.00 a.m.	Receive complaint for enquiry
Wednesday 5.9.02 11.00 a.m.	Initial visit to site.

The record of work undertaken records all work, details of people spoken to, physical evidence seized, photographed etc., as well as details of enquiries still to be conducted.

(signed)

Prepared by: [name of the Inspector]

Department of Public Health

Ministry of Health

**Specimen improvement notice**

**ISSUED UNDER AUTHORITY OF THE XXX ACT 200X**

**Enforcement authority:** *[name and postal address of authority]*

**Notice number:**  
**Date of issue:**  
**Issuing inspector:**

THIS NOTICE IS ISSUED TO THE PERSON DESCRIBED BELOW (WHO IS REFERRED TO AS 'THE DEFENDANT') IN RESPECT OF IMPROVEMENTS REQUIRED TO BE MADE WITHIN THE TIME PERIOD SPECIFIED IN ORDER TO CEASE COMMITTING THE ALLEGED OFFENCE DESCRIBED BELOW.

**DETAILS OF THE DEFENDANT**

**Name:**  
**Postal address:**  
**Occupation:** **Date of birth:**

**DETAILS OF ALLEGED OFFENCE**

**Date:** **Day of week (circle):** S M T W T F S  
**Time:**  
**Place:**

**This notice is issued to specify improvements to be made within** \_\_\_\_\_ **days of the date of this notice in order to cease an alleged infringement offence which is a breach of:** *[state provision of the Act or regulations that has allegedly been breached]*

**In that you:** *[describe nature of alleged breach]*

**You are required to take the following action:**

- 1 .....
- 2.....
- 3.....

**Failure to take the required action by** \_\_\_\_\_ **will be considered to be evidence of the continuation of an alleged infringement offence for which an infringement notice may be issued.**

**Specimen prohibition notice**

**ISSUED UNDER AUTHORITY OF THE XXX ACT 200X**

**Enforcement authority:** *[name and postal address of authority]*

**Notice number:**  
**Date of issue:**  
**Issuing inspector:**

THIS NOTICE IS ISSUED TO THE PERSON DESCRIBED BELOW (WHO IS REFERRED TO AS 'THE DEFENDANT') IN RESPECT OF SPECIFIED IMPROVEMENTS REQUIRED TO BE MADE **IMMEDIATELY** IN ORDER TO CEASE COMMITTING THE ALLEGED OFFENCE DESCRIBED BELOW.

**DETAILS OF THE DEFENDANT**

**Name:**  
**Postal address:**  
**Occupation:** **Date of birth:**

**DETAILS OF ALLEGED OFFENCE**

**Date:** **Day of week (circle):** S M T W T F S  
**Time:**  
**Place:**

**This notice is issued to specify improvements to be made IMMEDIATELY in order to cease an alleged infringement offence which is a breach of:** *[state provision of the Act or regulations that has allegedly been breached]*

**In that you:** *[describe nature of alleged breach]*

**You are required to take the following action IMMEDIATELY:**

- 1 .....  
.....  
.....
- 2.....  
.....  
.....
- 3.....  
.....  
.....

**Failure to take the required action IMMEDIATELY will be considered to be evidence of the continuation of an alleged infringement offence for which an infringement notice may be issued.**



**Specimen infringement notice****ISSUED UNDER AUTHORITY OF THE XXX ACT 200X**

**Enforcement authority:** *[name and postal address of authority]*

**Notice number:**

**Date of issue:**

**Issuing inspector:**

THIS NOTICE IS ISSUED TO THE PERSON DESCRIBED BELOW (WHO IS REFERRED TO AS "THE DEFENDANT") IN RESPECT OF THE ALLEGED OFFENCE DESCRIBED BELOW.

**DETAILS OF THE DEFENDANT**

**Name:**

**Postal address:**

**Occupation:**

**Date of birth:**

**DETAILS OF ALLEGED OFFENCE**

**Date:**

**Day of week (circle):** S M T W T F S

**Time:**

**Place:**

**This notice is issued in relation to an alleged infringement offence**

**For a breach of:** *[state provision of the Act or regulations that has allegedly been breached]*

**In that you:** *[describe nature of alleged breach]*

**Prior warning:**

You have received prior warning for the same or a similar matter, being:  
*(e.g. details of hazard or prohibition notice)*

**The infringement fee payable on this notice is:** *[state amount]* **and may be paid (not later than 28 days after service of this notice) at the following address, either in person or by sending it by post:** *[Address where fee may be paid]*

**Note: Payment must be made in full. Part payment will not be accepted.**

**IMPORTANT: The notes printed on the back of this notice set out important information.**

**Remittance advice**

The remittance advice must

Accompany all payments

**Name and address:** *[name and address of defendant]*

**Notice number:**

**Due date:**

**Infringement fee payable:** *[amount]*

## Notes to infringement notice

### Payments

**If you pay the infringement fee for the alleged infringement offence within 28 days after being served with this notice, no further enforcement action will be taken against you for the offence.**

### Further action

You may –

- raise any matter relating to the circumstances of the alleged infringement offence with the enforcement authority; or
- deny liability for the offence and request a court hearing; or
- admit liability for the offence, but have a court consider written submissions as to penalty or otherwise.

For more details, read paragraphs 3 to 6 below.

**To raise any matter relating to the circumstances of the alleged infringement offence**, write to the enforcement authority at the address on the front page of this notice. You should raise these matters with the enforcement authority at the earliest opportunity.

If you **deny liability** and wish to request a hearing in a magistrates' court in respect of the alleged infringement offence, you must, before or within 28 days after service on you of this notice (*nb. consider providing for reminder notices*), write to the enforcement authority at the address on the front of this notice requesting a court hearing in respect of the alleged offence. You must sign your request. If you are a body corporate, a person authorized to act on your behalf must sign the request. The enforcement authority will, unless it decides not to commence court proceedings in respect of the alleged offence, serve you with a notice of hearing, setting out the place and time at which the matter will be heard by the Court.

**Note:** If the Court finds you guilty of the offence, costs will be imposed in addition to any penalty.

If you **admit liability** for the offence, but want the Court to consider your **submissions as to penalty or otherwise**, you must, before or within 28 days after service on you of this notice –

- write to the enforcement authority at the address shown on the front of this notice; and
- request a hearing; and
- admit liability; and
- set out the written submissions you wish to be considered by the Court; and
- sign your request. If you are a body corporate, a person authorized to act on your behalf must sign the request.

The enforcement authority will then file your letter with the court (unless it decides not to commence court proceedings in respect of the alleged offence). There is no provision for an oral hearing before the court if you follow this course of action.

**Note:** Costs will be imposed in addition to any penalty.

This infringement notice may be withdrawn by an inspector at any time before –

- the infringement fee is paid; or
- an order for payment of a fine is made or deemed to be made by a court.

If the infringement notice is withdrawn, written notice will be given to you.

### Further details about correspondence or payment of infringement fee

When writing or making payment of an infringement fee, please indicate –

- the infringement notice number; and
- the date of the alleged infringement offence; and
- your address for reply (if you are not paying the infringement fee for the alleged offence).

### Non-payment of infringement fee

If you do not pay the infringement fee and do not request a hearing in respect of the alleged offence within 28 days after being served with this notice, you will become liable to pay **costs in addition to the infringement fee** (unless the enforcement authority decides not to commence proceedings against you).

### Defence

You have a defence in proceedings for an alleged infringement offence if the infringement fee for that offence has been paid to the enforcement authority at the address shown on the front page of this notice before or within 28 days after service on you of this notice. Late payment or payment made to any other address will not constitute a defence.

**Note:** All queries and correspondence regarding the alleged infringement offence must be directed to the enforcement authority named in this notice at the address shown on the front page of this notice.

## Glossary

<b>absolute liability</b>	An offence of absolute liability requires only that the <i>actus reus</i> of the offence be done by the accused for him or her to have committed the offence and there is no requirement that the <i>actus reus</i> be accompanied by <i>mens rea</i> or even that the conduct of the accused be shown to be voluntary.
<b>acquittal</b>	A setting free from a criminal charge.
<b><i>actus reus</i></b>	Literally ‘wrongful act’. This term is used in the analysis and definition of criminal offences. It is the physical component of a particular crime, being the action itself, as opposed to the necessary accompanying state of mind (see <i>mens rea</i> ).
<b>adduced evidence</b>	Information given and statements made in a court to prove or disprove a fact at issue. Evidence is adduced in the following forms: <ol style="list-style-type: none"><li>1. oral testimony of a witness;</li><li>2. documentary evidence;</li><li>3. real evidence.</li></ol>
<b>admissible evidence</b>	Evidence that is relevant to a proceeding and complying with the other rules of evidence that may be adduced to a court or tribunal as fact.
<b>affirmation</b>	The making of a solemn declaration, the secular equivalent of the taking of an oath.
<b>breaches</b>	The infraction or violation of a law or a legal obligation.
<b>burden of proof</b>	The obligation on the party who asserts a matter to establish his or her case by adducing sufficient supporting evidence and/or argument to satisfy the required standard of proof. In criminal trials, the burden rests on the prosecution, except in the case of certain defences.
<b>bye-law</b>	Also known as by-law. A type of delegated or secondary legislation made by a public authority, such as a local government body. Bye-laws have effect only within the area of responsibility of the authority. They are subject to the usual rules of delegated legislation, including that they are reasonable, published and not <i>ultra vires</i> .

<b><i>certiorari</i></b>	Literally meaning ‘to be informed of’. A type of prerogative remedy issued by a court to bring before it the decision or determination of a tribunal or inferior court so that it may be quashed on the grounds of non-jurisdictional error of law on the face of the record, or for jurisdictional error or denial of procedural fairness (natural justice).
<b>chain of evidence</b>	Also known as the chain of custody or chain of custody of evidence. A process used to maintain and document the chronological history of the evidence. Documents should include the name or initials of the individual collecting the evidence, each person or entity subsequently having custody of it, dates the items were collected or transferred, the case number, the suspect’s name and a brief description of the item.
<b>circumstantial evidence</b>	Representations or information regarding a fact from which a jury or court is asked to infer a further fact.
<b>civil law</b>	A system of law, with its origins in Roman Law, where respect and obedience is given to a complete code of written law. Generally contrasted with a common law system. Judges may respect a line of decisions that give the same interpretation of a written law, but they are not bound to follow those decisions. The written code is the source of law.
<b>common law</b>	A system of law where the sources of law are both statutory law and law made by judges. Generally contrasted with civil law systems. The most important characteristic of a common law system is the doctrine of precedent. The common law also refers to the unwritten law derived from the traditional law of England, as developed by judicial precedent, interpretation, expansion and modification.
<b>compensation</b>	An amount given or received as recompense for a loss suffered.
<b>compliance</b>	The act of complying by ceasing to act in a way that is prohibited or acting in a way that is required.
<b>compliance order</b>	An order of a court requiring that a legislative provision or an earlier court order or other requirement be complied with.
<b>contamination</b>	The unwanted transfer of material between two or more sources of physical evidence or the introduction of material not present at the time of the offence.
<b>contemporaneous notes</b>	Notes of activities made at the time of the activity or at the earliest opportunity thereafter such that the notes are an accurate and complete record and able to be referred to in giving evidence.

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<b>convicted/conviction</b>	A finding that an accused is guilty of the crime charged.
<b>corroboration /corroborative evidence</b>	Additional independent evidence from another source, deemed necessary to support the evidence of witnesses considered unreliable. Corroboration must confirm in some material particular, not only that the crime has been committed, but also that the accused committed it.
<b>counsel</b>	The person presenting a case to a court or tribunal on behalf of one of the parties involved. Depending on who is given audience in a particular court, this will be a barrister, solicitor or other law practitioner.
<b>decided case</b>	A past case in which a judge or magistrate has made a decision.
<b>decision</b>	The law as stated by a judge in a case or the finding in a case.
<b>declaratory judgement</b>	An authoritative but non-coercive pronouncement by a superior court concerning the legal rights of parties.
<b>discovery</b>	A pre-trial procedure where a party to proceedings makes all relevant documents available to the other parties for inspection.
<b>direct evidence</b>	Evidence which employs a direct pattern of inference, such as 'If A, then B'. It is capable of directly proving a fact at issue without requiring complex inferences from indirect items of proof.
<b>documentation</b>	Written notes, audio/videotapes, printed forms, sketches and/or photographs that form a detailed record of the scene, evidence recovered and actions taken during the search of the scene.
<b>double jeopardy</b>	Placing an accused person in peril of being convicted of the same crime in respect of the same conduct on more than one occasion. In common law systems, there is a rule against a person being placed in double jeopardy. The operation of the rule is shown in statutory enactments against double punishment and in the limited power to appeal against an acquittal.
<b>enforcement</b>	The process by which the law seeks to deter breach of statutes, regulations, bye-laws, rules of common law, awards and agreements by individuals and/or organizations. The term is also used in the specific sense of when proceedings are taken to penalize persons who might have disobeyed the law.

<b>enforcement officers</b>	Officers who are authorized under a law to enforce that law. They may be called enforcement officers, authorized officers, health inspectors, town officers, wardens or sanitary inspectors.
<b>enforcement process</b>	See enforcement.
<b>enforcement steps</b>	Stages in the enforcement process.
<b>evidence</b>	The facts, testimony, documents and real evidence which may be legally received in order to prove or disprove the matter under enquiry.
<b>evidential burden</b>	The obligation to adduce/introduce evidence sufficient for a matter to be considered by a court. See also burden of proof.
<b>exhibits</b>	Tangible items (e.g. books, documents, photographs) admitted into evidence in a case before a court or tribunal. In some jurisdictions, legislation prohibits the taking out of an exhibit without the permission of the court or tribunal.
<b>forfeiture</b>	The immediate loss of all interest in property as well as loss of the right to possession of that property.
<b>hearsay evidence</b>	Evidence given by a person of words spoken or written by another person (literally words the person has heard said). Hearsay evidence is usually not admissible evidence.
<b>hearsay rule</b>	The rule making hearsay evidence inadmissible.
<b>improvement notice</b>	A notice requiring the recipient of the notice to take action to comply with the law, often by ceasing unlawful behaviour and remedying any harm caused by the behaviour within a stated time. Contrasted with a prohibition notice, which requires immediate cessation of the behaviour.
<b>indictment</b>	A form of information that must be presented or filed for the prosecution of an offence. Generally more serious crimes are prosecuted by way of indictment.
<b>infringement notice</b>	An administrative notice, authorized by a statute, that sets out the particulars of an offence and gives the alleged offender the option of paying a penalty (often, but not necessarily, a fixed monetary penalty by way of a fine) or electing to have the matter dealt with by a court. Normally used for clear-cut offences of a less serious nature.
<b>injunction</b>	An order of a court to prevent someone acting in a particular way (prohibitive injunction) or to require someone to act in a particular way (mandatory injunction).

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<b>inspection</b>	Formal or official viewing or examination of evidence by a court.
<b>judicial notice</b>	A court's acceptance, without proof, of certain facts considered so well established as to render evidence unnecessary. This includes matters of common knowledge.
<b>jurisdiction</b>	The power of a State to legislate and enforce its laws, the power of a court or other authority to exercise judgment over the territory or matters over which such power is exercised.
<b><i>mandamus</i></b>	Meaning 'we command'. An order issued by a court to compel a public official to exercise a power in accordance with his or her public duty.
<b>material facts</b>	Relevant facts.
<b>measurement scale</b>	An object showing standard units of length (e.g. a ruler) used in photographic documentation of an item of evidence.
<b>memory-refreshing rule</b>	The rule allowing a witness to refresh his or her memory while giving evidence in the witness box by reading a document (whether it is a statement or otherwise). Before a document can be used to refresh memory, it must be shown that the writing was made or verified by the witness concerning, and contemporaneously with, the facts to which he or she testifies.
<b><i>mens rea</i></b>	Literally a 'guilty mind'. The state of mind required to constitute a particular crime. The mental element of an offence as opposed to the <i>actus reus</i> , the wrongful act.
<b>natural justice</b>	The minimum standard of fairness that has to be applied in the adjudication of a dispute. The term natural justice is used interchangeably with 'procedural fairness' to mean the principles developed at common law to ensure the fairness of the decision-making procedure of courts and administrators. The concept of natural justice has two limbs that require bodies exercising an adjudicative function to (1) grant both parties a fair hearing and (2) act without bias. If natural justice is denied, remedies such as prohibition, <i>certiorari</i> , <i>mandamus</i> , declaratory judgment and injunction are available.
<b>offence</b>	A specified transgression of the criminal or regulatory law. An offence may be against the common law or against the provisions of statutes or subordinate legislation.

<b>parol evidence</b>	Evidence given orally.
<b>plea in mitigation</b>	An appeal for leniency in passing sentence. Relevant factors might include good character and hardship to the offender or others.
<b>presumptions of law</b>	Presumptions of law direct that certain things are to be taken for granted. Such directions are either conclusive and cannot be contradicted, or disputable and can be proved incorrect.
<b>presumptive evidence</b>	See circumstantial evidence.
<b><i>prima facie</i></b>	At first sight or appearance or ‘on the face of it’.
<b>privilege</b>	The term describing a number of rules excluding evidence that would be adverse to a fundamental principle or relationship if it were disclosed. Examples of privilege include legal professional privilege, privilege against self-incrimination and marital privilege. A privileged communication is a communication made between persons falling within a certain relationship where public policy requires that the communication be maintained as confidential (e.g. communication made by or to a legal practitioner in his or her capacity as a legal practitioner).
<b>procedural law</b>	The legal rules concerned with procedural matters, as opposed to law governing the substance of a court action.
<b>prohibition</b>	A prerogative writ issued by a superior court directing a lower court, tribunal, public authority or official to desist from or not to commence some action.
<b>prohibition notice</b>	A notice requiring the recipient to take immediate action so as to achieve compliance with a legal requirement. Used where there is an imminent risk of serious harm should the prohibited action continue. Contrasted with an improvement notice, where the recipient is given a period of time to bring his/herself into compliance.
<b>proof</b>	The establishment of the material facts at issue by proper means to the satisfaction of the court.
<b>prosecution</b>	Proceedings by which a person is brought to trial for a criminal offence. The term ‘the prosecution’ is also used to mean those representing the State in a trial, as opposed to ‘the defence’, meaning the person being tried and his or her legal representatives.
<b>reparation</b>	The making of amends for injury or wrong done, often by the payment of compensation.



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<b>responsive regulation/ responsive model of enforcement</b>	A model of enforcement that allows for a mix of activity in response to necessity for, and means of, ensuring enforcement. Can use a mix of deterrent and persuasive approaches.
<b>search and seizure</b>	The power of police and enforcement officers to search premises and people and seize property. Generally, there is no power to search and seize without the consent of the person involved. However, the lawful search and seizure of property may arise under the authority of a search warrant, as an incidental power under a lawful arrest or where legislation specifically empowers search and seizure of property.
<b>search warrant</b>	A document, issued by a magistrate, judge or justice of the peace, authorizing a search of a person, premises or thing.
<b>substantive law</b>	Law that defines rights, duties and liabilities and creates offences. Contrasted with procedural law.
<b>voluntarily</b>	Without fear of prejudice or hope of advantage that was exercised or held out by a person in authority.
<b>warrant</b>	See search warrant.



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