

# Discussion sheet 9: Monitoring and enforcement

The current SRS legislation is being reviewed. It is proposed that new legislation and regulations will be introduced that will protect the rights of vulnerable people living in SRS in Victoria and seek to ensure they receive the accommodation and personal care services for which they pay.

**New enforcement measures are being proposed that build capacity to make real improvements in achieving compliance. The proposed measures include options focusing on improvements to business and care practices, rather than the imposition of penalties, although prosecution and current sanctions will be retained.**

## What we know

- The current monitoring regime includes regular activities such as self-assessment audits, care and facility audits, and inspections such as unannounced visits by authorised officers in response to a complaint.
- Current enforcement provisions include action plans that tell the proprietor what action needs to be taken to comply, offence provisions that may be prosecuted through the courts and some civil sanctions such as censure of a proprietor in parliament, suspension of admissions, revocation of registration or the appointment of an administrator.
- Prosecution and civil sanctions are seldom used in part because the costs to the department and to the proprietor are often disproportionate to the outcome they achieve.
- Modern regulatory schemes use a range of enforcement measures that can be applied before prosecution to achieve compliance without expensive court action.

## New directions – proposals for legislative reform

- In this paper, the department is signaling the importance of ensuring compliance, both for the better protection of vulnerable residents, and to ensure that the SRS sector continues to be held in high regard.
- Existing monitoring activities (self-assessment, care audit, facility audits, fabric audits and action plans) will continue, as these tools measure the degree of compliance.
- Current civil sanctions (suspension of admissions, revocation of registration, administrator appointments and censure in parliament), the ability to impose conditions on registration and the ability to prosecute offences will all be retained in the new legislation, as they provide safeguards when other compliance measures have not been successful.
- However, these more severe measures will be supplemented with a range of new enforcement measures that can be applied before more severe options. It will be possible to apply a number of measures at the same time.

- The new measures will focus on steps the proprietor can implement that will have positive outcomes for residents and ultimately for the proprietor's business. How the different enforcement measures are applied will depend on the nature of the compliance issue, the level of risk to residents and the willingness of the proprietor to remedy the situation. If a proprietor complies with the enforcement measure imposed, the department will take no further action. If a proprietor does not comply or if there are further compliance issues, the department may choose to apply other enforcement measures of increasing seriousness for the proprietor or the proprietor's business. For example, if a proprietor has been issued with several infringement notices for the same or similar offences, and continues to be noncompliant, the department may consider that the risk to residents is increasing and may apply another measure as described below.
- The diagram at the end of this discussion sheet shows how the various enforcement measures may be applied, depending on the level of risk to residents and the cooperation of the proprietor. Where the level of risk to residents is considered low to moderate and the proprietor is willing to remedy the identified breach, measures such as infringement notices, action plans, appointment of an SRS adviser or an enforceable undertaking may be applied. Where the risk to residents is higher and the proprietor is unwilling to remedy it, increasing pressure can be brought to bear on the proprietor and ultimately prosecution and or revocation of registration may be pursued.
- For the compliant proprietor, the proposed enforcement measures will have no negative effects. There may in fact be positive effects on market competition, as residents and their families will be able to obtain information about the compliance status of the SRS.
- For the noncompliant proprietor, there will be opportunities to become compliant before being exposed to the most significant consequences of prosecution and formal civil sanctions.

**Proposal: Introduce a range of new enforcement measures to ensure proprietors achieve compliance.**

The new measures are:

- infringement notices
- appointment of SRS advisers
- enforceable undertakings and compliance notices.

## Infringement notices

Infringement notices or on-the-spot fines will be introduced for offences of a clear-cut nature and where the breach is relatively minor. An example would be if a proprietor had failed to display a certificate of registration or failed to produce a required record on request. Infringements provide an opportunity to have the matter dealt with promptly and with no loss of business time. The amount of the penalty imposed is also significantly reduced.

Managing infringements follows the processes set out in the *Infringements Act 2006*. Proprietors may challenge the notice before payment is due. If payment is not made when due, and the notice has not been challenged, enforcement is taken over by the Infringements Court, which has powers to add enforcement costs, send the matter to the Sheriff for enforcement, or to issue a warrant for the offender's arrest.

Payment of the fine would 'expiate' the offence, but the proprietor will still need to comply with the law. If the proprietor does not remedy the situation, multiple infringement notices for the same offence can be issued.

## SRS advisers

The intention of this proposal is to encourage proprietors to achieve compliance by accessing appropriate advice. In cases where the department considers that a proprietor requires professional assistance or guidance to meet the appropriate standards, and the proprietor is willing to implement changes, the department may appoint an adviser (at the proprietor's expense). The SRS adviser's responsibility is to review noncompliant practices and assist the proprietor to implement changes to achieve compliance. A panel of approved advisers will be established by the department, and the proprietor will be able to select an adviser from the panel.

Prior to an adviser appointment, the department will assess whether this course of action is appropriate, having regard to relevant issues such as the nature and seriousness of the noncompliance and the proprietor's compliance history. The appointment of an SRS adviser would not be required to be exposed by the proprietor.

While a proprietor is following the adviser's recommendations and provided the department is satisfied with the quality of the changes and the proprietor's overall level of compliance, the department will not take further enforcement action. Where the appointment of the adviser does not have the desired effect, any of the other enforcement strategies mentioned in this document may be implemented.

## Enforceable undertakings and compliance notices

For matters that are either more serious or less clear-cut (for example, assessing whether the proprietor's actions have been 'reasonable'), there will be two new mechanisms for achieving compliance:

- An 'enforceable undertaking' may be issued in which the department and the proprietor sign an agreement on the changes to be implemented to achieve compliance and a timeframe for these changes to occur.
- A 'compliance notice' may be issued where agreement on an enforceable undertaking cannot be reached and an authorised officer assesses that there are serious matters of noncompliance. A compliance notice will specify the area(s) of noncompliance and provide directions on what the proprietor must do to achieve and maintain compliance.

The proprietor will be able to challenge the decision to issue a compliance notice in the Victorian Civil and Administrative Tribunal (VCAT), which may confirm or annul the notice or vary any of its requirements. Unless VCAT orders otherwise, the proprietor will be expected to comply with the notice until the challenge has been heard.

Failure to comply with an enforceable undertaking or a compliance notice will be an offence and will lead to further action, such as prosecution and/or the current civil sanctions referred to earlier in this paper.

Where a breach carries the penalty of a fine or imprisonment a court will be able to order a reduction in residents' fees while compliance remains outstanding.

Details of enforceable undertakings and compliance notices can be published on the department's website and will be required to be displayed prominently on the SRS premises. The proprietor will also be required to include a statement of noncompliance in the residential statements for new residents.

Enforceable undertakings, compliance notices and adviser appointments provide proprietors with the opportunity to achieve compliance without incurring any fine or other criminal consequence. As there is no hearing of the alleged breach, there is no conviction recorded. However, where these measures are implemented the proprietor's responses to them may be taken into account by the department in considering whether to seek civil sanctions against him/her.

## What's new?

The table below summarises the requirements that will be retained from the current regulatory scheme and the new requirements being introduced.

Status	Requirements
Retained	<p>Rolling cycle of regular audits – self-assessment, care and fabric audits.</p> <p>Monitoring activities such as unannounced visits in response to a complaint.</p> <p><i>Anticipated date of effect: current, and to be included in the new legislation.</i></p>
Retained	<p>Action plans, the ability to impose conditions on registration, prosecution and civil sanctions* will be retained. Processes and penalties to be reviewed to take account of other enforcement processes.</p> <p>* These include suspension of admissions, revocation of registration, administrator appointments and censure in parliament.</p> <p><i>Anticipated date of effect: current, and to be included in the new legislation.</i></p>
New	<p>Infringement notices may be given for breaches that are clear-cut and can be remedied quickly.</p> <ul style="list-style-type: none"> <li>• If compliance is achieved, no further consequences.</li> <li>• If a fine is not paid, further action may be taken under the Infringement Act.</li> <li>• No mandatory disclosure.</li> </ul> <p><i>Anticipated date of effect: 12–18 months after the legislation is passed.</i></p>
New	<p>An SRS adviser may be appointed to help proprietors make changes to achieve compliance in cases where access to additional operational know-how may remedy ongoing failure to comply with action plans. The proprietor must be willing and will bear the cost.</p> <ul style="list-style-type: none"> <li>• If compliance is achieved, there will be no further consequences.</li> <li>• No mandatory disclosure will exist.</li> </ul> <p><i>Anticipated date of effect: immediately after the legislation is passed.</i></p>
New	<p>Enforceable undertakings may be issued for breaches that are too serious for an infringement notice or in cases of ongoing failure to comply with action plans.</p> <ul style="list-style-type: none"> <li>• The undertaking must be agreed by the proprietor and the department.</li> <li>• It may continue to apply despite a change in ownership of SRS if changes are relevant to its continued operation.</li> <li>• If compliance is achieved, no further consequences will result.</li> <li>• If compliance is not achieved, prosecution/civil sanctions may be applied. A court may order a fee reduction until compliant.</li> <li>• Mandatory disclosure will be noted on the department's website and within the SRS until the service is compliant.</li> </ul> <p><i>Anticipated date of effect: 6–12 months after the legislation is passed.</i></p>
New	<p>A compliance notice will be issued for breaches that are too serious for an infringement notice or where an enforceable undertaking cannot be agreed. The terms are:</p> <ul style="list-style-type: none"> <li>• The proprietor is not willing to cooperate with an enforceable undertaking.</li> <li>• It can be challenged at VCAT but, pending a hearing, the order must be obeyed unless</li> </ul>

Status	Requirements
	<p data-bbox="368 203 655 232">VCAT orders otherwise.</p> <ul data-bbox="320 259 1474 539" style="list-style-type: none"> <li data-bbox="320 259 1474 315">• It may continue to apply despite a change in ownership of the SRS if changes are relevant to its continued operation.</li> <li data-bbox="320 342 1126 371">• If compliance is achieved, no further consequences will result.</li> <li data-bbox="320 398 1422 454">• If compliance is not achieved, prosecution/civil sanctions may be applied. A court may order a fee reduction until compliant.</li> <li data-bbox="320 481 1453 539">• Mandatory disclosure will be noted on the department’s website and within the SRS until the service is compliant.</li> </ul> <p data-bbox="320 566 1177 595"><i>Anticipated date of effect: 6–12 months after the legislation is passed.</i></p>

## Implementation

A training program for proprietors and departmental officers involved in monitoring the program will be developed.

## Frequently asked questions

### **Q.1 As a proprietor, what happens if I don’t comply with the regulations?**

**A.** Existing compliance mechanisms in the Act will remain. However, a number of new and practical measures are being proposed. If it is a minor matter, you may be given an action plan, and you may also be given an infringement notice (an on-the-spot fine).

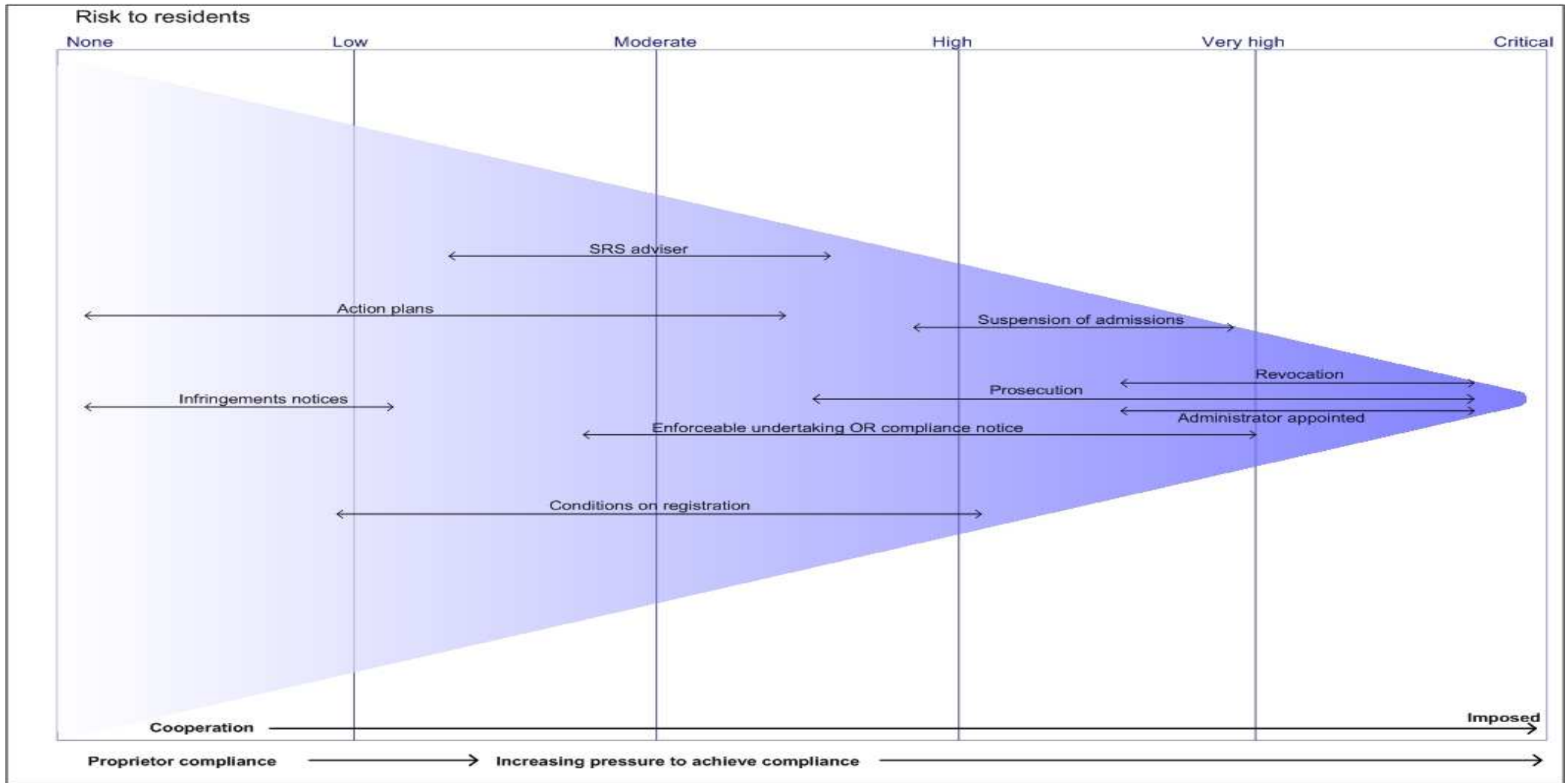
If it is more serious, or if you have had a lot of fines previously, the department might take a different approach. This might vary, according to the circumstances. If you need help to become compliant (and if you agree) an advisor may be appointed at your expense to help you review your systems and practices to achieve compliance.

For more serious cases, you and the department might work out a plan for you to achieve compliance through an enforceable undertaking in which you agree to carry out the plan. If you don’t agree to an enforceable undertaking, the department may serve a compliance notice requiring you to take specific actions to become compliant. You will need to tell residents and their families if either of these steps happens and there will be a time limit imposed.

If, after some or all of these measures have been tried, you still do not comply then you can expect to be prosecuted and for there to be some repercussions for your registration. Again, the repercussions will be based on the particular circumstances. They could include conditions on registration, suspension of admissions, revocation of registration and or the appointment of an administrator. You might also be censured in parliament.

### **Q.2 If I breach the legislation and regulations, will the breach be made public?**

**A.** A breach will be made public if an SRS is issued with an enforceable undertaking or a compliance notice, or if a proprietor is prosecuted or made subject to a civil sanction.



**Diagram:** Application of enforcement measures is dependent on the level of risk to residents and the cooperation of the proprietor to remedy the identified breach.