

# Conduct of Work Health and Safety Prosecutions Review (WorkSafe ACT)

Commissioned by WorkSafe ACT  
Independent review conducted by Marie Boland

*Final Report*



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## Contents

Executive Summary	3
Recommendations	6
Introduction	7
1. Current model	8
2. An in-house prosecution team	20
3. An independent statutory office	25
4. Other models	29
5. A new model for the Australian Capital Territory	31
Appendix A: Terms of Reference	35
Appendix B: Office of the Work Health and Safety Prosecutor Business Plan 2021-22	36
Appendix C: Key Terms	37
Appendix D: Consultation	38
Appendix E: Select Bibliography	40

## Executive Summary

Over the last four months I have had the privilege of consulting with business organisations and associations, unions, community organisations, small business owners, legal practitioners, ACT government officers, and investigation managers and prosecutors from other work health and safety (WHS) jurisdictions about the current conduct of WHS prosecutions in the Australian Capital Territory (ACT).

I met with the ACT's WHS Commissioner, the Deputy WHS Commissioner, and WorkSafe ACT staff to hear about their practical experience of working within the current framework for progressing WHS prosecutions. I also met with the Supervising Lawyer (Work Safety) from the ACT's Office of the Director of Public Prosecutions (DPP) and the Solicitor-General for the ACT.

I benefited significantly from conversations with Ms Kay Catanzariti and I acknowledge her continued commitment to and advocacy for improving prosecution outcomes where breaches of WHS laws lead to the death of a worker.

I thank all the individuals and organisations for meeting with me and for sending me written comments and submissions. I particularly thank the staff at WorkSafe ACT who provided me with the support I needed to finalise and deliver this report to the WHS Commissioner for her consideration.

Over the years, WHS regulators, including WorkSafe ACT have been the subject of numerous reviews and recommendations. Most of these reviews have focussed on the relevant WHS regulator's internal inspection and investigation regimes. They have tended to stop at the door of the WHS regulator without moving outside to consider the role of external agencies which in many jurisdictions play a key role in ensuring successful WHS prosecution outcomes (for example Offices of the Director of Public Prosecutions or Crown /Government Solicitor's Offices).

This review takes that next step and focusses on the ACT's processes and procedures when external WHS prosecution advice is being sought and external decisions to prosecute are being made.

Consistent with the terms of reference for the review, I considered whether the ACT's prosecution decision making processes and procedures and the legislative and policy frameworks surrounding them support four key criteria:

- the object of the *Work Health and Safety Act 2011* (ACT) (WHS Act) to secure compliance through effective and appropriate compliance and enforcement measures
- the independence and accountability of the WHS Commissioner
- the principles underpinning WorkSafe ACT's *Compliance and Enforcement Policy 2020-2024* to ensure the highest standard of integrity (including consistency and transparency) in prosecutorial decision making
- the delivery of WorkSafe ACT's *Strategic Plan 2020-2024* to create an exemplary regulator and ensure firm and fair enforcement against non-compliance

It is clear to me from the feedback I received that **the conduct of WHS prosecutions in the ACT can be improved**. No one I consulted suggested the current framework is operating at optimum efficiency, effectiveness, transparency, or consistency.

The purpose of prosecution generally is to deter non-compliance with the laws and hold persons who breach those laws to account. Participants in this review considered neither purpose was

being met in the ACT in the context of WHS law. Fundamentally, **it is not clear to the community at large how and why WHS prosecution decisions are made.** This has led to anecdotal propositions which have become well established opinions that it is only where there has been a very serious incident resulting in a worker's death (and most likely in construction) that a WHS prosecution will be commenced in the Territory.

I am recommending the development of a publicly available WHS prosecution policy which states clearly how prosecution decisions are made and highlights the breaches expected to result in prosecution action. Importantly, any WHS prosecution policies should continue to comply with the Director of Public Prosecutions, *Prosecution Policy of the Australian Capital Territory*. I am also recommending prosecution priorities are included in WorkSafe ACT's legislatively required statement of operational intent. These recommendations are discussed in more detail at Part 1 of this report.

Many stakeholders asked for more open reporting of prosecutions and their outcomes. I am therefore recommending prosecution data is made available on WorkSafe ACT's website including prosecution and court summaries. A role for the WHS Council to monitor prosecution data, including success rates is also recommended. These recommendations are discussed in detail at Part 1 of this report.

I have also made recommendations about performance measures which are also discussed at Part 1 of this report.

It is essential the ACT community has confidence in the way WorkSafe ACT conducts its prosecutions. Where there are breaches of the WHS laws, everyone has the right to expect these breaches are dealt with by the WHS regulator in a timely manner (and well within the two-year statute of limitations). Everyone also has the right to expect the WHS regulator will make decisions to prosecute consistent with the object of the laws it is regulating, its publicly identified policies and strategic plans and in the public interest.

The ACT Government has invested heavily to fulfil its vision of creating an independent, agile, exemplary WHS regulator. The creation of the statutory role of the WHS Commissioner is central to achieving this vision. Critically, the ACT Government has also legislated to reinforce the independence and accountability of the WHS Commissioner for all decisions made to enforce the WHS Act.

I find **the WHS Commissioner's lack of control over the management of WHS prosecution decision making compromises the ACT Government's vision for an independent, agile, exemplary WHS regulator which will deliver better WHS outcomes for the Territory.** It limits the WHS Commissioner's ability to maintain the momentum on the cultural change currently underway at the WHS regulator and risks undermining the consequential objective of creating a more dynamic WHS culture across ACT workplaces

I also find **providing the WHS Commissioner with the authority to decide whether to prosecute for WHS law breaches and with the flexibility to choose where to seek prosecution advice is the final critical element required to deliver an independent, agile, exemplary WHS regulator.**

I am therefore recommending a new model for conducting WHS prosecutions in the ACT which provides the WHS Commissioner with that control and flexibility. It is discussed at Part 5 of this report.

There are other issues which affect WHS prosecution outcomes that were raised with me during consultations but lie outside the scope of this review. Many stakeholders are still concerned about the quality of investigations and the accountability of WorkSafe ACT within that context.

Others raised issues around the lack of a dedicated Industrial Magistrate within the ACT to hear WHS matters. Concerns were also raised about sentencing outcomes and the lack of national sentencing guidelines to promote consistency across the WHS jurisdictions and support deterrence.

**The need to maintain harmonisation of WHS laws was also raised as an important issue** for many participants. Whilst I consider that the current wording of the WHS Act facilitates the proposed new model for conducting WHS prosecutions, to avoid doubt, I am recommending that Part 13, Division 1 of the WHS Act (Legal Proceedings, General Matters) is amended to reflect the model WHS Act provisions. This recommendation is discussed in more detail at Part 5 of this report.

**There is currently no consistency across jurisdictions in the operational frameworks used to manage WHS prosecutions.** Some WHS regulators have in-house prosecutors, some refer matters to the relevant Director of Public Prosecutions or Crown Solicitor's Office, others seek external counsel assistance to undertake WHS trial advocacy.

However, across the country there are WHS prosecutors who are gaining extensive specialist WHS expertise either as in-house prosecutors within WHS regulators or within the Office of the WHS Prosecutor in Queensland. There is capacity to further develop what is an emerging community of practice which will assist in achieving consistent approaches to WHS prosecution decision making across the harmonised jurisdictions and elevate the prosecution of WHS law breaches as a significant area of legal practice into the future.

Finally, it is important to note this review's recommendations are proposed on the basis they will optimise WHS outcomes for the ACT's workers and employers and ensure the community has faith in its WHS regulator to make prosecution decisions efficiently, effectively, transparently, and consistently.

## Recommendations

### Efficiency

#### **Recommendation 1:**

Implement an efficiency performance measure which requires briefs of evidence to be assessed within 120 days of referral.

### Effectiveness

#### **Recommendation 2:**

Implement an effectiveness performance measure which requires 90% of prosecutions to result in a conviction with the conviction rate being the percentage of defendants convicted in prosecutions which proceeded to a decision or verdict.

### Data collection and reporting

#### **Recommendation 3:**

Collect investigation and prosecution timeline data and provide regular reports to the WHS Council on the length of time taken from notification of an incident to filing of charges and on the outcomes of prosecutions.

#### **Recommendation 4:**

Publish detailed prosecution reports, court summaries and data on the WorkSafe ACT website like the reports and data currently provided by the Office of the WHS Prosecutor in Queensland

### Transparency and consistency

#### **Recommendation 5:**

Develop a prosecution policy which states clearly how prosecution decisions are made and highlights the breaches expected to result in prosecution action.

#### **Recommendation 6:**

Incorporate prosecution priorities into the statement of operational intent.

### A new model for the ACT

#### **Recommendation 7:**

Establish an in-house prosecution team comprising one senior prosecutor, two junior prosecutors, a legal graduate, and a paralegal.

#### **Recommendation 8**

Amend the *Law Officers (General) Legal Services Directions 2012* (ACT) to allow the WHS Commissioner to seek prosecution advice from external counsel without the need for approval from the Chief Solicitor of the ACT

#### **Recommendation 9**

Amend the *Law Officers (General) Legal Services Directions 2012* (ACT) to allow the WHS Commissioner to use external counsel to progress WHS prosecutions through the relevant courts.

#### **Recommendation 10**

Amend the *Law Officers (General) Legal Services Directions 2012* (ACT) to allow the WHS Commissioner to establish an in-house prosecution team within WorkSafe ACT

#### **Recommendation 11**

Ensure that all Industrial Manslaughter offences are prosecuted by the DPP

#### **Recommendation 12**

Amend section 230 of the WHS Act to reflect the original wording of the model WHS Act

## Introduction

I was engaged by the WHS Commissioner to review the legislative, policy and operational framework currently being used in the Australian Capital Territory to initiate, run, and manage work health and safety prosecutions (Review).

I was also asked to make recommendations about the preferred approach to conducting WHS prosecutions into the future and to identify any consequential legislative changes arising from those recommendations.

The Review had two stages.

During stage one, I considered the WHS laws, operational policies, procedures, and staffing structures supporting the conduct of WHS prosecutions in the Australian Capital Territory (ACT). I examined other jurisdictional models with a particular emphasis on Queensland, Western Australia, and Victoria. I considered previous reviews and commentaries on WorkSafe ACT's approach to compliance and enforcement of WHS laws and undertook preliminary consultations.

This work helped shape a Discussion Paper which was publicly released in May 2022 with a call for submissions on the issues raised and the questions asked within it.<sup>1</sup> The Discussion Paper provides important details about WHS prosecution models which support the analysis in this final report.

In the preliminary consultation I grouped the feedback from stakeholders into four key themes:

1. Independence and control
2. Consistency and efficiency
3. Skills and resourcing
4. The public interest

I found these themes remained dominant throughout the broader consultation process and I have retained them as headings in this report to present my summaries of stakeholder feedback.

Stage two of the Review involved the distribution of the Discussion Paper with an invitation to provide feedback to me on its contents. I also continued to meet with stakeholders including face to face meetings during a two-day visit to Canberra. For completeness, during stage two I examined the Comcare, New South Wales, South Australian, Northern Territory and Tasmanian approaches to managing WHS prosecutions.

In preparing this final report and framing recommendations I considered the feedback from all participants. In assessing the merits of any calls for change, I was guided by the Terms of Reference for the Review<sup>2</sup> and particularly whether proposals would:

- support the compliance and enforcement object of the WHS Act
- optimise the independence and accountability of the WHS Commissioner
- help deliver WorkSafe ACT's strategies of ensuring fair and firm enforcement against non-compliance with WHS laws
- create an exemplary regulator
- reinforce the principles of consistency and transparency upon which WorkSafe ACT's compliance and enforcement policy is built

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<sup>1</sup> The Discussion Paper is available at <https://www.worksafe.act.gov.au/initiatives/work-health-and-safety-prosecutions-review>

<sup>2</sup> See Appendix A.

## 1. Current Model<sup>3</sup>

There have been several independent reviews of WorkSafe ACT's compliance and enforcement activities, including the conduct of investigations, over the years<sup>4</sup>.

The amendments to the WHS Act which created the independent statutory role of WHS Commissioner, and the most recent structural changes made to WorkSafe ACT are a result of recommendations made by the 2018 review of WHS compliance, infrastructure, policies, and procedures undertaken by the Nous Group<sup>5</sup> (the Nous Review).

The Nous Review reported in relation to WHS prosecutions:

*'stakeholders expressed strong views that the limited resources available to WorkSafe ACT for investigations has in the past resulted in a failure to properly investigate serious incidents, a failure to prosecute matters and a failure to lay charges within the statutory time limits'<sup>6</sup>. However, it also noted 'processes for conducting and documenting investigations have been significantly improved over the past 12 months.'<sup>7</sup>*

Whilst it didn't specifically consider in detail the operational practice and processes used by WorkSafe ACT to refer briefs of evidence to the Office of the Director of Public Prosecutions (DPP) for a decision whether to prosecute matters, the Nous Review recommended WorkSafe ACT *'continue to improve procedures and expand investigative skills to support successful enforcement outcomes'<sup>8</sup>.*

### 1.1. Stakeholder responses

Significant concerns about the ACT's WHS prosecution record, consistent with those reported in the Nous Review, continue to be raised by all stakeholders who contributed to this Review.

Whilst there is recognition from all those consulted of the improvements that are demonstrably being made to the compliance and enforcement activities of WorkSafe ACT, there is still widespread unease about the low numbers of WHS prosecutions being conducted in the Territory.

There is a general view amongst many stakeholders it is in the public interest for the ACT to see more successful WHS prosecutions finalised through the courts. One stakeholder said:

*'if there were more successful prosecutions, it would act as a powerful deterrent and is likely to make industry snap to attention'.*

Another stakeholder went so far as to say:

*'there are no consequences for breaching WHS laws in the ACT'.*

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<sup>3</sup> Details of the current legislative, policy and operational framework which supports the conduct of work health and safety prosecutions in the ACT are provided in Part One of the Discussion Paper.

<sup>4</sup> See for example, *'Getting Home Safely', Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry 2012* and the most recent review undertaken by the Nous Group - *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018.

<sup>5</sup> Nous Group - *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018

<sup>6</sup> Nous Group - *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018 p 56.

<sup>7</sup> Nous Group - *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018 p 56.

<sup>8</sup> Nous Group - *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018 p 59.



A third suggested:

*'the current narrative is that there will be no prosecutions unless something terrible happens'*.

Significant concerns were raised about the fact that past prosecutions in the ACT have largely been in the construction industry which represents a small portion of the ACT's workforce (4.9%)<sup>9</sup>.

Many stakeholders considered WorkSafe ACT, and prosecutors should be focussing more attention on breaches of WHS laws in industries like health and education services and the public service. These are sectors where significant harm is reported and significant numbers of workers compensation claims arise from workplace risks such as sexual harassment, bullying and occupational violence.

Whilst recognising there are inefficiencies and issues with the existing ACT WHS prosecution system, some stakeholders questioned whether *'the concerns identified are systemic to the [current] framework or are more related to the actual implementation of the framework and associated policies.'*

The importance of completing successful prosecutions as both a punishment for past breaches and a deterrent against future breaches was emphasised by a WHS prosecutor who manages an in-house WHS prosecution team:

*'a regulator has to do **enough** [emphasis added] prosecutions and they need to be managed efficiently, effectively and transparently.'*

#### **1.1.1. Independence and control**

Much work has been done and government investment made in the ACT over the past few years to establish an independent statutory office to regulate WHS more effectively. However, several stakeholders expressed a view that *'the ability of the WHS Commissioner to be independent is diminished by having an external prosecutor who makes the final decision on whether to prosecute'*.

The WHS Commissioner's perceived lack of independence is linked to further perception regulatory prosecutions are not a significant focus for the DPP.

This in turn is feeding a common view the current system of referring briefs of evidence to the DPP for a decision on whether to prosecute breaches of WHS laws doesn't work.

Several legal practitioners with experience of working in the ACT's WHS jurisdiction suggested regulatory prosecutions are not a central priority for the DPP and an alternative model should be implemented.

Many stakeholders want the WHS Commissioner to retain control of the management of WHS matters from the moment an incident is notified to the regulator through to the final decision to prosecute and on to the completion of the matter through the courts.

However, there are other stakeholders who, whilst understanding the WHS Commissioner's frustrations about not being able to manage WHS matters along the entire path from incident notification to prosecution outcome, consider segregation is needed between the WHS regulator and the prosecutor. One relevantly noted:

*'Currently the Commissioner can make the decision to refer the matter to the DPP ... that should be enough ... otherwise conflicts of interest could undermine the process'*.

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<sup>9</sup> Master Builders, Australian Capital Territory, *Construction Data and Forecasts*, February 2022 accessed at [https://mba.org.au/wp-content/uploads/2022/04/ACT\\_Building-Construction\\_March-2022.pdf](https://mba.org.au/wp-content/uploads/2022/04/ACT_Building-Construction_March-2022.pdf)

Another submitted:

*'a body responsible for regulatory oversight of an industry should not be directly involved in potential prosecutions. It is important that there is a degree of 'distance' between those undertaking investigations and interacting – sometimes frequently – with those who may be subject to prosecutions.'*

It is important to note the DPP's Supervising Lawyer (Work Safety) reinforced the DPP's support for the current model which is consistent with the ACT jurisdiction's broader approach to regulatory prosecutions.

I was also informed by the Supervising Lawyer (Work Safety) that since November 2019 the DPP has only refused to prosecute one matter which WorkSafe ACT wanted to prosecute and that was due to a DPP assessment there were insufficient prospects of conviction.

### **1.1.2. Consistency and efficiency**

There is a shared view amongst stakeholders the current system of managing WHS prosecutions is leading to inconsistencies and inefficiencies with it being described as *'cumbersome, complex and overly bureaucratic'*.

I was informed the two-year statutory deadline for investigating and laying charges often runs right down to the final weeks and days before a decision to prosecute is made by the DPP.

A family advocate reinforced delays in prosecution decision making adds *'significant trauma to the victim's family'* with critical *'victim of crime counselling and support only provided when charges are filed'*. Others noted it also adds significant trauma to *'injured workers, the alleged offender and the workmates.'*

Time and again stakeholders emphasised those being investigated should not have to wait two years for a decision. A legal practitioner stressed filing charges *'two days before the two-year statute of limitations runs out is just not good enough ... two years is too long – the deterrent effects are lost'*.

Linked to the general concerns about timelines are specific operational issues raised by WorkSafe ACT staff such as briefs of evidence being sent to the DPP but not being considered for several months. I was advised this often leads to *'very late requests for more work to be done on prosecution files (that is, close to the two-year deadline) and often it is too late to gather the evidence required'*.

The Supervising Lawyer (Work Safety) clarified delays:

*'can be attributable to many factors including the timing of the receipt of the brief from Work Safe ACT to the DPP, requests by the DPP to WorkSafe to obtain further evidence which will inform the decision to institute a prosecution based on prospects of conviction and will inform the particulars of the charge (which cannot be amended past the statutory limitation period except in certain circumstances), the timing of the receipt of that further evidence from WorkSafe to the DPP, the DPP's current practice to draft the statement of facts and the particulars of the charge (as matters have previously failed when WorkSafe drafted the charges) and whether other matters have higher priority in terms of either an impending court deadline or in terms of the expiration of a statutory limitation period.'*

### **1.1.3. Skills and resourcing**

There is a strong view particularly amongst stakeholders from WorkSafe ACT and other WHS regulators consulted that those prosecuting WHS matters should have significant WHS knowledge and experience.

It was highlighted WHS is a 'niche area of the law', 'DPP prosecutors are not safety specialists, and generally have a criminal law background' and 'they do safety prosecutions so rarely [in the ACT] that they don't build up the experience and knowledge'.

Some stakeholders advised 'we have found that the specific complexities of WHS law, for example chains of responsibility, are not well appreciated by staff, who largely specialise in Crimes Act proceedings and a number of important prosecutions have either been dropped or settled inappropriately as a result'.

An alternative view was presented by some legal practitioners who consider prosecutors 'can learn WHS, whereas WHS legal practitioners cannot necessarily learn the trial (particularly advocacy) skills.'

I was advised the DPP has access to over 40 prosecutors at various levels of experience, who while they may not know about WHS can support with legal issues. There is a dedicated Supervising Lawyer for Work Safety based with the DPP who liaises with WorkSafe Act on WHS prosecution matters.

Importantly I received considerable feedback that dedicated WHS prosecutors may not offer the 'silver bullet' required to address the low number of successful prosecutions in the ACT. As one stakeholder noted:

*'I support dedicated WHS prosecutors, but it won't overcome a sloppy brief of evidence or necessarily address failures right along the chain'.*

#### **1.1.4. The public interest**

All stakeholders consulted agree it is important WHS prosecution decision making remains consistent with the *Office of the Director of Public Prosecutions Policy and Guidelines*. However, there was some discussion about whether there should also be specific public interest criteria in the context of WHS and if yes what the criteria should be.

One stakeholder emphasised:

*'there must not be a difference between the public interest test for WHS offences and the public interest test for [other] criminal offences' ... this would be contradictory to the ACT Human Rights framework and fundamental rights of ACT citizens ... however this does not mean that the current system is perfect and achieving the balance of public interest'.*

A family advocate reinforced the 'interests of victims and families should be an important part of the public interest test'.

Several stakeholders noted:

*'it may often be in the public interest to prosecute for lower order breaches such as not complying with a notice, not paying an infringement fine or for repeat offending'.*

There is significant stakeholder support for specific WHS public interest criteria to be considered when a decision is being made about whether to prosecute for a breach of WHS laws. There is also support for more prosecutions of bullying and sexual harassment matters where breaches of WHS laws can be proven.

The Supervising Lawyer (Work Safety) advised the DPP currently has the capacity to run these types of cases. I was also advised:

*'the office has never refused to prosecute a WHS matter based on the public interest test as the public interest would ordinarily militate for the institution or the continuation of a prosecution. If a WHS matter is not proceeded with or is discontinued, it would ordinarily be on the basis of insufficient prospects of conviction'.*

Several stakeholders submitted it is equally in the public interest that *'the regulator should be accountable for its decision making and communication about prosecution decision making should be transparent'*. In this context several contributors to the Review considered WorkSafe ACT should *'report as transparently as does the Office of the Work Health and Safety Prosecutor in Queensland'*.

## 1.2. Discussion and recommendations

In 2012, the *'Getting Home Safely' Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry* (Getting Home Safely Inquiry) suggested:

*'companies are operating in an environment where they can 'roll the dice', only paying the price, and that price is often a very low one if something goes wrong'*.<sup>10</sup>

Arguably, the dice is still worth rolling. There have been 15 prosecutions resulting in a conviction, order, or agreement in the ACT since the Getting Home Safely Inquiry with fines totalling \$757,000.<sup>11</sup> Most of these prosecutions have been in the construction industry where there has been a fatality or very serious physical injury.

Currently, in the ACT, there is only a small chance of prosecution for non-compliance with WHS laws, particularly where breaches involve bullying, sexual harassment, occupational violence, and non-compliance with WorkSafe ACT notices. Indeed, previous reviews noted WorkSafe ACT inspectors themselves placed a lower priority on investigations of breaches where there is no fatality presuming they were unlikely to be prosecuted.<sup>12</sup>

The Getting Home Safely Inquiry emphasised:

*'effective and credible regulation is a fundamental motivator of employer behaviour and therefore a vital element in any effective WHS jurisdiction'*<sup>13</sup>.

Whilst acknowledging the important role of education and inspection, it places the third element of an effective regulatory regime - enforcement - on an equal footing, concluding:

*'there must be a credible prospect that there can and will be consequences associated with non-compliance'*<sup>14</sup>.

The considerations, conclusions, and recommendations of the Getting Home Safely Inquiry remain relevant today. They were reinforced throughout this Review with everyone consulted agreeing the WHS regulator should be using prosecution (where appropriate) as an enforcement tool to punish past breaches of WHS laws and to deter future breaches.

I found a strong and consistent perception that currently WHS breaches which should be prosecuted are not being prosecuted, that the conduct of prosecutions is inefficient and statutory time limits are running out before a decision has been made on whether to prosecute. These views are held even when stakeholders have little knowledge of how the current prosecution processes operate and how decisions to prosecute are currently made.

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<sup>10</sup> *Getting Home Safely', Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry* 2012 p 8.

<sup>11</sup> Safe Work Australia, *Comparative Performance Monitoring Report*, 17<sup>th</sup> edition, October 2015, p 19 and Safe Work Australia, *Comparative Performance Monitoring Report 23/Work Health and Safety Compliance and Enforcement*, p 16.

<sup>12</sup> I note these assessments were presented before the Nous review recommendations were implemented and before the recent changes at WorkSafe ACT.

<sup>13</sup> *Getting Home Safely', Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry* 2012 p 60.

<sup>14</sup> *Getting Home Safely', Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry* 2012 p 61.

I also found a perception certain matters are not referred to the DPP because there is a presumption the DPP would not have the appetite to progress them.

It is a concern many stakeholders consider the current system for conducting prosecutions doesn't allow WorkSafe ACT to meet one of the key objectives of the WHS Act;

*'securing compliance with [the Act] through effective and appropriate compliance and enforcement measures'*<sup>15</sup>

I note in this context some stakeholders offered the view the primary role of the WHS regulator is education and engagement with stakeholders, and it is therefore appropriate to leave the prosecution decision making role to the DPP. However, the functions of the regulator provided by the WHS Act are not listed in priority order; they are equally important.

The ACT's *Compliance and Enforcement Policy 2020-2024* (CEP) identifies the compliance and enforcement tools WorkSafe ACT will use to ensure duty holders are meeting their legal obligations in the following table<sup>16</sup>:

Aim	Compliance and Enforcement Tool
Voluntary compliance	Guidance
Deterring non-compliance	<b>Remedial actions:</b> Improvement notice Prohibition notice <b>Punitive actions:</b> Injunctions Infringement notice
Sanctions (penalising an offender)	Prosecution Revoking, cancelling, or suspending authorisations
	Accept an enforceable undertaking <sup>17</sup>

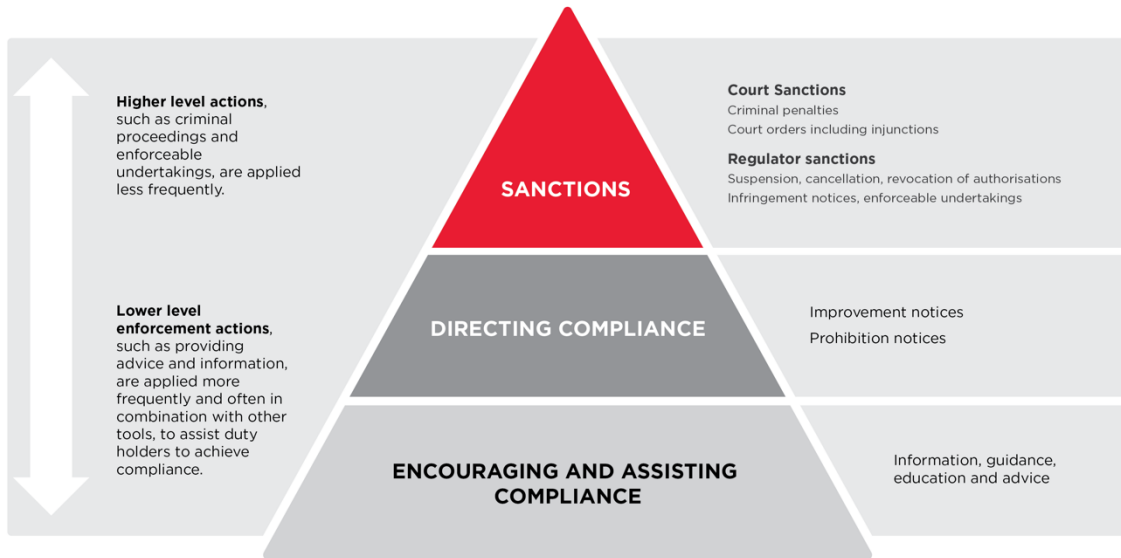
In the National Compliance and Enforcement Policy (NCEP), upon which the CEP is based, these tools are identified in an enforcement pyramid<sup>18</sup>. This pyramid approach to regulatory compliance is used by WHS regulators nationally and in other jurisdictions such as environment, business, and financial regulation: The narrative supporting the enforcement pyramid points out lower-level enforcement actions are applied more frequently than higher level actions such as criminal proceedings.

<sup>15</sup> Work Health and Safety Act 2011 (ACT) s3(1)(e)

<sup>16</sup> WorkSafe Act, *Compliance and Enforcement Policy 2020-2024* p 9.

<sup>17</sup> Enforceable undertakings are an alternative to legal proceedings in some cases. An EU is voluntary and is initiated by the PCBU. An EU cannot be accepted for Category 1 offences.

<sup>18</sup> Accessed at <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/national-compliance-and-enforcement-policy>



Commissioner Kenneth Hayne in his final report on the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, wrote about the regulatory pyramid, highlighting it 'reflects two very practical observations: not all contraventions of law are of equal significance and regulators do not have unlimited time or resources.'

He further highlighted:

*'it is wholly consistent with the analyses that are expressed by the metaphor of the regulatory pyramid that serious breaches of the law ... call for the highest level of regulatory response. And this is what has been missing'<sup>19</sup>.*

Arguably what was missing in the banking and financial regulatory jurisdiction is also what is currently missing in the ACT WHS jurisdiction.

I was advised that in the past eight months, two charges have been laid and two prosecutions have been tried in the ACT. There are currently four briefs of evidence with the DPP waiting for a decision whether to prosecute. Two of these briefs of evidence were referred to the DPP on 28 September 2021, one on 19 November 2021, and one on 4 March 2022. To date a statement of facts has been drafted for one of the four briefs, with further work yet to commence on the other three briefs<sup>20</sup>.

I was also advised that between January 2021 and May 2022 there were approximately ten duty holders who had been identified as repeat offenders, 30 duty holders who had notified WorkSafe ACT of a WHS incident resulting in a serious injury, death, or dangerous incident and 91 duty holders where there had not been a serious injury or death, but where a notifiable incident had occurred. If only 10% of these matters were investigated with a view to prosecution and a decision was made to prosecute that would lead to thirteen matters before the courts.

The Getting Home Safely Inquiry highlighted:

*'the demonstration of strong enforcement action such as prosecution will be significantly blunted by lengthy delays in bringing matters to finality undermining the value of one of its strongest deterrents'<sup>21</sup>.*

<sup>19</sup> Royal Commission, *Misconduct in the Banking, Superannuation and Financial Services Industry*, 2019

<sup>20</sup> This information is current as at 23 June 2022.

<sup>21</sup> *Getting Home Safely*, *Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry* 2012, p 63.

I note WorkSafe ACT has acknowledged that in the past incomplete briefs of evidence were often referred to the DPP which contributed to delays in prosecution decision making with a flow on effect of requests for information from the DPP being made close to the two-year deadline.

The two-year legislative timeframe for bringing WHS prosecutions is reflective of the reality of the practical requirements to finalise investigations in a timely manner so they can be efficiently and effectively prosecuted. It is a recognition it is more and more difficult to successfully prosecute matters the longer the period that elapses from the date of the relevant incident. As one stakeholder observed:

*'the longer the timeframe between the incident occurring and any prosecution being commenced, the poorer the outcomes for the victim(s), the defendant(s), and the general public'.*

Timeliness is also essential for deterrence/prevention purposes because prosecutions elevate workplace/industry wide issues which have caused serious injury or death or have the potential to cause serious injury or death and highlight reasonably practicable measures that should be addressed.

I note significant improvements have been made at WorkSafe ACT over the last twelve months to increase investigation quality and efficiency. These include:

- the implementation of new investigation governance processes to support transparency in decision making with an associated tracking and referral system to the DPP
- the establishment of a Case Management Panel to oversee the governance processes
- management of investigation processes and the tracking system by an experienced senior director
- early engagement with persons conducting a business or undertaking (PCBUs) advising them of investigation progress including a letter identifying the process from the WHS Commissioner
- early formal engagement of expert witnesses
- brief of evidence templates
- key performance indicators which require completion of briefs of evidence within a set timeframe
- early engagement with injured workers, families and loved ones by a Family Liaison Officer
- improvements in the use of technology, for example drones
- improvements in the proper collection, handling, seizure, logging, and storage of evidence
- capability training in forensic photography, elements of offences
- development of an offences' identification manuals
- referral of full briefs of evidence to the DPP (noting it was common practice in the past to send partial briefs).

Whilst the processes for training and management of investigators and their work lies outside the scope of this Review, it is relevant to highlight the performance measures used by the Office of the WHS Prosecutor in Queensland (OWHSP) and WorkSafe Victoria which include measures for receipt of prosecution advice and prosecution decisions. WorkSafe Victoria has a performance measure of 12 months from the date of the incident to the date charges are issued. The OWHSP requires briefs of evidence to be assessed within 120 days of referral with pre-brief advice provided within 30 days of a request.

Consistent with the terms of reference for this Review, I placed significant weight on how the current conduct of WHS prosecutions supports the independence and accountability of the WHS Commissioner. Much legislative, policy and operational work has been done over the last year to give effect to Recommendation 21 of the Nous Review:

*Establish WorkSafe ACT as an entity under the WHS Act using a single accountability governance model in which a commissioner is appointed as the regulatory authority and is accountable for all regulatory decisions*<sup>22</sup>.

Many stakeholders hold a strong view the current model for conducting WHS prosecutions doesn't allow the Commissioner to discharge her duties according to the WHS Act as the person accountable for all regulatory decisions using a single accountability governance model. I found this view persuasive.

However, countering it were the concerns raised by others that the WHS Commissioner is also responsible for engaging with stakeholders and therefore shouldn't be the one to decide whether to prosecute them. However, this is the case with all WHS regulators. They all have an education role as well as an enforcement role and most WHS regulators are responsible for making the final decision about whether to prosecute.

Irrespective of what model is used, and who makes the final decision, I found there is strong support for dedicated WHS prosecutors in the ACT whose only work is prosecuting WHS matters with no requirement to balance them against other non-WHS priorities.

However, this support was often accompanied by some doubt there will be enough WHS breaches to warrant dedicated WHS prosecutors in the ACT. One stakeholder held *'concerns about the efficacy of having a standalone prosecution team within WorkSafe ACT who would have sporadic high and low peaks of workload'*. Another noted *'it's not that there are not enough breaches in the ACT – it's that there are not enough breaches being prosecuted'*.

In reinforcing breaches of laws must carry consequences, in the context of financial and banking regulation, Commissioner Hayne stated:

*'Prosecution policies have always recognised that there may be good public reasons not to pursue a particular case. But the starting point for consideration is and must always be that the law is to be obeyed and enforced. The rule of law requires no less. And adequate deterrence of misconduct depends upon visible public denunciation and punishment'*<sup>23</sup>.

The same point can be made about other regulatory frameworks including WHS. Central to Commissioner Hayne's statement is of course the application of prosecution policies which ensure prosecution decision making is transparent and consistent.

Most stakeholders involved in this Review had little or no knowledge about how the decision to prosecute is made in the ACT. WorkSafe ACT's CEP paraphrases and explains the provisions of the WHS Act as they relate to prosecutions but does not go into any detail about how these provisions are applied in a policy and operational context in the ACT.

Key elements of the new approach to WHS regulation in the ACT are the statutorily required *Ministerial Statement of Expectations* and WorkSafe's *Statement of Operational Intent*. I found it interesting the word 'prosecution' does not appear in either.

I consider a publicly available prosecution policy would assist in explaining what breaches of the WHS laws are likely to be prosecuted in the ACT while reinforcing prosecution is a central component of WorkSafe ACT's compliance and enforcement approach.

In its *Prosecution Regulatory Function Policy*, WorkSafe New Zealand makes it clear it *'expects that prosecution would normally be recommended when one or more of the following circumstances apply'*:

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<sup>22</sup> Nous Group, *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures, Final Report*, 27 August 2018, p 10.

<sup>23</sup> Royal Commission, *Misconduct in the Banking, Superannuation and Financial Services Industry*, 2019 p 430.



- where non-compliance resulted in death
- the gravity of the offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender warrants it
- where there has been a reckless and/or negligent disregard of health and safety requirements
- where work has been carried out without an appropriate authorisation or license or in serious non-compliance with a safety case
- where a duty holder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk
- where there has been adverse conduct for a prohibited health and safety reason under Part 3 of the Health and Safety at Work Act (HSWA)<sup>24</sup>
- where a provisional improvement notice (which an inspector has not been required to review) has not been complied with
- where a breach of a worker participation or engagement duty is considered to have contributed to the occurrence of death or serious injury or the risk of death or serious injury
- where there has been a failure to comply with a notice or direction given by an inspector or WorkSafe, especially where the risk that was subject to the notice or direction:
  - still exists
  - was not remedied until a significant time after the date specified in the notice or direction
- where there has been coercion or inducement in breach of s92 of HSWA<sup>25</sup>
- where there has been a contravention of an enforceable undertaking
- where there has been an obstruction of an inspector while exercising their statutory powers
- where there is offending within an identified focus area for WorkSafe<sup>26</sup>.

In effect, a list like this which should link to WorkSafe ACT's statutory objectives and enforcement priorities would provide a public interest framework to support WHS prosecution decision making (noting decisions would also be subject to DPP prosecution guidelines and public interest test).

I also consider prosecution priorities should be identified and included in the statement of operational intent. This would allow WorkSafe ACT, in consultation with the WHS Council to respond to emerging issues and link its prosecution decision making to strategic priorities. It would also reinforce prosecutions are likely even in situations where there has not been a workplace death or serious injury.

I was able to gain significant amounts of information about WHS prosecution decision making, outcomes and trends from Queensland's OWHSP's annual reports, court reports and other data and statistics publicly available on its website<sup>27</sup>. It is generally acknowledged the deterrent and preventative impact of prosecutions is reinforced through this type of open and transparent reporting:

*Business leaders have a legislative duty to acquire and maintain up to date knowledge of work health and safety matters relevant to the nature of their operations. But without any visibility of the health and safety prosecutions that occur, it can be hard to grasp what can go wrong within your operations. Courts help refine what 'reasonably practicable' means in certain circumstances. Reasonably practicable means that you should consider the likelihood and degree of harm of a hazard or risk. Whilst there may not have previously*

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<sup>24</sup> These provisions are like Part 6 of the WHS Act.

<sup>25</sup> This provision is like section 108 of the WHS Act.

<sup>26</sup> New Zealand Government, WorkSafe Mahi Hauru Aotearoa, Prosecution Regulatory Function Policy, August 2020, p 17.

<sup>27</sup> <https://www.owhsp.qld.gov.au>

*been an incident at your workplace if a significant incident has occurred across your industry, you should be aware of it'<sup>28</sup>*

Many stakeholders wanted to 'encourage WorkSafe ACT to release as much data and educational information, including real-time incident reporting lessons learned, to assist all industries to learn from past mistakes.'

To conclude, I am making several recommendations in the context of this discussion about the current conduct of WHS prosecutions in the ACT which will remain relevant irrespective of whether the current model continues or a new one is implemented.

Some of these recommendations, particularly those dealing with efficiency, effectiveness, and timeliness, will rely on the agreement and on-going co-operation of the DPP if the current model is maintained.

I find this reliance on another agency to manage performance measures which impact on the efficiency and effectiveness of the WHS regulator reinforces the concerns raised about the current operational model.

## Summary

The current conduct of WHS prosecutions in the ACT

1. is inefficient and ineffective.
2. takes too long from the time of incident notification to the filing of charges.
3. lacks transparency.
4. lacks consistency.
5. limits the ability of the WHS Commissioner to meet her statutory duty to act independently.
- 6.. results in too few prosecutions.

### Efficiency

#### Recommendation 1:

Implement an efficiency performance measure which requires briefs of evidence to be assessed within 120 days of referral.

### Effectiveness

#### Recommendation 2:

Implement an effectiveness performance measure which requires 90% of prosecutions to result in a conviction with the conviction rate being the percentage of defendants convicted in prosecutions which proceeded to a decision or verdict.

### Data collection and reporting

#### Recommendation 3:

Collect investigation and prosecution timeline data and provide regular reports to the WHS Council on the length of time taken from notification of an incident to filing of charges and on the outcomes of prosecutions.

#### Recommendation 4:

Publish detailed prosecution reports, court summaries and data on the WorkSafe ACT website like the reports and data currently provided by the Office of the WHS Prosecutor in Queensland

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<sup>28</sup> *Prosecutions: 2021 summary for NSW and Victoria* accessed at <https://www.actionohs.com.au/prosecutions-2021-summary-for-nsw-and-victoria/>

## Transparency and consistency

### **Recommendation 5:**

Develop a prosecution policy which states clearly how prosecution decisions are made and highlights the breaches expected to result in prosecution action.

### **Recommendation 6:**

Incorporate prosecution priorities into the statement of operational intent.

## 2. An in-house prosecution team<sup>29</sup>

The in-house prosecution team model for conducting occupational health and safety prosecutions has been operating for several years in Victoria and has recently been established in Western Australia. As part of this Review, I had the opportunity to speak with those involved in investigation management and prosecution and those holding the position equivalent to the ACT's WHS Commissioner in those jurisdictions about the pros and cons of this model. Local stakeholders in the ACT also provided me with comprehensive feedback about it.

### 2.1. Stakeholder responses

It was acknowledged by participants in this Review the in-house prosecution model gives ultimate control and responsibility for prosecution decision making to the WHS regulator. It was also acknowledged that under this model, WHS regulators in other jurisdictions have expanded the range of matters prosecuted and increased the numbers of successful prosecutions over the years.

This acknowledgement was accompanied by concerns:

- the ACT would not be able to source prosecutors with the necessary skills.
- there wouldn't be enough prosecutions to justify an in-house team.
- there should be a clear separation between those who investigate and those who make the decision to prosecute.

#### 2.1.1. Independence and control

Victorian and Western Australian regulatory officers and prosecutors spoke about two key benefits of the in-house team model they considered important in the context of a WHS regulator's independence and control:

1. the ability for the WHS regulator to apply a risk based regulatory management approach to decision making about whether to prosecute; and
2. the ability to run test cases (which the DPP might be reluctant to run) allowing for the WHS regulator's strategic priorities to be aligned to prosecution decision making.

Many ACT stakeholders agree the WHS Commissioner should be in control of prosecution decision making so the current momentum on making positive change within the WHS regulator is maintained. Others noted the WHS regulator is accountable for prosecution decisions in the eye of the public *'so she needs to be able to make the decision'*.

It was stressed to me the DPP always takes account of WorkSafe ACT's view *'but that is only one factor amongst many'*. Prosecution decisions are made by the DPP based on DPP guidelines *'and [the DPP] is answerable to the community at large and not a particular interest group'*.

Some legal practitioners noted they could *'understand the difficulty the WHS commissioner has around public policy considerations and wanting to run prosecutions to change behaviour'*; suggesting the DPP *'has a more purist approach'*.

#### 2.1.2. Consistency and efficiency

Those who have experience of working with an in-house prosecution team in a WHS regulatory environment reinforced it leads to a consistent approach to prosecution decision making and quicker decision making. It was stressed in-house prosecution teams are also working to performance measures established by the WHS regulator which *'allows the regulator to closely monitor the timelines for consideration of briefs of evidence and decision making'*. It was also

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<sup>29</sup> Details of the legislative, policy and operational framework which support the in-house prosecution team approach to work health and safety prosecutions in Western Australia and occupational health and safety prosecutions in Victoria are provided in Part Two of the Discussion Paper.

suggested in-house prosecutors are *'more likely'* to understand *'the importance of prosecution as a compliance tool and not an end in itself'*.

Many ACT stakeholders however, reinforced the sentiment *'an in-house prosecution team is all well and good but everything else needs to work – for example the quality of investigations, training, resources etc'*.

### **2.1.3. Skills and resourcing**

Those operating in-house prosecution teams stressed the need for these teams to be staffed by experienced trial lawyers:

*'an in-house team needs to be top-heavy – as a minimum I'd recommend five plus years of experience'*.

WorkSafe Victoria officers noted:

*'in WorkSafe Victoria separation between in-house legal advisers and the in-house prosecutors is inherent in how they work. There is no blurring the lines. It is a productive relationship but not a conflict of interest'*.

Others operating under this model stressed:

*'prosecutors play no role in directing the investigation nor in providing advice about appropriate tools to use to get information ... there are strong governance frameworks internally to protect legal professional privilege'*.

ACT stakeholders raised the question of scale:

*'will there be enough work in the ACT to justify the cost of a separate prosecution unit'? What supporting infrastructure would be needed and what is the cost/benefit analysis?'*

### **2.1.4. The public interest**

Victorian and Western Australian contributors to this Review advised their in-house prosecutors are obliged to consider local DPP guidelines, but they also have specific criteria to further consider the public interest in the context of WHS.

A key public interest issue raised by ACT participants in the context of an in-house prosecution team related to the importance of keeping investigation roles separate from prosecution roles.

The *'need to distinguish between the person who brings the prosecution and the person who conducts the prosecution'* was emphasised regularly:

*'it is important that there is a separation between those who make the decision to prosecute and those who provide legal advice to inspectors about their functions and powers and other issues'*.

Experienced legal practitioners considered these concerns could be addressed:

*'there can be independence with an in house set up – with a sound governance framework there should be no problem'*.

The costs/benefits to the ACT community of funding a prosecution team within WorkSafe ACT, particularly when the size of the ACT WHS jurisdiction is considered was also raised regularly. Many stakeholders considered the ACT is too small to justify and support an in-house prosecution function in WorkSafe ACT with some suggesting this model *'can only work in large jurisdictions'*.

Others considered *'there will be enough work if there is more focus on prosecutions of recidivist duty holders, occupational violence and mental health injury'*

## 2.2 Discussion and recommendations

The ACT government has invested in a new approach to regulating WHS to create a more dynamic WHS culture across the ACT. Key to its success is the creation of an independent WHS regulator with regulatory authority vested in a single WHS Commissioner. According to the Nous Review this model *'best addresses the need for independent decision making and creates role clarity'*.<sup>30</sup>

The Nous Review noted:

*'How a regulator is set up, directed, controlled, resourced and held to account – including the nature of the relationships between the regulatory decision maker, political actors, the legislature, the executive administration, judicial processes and regulated entities – builds trust in the regulator and is crucial to the overall effectiveness of regulation'*.

It further noted *'we consider that **role clarity and independence are the two principles most important** [emphasis added] for assessment of the design of the future governance arrangements for WorkSafe ACT'*<sup>31</sup>.

There continues to be strong support for the role of the WHS Commissioner to be independent – for her to be able to exercise her regulatory functions without direction from anyone else, consistent with the provisions the WHS Act:

*'The WHS commissioner is not subject to the direction of anyone else, and must act independently, in relation to the exercise of a function under this Act or another territory law under which the WHS commissioner exercises a function'*.<sup>32</sup>

I consider the existence of an in-house prosecution team within WorkSafe ACT is the most effective model for ensuring the continued independence of the WHS commissioner as required by the WHS Act, an independence which will allow her to exercise all her regulatory functions efficiently, effectively, transparently and consistently.

I am persuaded by critiques of regulatory prosecution systems which rely on referral to an office of the DPP. In his paper, *'Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion'*, Remy Farrell suggests:

*'the prosecution of regulatory offences by the DPP necessarily restricts the degree of regulation that can be brought to bear by a given regulator. Once it goes to the DPP it is no longer the regulator that is calling the shots in relation to the prosecution'*<sup>33</sup>.

The Australian Law Reform Commission noted:

*'The major inconsistency relates to the basic objectives of the different bodies. The regulation of the marketplace, which is the focus of regulators like ASIC and the ACCC, is said to require immediate response to contraventions, restoration of the status quo and prevention of future problems, whereas the DPP is required to be concerned with the circumstances and culpability of a particular contravention in the past. It is obvious that these objectives may lead to contradictory views on how to deal with a case'*.<sup>34</sup>

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<sup>30</sup> Nous Group, *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018, p 75.

<sup>31</sup> Nous Group, *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018 p 70.

<sup>32</sup> Work Health and Safety Act 2011 (ACT) Schedule 2, section 2.23(1).

<sup>33</sup> Farrell, Remy BL, *'Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion'*, 11<sup>th</sup> Annual National Prosecutors' Conference, 24 April 2010, Dublin, Ireland p 2.

<sup>34</sup> *Australian Law Reform Commission Report* 95.

Farrell notes the very different nature of the roles performed by a regulator who prosecutes and a DPP:

*'The DPP role is limited to that of enforcing a set of pre-existing rules in relation to past behaviour. Regulators will be as interested if not more so in influencing future conduct. Considerations that will feed into the decisions to be made during the run of a case are also fundamentally different. The importance of prosecution as one of the weapons in the armoury of a regulator who is seeking to influence the manner in which a particular industry or sector behaves. **Unlike the DPP whose function is to respond to crime rather than to prevent it the regulator is more likely to be held accountable for failings in relation to prosecutions – and perhaps rightly so. As such regulators should be given a role commensurate with that degree of accountability**' [emphasis added]<sup>35</sup>*

He also highlights:

*'the role of the regulator frequently calls for a significant degree of expertise in a particular sector or industry. The expertise brought to bear by the office of the DPP is principally legal and forensic expertise of a somewhat more generic nature'.*

Even though the DPP makes the decisions whether to prosecute WHS breaches in the ACT, it is generally the WHS Regulator being criticised on the front page of the newspaper when a high profile WHS prosecution is unsuccessful or is not taken in the first place. It is rarely if ever, the DPP which bears the brunt of public backlash. I recommend that this public perception and indeed expectation that it is the WHS regulator making the prosecution decisions should be the structural and operational reality.

I am persuaded that the current conduct of WHS prosecutions in the ACT is not aligned with the public expectation or indeed the legislative provisions which designate the WHS Commissioner as the single responsible entity for WHS regulatory decision making.

Since the new structure for managing WHS in the ACT was implemented, the WHS Commissioner and WorkSafe ACT have developed detailed operational and strategic plans. Arguably, they cannot execute these plans to their fullest extent because responsibility for prosecution decision making, the highest level of the compliance and enforcement pyramid is held by the DPP.

I am also persuaded a significant advantage of an in-house prosecution team is it allows the regulator to apply a risk-based approach to prosecutions consistent with its strategic and regulatory priorities. Ultimately, in the context of the graduated enforcement underpinning compliance with the WHS Act it is the regulator who must be able to select the most appropriate enforcement response to any given breach.

As the Nous Review highlighted:

*'modern regulators plan and target their activities through a strategic planning process that considers the changing environmental context, examines data and trends and identifies specific priorities for action based on that data analysis and risk assessment'.<sup>36</sup>*

This risk-based approach combined with the availability of its in-house prosecution team has enabled WorkSafe Victoria to focus its prosecutions on matters of importance to its enforcement strategy and matters that are likely to have an impact on a broader class of cases across industries or sectors.

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<sup>35</sup> Farrell, Remy BL, 'Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion', 11<sup>th</sup> Annual National Prosecutors' Conference, 24 April 2010, Dublin, Ireland p 5.

<sup>36</sup> Nous Group, *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures*, Final Report, 27 August 2018 p 38.

In practice, the presence of an in-house prosecution team in WorkSafe Victoria allows for the creation of a clear decision-making framework where there is an independent assessment of most breaches of its occupational health and safety laws as potential prosecutions.

A combination of DPP guidelines and the regulator's own strategic priority criteria provide the triaging framework to narrow down which matters will proceed to charges being filed. This model also means prosecution advice is being provided earlier than is currently the case in the ACT. This in turn over time enables investigators to develop their skills in relation to preparation of briefs of evidence, including identification of elements of offences, evidentiary issues, witness identification and lines of inquiry.

A decision-making framework combined with the management of performance measures within the WHS regulator from the time of incident notification to the decision to prosecute should assist with avoiding 'investigation drift' where matters are potentially left to sit for months with no action taken to progress them.

It should also result in more management emphasis internally on evidence analysis, certainty about which party will most likely be able to be successfully prosecuted and a clearer focus and targeting of the work required to be undertaken (and the evidence that needs to be gathered) to ensure the investigations process is more effective and efficient.

Finally, it will facilitate Work Safe ACT to broaden its focus and emphasis to a wider range of industries, for example health and community services, and beyond physical injuries to include psychosocial injuries that are cumulative including bullying, harassment, and mental health. An in-house prosecution team could also play a role in training investigators in respect of preparing briefs of evidence.<sup>37</sup>

I am recommending there be an in-house prosecution team (with five officers as identified in the recommendation below) which reports directly to the WHS Commissioner. I am also recommending the team operates within a flexible decision-making framework which gives the WHS Commissioner flexibility about where she seeks prosecution advice and support.

This flexible framework is discussed further in Part 5 of this report<sup>38</sup>. I note that the establishment of an in-house prosecution team at WorkSafe ACT may require amendments to the *Law Officers (General) Legal Services Directions 2012* (ACT). This is also discussed in Part 5.

## Summary

The in-house prosecution team model:

- provides ultimate responsibility for prosecution decision-making to the WHS regulator.
- enables the WHS regulator to apply a risk-based approach to prosecutions.
- aligns prosecution decision-making to the WHS regulator's strategic priorities.
- allows for an assessment of most breaches of WHS laws as potential prosecutions.

### An in-house prosecution team

#### Recommendation 7:

Establish an in-house prosecution team comprising one senior prosecutor, two junior prosecutors, a legal graduate, and a paralegal.

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<sup>37</sup> I note the Office of the Work Health and Safety Prosecutor provides training to investigators in that jurisdiction, and it has been suggested in previous reviews of the ACT WHS framework the resources of the DPP could be drawn on to provide training.

<sup>38</sup> See page 31.



### 3. An Independent Statutory Office<sup>39</sup>

The Office of the Work Health and Safety Prosecutor (OWHSP) is an independent prosecution office established under the Queensland WHS Act. Its role is to conduct and defend proceedings for breaches of Queensland's WHS laws.

The OWHSP operates independently of Queensland's DPP and WHS regulator. The OWHSP is headed by the Work Health and Safety Prosecutor (WHSP)<sup>40</sup>. In practice, this means the decision to commence a prosecution under the Queensland WHS Act is one ultimately for the WHSP.

The WHSP applies the DPP Guidelines to any decision taken to commence a prosecution and has regard to the views and priorities of the WHS regulator. Any general or specific guidelines issued by the OWHSP are read with, and subject to, the DPP Prosecution Guidelines.

As well as conducting legal proceedings for breaches of the Queensland WHS Act, the OWHSP also advises the WHS regulator on matters relating to it and provides training to investigators<sup>41</sup>.

The OWHSP annual report<sup>42</sup> confirms the WHS regulator is responsible for operational decisions including as to whether an investigation is warranted, an investigation's scope, the ongoing management of the investigation, the prioritisation of investigations and the deployment of resources during investigations.

For most stakeholders who participated in this Review, the Queensland model is their preferred option if there is to be a change in how prosecutions are conducted in the ACT.

#### 3.1. Stakeholder responses

Whilst the Queensland model is considered 'the ideal' for most participants in this Review, their support is couched by a consistent comment that the ACT is too small to resource an independent statutory office to exercise all functions in relation to WHS prosecutions. One stakeholder noted:

*'the Queensland jurisdiction deals with exponentially more work health and safety incidents and injuries, and therefore prosecutions, than the ACT. It [the QLD model] is not fit for purpose in the ACT.'*

Others suggested the Queensland model could be adapted to suit the ACT context.

##### 3.1.1. Independence and control

Some stakeholders highlighted the creation of an OWHSP, whilst ensuring WHS specialist prosecutors would be available and ensuring their expertise and skills would develop over the years, did not resolve concerns they held about the independence of the WHS Commissioner and her ability to have the final say on whether to prosecute breaches of WHS laws.

##### 3.1.2. Consistency and efficiency

Everyone contributing to this Review was impressed by the level of efficiency, effectiveness, transparency, and consistency operating within the Queensland OWHSP<sup>43</sup>. *'It's fast and it's efficient'*, was a common response to the QLD model.

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<sup>39</sup> Details of the legislative, policy and operational framework which supports the model of an independent statutory office of the Work Health and Safety Prosecutor operating in Queensland are provided in Part Two of the Discussion Paper.

<sup>40</sup> *Work Health and Safety Act 2011* (QLD) Schedule 2, ss25-32.

<sup>41</sup> Office of the Work Health and Safety Prosecutor Annual Report 2020-2021 p5.

<sup>42</sup> Office of the Work Health and Safety Prosecutor *Annual Report 2020-2021*

<sup>43</sup> I have recommended that whatever model is adopted in the ACT, the Queensland approach to prosecution data collection and reporting should be adopted.

### 3.1.3. Skills and resourcing

Several contributors to the Review emphasised the staffing numbers in the Queensland OWHSP would not be a good use of resources in a much smaller jurisdiction like the ACT.

Others pointed to the fact the Northern Territory Government had considered the possibility of creating an independent statutory office for WHS prosecutions but formed the view this would be an inefficient use of resources in a small jurisdiction proposing *'that a similar conclusion would follow in the ACT'*.

To overcome this resourcing issue, some stakeholders suggested smaller jurisdictions like the Northern Territory, ACT and Tasmania could perhaps combine their resources and *'set up an OWHSP together'*. Another noted:

*'the ACT is double the size of the NT and its employment base is larger – the ACT economy should support it [an independent statutory WHS prosecution office].*

### 3.1.4. The public interest

The main point made from a public interest perspective in relation to the Queensland model was that an independent statutory OWHSP ensures there is no 'capture' of prosecutors by the WHS regulator which was a concern for several stakeholders.

## 3.2. Discussion and recommendations

The OWHSP was established because of a review which highlighted concerns about the conduct of WHS prosecutions in Queensland, many of which are mirrored in this Review.

The *Best Practice Review of Workplace Health and Safety Queensland* <sup>44</sup> emphasised the WHS regulator needs to be prosecuting and the prosecution process needs to be efficient, effective, transparent, and consistent. The OWHSP operates to ensure:

1. WHS prosecution decisions are made by an experienced legal decision maker with expertise in WHS law.
2. The decision maker is an experienced trial advocate/barrister who can appear in court to prosecute and defend WHS matters.
3. The decision maker is also a senior public servant with management experience who can ensure timelines and KPIs are met.
4. There is a 'figurehead' who is publicly associated with WHS prosecution matters.
5. Prosecution results are identified and openly reported.

Before the establishment of the OWHSP, Queensland had an in-house prosecution team within its WHS regulator. The impact of the new model appears to be emerging now that the OWHSP has been in operation for three years with a significant rise in completed prosecutions in the 2020/2021 financial year.

### Queensland Prosecutions Data<sup>45</sup>

2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
98	53	54	48	69	65	64	47	107

<sup>44</sup> *Best Practice Review of Workplace Health and Safety Queensland, Final Report* 3 July 2017

<sup>45</sup> *Comparative Performance Monitoring Report 23/Work Health and Safety Compliance and Enforcement* and Office of the Work Health and Safety Prosecutor, Annual Reports 2019-2021. It includes all prosecutions including those which were successful, unsuccessful, and withdrawn.

Between 2012 and 2019, the average time between an incident occurring and a decision by the WHS regulator in Queensland to prosecute in relation to an incident was 14 months<sup>46</sup>. In the financial year 2020/21, the average time between an incident occurring and a decision by the OWHSP to prosecute in relation to an incident was 202 days (approximately 6 and a half months).

The OWHSP annual reports, court reports and prosecution summaries also indicate the OWHSP has prosecuted many times where there has not been a fatality or serious injury. For example, it has prosecuted for a failure to notify the WHS Regulator when the duty holder was aware an incident was notifiable, obstruction of a WHS inspector and for exposing workers to silica dust<sup>47</sup>.

The results coming out of the OWHSP in Queensland are impressive. However, I am persuaded by those with the knowledge and experience of living and working in the ACT and conclude the resources required to establish an independent statutory prosecution office in the ACT with its specialist prosecutors, support staff and administrative infrastructure would not be the best use of resources in a smaller jurisdiction.

I am also reluctant to recommend the removal of prosecution decision making from one office external to the WHS regulator (DPP) to another office external to the WHS regulator (an OWHSP).

In my consideration of whether to recommend the creation of an independent prosecution office for WHS matters in the ACT, I was also interested in Commissioner Haynes' comments when he pondered whether to recommend the establishment of an independent civil penalty enforcement agency in the context of regulating business and financial markets.

He said,

*'the creation of a specialist civil enforcement agency would preserve all of ASIC's regulatory tools, save for the right to litigate in respect of civil penalty provisions. ASIC would be required to prepare a brief of materials to the new agency if a particular evidentiary threshold was reached. It would then be for the enforcement agency to make any decision about whether to commence proceedings. In other words, ASIC would act as the investigators but not make the decision to commence civil proceedings. There would be some benefits in such an arrangement. A specialised litigation agency would have to develop core skills in what is an increasingly specialised area of the law. This arrangement would repose responsibility for determining whether public interest considerations required action or no action in a professional body that would become skilled in making those judgements. Notwithstanding the prospect of those benefits, I do not recommend such a radical change. It may be that the removal of a regulatory tool as important as civil penalty litigation would have other effects on ASIC's work – because civil penalties were intended to be a feature of an enforcement regime that provided ASIC with gradations of sanctions based on 'strategic regulation theory' and the enforcement pyramid model'.<sup>48</sup>*

Given the terms of reference for this Review and the emphasis on the ability of the WHS Commissioner to secure compliance with the WHS Act through effective and appropriate compliance and enforcement measures; the independence and accountability of the WHS Commissioner; the principles underpinning WorkSafe ACT's *Compliance and Enforcement Policy 2020-2024* to ensure the highest standard of integrity (including consistency and transparency) in prosecutorial decision making; and the delivery of WorkSafe ACT's *Strategic Plan 2020-2024* to create an exemplary regulator and ensure firm and fair enforcement against non-compliance, I consider it is critical the WHS Commissioner is given the authority and independence to make decisions about when to use all of the enforcement tools at her disposal including prosecution.

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<sup>46</sup> *Best Practice Review of Workplace Health and Safety Queensland, Final Report* 3 July 2017

<sup>47</sup> Office of the Work Health and Safety Prosecutor, Annual Report, 2020-2021.

<sup>48</sup> Royal Commission, *Misconduct in the Banking, Superannuation and Financial Services Industry*, 2019 pp 428-29.

This does not mean, however, that key elements of the OWHSP and how it operates cannot be incorporated into the ACT model. I note Recommendations 1-4 of this Review are intended to adapt several of the OWHSP's best practice approaches to the ACT context<sup>49</sup>.

## Summary

The independent statutory office of a WHS prosecutor model is:

1. considered ideal by many participants in this Review.
2. considered not fit for purpose in a smaller jurisdiction by most participants.
3. increasing WHS prosecution efficiency, effectiveness, transparency, and consistency
4. resulting in more prosecutions for a more diverse range of offences.
5. replacing one external prosecution office (DPP) for another (OWHSP).
- 6.. a model that would limit the ability of the WHS Commissioner to use all the enforcement tools provided to her by the WHS Act
7. more suited to larger jurisdictions
8. a good example of prosecution data collection, reporting and performance management approaches

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<sup>49</sup> See Part 1 of this report.

## 4. Other Models

During my consultations, other models for conducting WHS prosecutions were raised as possible options for the ACT.

### 4.1 Government Solicitor's Office

It was proposed that a regulatory enforcement unit could be established within the Government Solicitor's Office (GSO) which would prosecute all regulatory offences across the Territory, and not just WHS matters. The GSO currently has a Regulation and Revenue unit which includes as a function '*Regulatory enforcement including civil penalties.*'

It was suggested that embedding a small team of specialist WHS prosecutors within a GSO based regulatory unit would be a cost-effective way of building WHS and other regulatory prosecution skills in the ACT. It would also apply a whole of government perspective to the problems/concerns raised by those contributing to this Review.

I note in the context of the GSO taking on WorkSafe ACT's prosecution matters the feedback from contributors to this Review that WorkSafe ACT is regularly asked to adjudicate WHS issues within Government agencies and directorates, for example, within ACT government hospitals, schools, and prisons. In these situations, it is likely that the GSO would be advising the relevant Government Departments on how to deal with the WHS regulator. I was further advised that these matters where there exists a clear conflict of interest could be briefed from the GSO to the external bar.

The proposed GSO model is like the model used in South Australia where the WHS regulator (and other regulators across the South Australian Government) refer briefs of evidence to a Solicitor from the Crown Solicitor's Office (CSO). Some CSO Solicitors are outposted to the relevant agency but continue to report directly to the CSO rather than the head of the agency within which they are placed.

I am not recommending the GSO model as part of this Review. Whilst I have considered the proposition that the GSO would likely be receptive to WorkSafe ACT's priorities, the model would in effect replace one external prosecution office (DPP) for another (GSO).

I also consider the conflicts of interest are problematic and reinforce the importance of ensuring that the WHS Commissioner can make WHS prosecution decisions independently.

### 4.2 Prosecution Panel

It was suggested that a prosecution panel, independent of WorkSafe ACT and the DPP, could make decisions about whether to prosecute based on the recommendation of the WHS Commissioner.

It was proposed this panel would be made up of a rotating group of people with expertise in industrial matters, WHS and law. It would consider the WHS Commissioner's recommendations and decide whether a prosecution should be commenced. If yes, WorkSafe ACT would then brief to external counsel to prosecute. It was suggested that this model is a cost-effective way to establish a variation on the Queensland model, providing for a prosecution decision maker independent of the WorkSafe ACT and the WHS Commissioner.

I note that the *Best Practice Review of Workplace Health and Safety Queensland* considered the merits of a Prosecutions Panel. It reported

*'the view of the review that the establishment of a prosecutions board [panel] is inappropriate due to conflicts of interest with potential members of such a board noting it is likely they would need to be legal practitioners. Additionally, a prosecutions board is considered to be an overly complex response to issues surrounding prosecutorial decision*

*making and that there are other alternatives approaches to ensuring the efficacy and independence of the decision-making process<sup>50</sup>.*

I agree with these assessments of the Prosecutions Panel model, and I am not recommending this approach.

### **4.3 Work Health and Safety Tribunal**

During discussions on the issues and concerns raised by this Review, and particularly in relation to concerns about broader issues such as sentencing and the lack of a designated Industrial Magistrate, it was suggested that a broader examination of the criminal justice framework as it relates to WHS prosecutions should be undertaken.

One suggestion in this broader context was to establish a separate tribunal with WHS Commissioners and Judges (and a counsel assisting) who can 'own' the WHS prosecution processes.

It was suggested this could lead to a more inquisitorial rather than adversarial approach to WHS matters and a stronger emphasis on restorative justice.

This section is included to ensure all ideas proposed are included and to sow the seeds for some further debate. I acknowledge that the tribunal concept lies outside the scope of this Review and am making no recommendation about it.

### **4.4 Other WHS jurisdictions**

For completeness, I considered all the remaining WHS prosecution decision making frameworks in Comcare, New South Wales, Tasmania, and the Northern Territory.

Currently in the Comcare jurisdiction, prosecution briefs of evidence are referred to the DPP following a decision to prosecute by the regulator's enforcement committee. There is a capacity for Comcare to prosecute using in-house staff, but this has not happened to date. I was advised that Comcare may take advantage of this flexibility to use in-house prosecutors for less complex matters going forward. Comcare also has the capacity to engage external counsel advice/prosecutors without having to seek permission from an outside agency/office.

SafeWork New South Wales has an in-house prosecution team. It occasionally briefs prosecution matters to the external bar and in those matters retains the role of instructing solicitors. Those operating within this system identified a consistent and strategic approach to prosecution decision making as an important benefit of having an in-house prosecution team.

In Tasmania, a decision to prosecute is made by the DPP following consideration of a recommendation by WorkSafe Tasmania.

WorkSafe Northern Territory has a WHS prosecution stream which consists of a co-ordinator who provides legal support, prepares, and files complaints, information, summons documents, manages the carriage of court files and undertakes prosecutorial duties in the local court. Complex matters are referred to the DPP.

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<sup>50</sup> *Best Practice Review of Workplace Health and Safety Queensland, p 70.*

## 5. A New Model for the ACT

I note that much work has been done over the last twelve months to improve the working relationship between WorkSafe ACT and the DPP and that WorkSafe ACT has improved the management of its investigations and the preparation of its briefs of evidence to ensure that the DPP can provide early advice on potential prosecutions.

I have made recommendations about efficiency, effectiveness, data collection and reporting which will build on these improvements. However, I consider that these alone will not resolve the issues highlighted during my Review.

I am therefore recommending a new model for the conduct of WHS prosecutions in the ACT.

It is important to note that my recommendation for a new model has as its objective achieving optimum outcomes for WorkSafe ACT's compliance and enforcement activities in the Territory. It should not be read as a criticism of the DPP or WorkSafe ACT officers currently responsible for the management of prosecution referrals and the provision of prosecution advice.

However, given everyone consulted considers the current conduct of WHS prosecutions in the ACT is deficient, I concluded that the best outcomes would not be achieved simply by placing new processes around or within the current operational frameworks. I am recommending an entirely new operational approach to the management of WHS prosecutions in the ACT.

During the stage two consultation for this Review, as well as the four broad areas of concern which emerged during stage one and which I presented in the Discussion Paper (independence and control, consistency and efficiency, skills and resourcing, and the public interest<sup>51</sup>) two other key issues emerged: These are:

- clarity and transparency; and
- effectiveness.

In recommending the new model I was guided by how best to address these six broad areas of concern, taking note of the ACT's size, the solid WHS regulatory foundations already embedded in the Territory because of the most recent amendments to the WHS Act, the creation of the WHS Commissioner's role and the establishment of a new structure within WorkSafe ACT.

I was also influenced by the OWHSP and the Victorian models and by those who have extensive experience in prosecuting WHS matters in other jurisdictions who advocated that to implement an effective WHS prosecution strategy the following personnel and roles are required, preferably all operating within the same agency:

1. an experienced legal decision maker
2. an experienced trial advocate/barrister
3. an experienced public servant/manager who can manage timelines, people etc
4. a figurehead who is clearly and publicly identifiable as the ultimate prosecution decision-maker

Having the right personnel embedded in WorkSafe ACT with the right decision-making authority will enhance the efficiency, effectiveness, transparency, consistency, and clarity regarding WHS prosecutions in the ACT.

The model I am proposing assigns all prosecution decision-making responsibilities to the WHS Commissioner. I consider this reinforces the intention of the model WHS Act which anticipates it is the WHS regulator making the initial decision whether to prosecute for breaches of WHS laws

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<sup>51</sup> *Conduct of Work Health and Safety Prosecutions Review (WorkSafe ACT) Discussion Paper, May 2022 pp 20-22*

and provides for an independent external review of that decision by the DPP in situations where a decision not to prosecute is made.<sup>52</sup>

The model I am recommending is a hybrid model which seeks to adapt elements of other jurisdictional models to work within the smaller ACT jurisdiction. Its aim is to provide the WHS Commissioner with the flexibility to refer briefs of evidence to either an in-house prosecution team, external counsel or the DPP for prosecution advice prior to her making any decision whether to prosecute.

I am also recommending that the WHS Commissioner, once she has decided that a prosecution will be commenced, is given the flexibility to decide whether to instruct the DPP, an in-house prosecutor or external counsel to progress the matter through the courts on her behalf. Importantly, where the WHS Commissioner engages the DPP or external counsel for trial advocacy of a WHS prosecution matter, I am recommending WorkSafe ACT's internal prosecution team will remain the instructing solicitors for the matter.

It is important to note that I am recommending industrial manslaughter matters should always be referred to the DPP with WorkSafe ACT's in house prosecution team acting as instructing solicitors.

I note that New Zealand's WHS regulator, WorkSafe New Zealand, uses a combination of internal and external prosecutors. The decision whether to use an internal or external prosecutor is one made by the WHS regulator. WorkSafe New Zealand includes in its prosecution policy examples of situations where an external prosecutor may be instructed to lead or support a prosecution.

Reason	Example
<b>To support WorkSafe's capacity to provide services</b>	Where there are insufficient staff within a particular district or area of regulation to meet needs
<b>Complex legal issues</b>	Likely to require complex advocacy with national implications
<b>High profile</b>	Case is high profile with considerable media interest. This may be because of the defendant's identity, international aspects, or circumstances surrounding the case or the victims' identity.
<b>Independence from WorkSafe required</b>	When the case calls for independent advice or advocacy – for example when there is a perceived or actual conflict of interest. <sup>53</sup>

Whilst I consider that the current wording of the WHS Act raises no obstacles to the hybrid model, to avoid doubt and to maintain WHS harmonisation, I am recommending that section 230 of the WHS Act is amended and the original wording of the model WHS Act is reinstated.

<sup>52</sup> See sections 230 and 231 of the model WHS Act.

<sup>53</sup> New Zealand Government, *WorkSafe Mahi Haumarua Aotearoa, Prosecution Regulatory Function Policy*, August 2020, p 21.



I note that the *Law Officers (General) Legal Services Directions 2012* (ACT) (Directions) states:

## **Legal Services (General) Directions**

### **1. Provision of legal services**

1.1 Subject to paragraphs 1.2, 1.3 and 1.4, all Territory legal work is to be performed by the Government Solicitor.

1.2 The Government Solicitor may outsource Territory legal work, or agree to an agency outsourcing Territory legal work, only with the approval of the Chief Solicitor.

*Example* The Chief Solicitor may approve the outsourcing of Territory legal work if there is a reasonable apprehension of a conflict of interest on the part of the Government Solicitor.

1.3 Paragraphs 1.1 and 1.2 do not apply to a Territory-owned corporation (TOC).

#### *Use of in-house lawyers by agencies*

1.4 Agencies may only engage an in-house lawyer if approved by the Attorney General, on the advice of the Chief Solicitor.

1.5 In-house lawyers are to perform a largely managerial function or provide advice and assistance where the availability of legal services on an immediate basis is integral to the delivery of the agency's core services and cannot be conveniently or appropriately provided by the Government Solicitor.

Clearly these Directions prevent the WHS Commissioner from seeking external counsel advice or engaging external counsel to run WHS prosecutions without the relevant permissions from the Chief Solicitor. They also limit the employment of in-house lawyers.

I am therefore recommending that the Directions are amended to exempt the WHS Commissioner from the prohibition on outsourcing legal work without the approval of the Chief Solicitor and the use of in-house lawyers without the approval of the Attorney-General (on the advice of the Chief Solicitor).

I am persuaded by the view it is critical for the WHS Commissioner to become the publicly identifiable figurehead for WHS prosecution decisions in the ACT. The many layers of approvals and authorisations external to WorkSafe ACT which currently exist to manage WHS prosecutions and the provision of legal advice I suggest detract from the ACT Government's objective of creating an independent, transparent, and accountable WHS regulator.

The concerns raised about the separation of investigation from prosecution decision making can be addressed with a strong internal governance model as evidenced by other WHS regulators which manage their own in-house prosecution teams.

I consider the proposed hybrid model will enable upskilling of an in-house prosecution team over the first few years of its operation when it could initially run less complex prosecutions whilst more complex prosecutions are run by either the DPP or external counsel. This in turn will enable upskilling across all WorkSafe Act staff in the identification of elements of offences, evidentiary issues, identifying witnesses and lines of inquiry and seriousness of offending.

Regular reporting to the WHS Council and to the community consistent with my Recommendations 3 and 4 will provide the opportunity to measure the effectiveness of the new model.

## Summary

The proposed new model:

1. allows the WHS Commissioner to seek prosecution advice from external counsel without having to seek the approval of the Chief Solicitor of the ACT.
2. allows the WHS Commissioner to decide whether to use an in-house prosecutor, a DPP prosecutor or an external prosecutor to progress WHS prosecutions
3. ensures that any industrial manslaughter prosecutions continue to be undertaken by the DPP
4. identifies the WHS Commissioner as the figurehead publicly associated with WHS prosecution decision making
5. enables the creation of an in-house prosecution team which can undertake less complex prosecutions while building its skills

### A New Model for the ACT

#### **Recommendation 8**

Amend the *Law Officers (General) Legal Services Directions 2012* (ACT) to allow the WHS Commissioner to seek prosecution advice from external counsel without the need for approval from the Chief Solicitor of the ACT.

#### **Recommendation 9**

Amend the *Law Officers (General) Legal Services Directions 2012* (ACT) to allow the WHS Commissioner to use external counsel to progress WHS prosecutions through the relevant courts without the need for approval from the Chief Solicitor of the ACT.

#### **Recommendation 10**

Amend the *Law Officers (General) Legal Services Directions 2012* (ACT) to allow the WHS Commissioner to establish an in-house prosecution team within WorkSafe ACT.

#### **Recommendation 11**

Ensure that all Industrial Manslaughter offences are prosecuted by the DPP.

#### **Recommendation 12**

Amend section 230 of the WHS Act to reflect the original wording of the model WHS Act.

## Appendix A Terms of Reference

The Review will consider whether the legislative, policy and operational frameworks within which work health and safety prosecutions are conducted in the Australian Capital Territory support:

- (a) the object of the WHS Act to secure compliance through effective and appropriate compliance and enforcement measures;
- (b) the independence and accountability of the WHS Commissioner;
- (c) the principles underpinning WorkSafe ACT's *Compliance and Enforcement Policy 2020-2024* to ensure the highest standard of integrity (including consistency and transparency) in prosecutorial decision making; and
- (d) the delivery of WorkSafe ACT's *Strategic Plan 2020-2024* to create an exemplary regulator and ensure firm and fair enforcement against non-compliance.

## Appendix B



# Office of the Work Health and Safety Prosecutor Business plan 2021-22

### About us

The Office of the Work Health and Safety Prosecutor (OWHSP) is an independent prosecution office, established by the Queensland Parliament under the *Work Health and Safety Act 2011*. OWHSP conducts and defends proceedings under Queensland's workplace and resources health and safety laws.



### Purpose

Our purpose is to provide an independent prosecution service which:

- meets the expectations of our client agencies and other stakeholders
- understands the priorities of our client agencies
- contributes to the safety of Queensland workers and members of the public.



### Aim

We aim to:

- act with courtesy and professionalism
- ensure consistency in decision-making
- work as model litigants
- ensure the timely advice of decisions and outcomes to our stakeholders.



### Strategic priorities

- Provide an efficient, effective and transparent prosecution service.
- Establish and maintain effective engagement with our stakeholders.
- Develop and recognise our people.



### Performance measures

#### Effectiveness

- Compliance in applying the Guidelines of the Director of Public Prosecutions<sup>1</sup> in decisions to commence, not commence, continue or discontinue a prosecution 100%.
- Prosecutions<sup>2</sup> resulting in a conviction 90%.

- Defendants in defended summary hearings resulting in conviction 70%.
- Defendants tried on indictment and convicted 70%.



#### Efficiency

- Briefs of evidence assessed within 120 days of referral 100%.
- Pre-brief advice provided within 30 days 100%.



AEUss/sa1y

<sup>1</sup> Namely the existence of a prima facie case, reasonable prospects of conviction and that a prosecution is in the public interest.

<sup>2</sup> The conviction rate is the percentage of defendants convicted in prosecutions which proceeded to a decision or verdict. The calculation does not include defendants where the OWHSP determined not to commence a prosecution or discontinued a prosecution prior to decision or verdict. "Conviction" includes any finding of guilt, and is not limited to prosecutions in which a conviction is recorded. It also includes prosecutions with multiple charges, where at least one charge is proven.



## Appendix C Key Terms

<b>ACT</b>	Australian Capital Territory
<b>CEP</b>	WorkSafe ACT's <i>Compliance and Enforcement Policy 2020-2024</i>
<b>DPP</b>	Office of the Director of Public Prosecutions
<b>NCEP</b>	National compliance and enforcement policy
<b>Nous Review</b>	Nous Group, <i>Independent review of the ACT's work safety compliance, infrastructure, policies and procedures, Final Report</i> , 27 August 2018.
<b>OWHSP</b>	Office of the Work Health and Safety Prosecutor, Queensland
<b>Review</b>	Conduct of Work Health and Safety Prosecutions Review (WorkSafe ACT) 2022
<b>WHS</b>	Work health and safety
<b>WHS Act</b>	<i>Work Health and Safety Act 2011 (ACT)</i>
<b>WHSP</b>	Work Health and Safety Prosecutor (Queensland)
<b>WorkSafe ACT</b>	The Office of the Work Health and Safety Commissioner, who along with the staff of WorkSafe ACT constitutes WorkSafe ACT

## Appendix D Consultation

Jacqueline Agius, Work Health and Safety Commissioner, WorkSafe ACT  
Ashlee Berry, Member Services Director, Master Builders Association of the ACT  
Anthony Brierley, General Manager, Australian Hotels Association (ACT Branch)  
Alan Campbell, Special Counsel, Employment and Industrial Relations, ACT Government Solicitor  
Martin Carrick, Practice Group Leader, Slater and Gordon Lawyers  
Kay Catanzariti, Founder, Will it Your Way  
Peter Collins, Director, Investigations, WorkSafe Victoria  
Stuart Craig, Waste Away  
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Brooke Grey, Senior Director, Investigations, WorkSafe ACT  
Jillian Hamilton, Chief Executive Officer, Safety Governance Foundation  
Brenton Higgins, Lead Organiser, Community and Public Sector Union (ACT Branch)  
Michael Hopkins, Chief Executive Officer, Master Builders Association of the ACT and Civil Contractors Federation of the ACT  
Wayne Huckstepp, Small Business Owner  
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Tyrone Smithers, Assistant Director, Major Investigations Team, WorkSafe ACT  
Chris White, SafeWork New South Wales  
Anna Whitty, Chief Executive Officer, Northside Community Services

Michael Young, Executive Director, Workplace Safety and Industrial Relations, Chief Minister,  
Treasury and Economic Development Directorate | ACT Government

Australian Education Union, ACT Branch

Construction, Forestry, Maritime, Mining and Energy Union, ACT Branch

Housing Industry Association, ACT/Southern NSW

Master Builders Association of the ACT

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