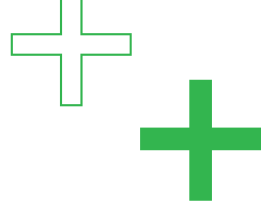


**WORKSAFE ACT  
RESPONSE:  
CONDUCT OF WORK  
HEALTH AND SAFETY  
PROSECUTIONS  
REVIEW – JUNE 2022**

MARCH 2023



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# BACKGROUND

In March 2022, the Australian Capital Territory (ACT) Work Health and Safety (WHS) Commissioner, Jacqueline Agius, engaged Marie Boland to undertake a review of the current legislative, policy and operational framework used in the ACT to initiate, run and manage WHS prosecutions.

In accordance with the review Terms of Reference, Ms Boland considered whether the legislative, policy and operational frameworks within which WHS prosecutions are conducted 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.

The Review's first stage considered the prosecution models of other WHS jurisdictions, previous reviews of WorkSafe ACT's approach and conducted preliminary stakeholder consultation. A Discussion Paper was developed following the completion of this work.

In the second stage of the Review, Ms Boland released the Discussion Paper for public consultation and sought community feedback on the ACT's WHS prosecution framework.

The *Conduct of Work Health and Safety Prosecutions Review June 2022* (the Review) was provided to WorkSafe ACT on 30 June 2022. The Review report contains 12 recommendations, four of which fall wholly within the remit of WorkSafe ACT (**Recommendations 3-6**). This document is WorkSafe ACT's response to these recommendations as well as the recommendations relating to a new prosecution model for the ACT (**Recommendations 7-12**).

## CURRENT WHS PROSECUTION PROCESS

By way of background, WHS prosecutions in the ACT are conducted by the Director of Public Prosecutions (DPP) on behalf of the WHS Commissioner via the referral of briefs of evidence. The decision to prosecute a WHS matter is made by the DPP – the WHS Commissioner cannot seek a review if the decision is made not to proceed a matter through the courts.

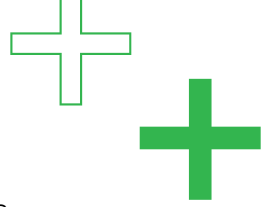
The DPP provides the Territory with an independent prosecuting service and continues to have a dedicated WHS prosecutor. In 2021-2022, the DPP reported its Work Safety Unit had a six prosecutor team headed by a Supervising Prosecutor and had three successful WHS prosecutions involving workplace fatalities in the construction sector.<sup>1</sup>

The WHS prosecution rate for the last several years as reported annually by the DPP is:

- 2017-2018: 2 prosecutions
- 2018-2019: 2 prosecutions
- 2019-2020: 3 prosecutions with one unsuccessful matter, and
- 2020-2021: 4 prosecutions with three unproven matters.<sup>2</sup>

<sup>1</sup> ACT Director of Public Prosecutions 2021-2021 Annual Report

<sup>2</sup> DPP Annual Reports 2017-2018 to 2021-22



The DPP prosecutor's role is independent of police and other investigative agencies such as WorkSafe ACT and once an investigation is referred for consideration to prosecute, any decision regarding its progress will be independently made by the DPP. As a result, the WHS Commissioner cannot influence, direct, or review any prosecutorial decisions made regarding WHS matters by the DPP.

## WHS REGULATORS

The Review considered the WHS prosecution decision making frameworks in other WHS regulatory bodies and found there is no consistency across jurisdictions in the frameworks used to manage WHS prosecutions. Regulators manage prosecutions in the following manner:

**Comcare:** prosecution briefs of evidence are referred to the Commonwealth DPP following a decision to prosecute by the regulator's enforcement committee. There is a capacity for Comcare to prosecute using in-house staff.

**Victoria:** in-house prosecution team which occasionally refers matters to the DPP.

**New South Wales:** in-house prosecution team. It occasionally briefs prosecution matters to external counsel and in those matters retains the role of instructing solicitors.

**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 court files and undertakes prosecutorial duties in the local court. Complex matters are referred to the DPP.

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

**Queensland:** an external prosecution body conducts all WHS prosecutions.

**Western Australia:** in-house prosecution team which briefs complex matters to the State Solicitor's office. All industrial manslaughter prosecution matters are referred to the DPP.

## WORKSAFE ACT'S POSITION ON THE CURRENT WHS PROSECUTION PROCESS

The current model of WHS prosecutions in the ACT is not aligned with the public's (community and stakeholders) expectations and the legislative provisions which designate the WHS Commissioner as the single responsible authority for WHS regulatory decision making. The current process does not permit the WHS Commissioner to discharge her duties according to the *Work Health and Safety Act 2011* (ACT) as the person accountable for all regulatory WHS decisions.

The lack of control over the management of WHS prosecution decision making is inconsistent with the WHS Commissioner's vision for WorkSafe ACT to operate as an independent WHS regulator. It restricts the WHS Commissioner's ability to positively influence a change in safety culture and risks and undermines the objective of creating safe workplaces across the ACT.

Providing the WHS Commissioner with the authority to decide when to prosecute WHS breaches, and the flexibility to choose where to seek prosecution advice, is a critical element required to deliver WorkSafe ACT's objective of a genuinely independent WHS regulator.

This paper suggests a refined hybrid model of initiating and managing WHS matters from the moment an incident or alleged WHS breach is notified to the regulator, through to the final decision to prosecute the matter through the courts. The proposed hybrid model will allow the WHS Commissioner to respond to emerging issues from workplace risks such as sexual harassment, bullying and occupational violence and link its prosecutorial decision making to strategic priorities.

# RECOMMENDATIONS

The Review made the following 12 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.

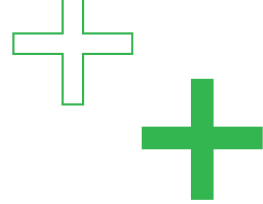
**Recommendation 8:** Amend the Law Officers (General) Legal Services Directions 2012 (ACT) to allow the WHS Commissioner to seek prosecution advice from external counsel without the need for approval from the Chief Solicitor of the ACT.

**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.



## RESPONSE TO RECOMMENDATIONS SPECIFIC TO WORKSAFE ACT

As specified in the [Work Health and Safety \(Office of the Work Health and Safety Commissioner\) Statement of Operational Intent 2022](#), the WHS Commissioner has agreed, in-principle, to the implementation of all recommendations falling within the scope of WorkSafe ACT.

This includes any improvements suggested to Worksafe ACT's existing supports already in place to assist families in the event of a workplace death or serious injury.

Recommendation	Position	Action
<p><b>3</b> 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.</p>	<p><b>Agree</b></p>	<p>WorkSafe ACT will include this information in its Quarterly Data Reports which are provided to the Minister for Industrial Relations and Workplace Safety and the ACT WHS Council.</p> <p><b>Expected completion:</b>  <b>Complete</b> - WorkSafe ACT commenced publishing prosecution information in its monthly reports (now quarterly) in August 2022.</p>
<p><b>4</b> 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.</p>	<p><b>Agree</b></p>	<p>WorkSafe ACT has considered this recommendation and identified the next steps that need to be undertaken to facilitate implementation.</p> <p><b>Expected completion: In progress</b> – this work will be progressed when implementing the full suite of the Review's recommendations.</p>
<p><b>5</b> Develop a prosecution policy which states clearly how prosecution decisions are made and highlights the breaches expected to result in prosecution action.</p>	<p><b>Agree</b></p>	<p>WorkSafe ACT has commenced the development of a prosecution policy which encompasses the specifics of this recommendation.</p> <p><b>Expected completion: In progress</b> – this work will be finalised in the first half of 2023.</p>

Recommendation	Position	Action
<p><b>6</b> Incorporate prosecution priorities into the statement of operational intent.</p>	<p><b>Agree</b></p>	<p>WorkSafe ACT has stated its commitment to deliver the Review's recommendations falling within its scope in the <a href="#">statement of operational intent 2022</a></p> <p><b>Expected completion: In progress</b> - WorkSafe ACT will incorporate its prosecution priorities into the statement of operational intent for 2023.</p>

## WORKSAFE ACT'S POSITION IN THE REVIEW'S PROPOSED PROSECUTION MODEL

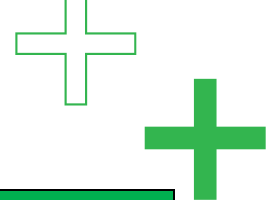
Acknowledging that the remaining recommendations will ultimately be a decision for the ACT Government, WorkSafe ACT has considered, and formed a view, on the recommendations which the Review categorised as "A new model for the ACT" (**Recommendations 7-12**).

The Review proposed several prosecution models and recommended the establishment of an in-house prosecution team. The establishment of an in-house prosecution team was regarded as the most effective model for ensuring the continued independence of the WHS Commissioner by allowing her to exercise all her regulatory functions.

WorkSafe ACT notes, however, that the proposed in-house prosecution team of a senior prosecutor, two junior prosecutors, a legal graduate and a paralegal raised several concerns with stakeholders and community representatives. It is the view of WorkSafe ACT that, given the size of the Territory, the costs of an in-house prosecution team and the possibility of 'capture' does not make this option viable.

Having considered the options presented in the Review, WorkSafe ACT instead supports a refined hybrid model which varies from the Review's recommendation. The refined hybrid model adopts elements of other jurisdictional models and is underpinned by WorkSafe ACT's ability to independently seek external counsel and an external prosecutor. Specifically, WorkSafe ACT's proposed hybrid model would:

- allow the WHS Commissioner to seek prosecution advice from external counsel without having to seek the approval of the ACT Solicitor-General (**Recommendation 8**)
- allow the WHS Commissioner to engage an external prosecutor to progress WHS prosecutions (**Recommendation 9**)
- ensure that any industrial manslaughter prosecutions continue to be undertaken by the DPP (**Recommendation 11**)
- permit prosecutions to be aligned with strategic objectives of WorkSafe ACT and provide the opportunity to conduct test cases in emerging WHS risks
- permit WorkSafe ACT to pursue the recovery of legal costs, and
- optimise the independence and accountability of the WHS Commissioner to initiate, manage and conduct WHS prosecutions.



Recommendation	Position	Reason
<p><b>7</b> Establish an in-house prosecution team comprising one senior prosecutor, two junior prosecutors, a legal graduate, and a paralegal.</p>	<p><b>Not supported</b></p>	<p>The costs of an in-house prosecution team and the possibility of 'capture' does not make this option viable</p>
<p><b>8</b> Amend the <i>Law Officers (General) Legal Services Directions 2012</i> (ACT) to allow the WHS Commissioner to seek prosecution advice from external counsel without the need for approval from the Chief Solicitor [Solicitor-General] of the ACT.</p>	<p><b>Support</b></p>	<p>The current legislation prevents the WHS Commissioner from seeking external counsel advice or engaging external counsel to conduct WHS prosecutions without Chief Solicitor approval. This amendment would facilitate WorkSafe ACT's preferred hybrid model.</p>
<p><b>9</b> Amend the <i>Law Officers (General) Legal Services Directions 2012</i> (ACT) to allow the WHS Commissioner to use external counsel to progress WHS prosecutions through the relevant courts.</p>	<p><b>Support</b></p>	<p>This amendment would facilitate WorkSafe ACT's preferred hybrid model.</p>
<p><b>10</b> Amend the <i>Law Officers (General) Legal Services Directions 2012</i> (ACT) to allow the WHS Commissioner to establish an in-house prosecution team within WorkSafe ACT.</p>	<p><b>Not supported</b></p>	<p>WorkSafe ACT does not support the establishment of an in-house prosecution team. This amendment will not be required if the establishment of an in-house prosecution team is not pursued.</p>
<p><b>11</b> Ensure that all Industrial Manslaughter offences are prosecuted by the DPP.</p>	<p><b>Support</b></p>	<p>WorkSafe ACT has no objections with this recommendation.</p>
<p><b>12</b> Amend section 230 of the WHS Act to reflect the original wording of the model WHS Act.</p>	<p><b>Support</b></p>	<p>WorkSafe ACT supports amendments to reflect the original wording of the model WHS Act and remove the requirement for the WHS Commissioner to refer matters to the DPP.</p>



## Summary

WorkSafe ACT agrees to all of the Review's recommendations which fall directly within its remit. However, WorkSafe ACT supports a refined hybrid model which will provide the WHS Commissioner with the authority and independence to make decisions about when to use all of the enforcement tools at her disposal including prosecution. This approach is consistent with the intention of the Review's recommendations.

The ability to apply a risk based regulatory management approach to decision making, about whether to prosecute and to run test cases, allows for the WHS regulator's strategic priorities to be aligned to prosecutorial decision making.

The legal costs associated with a prosecution can also, at times, be significant. To ensure these costs do not inadvertently divert money from WHS compliance activities, WorkSafe ACT would like the option of pursuing costs from a defendant where it is reasonable to do so.

It is Worksafe ACT's strong view that the proposed hybrid model will promote a quicker and more consistent approach to prosecutorial decision making. The hybrid model would also facilitate enforcement of a broader scope of offences across a wider range of industries, for example health and community services and beyond physical injuries to include psychosocial injuries such as bullying, sexual harassment, and mental health.

WorkSafe ACT is committed to working with the ACT Government and relevant stakeholders to ensure the ACT's WHS prosecution model is cotemporary, fit for purpose and meets community expectations.