

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

*Discussion Paper*

*May 2022*

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## Foreword

I have been engaged by the Work Health and Safety (WHS) Commissioner to review the legislative, policy and operational framework currently being used in the Australian Capital Territory (ACT) to initiate, run, and manage WHS prosecutions (Review).

I have also been 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 has two stages:

### Stage One

During Stage One, I considered the WHS laws, operational policies, procedures and staffing structures supporting the conduct of WHS prosecutions in the ACT. I examined other jurisdictional models with a particular emphasis on Queensland, Western Australia and Victoria<sup>1</sup>. I considered previous reviews and commentaries on WorkSafe ACT's approach to compliance and enforcement of WHS laws, and undertook preliminary consultations.

The stage one work helped shape this Discussion Paper and the Terms of Reference for the Review which are listed at page 4.

### Stage Two

Stage Two of the Review involves the distribution of this Discussion Paper as widely as possible with an invitation to provide written feedback to me.

Focusing on the Terms of Reference, the Discussion Paper highlights key issues and concerns raised through the preliminary research and consultations about the current approach to conducting WHS prosecutions in the ACT and poses questions that you may wish to answer in a written submission.

The topics covered and the questions asked are not exhaustive and you are welcome to raise other issues. Equally, you are not required to answer all the questions posed in the Discussion Paper; you may address only those which are of relevance to you.

I am also happy to speak face to face with anyone who would prefer to provide their comments in that way (by zoom, teams, skype etc).

I will consider the feedback from all participants, drawing on your experiences, knowledge, and collective wisdom, when writing my final report and proposing recommendations.

In considering the merits of any calls for change, I will be guided by whether proposals would support the compliance and enforcement object of the *Work Health and Safety Act 2011* (ACT) (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 and of creating an exemplary regulator; and reinforce the principles of consistency and transparency upon which WorkSafe ACT's compliance and enforcement policy is built.

I would like to acknowledge the support and assistance I received from WorkSafe ACT in preparing this paper. I am also grateful to everyone who agreed to speak with me during Stage One of the Review.

**Marie Boland**

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<sup>1</sup> I chose these jurisdictions because they provide the opportunity to consider alternative approaches to the conduct of prosecutions.

# Terms of Reference and review timeline

## Terms of Reference

The Review will consider whether the legislative, policy and operational frameworks within which work health and safety (WHS) prosecutions are conducted in the Australian Capital Territory (ACT) 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.

## Timeline

Early May 2022	Distribution of Discussion Paper and invitation to provide feedback
May- June 2022	Consultation and consideration of feedback
30 June 2022	Delivery of Final Report with recommendations to the WHS Commissioner

## How to contribute your views

You can share your views about, and experiences of, the conduct of WHS prosecutions in the ACT by sending a written submission to the independent reviewer at [marie.boland@bigpond.com.au](mailto:marie.boland@bigpond.com.au) by the end of the day on **3 June 2022**.

If you would like to provide comments in a different format, speak with the reviewer or make a confidential submission, please contact Marie Boland at the above email address.

A list of questions to help guide your submission and feedback is provided at page 24.

## Setting the scene

In 2018, the ACT Government engaged the Nous Consulting Group to undertake a review of the ACT's WHS compliance and enforcement arrangements (2018 Independent Review)<sup>2</sup>. The 2018 Independent Review made 27 recommendations which it considered would enable WorkSafe ACT to be an effective and efficient regulator into the future.

A key recommendation was that WorkSafe ACT should be established '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>3</sup>.

Consistent with the 2018 Independent Review's recommendation, the *Work Health and Safety Amendment Act 2019* (ACT) established the WHS Commissioner as the regulator and created a single statutory office of the WHS Commissioner who, along with the staff of WorkSafe ACT, constitutes WorkSafe ACT.

On 28 April 2020, Ms Jacqueline Agius was appointed by the Minister for Employment and Workplace Safety to the role of WHS Commissioner.

Importantly for the purpose of this Review, the WHS Act confirms that 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 the WHS Act or another Territory law under which she performs a function<sup>4</sup>.

As well as assigning the functions of the regulator to the WHS Commissioner, the WHS Act also provides that she must make a compliance and enforcement policy, a strategic plan, and a draft statement of operational intent<sup>5</sup>. The WHS Commissioner has met these requirements, developing the *WorkSafe ACT Compliance and Enforcement Policy 2020-24* and the *WorkSafe ACT Strategic Plan 2020-2024*.

The *WorkSafe ACT Compliance and Enforcement Policy 2020-24* reinforces that the aim of WorkSafe ACT's compliance and enforcement activity is to prevent work-related deaths, injuries, and diseases by securing the highest possible level of compliance with the legislation<sup>6</sup>. It highlights the key principles guiding WorkSafe ACT when undertaking its compliance and enforcement role as 'Consistency, Constructiveness and Transparency'<sup>7</sup>.

The *WorkSafe ACT Strategic Plan 2020-2024* sets out the strategic focus areas for the regulator over the coming four years. It identifies the strategies underpinning WorkSafe ACT's activities as:

- Ensuring fair and firm enforcement against non-compliance.
- Minimising physical and psychological harm and improving WHS practice and culture.
- Engaging with stakeholders to better understand and respond to current and emerging WHS issues.
- Creating an exemplary regulator<sup>8</sup>.

This review is taking place within the context of the continuing work being done by WorkSafe ACT to implement the recommendations of the 2018 Independent Review to ensure the independence of the WHS Commissioner, to operate consistently with its compliance and enforcement policy, to deliver on its strategic priorities and to continuously improve the operational framework within which it operates.

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<sup>2</sup> Nous Group, *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures, Final Report*, 27 August 2018.

<sup>3</sup> Nous Group, *Independent review of the ACT's work safety compliance, infrastructure, policies and procedures, Final Report*, 27 August 2018, Recommendation 21, p 10.

<sup>4</sup> For more information about the legislative context within which the WHS Commissioner operates see page 6

<sup>5</sup> *Work Health and Safety Act 2011* (ACT) Schedule 2, s2.22. The *Draft Statement of Operational Intent* outlines how WorkSafe ACT will give effect to the Minister's Statement of Expectations which are his/her priority activities and initiatives identified having consulted with the Work Health and Safety Council (an advisory body comprising of union and employer representatives, the WHS Commissioner and the Public Sector Workers Compensation Commissioner).

<sup>6</sup> *WorkSafe ACT Compliance and Enforcement Policy 2020-2024* p 5. For a more detailed discussion of this policy see page 10. It is noted that WorkSafe ACT also has a compliance and enforcement role within the context of Dangerous Substances and Labour Hire Licencing legislation; however, the focus of this review is on WHS matters.

<sup>7</sup> *WorkSafe ACT Compliance and Enforcement Policy 2020-2024* p 6

<sup>8</sup> *WorkSafe ACT, Strategic Plan 2020-2024*, p 11

# Part 1: Current Model

## 1.1 Legislative Context

### 1.1.1 The Work Health and Safety Regulator

The ACT has implemented the nationally agreed model WHS laws comprising of the WHS Act, the *Work Health and Safety Regulation 2011* (ACT) (WHS Regulations) and 27 Codes of Practice (Codes).

The WHS Act:

- establishes WHS duties requiring the elimination or minimisation of risks arising from work
- provides for worker representation, consultation and participation relating to WHS matters
- enables compliance with and enforcement of the WHS Act, WHS Regulations and Codes through the regulator, including the initiation of legal proceedings, and
- provides for the creation of regulations and Codes to support the objectives of the WHS Act.

One of the WHS Act's key objects is:

*securing compliance with this Act through effective and appropriate compliance and enforcement measures.*<sup>9</sup>

To meet this objective, the WHS Act provides for the establishment of a regulator.

The regulator is defined in the WHS Act as the WHS Commissioner<sup>10</sup> and she is responsible for exercising the regulator's functions under section 152 of the WHS Act, including 'to conduct and defend proceedings under this Act before a court or tribunal'<sup>11</sup>.

Parts 9 and 10 of the WHS Act provide for the appointment of inspectors by the regulator and lists their functions and powers which relevantly include:

*'to investigate contraventions of this Act and assist in the prosecution of offences.'*<sup>12</sup>

### 1.1.2 The Work Health and Safety Commissioner

In addition to assigning the functions of the regulator to the WHS Commissioner, the WHS Act provides for additional functions specific to her role and her office (WorkSafe ACT).

These include:

*'ensuring, as far as practicable, that the functions of the office are exercised in a way that takes into account, and complies with, the compliance and enforcement policy, the strategic plan, and the statement of operational intent.'*<sup>13</sup>

The WHS Act requires that the WHS Commissioner must, for every period of four years, make a compliance and enforcement policy that includes the following:

- (a) the aims of compliance and enforcement activity for the office
- (b) the key principles underpinning compliance and enforcement activity to be carried out by the office
- (c) the approach the office must take in relation to monitoring and compliance
- (d) the compliance and enforcement tools to be used by the office
- (e) guidance material about enforcement, investigation and prosecution recommendation criteria to be applied by the office

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<sup>9</sup> *Work Health and Safety Act 2011* (ACT) s3(1)(e)

<sup>10</sup> *Work Health and Safety Act 2011* (ACT) Dictionary

<sup>11</sup> *Work Health and Safety Act 2011* (ACT) s152(h)

<sup>12</sup> *Work Health and Safety Act 2011* (ACT) s160(e)

<sup>13</sup> *Work Health and Safety Act 2011* (ACT) Schedule 2, Part 2.2, Division 2.2.3, s2.22(e)(ii)

- (f) *any other matter relating to the compliance and enforcement functions of the office prescribed by regulation.*<sup>14</sup>

The WHS Commissioner must also, for every period of four financial years, make a plan (a strategic plan) that includes the following:

- (a) *the purpose and objectives of the office*
- (b) *the outcomes to be achieved by the office*
- (c) *strategies to be used by the office to achieve the matters mentioned in paragraphs (a) and (b)*
- (d) *the strategic enforcement priorities for the office*
- (e) *a description of the operating environment of the office*
- (f) *the performance criteria for the office*
- (g) *strategies to improve the capability of the office*
- (h) *procedures for the oversight and management of risk within the office*
- (i) *any other matter related to strategic planning for the office prescribed by regulation.*<sup>15</sup>

### **1.1.3 Offences and Penalties**

There are three categories of penalties in the WHS Act which may be prosecuted, based on the degree of culpability, risk, and harm<sup>16</sup>.

Category 1 offences relate to serious cases of non-compliance, involving recklessness in exposing an individual to whom a duty of care is owed to the risk of death, serious illness, or injury. Individuals who are convicted of a Category 1 offence could face a prison sentence for a term of up to five years with the maximum penalty of \$3,000,000 for a body corporate convicted of the offence.

Category 2 offences relate to a person who fails to comply with their health and safety duty and in doing so exposes an individual to a risk of death or serious injury or illness. If convicted of a Category 2 offence individuals face maximum penalties of \$150,000, officers of a PCBU \$300,000 and body corporates \$1,500,000.

Category 3 offences relate to a person who fails to comply with their health and safety duty without the aggravating factors present in the first two categories. If convicted of a Category 3 offence individuals face maximum penalties of \$50,000, officers of a person who is conducting a business or undertaking (PCBU) \$100,000 and body corporates \$500,000.

The WHS Act also includes an offence of industrial manslaughter.

The industrial manslaughter offence relates to a PCBU or an officer of a PCBU if they:

- have a health and safety duty under the WHS Act
- engage in conduct that breaches a health and safety duty
- the conduct causes the death of a worker or another person, or
- an injury to a worker that later causes death of the worker, and
- are negligent or reckless about causing the death.<sup>17</sup>

Individuals who are convicted of an industrial manslaughter offence could face a prison sentence for a term of up to 20 years. The maximum penalty for a body corporate convicted of the offence is \$16,500,000.

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<sup>14</sup> *Work Health and Safety Act 2011* (ACT) Schedule 2, Part 2.2, Division 2.2.5, s2.37(1).

<sup>15</sup> *Work Health and Safety Act 2011* (ACT) Schedule 2, Part 2.2, Division 2.2.5, s2.38(1).

<sup>16</sup> *Work Health and Safety Act 2011* (ACT) ss31-33. There are exceptions for volunteer officers and unincorporated associations at s 34.

<sup>17</sup> *Work Health and Safety Act 2011* (ACT) s 34A.

There are several other offences under the WHS Act that relate to specific requirements and carry their own individual penalties. These include offences in relation to:

- incident notification (for example failure to notify the regulator of a notifiable incident)
- authorisations (for example using unauthorised plant equipment or substances at a workplace)
- consultation (for example failing to consult other duty holders or workers about WHS matters)
- the establishment of workgroups (for example failing to negotiate with workers or their representative regarding the formation of workgroups)
- Health and Safety Representatives (for example failing to consult with HSRs on WHS matters)
- Health and Safety Committees (for example, failing to establish an HSC following a request)
- discriminatory, coercive or misleading conduct (for example, knowingly or recklessly making a false or misleading representation to another person regarding the rights, obligations or abilities under the model WHS act), and
- the regulator and inspectors (for example impersonating an inspector).

The WHS Act also provides scope for issuing infringement notices (in effect 'on the spot' fines) which inspectors can use as an alternative to prosecution in prescribed circumstances<sup>18</sup>.

#### 1.1.4 Legal Proceedings

Part 13 of the WHS Act deals with the initiation of prosecutions for alleged breaches and the relevant provisions for the purpose of this review are extracted at Appendix A.

These provisions largely mirror those of the model WHS Act and were the subject of extensive consideration when the model laws were developed. At that time, several options about who should have standing to bring legal proceedings for offences under the model WHS Act were canvassed, including union and third party rights to prosecute<sup>19</sup>.

Ultimately, it was recommended that the right to bring a prosecution should lie with the regulator because *'it has the benefits of ensuring that the resources, expertise and accountability of the Crown is always applied to prosecution decisions and proceedings. It also facilitates the graduated enforcement that we consider must underpin securing compliance with the model Act'*<sup>20</sup>.

This approach was accompanied by four safeguards which are reflected in the WHS Act as follows:

1. The process for deciding upon prosecutions should be transparent and taken against the background of clear, publicly available prosecution guidelines (s230(3))
2. The regulator's decisions about not taking prosecution action should be speedily reviewable by an external authority (the DPP in each jurisdiction should have this role) (s231(3)); and
3. A person who considers that a particular action or inaction constitutes a serious breach of a duty of care (a Category 1 or 2 or an industrial manslaughter offence) may request in writing that there be a prosecution in relation to the matter <sup>21</sup> (ss231 ss(1-2)), and
4. The DPP also has the capacity to bring a prosecution for an indictable offence (s230(5)).

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<sup>18</sup> *Work Health and Safety Act 2011* (ACT) s 243

<sup>19</sup> Chapter 46: 'Who May Prosecute' in *National Review into Model OHS Laws: Second Report to WRMC* January 2009 pp 334 ff.

<sup>20</sup> *National Review into Model OHS Laws: Second Report to WRMC* January 2009 p 345

<sup>21</sup> Safeguards recommended by the *National Review into Model OHS Laws: Second Report to WRMC* January 2009, p 345



At the operational level, if WorkSafe ACT considers that a matter should be prosecuted, it refers the brief of evidence to the DPP and it is the DPP who decides whether to prosecute. This process is reflected in s230(2) of the WHS Act<sup>22</sup>.

Civil proceedings may also be brought by the regulator to deal with breaches of the provisions relating to WHS entry permit holders – whether by entry permit holders or by those who owe duties to them<sup>23</sup>.

### 1.1.5 Dangerous substances and labour hire licensing laws

The WHS Commissioner performs regulatory functions under other legislation, for example, the *Dangerous Substances Act 2004* (ACT) and the *Labour Hire Licensing Act 2020* (ACT). However, this review will focus on the conduct of prosecutions as they relate to alleged breaches of the WHS Act.

## 1.2 Policy Context

### 1.2.1 National Compliance and Enforcement Policy

The National Compliance and Enforcement Policy (NCEP) is a 'model policy' developed as a means of ensuring a consistent regulatory approach to support the intention and efficacy of the harmonisation of WHS laws nationally<sup>24</sup>. Jurisdictions can refer to and/or adopt the NCEP as their own. The NCEP was endorsed by WHS ministers, including the ACT Minister in August 2011.

The NCEP specifies nationally agreed:

- aims of compliance and enforcement
- key principles underpinning compliance and enforcement activities
- strategic enforcement priorities
- monitoring and compliance approaches
- compliance and enforcement tools
- information about guidance, enforcement, investigation and prosecution criteria

Part 7 of the NCEP lists the criteria which guide the regulators' enforcement decision making as:

- the adverse effect, that is the extent of the risk, the seriousness of the breach and the actual or potential consequences
- the culpability of the duty holder, that is, how far below acceptable standards the conduct falls and the extent to which the duty holder contributed to the risk
- the compliance history and attitude of the duty holder
- if it is a repeat offence or there is a likelihood of the offence being repeated
- whether the duty holder was authorised to undertake certain types of work;
- impact of enforcement on encouragement or deterrence
- any mitigating or aggravating circumstances, including efforts undertaken by the duty holder to control risks
- whether the risk to health and safety is imminent or immediate, and
- whether the safety issue can be rectified in the presence of an inspector or the inspector is satisfied with a plan to remedy the breach<sup>25</sup>.

The NCEP notes that the WHS regulators operate within a broader prosecutorial framework as part of each jurisdiction's criminal justice system and that each applies the Director of Public Prosecution (DPP) guidelines specific to its jurisdiction. It further notes there are three criteria common to all DPP guidelines across all jurisdictions which need to be met in determining whether or not to prosecute.

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<sup>22</sup> For more details about the operational processes that lead to the decision to prosecute see page 12

<sup>23</sup> *Work Health and Safety Act 2011* (ACT), Part 7.

<sup>24</sup> Safe Work Australia, *National Compliance and Enforcement Policy* (2011).

<sup>25</sup> Safe Work Australia, *National Compliance and Enforcement Policy* (2011) p 7.

These are:

1. the existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of legal proceedings.
2. a reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court (taking into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, the admissibility of any confession or other evidence, and any lines of defence available to the defendant).
3. a public interest test which may include the following considerations:
  - a) the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature
  - b) any mitigating or aggravating circumstances
  - c) the characteristics of the duty holder—any special infirmities, prior compliance history and background
  - d) the age of the alleged offence
  - e) the degree of culpability of the alleged offender
  - f) whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
  - g) the efficacy of any alternatives to prosecution
  - h) the prevalence of the alleged offence and the need for deterrence, both specific and general, and
  - i) whether the alleged offence is of considerable public concern<sup>26</sup>.

### 1.2.2 WorkSafe ACT Compliance and Enforcement Policy

WorkSafe Act has been guided by the NCEP in developing its *Compliance and Enforcement Policy 2020-2024* (CEP). In the context of prosecutions, the CEP reinforces that WorkSafe ACT 'operates within a broader prosecutorial framework as part of the Territory's criminal justice system that requires the highest standard of integrity to be applied in prosecutorial decision making'.<sup>27</sup>

It confirms that the *Prosecution Policy of the Australian Capital Territory* is applied in making decisions on whether to refer a WHS matter to the DPP. It further confirms that in determining whether or not to prosecute, three criteria need to be met. These criteria mirror those set out in the NCEP.

### 1.2.3 Prosecution Policy of the Australian Capital Territory

The DPP's prosecution policy explains in some detail the general criteria which underpin the decision to prosecute. It describes the decision of the DPP to prosecute as a two-stage process. Firstly, does the evidence offer reasonable prospects of conviction and if so, secondly, is it in the public interest to proceed with a prosecution<sup>28</sup>.

The prosecution policy notes that the DPP is invested with **significant discretion** (emphasis added), and, in appropriate cases, must give serious consideration to whether the public interest requires that the prosecution be pursued.

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<sup>26</sup> Safe Work Australia, *National Compliance and Enforcement Policy* (2011) p 10.

<sup>27</sup> WorkSafe ACT, *Compliance and Enforcement Policy 2020-2024*

<sup>28</sup> *The Prosecution Policy of the Australian Capital Territory*, p 3.

The prosecution policy provides a non-exhaustive list of the factors that may be relevant to the public interest. This list includes those already highlighted in the previous discussion of the NCEP and includes additional criteria as follows:

- the effect on public order and morale
- whether the consequences of any resulting conviction would be unduly harsh and oppressive
- any entitlement of a person or body to criminal compensation, reparation or forfeiture if prosecution action is taken
- the actual or potential harm occasioned to any person as a result of the alleged offence,
- the attitude of the victim of the alleged offence to a prosecution
- the need to give effect to regulatory priorities
- the likely length and expense of a trial
- whether the accused is willing to cooperate in the investigation or prosecution of others, or the extent to which they have already done so
- the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court
- whether the alleged offence is triable only on indictment, and
- the need to maintain public confidence in such basic institutions as parliament and the courts<sup>29</sup>.

### 1.3 Operational context

WorkSafe ACT has developed Standard Operating Procedures relevant to the investigation process including one on preparing briefs of evidence. When an incident is notified to WorkSafe ACT, it is triaged to decide what level of response will be taken.

Where a decision is made to undertake a preliminary investigation of the incident it is referred to a WorkSafe ACT inspector. The result of this early investigation is then considered by a Case Management Panel (Panel) which is comprised of the agency's Senior Directors, Directors and the Deputy WHS Commissioner.

The Panel makes the decision about whether an incident should be further investigated to produce a brief of evidence that will support a potential prosecution or whether the file should be closed.

A Senior Legal Officer provides legal advice to inspectors and investigators regarding the scope of their powers, administrative law issues and other general advising. This position also plays a role in quality control - reviewing completed investigation briefs of evidence before they are sent to the WHS Commissioner for consideration.

Once the brief of evidence is completed and reviewed by the relevant Manager and Senior Legal Officer it is forwarded to the WHS Commissioner.

If the WHS Commissioner decides that a prosecution should go ahead she will refer the file to the DPP. Importantly for the purpose of this review, it is the DPP who decides whether charges should be laid or not<sup>30</sup>. In making the decision, the DPP is guided by the ' *The Prosecution Policy of the Australian Capital Territory*'. Once the DPP has made its decision, it informs WorkSafe ACT's Senior Director, Investigations who will either initiate the prosecution or close the file consistent with the DPP's recommendations.

In the financial year 2019-2020 two prosecutions were finalised through the courts<sup>31</sup>.

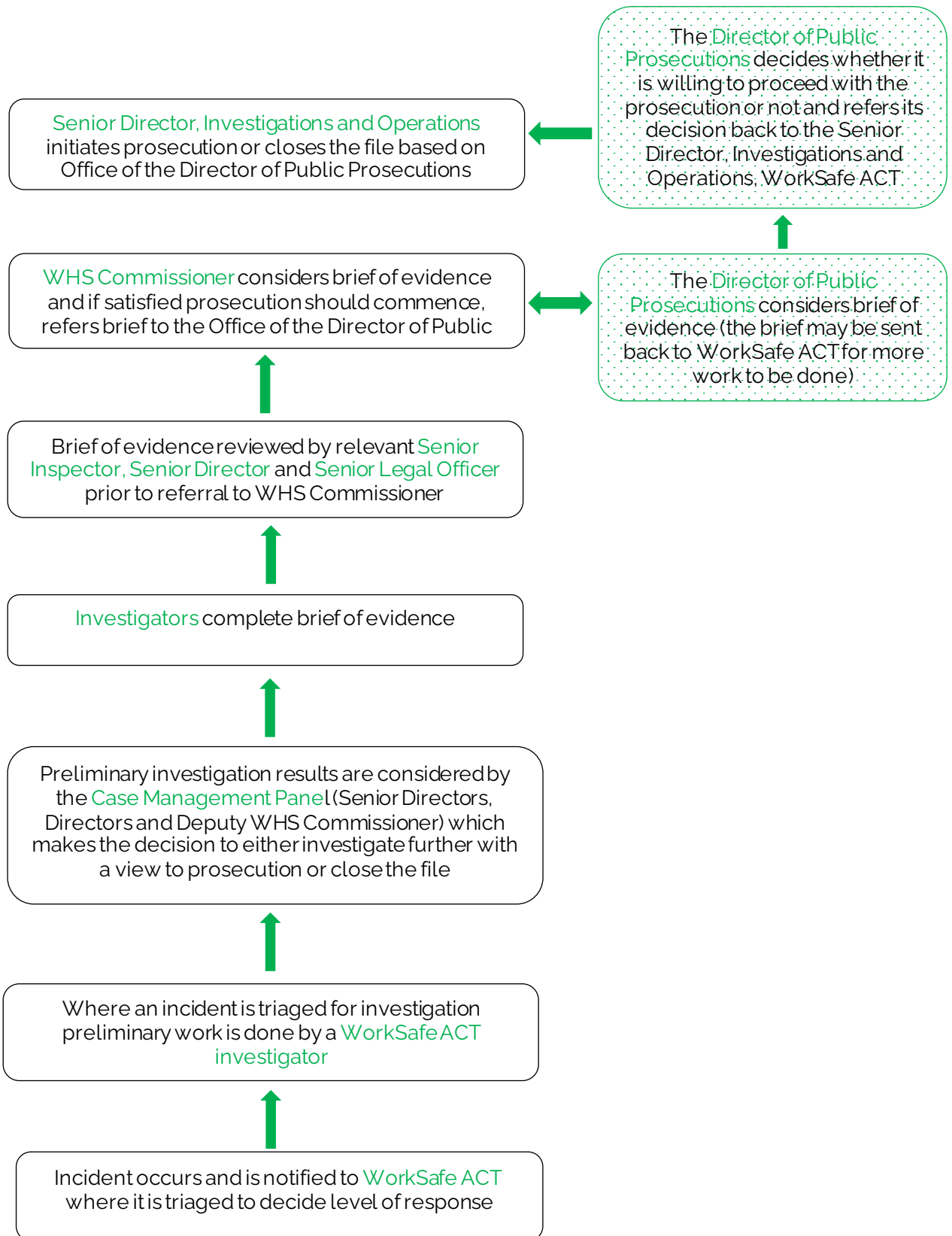
A pictorial version of the process is provided on page 12.

<sup>29</sup> Ibid, pp 5-7.

<sup>30</sup> WorkSafe ACT, Standard Operating Procedure for preparing a brief of evidence, p 2.

<sup>31</sup> Safe Work Australia, *Comparative Performance Monitoring Report, 23, Work Health and Safety Compliance and Enforcement*, p 16.

**Figure One: The decision to prosecute**



# Part 2: Alternative models

## 2.1 Queensland

### 2.1.1 Legislative Context

The relevant provisions of the *Work Health and Safety Act 2011* (QLD) (Queensland WHS Act) for the purpose of the Review are at Appendix A. The offences and penalties under the Queensland WHS Act are similar to those in the WHS Act.

In 2019, the Office of the Work Health and Safety Prosecutor (the OWHSP) was established under the Queensland WHS Act.

This means that in Queensland it is the Work Health and Safety Prosecutor (WHSP) and not the regulator who is entitled to initiate legal proceedings<sup>32</sup>.

The establishment of the OWHSP followed a 2017 review of the WHS regulator. That review recommended an independent statutory office to exercise all functions in relation to WHS prosecutions to provide a more transparent, effective, and consistent decision-making process<sup>33</sup>.

If a prosecution is not brought by the WHSP there is a procedure for external review with the opportunity for a person to ask the WHSP to refer the matter to the DPP for consideration<sup>34</sup>.

### 2.1.2 Operational Context

The OWHSP operates independently of Queensland's DPP and WHS regulator. Reporting to the Minister for Industrial Relations, (but not under the Minister's control or direction) the OWHSP is headed by the WHSP<sup>35</sup>. In practice, this means that 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>36</sup>.

The OWHSP annual report<sup>37</sup> confirms that 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.

### 2.1.3 OWHSP Staffing Structure<sup>38</sup>

The OWHSP is comprised of the following officers:

- 1 x Work Health and Safety Prosecutor
- 1 x Executive Assistant (0.8)
- 2 x Assistant Work Health and Safety Prosecutors
- 6 x Principal Prosecutors (one works 0.6)
- 4 x Senior Prosecutors
- 1 x Prosecutor
- 2 x Paralegal (both 0.8)
- 1 x Paralegal (Contractor)
- 1 x Director Corporate Services, and
- 1 x Senior Administrative Support Officer.

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<sup>32</sup> *Work Health and Safety Act 2011* (QLD) s 230(1)

<sup>33</sup> Tim Lyons, *Best Practice Review of Workplace Health and Safety Queensland – Final Report* July 2017.

<sup>34</sup> *Work Health and Safety Act 2011* (QLD) s 231(3)

<sup>35</sup> *Work Health and Safety Act 2011* (QLD) Schedule 2, ss25-32.

<sup>36</sup> Office of the Work Health and Safety Prosecutor Annual Report 2020-2021 p5.

<sup>37</sup> Office of the Work Health and Safety Prosecutor *Annual Report 2020-2021*

<sup>38</sup> Office of the Work Health and Safety Prosecutor *Annual Report 2020-2021* p 20.

## 2.1.4 OWHSP Statistics<sup>39</sup>

Prosecution success rate	78%
Prosecutions successfully finalised	83
Unsuccessful prosecutions	5
Withdrawn prosecutions	18
New Briefs of Evidence referred to the OWHSP during the reporting period	96
Brief assessments in progress as at 30 June 2021	22
Decisions made (to prosecute or not to prosecute)	387
Decisions made to commence prosecutions	149
Decisions made not to prosecute	238

It is interesting to note that the Senate *Inquiry into the framework surrounding the prevention, investigation, and prosecution of industrial deaths in Australia* recommended that:

*Safe Work Australia work with Commonwealth, State and Territory governments to:*

- *Amend the model WHS laws to include the establishment of a dedicated WHS prosecutor in each jurisdiction, similar to the model introduced in Queensland; and*
- *Pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.*<sup>41</sup>

Within this context, a review of WHS in the Northern Territory also recommended an independent statutory office with a part time Director of Workplace Health and Safety Prosecutions like the Queensland model. However, this recommendation was not supported by the NT Government as it was considered an inefficient use of resources in a small jurisdiction.<sup>42</sup>

<sup>39</sup> Office of the Work Health and Safety Prosecutor, *Annual Report, 2020-2021*, p 8.

<sup>40</sup> Of these 197 were determined to have no prima facie case, 20 were determined to have no reasonable prospect of conviction and 21 were determined not to be in the public interest.

<sup>41</sup> Senate Education and Employment References Committee, *Inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* October 2018.

<sup>42</sup> NT Government position on the *Best Practice Review of Work Health and Safety in the NT Final Report* (Lyons report) p 7.

## 2.2 Western Australia

### 2.2.1 Legislative Context

On 31 March 2022, the model WHS laws came into effect in Western Australia. The *Work Health and Safety Act 2020* (WA) (Western Australian WHS Act) contains similar provisions dealing with offences, penalties, and legal proceedings as the WHS Act. Part 13 of the Western Australian Act (Legal Proceedings) is extracted in Appendix A.

### 2.2.2 Policy Context

The WorkSafe Commissioner is the Western Australian WHS regulator<sup>43</sup> and has modelled that jurisdiction's compliance and enforcement policy on the NCEP.

The compliance and enforcement policy is further supported by the WorkSafe Commissioner's prosecution policy.

The purpose of the prosecution policy is

*'to facilitate transparency and accountability in the enforcement of the [Western Australian] WHS Act and ensure that decisions relating to prosecutions under the [Western Australian] WHS Act are based on appropriate criteria which are capable of being applied fairly and consistently across a broad range of circumstances to which the [Western Australian] WHS Act applies'*<sup>44</sup>.

It reinforces that the WHS regulator operates as a risk-based safety regulator, and therefore requires the flexibility to make decisions based on priorities to effectively achieve the objects of the Western Australian WHS Act using available resources.

The prosecution policy emphasises that in deciding to prosecute there should be consideration of whether the available evidence supports a reasonable prospect of conviction and whether it is in the public interest to prosecute.

The public interest criteria are consistent with the Western Australian DPP guidelines and include:

- the need to maintain the rule of law
- the need to maintain public confidence in the basic constitutional institutions
- the objectives of sentencing, including deterrence, retribution, protection of the community, punishment and rehabilitation
- the circumstances of the alleged offence
- the age, health or vulnerability of the victim or a witness
- the circumstances of the accused including their criminal history
- the lapse of time since the alleged offence, including delay in the prosecution process
- the degree of culpability of the accused
- the availability or efficacy of any alternatives to prosecution
- any actions taken by other agencies
- the attitude of the victim of an alleged offence to a prosecution
- the attitude of the investigating officer responsible for the prosecution
- the likely length and expense of a trial if disproportionate to the seriousness of the alleged offence
- whether the alleged offender has cooperated in the investigation and prosecution of others or has indicated an intention to do so
- the likely sentence in the event of a finding of guilt, and
- the entitlement of the State or other person to compensation, reparation or forfeiture<sup>45</sup>.

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<sup>43</sup> *Work Health and Safety Act 2020* (WA) s 4, and Schedule 1, Division 1.

<sup>44</sup> WorkSafe Western Australia, 2022, Prosecution Policy: Department of Mines, Industry Regulation and Safety, Western Australia, p1

<sup>45</sup> WorkSafe Western Australia, 2022, Prosecution Policy: Department of Mines, Industry Regulation and Safety, Western Australia, p5.



However, the prosecution policy also includes public interest criteria that are relevant in the context of WHS laws, including criteria to be considered when deciding whether to prosecute multiple offenders, directors or other corporate body officers, public authorities and the Crown. These include a consideration of

- who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention and what was their culpability?
- circumstances, seriousness and outcome of the breach
- alleged offender's knowledge of the risk of the potential harm, including whether or not the hazard was obvious or would have been obvious to a reasonable person in their position
- level of involvement of the alleged offender in the events that led to the breach, and
- ease with which the breach could have been avoided or rectified.<sup>46</sup>

The prosecution policy makes it clear that the decision to charge a person with an offence under the Western Australian WHS Act and subsequently prosecute is one for the regulator or the regulator's delegate, noting that the regulator can take legal advice

*'the regulator will consider legal advice to assist in the assessment of a proposed prosecution. The decision to charge a person with an offence under the [Western Australian] WHS Act and subsequently prosecute is one for the regulator or delegate, although the decision maker will be entitled to act on a lawyer's recommendation'.<sup>47</sup>*

### 2.2.3 Operational Context

WorkSafe Western Australia manages its prosecutions in-house. This means that when a brief of evidence is completed it is referred to a team of prosecutors operating within the regulator.

Prosecutors report to a General Counsel who in turn reports to the WorkSafe Commissioner. It is ultimately the WorkSafe Commissioner who decides whether to prosecute.

WorkSafe Western Australia also has a separate team of lawyers who provide legal advice to inspectors about the scope of their powers and other legal issues arising from the administration of the Western Australian WHS Act.

Industrial Manslaughter matters are not prosecuted by the in-house prosecutorial team but are referred to the Office of the DPP.

### 2.2.4 Staffing Structure

The prosecution team within WorkSafe Western Australia is comprised of eleven staff as follows:

- 1 x General Counsel
- 8 x Assistant General Counsels
- 1 x Co-Ordinator Legal Practice Support
- 1 x Senior Legal Officer

### 2.2.5 Statistics

July – December 2021 <sup>48</sup>	
Successful Prosecutions finalised	22

<sup>46</sup> WorkSafe Western Australia, 2022, Prosecution Policy: Department of Mines, Industry Regulation and Safety, Western Australia, pp7-8

<sup>47</sup> WorkSafe Western Australia, 2022, Prosecution Policy: Department of Mines, Industry Regulation and Safety, Western Australia, p3

<sup>48</sup> Safe Work Australia, *Comparative Performance Monitoring Report, 23, Work Health and Safety Compliance and Enforcement*



## 2.3 Victoria

### 2.3.2 Legislative Context

Victoria has not implemented the model WHS laws. However, Part 13 (Legal Proceedings) of the model WHS Act was influenced by and modelled on Part 11 (Legal Proceedings) of the *Occupational Health and Safety Act 2004* (VIC) (Vic OHS Act).

The relevant provisions of the Vic OHS Act for the purpose of the Review are at Appendix A.

Section 130(1) of the Vic OHS Act provides that it is the WHS regulator that initiates prosecutions and section 131 provides a procedure for a referral to the DPP for review in circumstances where the regulator has not prosecuted an alleged breach.

### 2.3.3 Policy Context

WorkSafe Victoria has developed an occupational health and safety (OHS) compliance and enforcement policy<sup>49</sup>. It provides an overview of the legislative framework within which WorkSafe Victoria operates and sets out how its inspectors will approach their compliance and enforcement activities.

The values underpinning WorkSafe Victoria's compliance and enforcement activities are accountability, transparency and an effective and caring approach to duty holders. The principles of the regulatory approach are listed as being 'targeted, proportionate, fair and with a commitment to collaboration and information sharing'.

The policy makes it clear that where there is sufficient admissible evidence of a contravention of OHS laws and prosecution would be in the public interest, WorkSafe Victoria may commence proceedings and conduct a prosecution in accordance with the general prosecution guidelines<sup>50</sup>.

### 2.3.4 Operational Context

WorkSafe Victoria has its own in-house prosecution unit with prosecutors funded by WorkSafe Victoria operating independently from the State's DPP. Prosecutors report to a General Counsel's Office, the head of which reports directly to the Chief Executive Officer (CEO) of WorkSafe Victoria.

The ultimate decision to prosecute or not for breaches of OHS laws rests with the Executive Director, Health and Safety (in effect the regulator). While some matters are referred to the DPP this would occur only after the committal stage and even then WorkSafe Victoria prosecutors will instruct the DPP to the end of the matter. They remain WorkSafe Victoria's cases.

Where sufficient admissible evidence exists of a breach of OHS laws and a prosecution would be in the public interest, WorkSafe Victoria will commence and conduct the prosecution in accordance with its general prosecution guidelines.

*WorkSafe Victoria's General Prosecution Guidelines* are almost a mirror image of the local DPP guidelines. They do however, reinforce that a prosecution may be brought regardless of whether a breach of OHS laws resulted in death, injury or disease. They also list target areas for prosecutions under health and safety laws including:

- work related fatalities
- incidents involving serious injury or an immediate risk to health and safety where there appears to be a high degree of culpability; for example, cases involving reckless conduct, repeat offending, disregard of previous warnings or knowledge and significant departures from widely known or accepted safe systems of work
- WorkSafe's focus areas for prevention, as determined by WorkSafe in its published strategies and business plans
- failure to comply with a notice or direction given by an inspector or WorkSafe, especially where the risk that was the subject of the notice or direction still exists at the workplace
- offences against inspectors
- failure to notify WorkSafe of 'notifiable incidents' and failing to preserve incident sites when required to do so, and
- other target areas as published from time to time by WorkSafe Victoria<sup>51,52</sup>.

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<sup>49</sup> WorkSafe Victoria, *Occupational Health and Safety Compliance and Enforcement Policy, A Guide for Employers*, July 2021

<sup>50</sup> See the discussion of WorkSafe's prosecution guidelines at section 2.3.3.

<sup>51</sup> WorkSafe Victoria, *Occupational Health and Safety Compliance and Enforcement Policy, A Guide for Employers*, July 2021, p4-5

<sup>52</sup> *WorkSafe Victoria's General Prosecution Guidelines* p 2.

WorkSafe Victoria prosecutors also apply the guidelines of the Victorian DPP to their decision making (including the model litigant guidelines). This means in practice confirming that there is a reasonable prospect of conviction, and it is in the public interest for WorkSafe Victoria to take prosecution action.

Factors that are considered in the context of the public interest test are the:

- nature and circumstances of the alleged offending
- characteristics of the alleged offender
- impact of the alleged offence on others
- need for general deterrence – reducing the likelihood that others will commit similar offences
- need for specific deterrence – reducing the likelihood that the alleged offender will commit further breaches
- effect of prosecution, including the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court, the availability and efficacy of alternatives to prosecution, whether the consequences of any resulting finding of guilt would be unduly harsh or oppressive
- need to maintain public confidence in the administration of the law and the scheme, including considering whether enforcement action could be perceived as counter-productive, eg by bringing the law into disrepute, and
- likely length and cost of taking enforcement action<sup>53</sup>.

### 2.3.5 Staffing Structure

The prosecution team within WorkSafe Victoria is comprised of:

16 prosecutors in total, and

5 support staff (paralegal).

Staff are divided into four teams on a geographical basis (East, West North and Central) with each team comprising of:

1 x Lead Lawyer/Prosecutor

1 x Senior Prosecutor

1 x Prosecutor, and

1 x Paralegal

The investigation teams are divided into four geographically based teams as well. However, it is important to note that the prosecution teams and the investigation teams are managed and operate independently and separately from each other.

There is also a separate legal team of 10 lawyers who provide advice to the inspectorate during investigations. They undertake coronial work and administrative law work. The intention is to keep the provision of legal advice at the early stages of an investigation separate from the later decision to prosecute.

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<sup>53</sup> *WorkSafe Victoria's General Prosecution Guidelines* p 4.

## 2.3.6 Statistics

2019-20 <sup>54</sup>	
OHS Prosecution success rate	79%
Completed OHS investigations proceeding to legal review outcome	75%
OHS Investigations proceeding to prosecution within 12 months	51%
Number of OHS prosecutions commenced (counted by defendant)	138
Number of compensation prosecutions commenced (counted by defendant)	38
Number of completed OHS prosecutions (counted by defendant)	118

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<sup>54</sup> WorkSafe Victoria Annual Report 2020 p 135

# Part 3: Preliminary Consultation

Rather than provide a narrative in this section, I have summarised comments, issues and concerns into dot points. These comments reflect discussions I held with representatives from WorkSafe ACT, WorkSafe Victoria, Work Safe Western Australia, employer organisations, unions, defence lawyers and family advocates.

It is important to note that everyone consulted raised concerns about the current conduct of WHS prosecutions in the ACT and considered that there was significant room for improvement.

It is also important to note these comments are based on a small number of persons consulted during stage one of the review. I hope to receive many more comments from a broad range of individuals and organisations during stage two.

I have grouped the feedback received during the preliminary stage one consultation into four key themes:

- Independence and control
- Consistency and efficiency
- Skills and resourcing
- The public interest

## 3.1 Independence and control

- 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 current model is terrible because the regulator loses control of prosecution decision making.
- Once the DPP has made up its mind it is very difficult to make it change its mind.
- An in-house prosecution team would allow the regulator to control its own risks.
- If there were more successful prosecutions, it would act as a powerful deterrent and is likely to make industry snap to attention.
- Matters are not making it to court which we think should make it.
- With an in-house prosecution team there is greater control and a higher success rate.
- An in-house prosecution team expands the range of matters the WHS regulator prosecutes.
- The DPP can withdraw cases and WorkSafe ACT has no control over that decision.
- Once a file is referred to the DPP it's 'their case' so for example, the regulator can't accept an Enforceable Undertaking during the matter... 'It's theirs'.
- A prosecution team independent of the DPP would work better – it would reinforce the independence of the regulator.
- I prefer the Queensland model. I worry about 'capture' of the prosecutors by the regulator.
- Accountability of the regulator and communication about prosecution decision making is a key factor for victims and families.
- With an in-house prosecution team, the regulator can apply a risk based regulatory management approach to decision making about whether to prosecute.
- WorkSafe Victoria can run test cases because the in-house prosecution team is self-funded – it can run cases the DPP might not run – this allows for strategic priorities to be aligned to prosecution decision making.
- WorkSafe Victoria's in-house prosecution team has been able to do a lot of bullying cases and cases dealing with occupational violence and aggression, where there has been no injury and where improvement notices have not been actioned. Silicosis, dust diseases and sexual harassment will be a priority and once the psychosocial regulations are made there will be a shift of focus to potential prosecutions in that area.

- With an in-house prosecution team, we would be able to run workers compensation cases, prosecutions for offences against inspectors, bullying, sexual harassment, silica dust – we have found trying to convince the DPP to run with these cases is very difficult.

### 3.2 Consistency and Efficiency

- An in-house prosecution model would provide more consistency in prosecution decision making.
- The current process is clunky.
- Often there are very late requests for more work to be done on prosecution files (that is, close to the two-year deadline). Often it is too late to gather the evidence required.
- An in-house prosecution team would lead to quicker decision making - in the past charges have been laid as late as five days before the two-year deadline runs out.
- Currently there are long time periods between the incident occurring and the decision to prosecute. This adds significant trauma to the injured worker, to the victim's family, to the alleged offender and the workplace where the incident occurred.
- Those being investigated should not have to wait two years for a decision.
- An in-house team allows the regulator to closely monitor the timelines for consideration of briefs of evidence and decision making.
- An outside agency managing prosecutions is often not responsive to the regulator's priorities – they have their own.
- We don't want to see increases in prosecutions but decreases in success rates.
- The ACT has had a patchy record with WHS prosecutions - this is because of many factors. Will a prosecutions team be the silver bullet for what are in effect multifactorial issues?
- 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.

### 3.3 Skills and resourcing

- DPP prosecutors are not safety specialists and they do safety prosecutions so rarely that they don't build up the experience and knowledge.
- We need people with WHS prosecution experience, for example those who have experience prosecuting within the Victorian and Queensland models.
- An in-house prosecution team will build up inspector skills – there will be less mistakes with early input from prosecutors.
- We need experienced trial lawyers if we're setting up an in-house prosecution team.
- If there are to be in house prosecutors the team needs to be top heavy – as a minimum I'd recommend five plus years of experience.
- An in-house prosecution team would mean that relevant legal considerations are factored into decision making early, for example there would be consideration of prosecution action against all duty holders and potential suspects identified during both the investigation and brief assessment.
- When there is a notification requirement for psychological injury and new psychosocial regulations are made this will bring with it a new strategic focus on that area and raise questions about potential prosecutions.
- 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.
- In WorkSafe Victoria separation between the in-house legal advisers and the in-house prosecutors is inherent in how they do their work. There is no blurring the lines. It is a productive relationship but not a conflict of interest.

- To ensure separation between the prosecutors and legal advisers you need a role for a lawyer who provides advice on administrative law questions, the scope of WHS laws advice, scope of inspectors' powers etc.
- There is a 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?
- Is an alternative model to have WHS specialist prosecutors in the DPP?

### 3.4 The public interest

- The WHS Commissioner has no ability to influence the 'public interest' test that informs the DPP's decisions about whether to prosecute.
- Consideration of the interests of victims and families should be a part of the public interest test for WHS prosecutions.
- A key problem is that WorkSafe ACT doesn't get to define the public interest.
- Neither WorkSafe ACT nor the DPP currently have the capacity to expand prosecutions for lower order breaches such as not complying with a notice, not paying an infringement fine or for repeat offending. It may often be in the public interest to prosecute these matters depending on the compliance history of the alleged offender and the industry within which he/she is operating.
- In Victoria, we consider the DPP guidelines but we also have specific criteria when we consider the public interest in the context of work health and safety prosecutions.
- We have a clear prosecution policy in Western Australia which complements our compliance and enforcement policy and includes specific public interest criteria the WorkSafe Commissioner considers when making decisions to prosecute.
- Are there any wider ramifications in the context of the ACT's criminal justice system?
- Given that any fines paid because of a successful prosecution go back to Work Safe ACT could the establishment of an in-house prosecutions team be seen as a conflict of interest?
- Is it also a problem that the Industrial Magistrate in the ACT only sits four times a year - two weeks each time?

## Part 4: Questions

1. Have you any comments regarding the ACT's current system for conducting WHS prosecutions?
2. What is your view of the Queensland WHS prosecution model? Can you identify advantages or disadvantages of this model?
3. What is your view of the Western Australian and Victorian WHS/OHS prosecution model? Can you identify advantages or disadvantages of this model?
4. What do you consider the public interest criteria for initiating a prosecution for a breach of WHS laws should be?
5. *'The referral of prosecution briefs to the DPP compromises the WHS Commissioner's independence in relation to the exercise of her functions under the WHS Act.'*

Do you agree or disagree with this statement? Please give reasons for your answer.

6. *'Giving the regulator exclusive control over prosecutions is important for the integrity and consistency of enforcement'*

Do you agree or disagree with this statement? Please give reasons for your answer.

7. Are there any other models to conduct WHS prosecutions which you think should be considered as part of the review?

# Appendix A

## Legislation Extracts

### Work Health and Safety Act 2011 (ACT)

#### Part 13 Legal proceedings

#### Division 13.1 General matters

#### 230 Prosecutions

- (1) Subject to subsection (5), a proceeding for an offence against this Act may be brought by—
  - (a) the regulator; or
  - (b) an inspector with the written authorisation of the regulator (either generally or in a particular case).

*Note* A reference to an Act includes a reference to statutory instruments made or in force under the Act, including a regulation and any law or instrument applied, adopted or incorporated by the Act (see [Legislation Act](#), s104).

- (2) If the regulator believes on reasonable grounds that a person has committed an offence against this Act, the regulator may refer the matter to the DPP.
- (3) The regulator must issue, and publish on the regulator's website, general guidelines in relation to—
  - (a) the referral of matters to the DPP under this section; and
  - (b) the acceptance of WHS undertakings under this Act.

- (4) A guideline is a notifiable instrument.

*Note* A notifiable instrument must be notified under the [Legislation Act](#).

- (5) Nothing in this section affects the ability of the DPP to bring a proceeding for an offence against this Act.

#### 231 Procedure if prosecution is not brought

- (1) A person (the **applicant**) may make a written request to the regulator that the regulator refer a matter to the DPP if—
  - (a) the applicant reasonably considers that the occurrence of an act, matter or thing constitutes a category 1 offence, a category 2 offence or an industrial manslaughter offence; and
  - (b) no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 12 months after the occurrence.
- (2) Within 3 months after the regulator receives a request the regulator must—
  - (a) advise the applicant (in writing)—
    - (i) whether the investigation is complete; and
    - (ii) if the investigation is complete—
      - (A) whether the regulator has referred or will be referring the matter to the DPP; or
      - (B) the reasons why the regulator will not be referring the matter to the DPP; and
  - (b) advise the person who the applicant believes committed the offence of the application.



- (3) If the regulator advises the person that the regulator will not be referring a matter concerning a category 1 offence, a category 2 offence or an industrial manslaughter offence to the DPP, the regulator must—
  - (a) advise the person that the person may ask the regulator to refer the matter to the DPP for consideration; and
  - (b) if the person makes a written request to the regulator to do so, refer the matter to the DPP within 1 month of the request.
- (4) The DPP must consider the matter and advise (in writing) the regulator as soon as practicable as to whether the DPP considers that a prosecution should be brought.
- (5) If the DPP considers that a prosecution should not be brought, the regulator must ensure that written reasons for the decision are given to—
  - (a) the person who made the request; and
  - (b) the person who the applicant believes committed the offence.
- (6) If the regulator declines to follow the advice of the DPP to bring a proceeding, the regulator must give written reasons for the decision to any person to whom written reasons are given under subsection (5).
- (7) In this section a reference to the occurrence of an act, matter or thing includes a reference to a failure in relation to an act, matter or thing.

## **232 Limitation period for prosecutions**

- (1) A proceeding for an offence against this Act may be brought within the latest of the following periods:
  - (a) within 2 years after the offence first comes to the notice of the regulator;
  - (b) within 1 year after a coronial report was made or a coronial inquiry or inquest ended, if it appeared from the report or the proceeding at the inquiry or inquest that an offence had been committed against this Act;
  - (c) if a WHS undertaking has been given in relation to the offence—within 6 months after—
    - (i) the WHS undertaking is contravened; or
    - (ii) it comes to the notice of the regulator that the WHS undertaking has been contravened; or
    - (iii) the regulator has agreed under section 221 (Withdrawal or variation of WHS undertaking) to the withdrawal of the WHS undertaking.
- (2) A proceeding for a category 1 offence may be brought after the end of the applicable limitation period in subsection (1) if fresh evidence relevant to the offence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.
- (3) This section does not apply to a proceeding for an industrial manslaughter offence.

## Work Health and Safety Act 2011 (QLD)

### Part 13 Legal proceedings

#### Division 1 General matters

##### 230 Prosecutions

(1AA) Proceedings for an offence against this Act, other than a category 1 offence or an offence against part 2A, must be taken in a summary way under the *Justices Act 1886*.

- (1) Subject to subsection (4), proceedings for an offence against this Act may only be taken by—
- (a) the WHS prosecutor; or
  - (b) for a category 3 offence—an inspector with the written authorisation of the WHS prosecutor, either generally or in a particular case.
- (2) An authorisation under subsection (1)(b) is sufficient authority to continue proceedings in any case where the court amends the charge, warrant or summons.
- (3) In deciding whether to bring a prosecution for an offence under this Act, the WHS prosecutor must have regard to any guidelines issued under the *Director of Public Prosecutions Act 1984*, section 11.
- (4) Nothing in this section affects the ability of the director of public prosecutions to bring proceedings for an offence against this Act.

##### 231 Procedure if prosecution is not brought

- (1) If—
- (a) a person reasonably considers that an act or omission constitutes a category 1 offence or a category 2 offence; and
  - (b) no prosecution has been brought in relation to the act or omission after 6 months but not later than 12 months after the act or omission happens;

the person may make a written request to the WHS prosecutor that a prosecution be brought.

(1A) Also, a person may make a written request to the WHS prosecutor that a prosecution be brought if—

- (a) the person reasonably considers an act or omission constitutes an offence against part 2A; and
  - (b) no prosecution has been brought in relation to the act or omission; and
  - (c) it has been at least 6 months since the act or omission happened.
- (2) Within 3 months after the WHS prosecutor receives a request under subsection (1) or (1A) the WHS prosecutor must—
- (a) advise the person, in writing—
    - (i) whether the investigation is complete; and

- (ii) if the investigation is complete, whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought; and
- and (b) advise the person who the applicant believes committed the offence of the application of the matters set out in paragraph (a).
- (3) If the WHS prosecutor advises the person that a prosecution for a category 1 or category 2 offence or an offence against part 2A will not be brought, the WHS prosecutor must—
  - (a) advise the person that the person may ask the WHS prosecutor to refer the matter to the director of public prosecutions for consideration; and
  - (b) if the person makes a written request to the WHS prosecutor to do so, refer the matter to the director of public prosecutions within 1 month of the request.
- (4) The director of public prosecutions must consider the matter and advise (in writing) the WHS prosecutor within 1 month as to whether the director considers that a prosecution should be brought.
- (5) The WHS prosecutor must ensure a copy of the advice is given to—
  - (a) the person who made the request; and
  - (b) the person who the applicant believes committed the offence.
- (6) If the WHS prosecutor declines to follow the advice of the director of public prosecutions to bring proceedings, the WHS prosecutor must give written reasons for the decision to any person to whom a copy of the advice is given under subsection (5).

### **232 Limitation period for prosecutions**

- (1) Proceedings for an offence against this Act may be taken within the latest of the following periods—
  - (a) within 2 years after the offence first comes to the notice of the WHS prosecutor;
  - (b) within 1 year after a coronial report was made or a coronial inquiry or inquest ended, if it appeared from the report or the proceedings at the inquiry or inquest that an offence had been committed against this Act;
  - (c) if a WHS undertaking has been given in relation to the offence, within 6 months after—
    - (i) the WHS undertaking is contravened; or
    - (ii) it comes to the notice of the regulator that the WHS undertaking has been contravened; or
    - (iii) the regulator has agreed under section 221 to the withdrawal of the WHS undertaking.
- (2) A proceeding for a category 1 offence may be taken after the end of the applicable limitation period in subsection (1) if fresh evidence relevant to the offence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.
- (3) Subsection (1) does not apply to a proceeding for an offence against part 2A.

## Work Health and Safety Act 2020 (WA)

### Part 13 — Legal proceedings

#### Division 1 — General matters

##### 229C. Terms used

In this Division —

**conduct** includes an act or omission;

**DPP** means the Director of Public Prosecutions appointed under the *Director of Public Prosecutions Act 1991* or any person performing the functions of, or acting in, that office.

##### 230. Prosecutions

- (1) Subject to subsection (3), proceedings for an offence against this Act may only be brought by —
  - (a) the regulator; or
  - (b) a public service officer working in the WHS department with the written authorisation of the regulator (either generally or in a particular case).
- (2) The regulator must issue, and publish on the regulator's website, general guidelines for or in relation to —
  - (a) the prosecution of offences under this Act; and
  - (b) the acceptance of WHS undertakings under this Act.
- (3) Nothing in this section affects —
  - (a) the ability of an authorised officer (as defined in the *Criminal Procedure Act 2004* section 80(1)) to commence or conduct a prosecution for an offence against this Act; or
  - (b) the functions of the DPP under the *Director of Public Prosecutions Act 1991*.

##### 231. Procedure if prosecution is not brought

- (1) If —
  - (a) a person reasonably considers that the occurrence of an act, matter or thing constitutes industrial manslaughter, a Category 1 offence or a Category 2 offence; and
  - (b) no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 12 months after that occurrence,the person may make a written request to the regulator that a prosecution be brought.
- (2) Within 3 months after the day on which the regulator receives a request the regulator must —
  - (a) advise the person (in writing) —
    - (i) whether the investigation is complete; and
    - (ii) if the investigation is complete, whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought;and
  - (b) advise the person who the applicant believes committed the offence of the application and of the matters set out in paragraph (a).
- (3) In this section a reference to the occurrence of an act, matter or thing includes a reference to a failure in relation to an act, matter or thing.

## 232. Limitation period for prosecutions

- (1) Proceedings for an offence against this Act, other than industrial manslaughter, may be brought within the latest of the following periods to occur —
  - (a) within 2 years after the offence first comes to the notice of the regulator;
  - (b) within 1 year after a coronial report was made or a coronial inquiry or inquest ended, if it appeared from the report or the proceedings at the inquiry or inquest that an offence had been committed against this Act;
  - (c) if a WHS undertaking has been given in relation to the offence, within 6 months after —
    - (i) the WHS undertaking is contravened; or
    - (ii) it comes to the notice of the regulator that the WHS undertaking has been contravened; or
    - (iii) the regulator has agreed under section 221 to the withdrawal of the WHS undertaking.
- (2) Proceedings for a Category 1 offence may be brought after the end of the applicable limitation period in subsection (1) if fresh evidence relevant to the offence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.
- (3) Subsections (4) and (5) apply to proceedings (the **relevant proceedings**) against a person for a Category 1 offence, a Category 2 offence or a Category 3 offence in relation to any conduct (the **relevant conduct**).
- (4) The relevant proceedings may be brought after the end of the applicable limitation period in subsection (1) if —
  - (a) either —
    - (i) the DPP has considered whether proceedings for industrial manslaughter should be brought against the person in relation to the relevant conduct or to any conduct that includes the relevant conduct, and has decided not to bring those proceedings; or
    - (ii) the DPP has discontinued proceedings for industrial manslaughter against the person in relation to the relevant conduct or to any conduct that includes the relevant conduct;
  - and
  - (b) the relevant proceedings are brought no later than 6 months after the day on which the DPP made that decision or discontinued those proceedings.
- (5) Despite section 230(1), the relevant proceedings may only be brought under subsection (4) by an authorised officer (as defined in the *Criminal Procedure Act 2004* section 80(1)).
- (6) A person may be convicted of an offence as provided for by section 30A(2) or (4) despite subsection (1) and section 10A(2) of *The Criminal Code*.

## Occupational Health and Safety Act 2004 (VIC)

### Part 11—Legal proceedings

#### Division 1—General matters

##### 130 Proceedings may be brought by the Authority<sup>55</sup> or inspectors

- (1) Proceedings for an offence against this Act or the regulations may be brought only by—
  - (a) the Authority; or
  - (b) an inspector with the written authorisation of the Authority (either generally or in a particular case).
- (2) An authorisation under subsection (1)(b) is sufficient authority to continue proceedings in any case where the court amends the charge-sheet, warrant or summons.
- (3) An inspector who brings proceedings may conduct the proceedings before the court.
- (4) The Authority must issue, and publish in the Government Gazette, general guidelines for or with respect to the prosecution of offences under this Act or the regulations.
- (5) Nothing in this section affects the ability of the Director of Public Prosecutions to bring proceedings for an indictable offence against this Act or the regulations.

##### 131 Procedure if prosecution is not brought

- (1) If—
  - (a) a person considers that the occurrence of an act, matter or thing constitutes an offence against this Act or the regulations; and
  - (b) no prosecution has been brought in respect of the occurrence of the act, matter or thing within 6 months of that occurrence—the person may request in writing that the Authority bring a prosecution.
- (2) If the offence the subject of a request under subsection (1) is a summary offence, within 3 months after the Authority receives a request it must—
  - (a) investigate the matter; and
  - (b) following the investigation, advise (in writing) the person whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought, unless the Authority considers that giving such advice or reasons will prejudice the current investigation of an indictable offence.
- (2A) If the offence the subject of a request under subsection (1) is an indictable offence, the Authority must, within 3 months after receiving the request, report in writing to the person who made the request, advising that—
  - (a) the Authority's investigation of the matter is complete, and—
    - (i) that a prosecution will be brought; or
    - (ii) give reasons why a prosecution will not be brought; or
  - (b) the Authority's investigation is still ongoing and that a further report will be given within 3 months after the date of the response, and after every subsequent 3-month period, until the investigation is completed.
- (2B) If subsection (2A)(b) applies, the Authority must, within each 3-month period, also report to the Minister as to the progress of the investigation.
- (2C) The Authority must commence and complete investigations under this section in as timely a manner as is reasonably practicable.

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<sup>55</sup> 'Authority' means the Victorian WorkCover Authority under the *Workplace Injury Rehabilitation and Compensation Act 2013*. WorkSafe Victoria is a trading name of the Authority and undertakes the occupational health and safety compliance and enforcement functions in that jurisdiction. It is, in effect, the regulator.

- (3) If the Authority advises the person that a prosecution will not be brought, or that it has not brought a prosecution within 9 months after receiving the request, the Authority must refer the matter to the Director of Public Prosecutions if the person requests (in writing) that the Authority do so.
- (4) The Director of Public Prosecutions must consider the matter and advise (in writing) the Authority whether or not the Director considers that a prosecution should be brought.
- (5) The Authority must ensure a copy of the advice is sent to the person who made the request and, if the Authority declines to follow advice from the Director of Public Prosecutions to bring proceedings, the Authority must give the person written reasons for its decision.
- (6) The Authority must include in its annual report, and publish on its website, a statement setting out—
  - (a) the number of requests received by the Authority under subsection (1); and
  - (b) the number of cases in which the Authority has advised under subsection (2)(b) or (2A)(a) that a prosecution has been or will be brought, or will not be brought; and
  - (ba) how long it took to commence and complete each investigation pursuant to a request under subsection (1); and
  - (bb) the number of times the Authority failed to report in accordance with subsection (2A) to a person making a request under subsection (1) and any reasons for such failure; and
  - (c) the number of cases in which the Director of Public Prosecutions has advised under subsection (4) that a prosecution should be brought or should not be brought.
- (7) The Authority must provide a copy of any statement containing the matters referred to in subsection (6)(bb) to the Minister.

### **132 Limitation period for prosecutions**

- (1) Proceedings for an indictable offence against this Act (other than a workplace manslaughter offence) may be brought within the latest of the following periods to occur—
  - (a) within 2 years after the offence first comes to the notice of the Authority;
  - (b) within one year after a coronial report was made or a coronial inquiry or inquest ended, if it appeared from the report or the proceedings at the inquiry or inquest that an indictable offence had been committed against this Act;
  - (c) if an undertaking has been given under section 16 in relation to the offence, within 6 months after—
    - (i) the undertaking is contravened; or
    - (ii) it comes to the notice of the Authority that the undertaking has been contravened; or
    - (iii) the Authority has agreed under section 16(2) to the withdrawal of the undertaking;
  - (d) at any time with the written authorisation of the Director of Public Prosecutions.
- (2) A proceeding for an indictable offence against this Act (other than a workplace manslaughter offence) may be brought after the end of the applicable limitation period in subsection (1) if fresh evidence relevant to the offence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.
- (3) A proceeding for a workplace manslaughter offence may be brought at any time.

# Appendix B

## 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>	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>Queensland review</b>	Best Practice Review of Workplace Health and Safety Queensland (2017)
<b>Queensland WHS Act</b>	<i>Work Health and Safety Act 2011</i> (QLD)
<b>Review</b>	Conduct of Work Health and Safety Prosecutions Review (WorkSafe ACT) 2022
<b>Victorian OHS Act</b>	<i>Occupational Health and Safety Act 2004</i> (VIC)
<b>Western Australian WHS Act</b>	<i>Work Health and Safety Act 2020</i> (WA)
<b>WHS</b>	Work health and safety
<b>WHS Act</b>	<i>Work Health and Safety Act 2011</i> (ACT)
<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 C

## Preliminary Consultation

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# Appendix D

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