



Government of **Western Australia**
Department of **Commerce**

Prosecution policy

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Contents

1. Application and context.....	2
1.1 Introduction.....	2
1.2 Why have a Prosecution Policy and what is its purpose?	2
1.3 Under what circumstances might WorkSafe consider prosecution?	2
1.4 Some fundamental principles underpinning this policy	3
2. Core elements of WorkSafe’s prosecution policy – applicable to all prosecutions.....	4
2.1 Key Principles.....	4
2.2 Prima Facie Case.....	4
2.3 The public interest	4
2.3.1 Reasonable prospects of conviction	5
2.3.2 Balancing other public interest factors.....	6
2.3.3 Factors that may weigh in favour of prosecution	6
2.3.4 Factors that may weigh against prosecution	7
2.3.5 Irrelevant factors.....	9
3. Other factors that may be relevant to specific cases – applicable to some prosecutions only	9
3.1 Juveniles	9
3.2 Prosecution of the mentally impaired	9
3.3 Victims.....	10
3.4 Charge negotiation	10
3.5 Prosecution of partners in business	11
3.6 Prosecution of directors and other officers	12
3.7 Prosecution Appeals	13
3.8 Concessions.....	13
3.9 Prosecution of the Crown	14
4. Other key aspects of the DPP’s guidelines	14

PROSECUTION POLICY

1. Application and context

1.1 Introduction

The WorkSafe Division of the Department of Commerce (referred to as WorkSafe) is responsible for the administration and enforcement of the *Occupational Safety and Health Act 1984* (the OSH Act) and its accompanying regulations, the *Occupational Safety and Health Regulations 1996* (the Regulations).

This policy applies to all prosecutions under the OSH Act and Regulations and, as the circumstances allow, to all appeals arising out of proceedings in respect of any such prosecutions.

This policy is to be applied prior to any authority to prosecute being signed and at any subsequent time should additional information be provided that might influence the decision to prosecute prior to the matter being heard in court.

This Prosecution Policy should be read in conjunction with WorkSafe's Enforcement Policy.

1.2 Why have a Prosecution Policy and what is its purpose?

Prosecution of an alleged breach under the OSH Act or Regulations is discretionary, and prosecution is not the only enforcement tool available to deal with an alleged breach. It is therefore important that decisions made regarding prosecution are appropriate.

The Prosecution Policy provides a framework within which such decisions can be made.

Importantly, the Prosecution Policy aims to ensure the law (the *OSH Act and Regulations*) is applied impartially, in a fair and consistent manner. It aims to ensure decisions in relation to prosecutions are based on appropriate criteria which are public, open, fair and capable of being applied consistently across the broad range of circumstances to which the occupational safety and health laws apply.

Through application of this policy, WorkSafe will avoid arbitrary decisions, and will ensure prosecutions are not conducted for improper purposes, capriciously or oppressively.

This policy embraces the principles contained in the Statement of Prosecution Policy and Guidelines issued by the Director of Public Prosecutions (DPP) and published in the Western Australian Government Gazette on 3 June 2005 (referred to here as the DPP's guidelines). This policy largely follows the DPP's guidelines (except where matters are not dealt with in the guidelines or require customisation to fit WorkSafe's circumstances). In particular, this policy adopts the principles that, before proceeding, a prosecution must:

- disclose a prima facie case; and
- be in the public interest (this includes consideration of the prospects of success).

1.3 Under what circumstances might WorkSafe consider prosecution?

Subject to this policy, and in accordance with the Enforcement Policy, where an inspector obtains sufficient evidence to establish a prima facie case, and there is a reasonable prospect

of a conviction, consideration will be given to taking prosecution action, instead of or in addition to applying alternative enforcement actions, in circumstances including:

- where the issue of notices is not considered sufficient for ensuring compliance with the Act or regulations;
- where an alleged breach of the Act or regulations either has resulted, or could have resulted, in a fatality or serious injury;
- alleged failure to comply with an improvement or a prohibition notice;
- where an inspector alleges a person has repeated the same offence;
- in cases of discrimination against an employee for any action in relation to occupational safety and health;
- breaches of the consultative provisions of the Act; and
- obstruction of an inspector.

The above list is not exhaustive, therefore it is possible that cases falling outside its scope may be appropriate for prosecution. Such cases will receive close scrutiny and the reason for proceeding will be recorded.

The investigation and prosecution of offences are separate and distinct functions within the criminal justice system. In WorkSafe, these functions are carried out separately. Inspectors appointed under the OSH Act undertake investigatory functions and may gather evidence and make recommendations for prosecution. Each prosecution must be authorised by the WorkSafe Western Australia Commissioner or a person delegated by the Commissioner. Prosecutions are conducted by a WorkSafe lawyer or a lawyer from the State Solicitor's Office. Such lawyers also provide legal advice to assist in the assessment of a proposed prosecution. The decision to charge will still be one for the Commissioner or delegate, although the decision maker will be entitled to act on the lawyer's recommendation.

The decision to continue a prosecution is at least as important as the decision to charge, and both take into account factors beyond those which influence an investigator. Those factors are set out in this document.

1.4 Some fundamental principles underpinning this policy

The fundamental objectives of a WorkSafe prosecution are:

- to bring to justice those who commit offences;
- to punish those who deserve punishment for their offences;
- to deliver a deterrence message to industry (either broadly or to one or more particular sector(s)) in order to improve compliance with the law;
- to discourage repeat offences and/or recalcitrance by duty holders, and thereby to improve occupational safety and health in workplaces.

In pursuit of these objectives, it is necessary to consider:

- the rights of the alleged offender;
- the interests of employees and others whose safety and health may be potentially adversely affected by the work; and
- the interests of the community.

PROSECUTION POLICY

It is recognised that the courts have a central role in the justice system in determining whether the law has been breached and in imposing appropriate sanctions for illegal conduct. The discretion on whether or not to prosecute must be exercised with this in mind.

The duty of the prosecutor is to act fairly and impartially, to assist the court to arrive at the truth. A prosecutor represents the community and not any private or sectional interest.

2. Core elements of WorkSafe's prosecution policy – applicable to all prosecutions

2.1 Key Principles

WorkSafe adopts the DPP's principles that a proposed prosecution must disclose a prima facie case and must be in the public interest before it can proceed. These principles (drawn from paragraphs 20 through to 33 of the DPP's guidelines) form the basis of the core elements of this Prosecution Policy. They are discussed in WorkSafe's context in the sections below.

2.2 Prima Facie Case

A proposed prosecution must disclose a prima facie case before it can proceed.

Whether or not there is a prima facie case is a question of law. It means: – if the available evidence is believed by the court, is it capable of proving, beyond reasonable doubt, all the elements of the offence?

The most common reason that WorkSafe does not proceed with a recommended prosecution is that there is no prima facie case. There may be evidence capable of proving some of the elements of the offence, but not all. This is not enough to proceed.

Where the available material does not support a prima facie case, the prosecution should not proceed under any circumstances.

2.3 The public interest

Where a prima facie case exists, a prosecution should only proceed where a second test is satisfied, namely where the prosecution is in the public interest. Whether a prosecution is in the public interest is determined by considering:

- Firstly whether there are reasonable prospects of conviction (see section 2.3.1).
- If the above point is satisfied, then there are a range of other factors to be considered, where they are relevant to the case in question (see sections 2.3.2 to 2.3.4). Irrelevant factors are listed in section 2.3.5.

It is in the public interest that prosecutions be conducted fairly and impartially.

A prosecution which is conducted for improper purposes, capriciously or oppressively is not in the public interest.

2.3.1 Reasonable prospects of conviction

It is not in the public interest to proceed with a prosecution which has no reasonable prospect of resulting in a conviction.

If it is concluded that there is no reasonable prospect of conviction, then unless this can be remedied by further prompt investigation, the prosecution should be discontinued.

Assessment of the prospects of conviction goes beyond whether there is a prima facie case. For example, the evidence might be there, but the witnesses might have made prior inconsistent statements that may reduce the likelihood that the court will accept the evidence. This latter issue will impact on the prospect of a conviction.

It is important to exercise dispassionate judgement, based on experience, in assessing the prospect of conviction.

This factor does not mean that only cases perceived as “strong” should be prosecuted. A case perceived as “weak” may not seem so to others, and it is important for the prosecutor to be mindful that the resolution of questions of disputed fact is for the court and not the prosecutor. The assessment of the prospects of conviction must be done without usurping the role of the courts, but rather as exercising discretion in the public interest. It may on occasions be difficult.

The evaluation of the prospects of conviction includes consideration of:

- (a) whether any alleged confession was voluntary and whether there are grounds for believing it may not be admitted into evidence, (Note that WorkSafe may prosecute corporate entities, in which case the confessional issues applicable to individuals do not arise. An inspector may require a director of a company to answer questions and the record of interview may be tendered as evidence against the company);
- (b) the likelihood of exclusion from trial of a confession or other important evidence. Regard should be had to whether a confession may be unreliable having regard to the intelligence of the accused or linguistic or cultural factors;
- (c) the competence, reliability and availability of witnesses;
- (d) known matters that may reduce the likelihood that a witnesses testimony will be accepted, eg prior inconsistent statement by the witness; attitude to the defence; or whether credibility is affected by any physical or mental impairment;
- (e) conflict or inconsistency between the evidence of the prosecution’s witnesses;
- (f) where the identity of the alleged offender is in issue, the cogency and reliability of the identification evidence;
- (g) any lines of defence that are plainly open to (or have been indicated by) the defence;
- (h) inferences consistent with innocence; and
- (i) the standard of proof.

Evaluation of the prospects of conviction will generally not have regard to:

- (a) material not disclosed to the prosecution by the defence;
- (b) notification of a defence that purports to rest upon unsubstantiated assertions of fact;

PROSECUTION POLICY

- (c) assertions or facts upon which a defence or excuse are based which are contentious, or rest on information which would not, in the opinion of the prosecutor, form the basis of credible cogent evidence.

2.3.2 Balancing other public interest factors

Having reached the conclusion that there is a prima facie case and reasonable prospects of conviction, the Commissioner or Commissioner's delegate must consider whether, in the context of the known facts and surrounding circumstances of the case, it is in the public interest to pursue a prosecution.

Sections 2.3.3 and 2.3.4 of this policy respectively list the factors (based on those in the DPP's guidelines) that may arise in favour of prosecution, and those that may arise against prosecution.

The factors that can be taken into account will vary from case to case, and it is likely that any particular case may have some factors in favour and some against.

Judgement must be exercised in balancing the factors in favour with those that mitigate against prosecution. It is not a question of counting the number of factors for and those against. They must be considered together, each identified factor being given appropriate weight according to the particular circumstances of the case in question. Ultimately it is all the relevant factors taken together which will determine, on balance, whether it is in the public interest to prosecute.

2.3.3 Factors that may weigh in favour of prosecution

Factors that may weigh in favour of prosecution include:

- (a) the need for punishment and deterrence. (Deterrence may be specific/personal or general, or both. With respect to general deterrence, it is noted that a particular prosecution may be warranted to establish a particular principle (a so-called "strategic prosecution"), for example where it is necessary to convey a message that WorkSafe regards breaches relating to particular matters as serious breaches. This might also apply where there are new concerns such as those relating to an emerging occupational health issue. A further example might be where WorkSafe considers it important to reinforce the message that a particular type of duty holder has responsibilities under the Act that will be enforced);
- (b) the circumstances in which the alleged offence was committed. (Considerations here might include the seriousness of the alleged offence and/or its outcome, the culpability of the offender and whether the alleged offence had been brought to the attention of the offender prior to the date in question);
- (c) the need to ensure consistency in the application of the law. (Similar cases should be dealt with in a similar way. This factor may also extend to the need to obtain clarity in the application of the law, because certainty is necessary for laws to be consistently applied and followed);
- (d) the need to maintain the rule of law (which embraces concepts such the application of the law without the influence of arbitrary power; the equal accountability of all before the law; and the protection of the rights and freedoms of individuals through the courts);

- (e) the need to maintain public confidence in basic constitutional institutions, including Parliament and the courts;
- (f) the entitlement of the State or other person to criminal compensation, reparation or forfeiture, if guilt is adjudged (for example, persons injured as a result of OSH breaches may be entitled to criminal compensation).

2.3.4 Factors that may weigh against prosecution

Factors which may, singly or in combination, render a prosecution inappropriate in the public interest (and against which the factors in favour should be balanced) include:

- (a) the trivial or technical nature of the alleged offence in the circumstances;
- (b) the youth, age, physical or mental health or special infirmity of the victim, alleged offender or a witness. (These factors may give rise to vulnerabilities that may render it inappropriate to subject the person to the trauma of prosecution or testifying in court. In WorkSafe's context, factors such as age, mental health or special infirmity may also impact on a person's future role in the workforce and hence the likelihood of re-offending. Notwithstanding these comments, there is an argument that vulnerabilities of youth, age, or infirmity, when applicable to a victim, should entitle the person to the protection the law provides. In other words, the offence is regarded as more serious because the victim was vulnerable. In view of these considerations WorkSafe will apply this factor with caution, with due regard to the question of whether or not the factor does, or is likely to, give rise to considerations that genuinely weigh against prosecution. Where these vulnerabilities weigh in favour of prosecution rather than against, they will be taken into account under item 2.3.3(b) "the circumstances in which the alleged offence was committed".)
- (c) the alleged offender's antecedents (ie previous history. This includes prosecutorial antecedents and may include improvement or prohibition notices. However it is recognised that the absence of prior notices does not necessarily indicate attention to workplace safety and health. Further the presence of prior notices is not proof of a prior offence, although, relevant prior notices does indicate the hazard was known or ought to have been known);
- (d) the staleness of the alleged offence, including delay in the prosecution process which may be oppressive. (This factor must be considered in the context of the Parliament's intent, as reflected in the OSH Act, that the period for bringing charges for offences under the Act is three years from the date of the offence. Charges greater than three years old cannot be brought. Given this, it would be unusual for "staleness of the alleged offence" to weigh heavily against proceeding. Only in extraordinary circumstances would it be expected that a delay of up to three years in bringing charges would be sufficiently oppressive as to weigh strongly against proceeding);
- (e) the degree of culpability of the alleged offender in connection with the offence. (This factor weighs against prosecution where culpability is low. Clearly a high level of culpability would weigh in favour of prosecution, and is to be considered under factors such as "the need for punishment and deterrence" and "the circumstances in which the alleged offence was committed");

PROSECUTION POLICY

- (f) the obsolescence or obscurity of the law. (Given the OSH Act and Regulations are relatively modern laws, which are reviewed regularly, this factor is less likely to arise in WorkSafe's context than in some others where the legislation is older. Nevertheless the possibility that some obscurity or obsolescence could arise cannot be disregarded);
- (g) whether a prosecution would be perceived as counter-productive to the interests of justice. (For example, a prosecution that is seen to be harsh might be perceived to be "unjust" and falling within this factor);
- (h) the availability or efficacy of any alternatives to prosecution. (In WorkSafe's context, notices are usually available as an alternative to prosecution. In limited circumstances, other options might also be available, such as the cancellation or suspension of a licence or registration. The availability of an alternative, especially the issuance of a notice, does not necessarily mean that the alternative alone is sufficient. Notices, in particular, are designed to effect change in the workplace, and although prosecution may do the same, punishment and deterrence plays a role in prosecution that is absent in the issuance of notices alone. Consideration needs to be given to whether the more serious enforcement action of prosecution is warranted in view of the alternatives available);
- (i) the lack of prevalence of the alleged offence and need for deterrence, either specific/personal or general;
- (j) whether the alleged offence is of minimal public concern. (In WorkSafe's context extreme care must be exercised before concluding that any particular breach is of minimal public concern. The OSH legislation is modern, updated regularly, and developed through a tripartite Commission, frequently with the input of additional stakeholders and/or public comment. It would be unusual to conclude that an offence under this legislation is of minimal public concern);
- (k) the attitude of the victim of an alleged offence to prosecution. (See section 3.4 for a discussion of victims in the context of the OSH Act and regulations);
- (l) the likely length and expense of a trial if disproportionate to the seriousness of the alleged offending;
- (m) whether the alleged offender has co-operated in the investigation and prosecution of others or has indicated an intention so to do;
- (n) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (o) the likely effect on public order and morale;
- (p) whether a sentence has already been imposed on the offender which adequately reflects the criminality of the circumstances; and
- (q) whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle, is remote (ie whether a person has been sentenced to a level where "enough is enough" and the court is unlikely to impose any additional penalty).

2.3.5 Irrelevant factors

The following matters are not to be taken into consideration in evaluating the public interest:

- (a) the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender. (The DPP's guidelines contain an exception where the matter is an element of the offence, however it is not likely that such an exception would ever be applicable to any WorkSafe matter);
- (b) the possible political consequences of the exercise or non-exercise of discretion;
- (c) the prosecutor's personal feelings concerning the alleged offender or victim; and
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

3. Other factors that may be relevant to specific cases – applicable to some prosecutions only

There are a number of other relevant considerations that may apply to some WorkSafe cases, but not others.

3.1 Juveniles

WorkSafe rarely prosecutes juveniles. This has to do with the nature of the world of work, where they are less likely than older persons to hold positions of responsibility for others. However, young workers have the same responsibilities under the Act as older workers, therefore the possibility of a juvenile allegedly committing an offence under the Act cannot be disregarded.

The DPP's guidelines identify a number of considerations that apply specifically in relation to the prosecution of juveniles. In some cases prosecution must be regarded as a severe measure with significant implications for the future development of the juvenile concerned. Factors to be considered in relation to the prosecution of a juvenile include, but are not limited to, the seriousness of the alleged offence, the age and apparent maturity of the juvenile, the available alternatives to prosecution and their efficacy, and whether a prosecution would be likely to be harmful to the juvenile or be inappropriate.

Where prosecution of a juvenile is to be considered, the sections on juveniles in the DPP's guidelines will be applied (paragraphs 34 and 35).

3.2 Prosecution of the mentally impaired

The DPP's guidelines discuss some considerations that apply specifically in relation to the prosecution of the mentally impaired. WorkSafe rarely prosecutes the mentally impaired, however where it does the DPP's guidelines will be applied, taking into account the matters discussed below.

In WorkSafe's context, key factors requiring consideration are the level of impairment; the role the person undertakes in the workplace; the level of risk of harm posed to the health and safety of others; whether the person understood or should have understood the risk posed to others; and the likelihood of re-offending (which includes consideration of whether the alleged offender remains in the workforce or is likely to return). As indicated in the DPP's guidelines, prosecution of a person with a mental impairment for a trivial offence is not considered appropriate.

PROSECUTION POLICY

3.3 Victims

Many alleged breaches of the OSH Act or Regulations are brought to the courts in the absence of any harm to any person. In fact one of the key features of the “new style” occupational safety and health legislation when it was introduced was that it did not need a victim to enable charges to be brought or other action to be taken. It had, and continues to have, a strong preventative element.

The OSH legislation is not intended to provide redress for work related injury or harm. Such mechanisms are available through workers’ compensation legislation and common law claims for personal injury. Therefore WorkSafe does not act on behalf of the victims of OSH breaches. WorkSafe acts in the best interests of the community as a whole (especially the working community). Taking prosecution under OSH laws is about changing behaviour across workplaces. Prosecution is as much about general deterrence as it is about individual deterrence and punishment.

WorkSafe aims to treat victims sensitively and appropriately. For example:

- Where a victim communicates a view regarding prosecution, this view will be taken into account. However, such a view cannot influence whether or not there is a prima facie case, and it is only one factor for consideration in relation to the public interest. Ultimately the decision will be made taking into account the broader public interest in view of all the factors relevant to the case.
- Where there is a reasonable basis to believe a victim may be significantly further traumatised by the taking of prosecution action, this will be taken into account in making the decision to proceed with prosecution. This especially applies where a victim has suffered mental illness linked to the incident.
- Where the above point applies and the process of giving evidence in court is likely to be a source of significant trauma to a victim, consideration will be given to alternatives, including proceeding without the witness’s testimony.
- When prosecution action is taken, victims will be provided with information regarding the opportunity to make a victim impact statement and will be provided with information on the service the Victim Support Service provides in this regard.

3.4 Charge negotiation

The DPP’s guidelines discuss the benefits of a plea of guilty and indicate that negotiations between the parties (with a view to securing a plea of guilty) are encouraged and may occur at any stage of the progress of a matter through the courts.

Subject to certain considerations, WorkSafe may agree to discontinue a charge or charges, or reduce a charge to a less serious charge, upon the promise of an accused person to plead guilty to one or more other charges. A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters:

- (a) where the plea of guilty reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing;
- (b) where the evidence available to support the prosecution case may be weak in a particular area, or the prosecution case may be fraught with difficulty, and the public interest will be satisfied with an acknowledgement of guilt to certain criminal conduct;

- (c) when the saving of cost and expense to the community is great when weighed against the likely outcome of the matter if it proceeded to trial without acceptance of the plea;
- (d) when to do so will save a witness or witnesses, particularly a victim or other vulnerable witness, the trauma of testifying at trial.

A plea will not be accepted if:

- (a) to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence;
- (b) the accused person intimates that he or she is not guilty of any offence.

In considering whether to accept a plea, regard may be had to the views of the investigating inspector and, where known, of the victim of the offence.

Charge negotiations must be based on principle and reason and not on expedience alone. A written record of the charge negotiation must be kept in the interests of transparency and probity.

Where a plea is offered by a person who may later give evidence for WorkSafe against another alleged offender in relation to the same matter, paragraphs 78 and 79 of the DPP's guidelines shall apply subject to section 3.8 of this policy.

3.5 Prosecution of partners in business

Many businesses in Western Australia are operated as partnerships where two or more persons carry on the business. If the business is not incorporated, then it does not have a distinct legal identity like a person or a company. The persons responsible for the actions of the business are the parties who operate it.

Because a partnership is not a legal entity, when a prosecution arises, each partner must be separately prosecuted and convicted.

Because the people who are in partnership may undertake different roles, it is entirely possible that one or more partners may have little or no involvement in the activities that may lead to a breach of the OSH Act or Regulations. The question arises whether a non-offending partner should be prosecuted by virtue of the actions of another partner (or partners).

WorkSafe will proceed against those partners who allegedly failed in their duties under the OSH legislation. In determining culpability in relation to the alleged offence, WorkSafe will consider factors such as:

- The level of involvement of the partner concerned in the activities or matters that gave rise to the alleged breach;
- The level of knowledge of the partner of the alleged breach and/or whether the alleged breach should have been known to the partner;
- Whether the alleged breach was attributable to another person;
- Whether it would have been reasonable for the partner to take steps to prevent or rectify the alleged breach.

The above factors do not replace the standard public interest assessment. They fall within existing factors such as culpability and circumstances in which the alleged offence was committed. Listing them above simply makes them clearer in the context of a partnership.

PROSECUTION POLICY

3.6 Prosecution of directors and other officers

Where a body corporate is guilty of an offence under the OSH Act, Section 55(1) of the Act provides (in part) that any director, manager, secretary or other officer of the body (referred to here as “director” for simplicity) is guilty of the same offence where the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of the director.

Section 55(1) makes directors accountable for their actions, or inaction. It means they cannot “hide behind” the corporate entity.

In applying section 55(1) of the OSH Act, WorkSafe recognises that where the body corporate concerned is operated and owned by a few individuals (eg one or two directors and a similar number of shareholders) any penalty awarded against the body corporate is likely to impact significantly on the director(s). Any penalty imposed by reason of section 55(1) will be above and beyond that imposed on the company. This effectively exposes the director(s) to additional punishment. That is not to say that section 55(1) charges should be discouraged. On the contrary, the Parliament clearly intended that directors be accountable and liable for prosecution. The key is to ensure such prosecutions are appropriately considered.

Factors to be taken into account in the consideration of section 55(1) prosecutions are:

- The circumstances, seriousness and the outcome of the alleged breach (eg was a person killed or seriously harmed or exposed to a high risk of being killed or seriously injured?);
- The level of culpability of the director against whom a charge under section 55 is proposed;
- The director’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 the position of the director;
- The level of involvement of the alleged offender in the events that led to the alleged breach, including the degree to which the alleged offender was personally responsible for what occurred;
- The ease with which the alleged breach could have been avoided or rectified.

The above does not override the considerations discussed in section 2 of this policy. They are merely more specific points that fall within the scope of the normal assessment processes outlined in section 2.

The factors listed above apply specifically where the charge is contemplated under section 55(1) of the OSH Act. They are not required where a body corporate has been charged with an offence committed in circumstances of gross negligence. In such cases, charges against a director etc would proceed under Section 55(1a). Where section 55(1a) applies, it is a “given” that the outcome is serious (by virtue of the description of “circumstances of gross negligence” in section 18A(2) of the OSH Act), and the details of what must be considered in terms of the director’s knowledge and action or inaction is covered within the section. It is not necessary to add anything further to the normal considerations that would apply in the application of this Prosecution Policy.

3.7 Prosecution Appeals

The purpose of prosecution appeals is to ensure that offence provisions are justly and correctly applied; and in the case of appeals against penalty is to ensure that there are established and maintained adequate, just and proportionate standards of punishment for offences.

Prosecution appeals have been held by the courts to raise considerations not present in an appeal by a defendant seeking a judgment of not guilty or a reduction in penalty. They have been described as cutting across time-honoured concepts of criminal administration and as putting the convicted person in jeopardy a second time.

Prosecution appeals must be considered against the background of many complex circumstances and legal principles. For any offence there is a range of sentencing options and a court must have regard, in choosing which option seems appropriate, to the principles laid down by Parliament and in other cases. For any offence there may be a number of different dispositions none of which are necessarily wrong. Therefore a prosecution appeal will not be initiated simply because the outcome is perceived as inadequate or inappropriate in a particular case.

In WorkSafe's context, the issue of whether or not to appeal an acquittal by the court arises from time to time. The question must be dealt with in the context of the above and considered in the light of legal advice.

Where the question relates to an appeal against sentence, the following factors are to be considered:

- (a) whether a penalty is so disproportionate to the seriousness of the offence as to reflect error in sentencing principle by the court;
- (b) whether a penalty is so disproportionate to the seriousness of the crime as to shock the public conscience;
- (c) whether a penalty is so out of line with other penalties imposed for the same or similar offences without reasonable cause for that disparity;
- (d) whether the idiosyncratic views of individual magistrates as to particular offences or types of offences require correction;
- (e) whether disputed points of sentencing principle are giving, or are likely to give, rise to disparity of penalties imposed for offences of the same or similar type;
- (f) whether existing penalties are already subject to wide and inexplicable variations and there is a need to reduce this disparity and variability in order to promote uniform standards of sentencing.

Reasons for proceeding with an appeal (whether of an acquittal or a sentence) will be documented.

3.8 Concessions

The DPP's guidelines state that in rare circumstances it may be necessary to grant concessions to people who have participated in alleged offences, in return for the provision of evidence against others.

Concessions rarely arise in WorkSafe's context. If the question of a concession arises WorkSafe will apply the DPP's Guidelines, taking into account any relevant legal advice.

A concession will only be given in the interests of justice, and as a last resort.

PROSECUTION POLICY

3.9 Prosecution of the Crown

In 2005 the OSH Act was amended to expressly provide for prosecution of the Crown. This clearly signals Parliament's intent that the Crown be treated no differently to any other duty holder under the Act (subject to some provisions that were required to make the provisions work, in view of the fact that most Government agencies are not legal entities in their own right).

This Policy applies to the prosecution of Government entities and agencies, so far as it is capable, in the same way that it applies to other alleged offenders.

To maintain communication across Government, WorkSafe will advise its responsible Minister whenever it authorises prosecution of an agency of the Crown, with a view to providing the Minister with the opportunity to advise the Minister responsible for the offending agency.

4. Other key aspects of the DPP's guidelines

The DPP's guidelines cover a range of other matters relating to the conduct of the prosecution once the decision has been made to proceed. For that reason they fall outside the scope of this policy. As far as appropriate and practicable (bearing in mind that some of the DPP's guidelines are more applicable to indictable offences than to summary offences), WorkSafe will apply principles consistent with those in the DPP's guidelines in relation to:

- expedition of the trial;
- disclosure to the defence;
- unrepresented accused;
- retrials;
- sentence; and
- victim impact statements