



Compliance policy and prosecution guidelines

March 2012

Disclaimer

This publication may contain work health and safety and workers compensation information. It may include some of your obligations under the various legislations that WorkCover NSW administers. To ensure you comply with your legal obligations you must refer to the appropriate legislation.

Information on the latest laws can be checked by visiting the NSW legislation website (www.legislation.nsw.gov.au).

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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Section A - General

1. Introduction

- 1.1 The WorkCover Authority of New South Wales (WorkCover) is committed to providing a transparent and consistent approach to its compliance and prosecution activities in both workers compensation and work health and safety.
- 1.2 WorkCover has endorsed the *National Compliance and Enforcement Policy* as a New South Wales Work Health and Safety Compliance Policy as part of the implementation of the nationally harmonised Work Health and Safety laws. The NSW Prosecution Guidelines have been revised in line with the *Work Health and Safety Act 2011*.
- 1.3 The *Work Health and Safety Act*, the *Work Health and Safety Regulation 2011* and supporting codes of practice are part of a nationally harmonised scheme for Work Health and Safety legislation that commenced in New South Wales, Queensland, the Australian Capital Territory, the Commonwealth and the Northern Territory on 1 January 2012.
- 1.4 The harmonised Work Health and Safety legislation was enacted pursuant to the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, signed by the Council of Australian Governments in July 2008. Safe Work Australia is the national policy body responsible for developing the model Work Health and Safety legislation.
- 1.5 The Work Health and Safety legislation is supported by a National Compliance and Enforcement Policy, available on the Safe Work Australia website at www.safeworkaustralia.gov.au. This WorkCover Compliance Policy and Prosecution Guidelines supplements the National Compliance and Enforcement Policy in respect of the application of the Work Health and Safety legislation in New South Wales.
- 1.6 The Prosecution Guidelines part of this Policy is published in accordance with section 230(4)(a) of the *Work Health and Safety Act*.

Role of WorkCover

- 1.7 WorkCover is a statutory corporation constituted pursuant to section 14 of the *Workplace Injury Management and Workers Compensation Act 1998*. WorkCover exercises various powers and authorities and has duties and functions under the legislative framework for work health and safety and workers compensation in NSW. WorkCover is part of the Compensation Authorities

Staff Division (CASD). The Division was formed as part of the NSW Government's creation of Principal Agencies in July 2009.

1.8 The legislative framework includes the following:

- *Work Health and Safety Act 2011* and the regulation and codes of practice made under the Act (WorkCover is co-regulator - the Department of Trade and Investment administers the Act in respect of mining workplaces);
- *Explosives Act 2003* and its regulation;
- *Workers Compensation Act 1987*, the *Workplace Injury Management and Workers Compensation Act 1998*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* and the regulations, instruments and guidelines made under the authority of those acts; and
- *Sporting Injuries Insurance Act 1978* and its regulations;
- *Rural Workers Accommodation Act 1969*;
- *Dangerous Goods (Road and Rail Transport) Act 2008* (jointly administered with the Department of Environment and Climate Change).

1.9 The functions of WorkCover include:

- ensuring compliance with the workers compensation legislation and the work health and safety legislation;
- responsibility for the day to day operational matters relating to the schemes to which any such legislation relates;
- investigating workplace incidents; and
- assisting in the provision of measures to deter and detect fraudulent workers compensation claims.

1.10 In exercising its functions, WorkCover is required to:

- promote the development of healthy and safe places of work;
- promote the prompt, efficient and effective management of injuries to persons at work;
- ensure the efficient operation of workers' compensation insurance arrangements; and
- ensure the appropriate co-ordination of arrangements for the administration of the schemes to which the workers compensation legislation and the work health and safety legislation relates.

1.11 Section 152 of the *Work Health and Safety Act* also provides for the functions of WorkCover as a WHS regulator. These functions include, among other things, to monitor and enforce compliance with the Act, to provide advice and information on work health and safety to duty holders and the community, and to conduct and defend proceedings under the Act.

WorkCover's approach

1.12 WorkCover's Corporate Plan 2010 – 2015 focuses on seven key result areas (KRAs).

The four business KRAs are:

1. The prevention of workplace injury and illness
2. Sustainable return to work
3. Low premiums
4. Sound financial management and system financial viability

Underpinning the delivery of these four KRAs are:

5. Exemplar organisation
6. Cost and efficiency
7. Customer-focused approach.

Underpinning KRA 1, the prevention of workplace injury and illness, are four key actions:

1. Target priority industries, injuries and illnesses through improved data capability and deployment of multidisciplinary teams
2. Use investigation, enforcement and follow-up processes that eliminate or control safety risks in workplaces

3. Review work health and safety legislation to ensure it is effective in preventing injury and illness
4. Targeting prevention and enforcement strategies for high consequence, low frequency risk.

1.13 In the exercise of its functions of ensuring compliance with workers compensation and work health and safety laws, WorkCover may take a number of different approaches (education, information, incentives and enforcement) depending on the nature of the issue that has arisen. The approach to be adopted in any particular matter will depend on an assessment of the circumstances of the workplace issue as well as consideration of a range of relevant factors, outlined in Section C.

Section B - Policy considerations – Compliance

2.1 Scope of WHS Jurisdiction

The scope of the Work Health and Safety (WHS) legislation does not include every incident or risk to health and safety. Those relating to workplaces and work activities will normally be included. Incidents or risks such as those on public roads or associated with recreational or leisure activities taking place in open areas would usually be outside the scope of the WHS legislation.

Issues of public safety in these places and involving these activities are usually the responsibility of other agencies such as the Independent Transport Safety Regulator, Roads and Maritime Services, the Office of Environment and Heritage, Police, the Ministry of Health or the Department of Education and Communities.

WorkCover has a number of agreements in place with other State agencies to prevent duplication in areas where there is potential for a number of legislative provisions to be called into action.

2.2 Compliance Generally

WorkCover's WHS and injury management functions constitute a comprehensive framework for preventing injury and illness at work. The primary aim of the framework is prevention.

WorkCover's principal focus is upon assisting NSW employers and employees to achieve safer workplaces and therefore more productive workplaces, as well as maintaining a financially and socially responsible workers compensation system through:

- applying an appropriate mix of information, assistance, education, advice, incentives and deterrents;
- building capability so that work health and safety risks are properly controlled;
- working co-operatively to develop a workplace safety culture and harmonised and practical workplace standards, information, testing and workable solutions;
- improving the workers compensation system for employers and employees through responsible financial management, improved health social and return to work outcomes for injured workers and fair and equitable dispute resolution;
- managing performance and ensuring accountability of agents, insurers and service providers;
- effective management of workers compensation scheme investments;
- engaging stakeholders to improve WHS and workers compensation outcomes.

WorkCover's role in enforcing compliance is a limited part of this larger role in injury and illness prevention and management.

Under the WHS legislation, generally the term “employer” is replaced with “person conducting a business or undertaking” and “employee” with “worker”. However for consistency with the workers compensation legislation and other legislation administered by WorkCover, this document will refer to employer and worker.

2.3 National Compliance and Enforcement Policy

All Australian work health and safety regulators are signatories to the *National Compliance and Enforcement Policy* (NCEP), available from the Safe Work Australia website at www.safeworkaustralia.gov.au.

Consequently, the NCEP at Section C of this document is endorsed and adopted as the current NSW WHS compliance policy.

The NCEP is intended to support consistency in approaches and outcomes by WHS authorities in all Australian jurisdictions. It promotes an effective mix of positive motivators and strong deterrents to achieve compliance with the law and improve work health and safety.

The NCEP specifies nationally agreed:

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

Section C - Compliance - Work Health and Safety

The *National Compliance and Enforcement Policy* (NCEP) sets out the approach WorkCover NSW and other work health and safety regulators will take to compliance and enforcement under the *Work Health and Safety Act 2011* and Regulation.

The NCEP was endorsed by Safe Work Australia Members on 29 July 2011 and by the Workplace Relations Ministers' Council on 10 August 2011.

The NCEP is available on Safe Work Australia's website:

<http://safeworkaustralia.gov.au/Legislation/NCP/Pages/NCP.aspx>

Section D - Compliance - Workers' Compensation And Injury Management

4.1 There are two major pieces of legislation that guide the administration of workers compensation and injury management in New South Wales. These are the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* and the regulations made under these Acts, collectively termed the workers compensation legislation. The workers compensation legislation establishes the WorkCover Scheme. This section outlines the obligations under the WorkCover Scheme and the compliance policy and strategies of WorkCover under the workers compensation legislation.

The WorkCover Scheme

4.2 The main objectives of the WorkCover Scheme are to:

- assist in securing the health, safety and welfare of workers and prevent work-related injuries;
- in order to assist injured workers and promote their return to work as soon as possible, provide:
 - prompt treatment of injuries,
 - effective and proactive management of injuries, and
 - necessary medical and vocational rehabilitation following injury,
- provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses;
- be fair, affordable, and financially viable,
- ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,
- deliver the above objectives efficiently and effectively.

4.3 The WorkCover Scheme is funded from the premiums paid by employers. Under the Scheme all employers are assigned to a Workcover Industry Classification (WIC) code, based on the claims history of employers in that industry. As an incentive for safe work practices the basic “rate” for an employer may be adjusted according to the employer's claims experience. WorkCover acts on behalf of the Nominal Insurer, which is the legal entity responsible for the performance of the Scheme. The Nominal Insurer contracts Scheme Agents to deliver case management and policy services within the Scheme. WorkCover also regulates and manages the workers compensation system, including the licensing of self and specialised insurers and the oversight of service providers.

- 4.4 Early return to work is a key element in injury management. Research shows that the earlier a worker returns to work or begins a rehabilitation program, the greater the likelihood of recovery from injury. This in turn reduces the amount of time a worker remains on financial benefits and enhances the viability of the Scheme. The premium structure, penalties for non-compliance and the benefits available to workers are all designed to ensure that an injured worker receives early and effective treatment. Returning the worker to maximum productivity is the shared responsibility of the treating doctor and the employer in co-operation with the worker. The insurer is responsible for overseeing the development of injury management plans.
- 4.5 WorkCover also administers the Uninsured Liability Indemnity Scheme (ULIS). This is also funded from workers' compensation premiums. The scheme ensures that workers who are injured at work, whose employers do not hold a workers' compensation insurance policy, are still entitled to the same assistance as those workers whose employer holds insurance. WorkCover will take action against uninsured employers to recover any monies paid to injured workers from the scheme.
- 4.6 As the financial viability of the Scheme is based on all employers sharing the costs of workplace injury equitably, failure to comply with the legislation, especially to pay workers' compensation premiums, is viewed very seriously.
- 4.7 Non-insurance places an unfair burden on those employers who do comply, as it increases their premiums and places them at a competitive disadvantage.

Obligations under the WorkCover Scheme

- 4.8 The workers compensation legislation imposes general obligations on employers, employees and others.
- 4.9 Some key obligations for employers are to:
- hold a valid workers' compensation insurance policy;
 - comply with the obligations imposed by the insurer's injury management program;
 - keep a record of wages paid for at least the last seven years;
 - notify the insurer within 48 hours after becoming aware that a worker has been significantly injured and is likely to be off work for seven days or more;
 - not dismiss a person wholly or mainly because of a work-related injury within six months after the worker first became unfit for work;
 - notify the insurer if unable to provide suitable employment (either at all or immediately) when requested by a partially incapacitated worker;

- have a Register of Injuries book in which workers should write work related injury details.

4.10 Workers must:

- notify their employer of an injury as soon as possible;
- not provide false or misleading statements in a notice of injury to an employer, or in a claim for workers' compensation payments, or in medical certificates or other documents;
- comply with the injury management program and plan;
- return to work as soon as possible; and
- notify the payer of workers' compensation payments of any changes in employment that affect the worker's earnings.

4.11 The workers compensation legislation should be consulted for full details of all obligations. As from 1 July 2003, there are obligations on principal contractors to ensure that subcontractors who engage employees have in place workers compensation policies.

Compliance Strategies

4.12 WorkCover provides a range of information and advice through the WorkCover Assistance Service. Workers Compensation insurers also provide advice on managing workplace safety risks, as well as insurance requirements, managing compensation claims and injury management issues.

4.13 WorkCover uses information derived from a variety of sources including from its inspectors and authorised officers and from data and research to identify areas of possible non-compliance with the workers compensation legislation.

4.14 As with WHS, WorkCover uses a range of compliance measures depending on the particular characteristics of the alleged non-compliance. For some breaches of the workers compensation legislation, an inspector may provide advice on how to comply with the legislation or may direct an employer to rectify a problem. Where the inspector is of the opinion that it is not sufficient merely to provide advice or direction about workers compensation obligations, a penalty notice will be issued. More serious offences may warrant prosecution.

4.15 WorkCover has a discretion in determining the appropriate method of achieving compliance. Decision-making in terms of compliance is, however, structured and involves consideration of the factors outlined in this policy. The decision to take court action is often not the compliance action of first choice-rather it is made after a careful consideration of a range of factors, including whether advice or some other form of compliance option is more appropriate.

Compliance options

Orders: s 174 *Workers Compensation Act 1987*

4.16 Section 174 of the *Workers Compensation Act 1987* provides inspectors and authorised officers with powers to issue orders to employers in relation to the supply of information and the keeping of records. Orders under this section are usually issued as part of an investigation into compliance with obligations under the workers compensation legislation.

Penalty notices (on-the-spot fines): s 246, *Workplace Injury Management and Workers Compensation Act 1998*

4.17 Penalty notices are used as an effective and efficient method of dealing with less serious breaches of the legislation. If the fine attached to the penalty notice is paid then no further action will be taken by WorkCover in relation to that offence. The offences in respect of which notices can be issued and the amounts that can be imposed by way of fine are set out in Schedule 5 to the *Workers Compensation Regulation 2003*. A person served with a penalty notice may elect not to pay the penalty and to have the matter dealt with by the court. The procedure for making an election is set out on the on the back of the penalty notice.

4.18 The factors a WorkCover inspector considers when determining whether to issue a penalty notice include:

- whether the breach is a minor one;
- in the case of a failure to insure, the number of employees and the length of time the employer was uninsured;
- whether the breach can be remedied quickly;
- whether the issuing of a penalty notice is likely to have the desired deterrent effect; and
- if the breach is a one-off situation or part of an ongoing pattern of noncompliance.

Debt recovery and reimbursement

4.19 Where there has been a failure to insure under the workers compensation legislation, WorkCover may take action to recover as a debt up to double the amount of the avoided premium. WorkCover may also seek reimbursement of any compensation paid to a worker under the Uninsured Liability and Indemnity Scheme. These actions are in addition to the issue of a penalty notice or taking action to prosecute an offence.

Prosecution

- 4.20 The fact that a penalty notice can be issued for an offence does not mean that only this action can be taken. WorkCover has discretion to undertake a prosecution for an offence and it has discretion to waive prosecution in circumstances where the offender pays a sum equal to double the amount of avoided premium. Where a penalty notice is considered under the circumstances to be inappropriate, prosecution action may be initiated.
- 4.21 Specific offences for which WorkCover may prosecute include non-insurance, under-insurance and fraud.

Non-insurance

- 4.22 Section 155 of the *Workers Compensation Act 1987* requires all NSW employers to obtain and maintain workers compensation insurance. Employers who fail to obtain a workers compensation policy place an unfair burden on those employers who do comply, as this increases their premiums and places them at a competitive disadvantage.

Under-insurance

- 4.23 Under-insurance constitutes the primary financial risk to the WorkCover Scheme. Under-insurance may involve direct under-declaration of wages, autorenewing a policy in order to reduce premium, provision of misleading information to obtain an incorrect WIC code and therefore “rate” or avoidance of claims experience to deliberately reduce premium.
- 4.24 The level of non-compliance varies across industry sectors. WorkCover pursues a number of different compliance strategies to ensure equity is maintained among employers in bearing the Scheme’s financial burden and meeting obligations through the premiums paid.

Fraud

- 4.25 There are various types of fraud, means of committing fraud and parties that commit fraud within the Workers Compensation Scheme. In general, fraud is the attainment of a benefit or advantage by means of deception. Specifically, it is when employers, service providers, employees or others receive payments from the Scheme due to deceptive means. WorkCover views fraud offences very seriously and will actively pursue these cases.
- 4.26 Making a false or misleading statement while claiming for workers compensation is a serious offence. A false or misleading statement can include making a claim for workers compensation

where there was no injury, or a claim falsifying the degree of injury suffered. The WorkCover fraud investigation unit investigates allegations of fraud and prosecutes in accordance with this policy.

4.27 More serious breaches of fraud may be referred to the Police.

Section E - Prosecution guidelines

The decision to prosecute

- 5.1 As indicated in earlier sections of this document, prosecution in a court for an offence under the WHS legislation or the workers compensation legislation is one of several options available to WorkCover.
- 5.2 Prosecution is a discretionary action. Not every breach of the laws passed by Parliament is automatically prosecuted.
- 5.3 The dominant factor in the exercise of the discretion to prosecute or not to prosecute is the public interest.
- 5.4 WorkCover, by commencing a prosecution, aims to change the behaviour of the offender and deter future offenders. Prosecution in appropriate circumstances sends a message to the community that failures of legislative responsibilities will be enforced through the Courts. The decision to prosecute is made on the basis of the applicable law at the time and public interest considerations.
- 5.5 WorkCover is committed to a policy of prosecuting whenever significant breaches of WHS legislation take place. Prosecution of significant cases include cases involving fatalities and incidents of serious injury where potential risks to health and safety are high. Breaches of workers compensation legislation involving fraudulent conduct, whether by an employer or worker or service provider, and non-insurance and under-insurance by employers, may also be prosecuted.

Factors taken into account

- 5.6 The general public interest is the paramount concern to be taken into account in the decision to prosecute. As provided for in the Prosecution Guidelines of the Office of the Director of Public Prosecutions (the ODPP Guidelines), the question of whether or not the public interest requires that a matter be prosecuted is resolved by determining:
- whether or not the admissible evidence available is capable of establishing each element of the offence, i.e. a prima facie case;
 - whether or not it can be said that there is no reasonable prospect of conviction; and if not
 - whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Prima facie case

- 5.7 Before any prosecution is considered, there must be enough evidence to establish a prima facie case.

Reasonable prospect of conviction

- 5.8 As noted by in the ODPP Guidelines, this consideration requires an exercise of judgment which will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place.
- 5.9 A relevant consideration in the evaluation of the strength of a prosecution case will be whether the proposed defendant ensured, so far as reasonably practicable, that the alleged risk was addressed and the existence or otherwise of evidence to support any defence that may be raised by the defendant.

Public interest

- 5.10 In considering the public interest, the main criteria for consideration will be similar to that adopted by the ODPP Guidelines and will include:
- a) the seriousness or triviality of the offence and/or whether the breach is of a technical nature only; WorkCover tends to prosecute when a death has occurred, when there has been a serious injury or illness, or when there has been a risk of fatal or serious injury or illness;
 - b) any mitigating or aggravating circumstances;
 - c) the length of time since the alleged offence;
 - d) the degree of culpability of the alleged offender in relation to the offence;
 - e) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
 - f) the prevalence of the alleged offence and the need for deterrence both specific and general;
 - g) any prior breaches of or convictions under the WHS or workers compensation insurance laws;
 - h) whether the alleged offence is of considerable public concern;
 - i) any precedent which may be set by not instituting proceedings;
 - j) the age, physical or mental health or special infirmity of the alleged offenders or witnesses;
 - k) the length and expense of a Court hearing;
 - l) whether proceedings are to be instituted against others arising out of the same incident;
 - m) community expectations that proceedings will be instituted;
 - n) the availability and efficacy of any alternatives to prosecution.

5.11 The applicability of and weight to be given to these and other factors will vary and depend on the particular circumstances of each case.

5.12 The resources available to WorkCover to conduct prosecutions are finite. They will therefore not be expended in pursuing inappropriate cases.

Irrelevant considerations

5.13 WorkCover adopts the principle that a prosecution must not be brought for improper purposes. A decision whether or not to prosecute will not be influenced by:

- any elements of discrimination against the person, e.g., race, nationality, political associations;
- personal empathy or antipathy towards the offender; or
- the political or other affiliations of those responsible for the prosecution decision; or
- possible political advantage or disadvantage to the government or any political party, group or individual.

5.14 WorkCover prosecution policy involves giving priority to prosecuting offences relevant to:

- a) target industries and or hazards;
- b) injury types and workplace fatalities;
- c) alleged failure to comply with a prohibition notice;
- d) offences against inspectors or authorised officers which prevent them from exercising their powers;
- e) offences relating to impersonating an inspector;
- f) employer, worker or service provider fraud;
- g) non-insurance or under insurance by employers.

5.15 When considering the exercise of prosecutorial discretion in prosecutions under the workers compensation legislation, WorkCover considers:

- how long the person has been uninsured;
- the particular circumstances of the breach;
- the conduct of the person since the offence. For example, whether any liability to the ULIS has been repaid, or how soon after the breach was detected was insurance taken out;
- the efficacy of such prosecution, for example whether the offender is an invalid pensioner, a liquidated company where there are no assets or where the offender is a bankrupt;

- the need to actively deter employer, worker or service provider fraud of the workers compensation scheme;
- the need to ensure that employers meet their workers compensation premium responsibilities; and
- any other factor peculiar to the circumstances.

Categories of offences

5.16 Under the *Work Health and Safety Act 2011* (WHS Act) there are three categories of offences for breach of a health and safety duty which relate to the relative seriousness of the breach:

- Category 1 offence – Reckless conduct

This is the most serious offence. A person commits a Category 1 offence if:

- (a) The person has a health and safety duty, and
- (b) The person, without reasonable excuse, engages in conduct that exposes an individual to whom the duty is owed to a risk of death or serious injury or illness, and
- (c) The person is reckless as to the risk to an individual of death or serious injury or illness

(see section 31 of the WHS Act)

- Category 2 offence – failure to comply with health and safety duty

A person commits a Category 2 offence if:

- (a) The person has a health and safety duty, and
- (b) The person fails to comply with that duty, and
- (c) The failure exposes an individual to a risk of death or serious injury or illness.

(see section 32 of the WHS Act)

- Category 3 offence – failure to comply with health and safety duty

A person commits a Category 3 offence if:

- (a) The person has a health and safety duty, and
- (b) The person fails to comply with that duty.

(see section 33 of the WHS Act)

Who may prosecute

5.17 For general offences under the WHS Act and the *Work Health and Safety Regulation 2011* (WHS Regulation), proceedings may only be instituted by:

- (a) the regulator, or
- (b) an inspector with the written authorisation of the regulator (either generally or in a particular case), or
- (c) by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate but if the offence is a Category 1 offence or a Category 2 offence only after the regulator has declined to follow the advice of the Director of Public Prosecutions to bring proceedings.

(See section 230 of the WHS Act)

While the WHS Act does create other offences, these Prosecution Guidelines focus on the offences in Part 2, Health and Safety Duties, as being the most serious.

5.18 For offences under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* proceedings are commenced in accordance with the provisions of section 245 of the 1998 Act.

Selecting defendants

General principles

5.19 Employers, including corporations and the managers and directors of corporations and other entities, persons conducting a business or undertaking (PCBUs), PCBUs involving management or control of workplaces, manufacturers, suppliers and designers of plant/substances and workers can be defendants. This may mean that a number of people commit an offence arising out of the same incident.

5.20 In addition to the factors set out at 5.13 above, further general considerations that may be taken into account in choosing the appropriate defendant in a particular case are:

- a) 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;
- b) in relation to (a) above, what was the culpability of the proposed defendant;
- c) the effectiveness of any Court order that might be made against the proposed defendant.

Corporate and director/manager liability

5.21 WorkCover's policy is to prosecute duty holders, including corporations and their officers, for breaches of the WHS, workers compensation and other legislation it administers where it is in the public interest to do so. In considering whether such prosecutions are in the public interest, regard will be had to the factors set out in paragraphs 5.6 and 5.22.

5.22 In relation to decisions concerning prosecutions of officers of corporations under the WHS legislation, particular regard will be paid to the steps taken by such persons to ensure compliance by the corporation with the WHS Act. Officers of a person conducting a business or undertaking must exercise due diligence to ensure that the person conducting a business or undertaking complies with its WHS duties and obligations. To meet this obligation, officers are required to take reasonable steps to meet a number of requirements as set out in section 27(5) of the WHS Act including, for example, keeping up to date with WHS matters, understanding the operations of the business or undertaking and the hazards and risks associated with the business or undertaking and having appropriate processes and systems in place.

Public authorities

5.23 The legislation administered by WorkCover binds the Crown and Government authorities. The law applies with equal force to both the private and public sectors. It is generally in the WHS area that a public authority is likely to be prosecuted by WorkCover.

5.24 WorkCover recognises that the issue of deciding in what circumstances public authorities should be prosecuted for breaches of the WHS legislation is a specific instance of determining whether prosecution is in the public interest and acknowledges that there are two competing public interests in relation to the prosecution of public authorities. These are:

- (a) the public has an interest in Government authorities abiding by the law; and
- (b) it is the taxpayer that bears the cost of any prosecution of public authorities. Such expenditure needs to be justified as being in the public interest.

- 5.25 Public authorities are usually under the control and direction of a Minister who can direct compliance with the WHS legislation. However, this position does not always achieve the requisite compliance. In the interests of general deterrence there will be instances where it is important that compliance not only be achieved but be seen to be achieved.
- 5.26 In prosecuting Government authorities however, the current Premier's Memorandum No. 97-26: "*Guidelines for litigation involving or between Government departments and authorities*", applies to the parties to proceedings. This procedure is designed to minimise the factual issues between the parties and provide an opportunity for open and frank discussion. The consultation envisaged by the guidelines operates as an adjunct and not necessarily an alternative to prosecution. This level of consultation can be applied to the private sector.

Charges

General principle

- 5.27 Once a decision is made to deal with an incident by way of prosecution, it is in the public interest for that prosecution to proceed. It is WorkCover's responsibility to select charges where there is a reasonable prospect of conviction. The charges must clearly reflect the seriousness of the alleged criminal conduct. The charges laid and any statement of facts must reflect adequately the nature and extent of the conduct disclosed by the evidence with the aim of providing a basis for the Court to impose an appropriate penalty.

Similar charges for the same offence

- 5.28 WorkCover has a duty to refine its case to avoid laying either duplicitous or multiple charges. There will be instances where the same act will be prohibited under two separate pieces of legislation and involve an offence under each. Where there is another prosecuting authority involved as well as WorkCover, WorkCover will liaise with the other organisation to ensure the most appropriate charge(s) are laid.

Death at work

- 5.29 Where there has been a breach of the law leading to a work-related death, the Police and WorkCover need to consider whether the circumstances of the case might justify a charge of manslaughter under the *Crimes Act 1900* or a charge under sections 31 (Category 1) or 32 (Category 2) of the *Work Health and Safety Act*. In accordance with the *Protocol For The Investigation And Provision Of Advice In Relation To Workplace Deaths And Incidents Of Serious Injury And Prosecutions Arising Therefrom*, the Police and WorkCover have agreed on certain investigative principles the aims of which are to maximise the expertise and resources of each

agency to ensure that the most appropriate charges are laid in the circumstances. The decision as to which agency will lead an investigation is to be made at the commencement of the process and where the facts support a charge of manslaughter the Police may seek the opinion of the ODPP. Both agencies on completion of their respective investigations will provide the Coroner with a brief of evidence to assist the Coroner in his or her deliberation of whether an inquest is to be held.

Charge –bargaining

- 5.30 Charge-bargaining involves negotiations between the defence and the prosecution in relation to the charges which will proceed to hearing with a view to the defence entering a plea of guilty to fewer than all the charges initially laid or to a lesser charge in return for the prosecution withdrawing the remaining charges. However, if appropriate charges are laid initially there is little scope for charge-bargaining and hence there will be only limited circumstances where bargaining will be considered.
- 5.31 A charge-bargaining proposal will not be considered by WorkCover unless:
- (a) the remaining charges adequately reflect the nature of the criminal conduct of the defendant and the plea provides adequate scope for sentencing; and/or
 - (b) the evidence available to support the prosecution case is weak in any material respect; and/or
 - (c) the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial.

Mode of trial

- 5.32 Under the WHS Act, proceedings for a Category 1 offence, which is the most serious, committed by an individual are to be taken on indictment in either the District Court or Supreme Court. Proceedings for a Category 2 offence are to be dealt with summarily before the Local Court or the District Court in its summary jurisdiction. Proceedings for a Category 3 offence are to be dealt with summarily before the Local Court or the Industrial Court.
- 5.33 Prosecutions for breaches of workers compensation legislation will generally be instituted before the Chief Industrial Magistrate's Court. Where an investigation or review of a workers' compensation prosecution matter reveals a serious breach of the provisions of the *Crimes Act 1900*, the matter may be referred to the Police for appropriate action. It is ultimately a matter for the Office of the Director of Public Prosecutions as to whether such matters are prosecuted before the Local Court or District Court. Unless there are good reasons to the contrary, all charges arising out of the same incident will normally be instituted in the same jurisdiction (and preferably at the same time) so the Court has the option to hear them together.

Offences under the ohs act commenced after 1 january 2012

5.34 The *Occupational Health and Safety Act 2000* (OHS Act) was repealed by the WHS Act on 1 January 2012. Schedule 18B to the *Work Health and Safety Regulation 2011* provides for transitional arrangements for proceedings for an offence under the OHS Act. Proceedings that are commenced from 1 January 2012 for an offence under the OHS Act are dealt with as provided for in clause 3 to Schedule 18B to the WHS Regulation.

Offences under the ohs act commenced in the industrial court before 1 january 2012

5.35 Proceedings for an offence under the OHS Act commenced in the Industrial Court before 1 January 2012 but not determined before 1 January 2012 remain in the Industrial Court.

Sentencing options

5.36 Where a Court finds that a WHS offence is proved, there are a number of sentencing options available. These include:

- Adverse publicity orders (section 236);
- Orders for restoration (section 237);
- Work Health and Safety Project Orders (section 238);
- Release on the giving of a court ordered WHS undertaking (section 239);
- Injunctions (section 240); and
- Training Orders (section 241)
- Monetary penalty.

Sentencing

5.37 In New South Wales, the purposes of sentencing and a list of factors relevant to sentence are set out in sections 3A and 21A of the *Crimes (Sentencing Procedure) Act 1999*. Section 3A provides that the purposes for which a court may impose a sentence on an offender are as follows:

- to ensure that the offender is adequately punished for the offence,
- to prevent crime by deterring the offender and other persons from committing similar offences,
- to protect the community from the offender,
- to promote the rehabilitation of the offender,
- to make the offender accountable for his or her actions,
- to denounce the conduct of the offender,
- to recognise the harm done to the victim of the crime and the community.

- 5.38 Section 21A of the *Crimes (Sentencing Procedure) Act* states that in determining the appropriate sentence for an offence, the court is to take into account the following matters:
- the aggravating factors referred to in section 21A(2) that are relevant and known to the court,
 - the mitigating factors referred to in section 21A(3) that are relevant and known to the court,
 - any other objective or subjective factor that affects the relative seriousness of the offence.

Further details are set out in sections 21A(2) – (6) of the *Crimes (Sentencing Procedure) Act*.

Sentencing – role of the prosecutor

- 5.39 The role of the prosecutor in the sentencing process is set out in Rules 62 – 72 of the New South Wales Barristers Rules, referred to in the Prosecution Guidelines of the Director of Public Prosecutions for New South Wales. Rule 71 of the Barristers Rules states that a prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:
- must correct any error made by the opponent in address on sentence;
 - must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
 - must assist the court to avoid appealable error on the issue of sentence;
 - may submit that a custodial or non-custodial sentence is appropriate; and
 - may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.

As part of its duty to assist the Court and represent the public interest, WorkCover will generally make submissions on sentencing if it is invited to do so. In making such submissions, WorkCover takes into account the relevant sentencing principles, and its submissions on sentence cannot depart from such relevant sentencing principles, but where appropriate may refer to the offence as being at the upper or lower end of the range of seriousness. In this way WorkCover assists the Court in its determination of the appropriate sentence.

Role of the workcover coordinator, counselling and liaison

- 5.40 The role of the Coordinator, Counselling and Liaison is to provide support, information and referral to family members when a person dies in a workplace incident or suffers a serious injury in the workplace. People witnessing fatalities or serious incidents may receive counselling through the Coordinator in the initial stages following an incident and also later, if they are required to attend Court as witnesses for WorkCover. As noted below, the Coordinator is also able to assist families or injured people prepare Victim Impact Statements. The Coordinator also provides court support

for families attending matters at Court, and can arrange for support to be provided to families attending coronial inquests.

Victim impact statements

What is a victim?

5.41 A victim can be either a primary victim or a family victim.

Primary victim

5.42 A primary victim is:

- a person against whom the offence was committed, or
- a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned.

In order to be a primary victim, a person must have suffered personal harm as a direct result of an offence.

Personal harm can include actual physical bodily harm, mental illness or nervous shock.

Family victim

5.43 Where a primary victim has died as a direct result of an offence, a family victim is a person who was, at the time when the offence was committed, a member of the primary victim's immediate family.

A person can be a family victim whether or not the person has suffered personal harm as a direct result of the offence. The following are considered to be members of the primary victim's immediate family:

- the victim's spouse
- the victim's de facto spouse or same sex-partner if that person has cohabited with the victim for at least 2 years
- a person to whom the victim was engaged to be married
- a parent, grandparent, guardian or step-parent of the victim
- a child or step-child of the victim or a child for whom the victim is the guardian
- a brother, sister, step-brother or half brother or step-sister or half sister of the victim.

What is a victim impact statement?

5.44 A victim impact statement is a written statement prepared by a victim. In the case of a primary victim, a victim impact statement contains information about any personal harm suffered by the victim as a direct result of the offence. Personal harm includes actual physical bodily harm, mental illness or nervous shock suffered by the primary victim.

In the case of a family victim, a victim impact statement contains information about the impact of the death of the primary victim on the members of the immediate family of the primary victim.

When can a victim impact statement be given about an work health and safety offence

5.45 The *Crimes (Sentencing Procedure) Act 1999* allows for Victim Impact Statements to be received in relation to an offence that is being dealt with by the Supreme Court, the Industrial Relations Commission, the District Court and, in limited circumstances, the Local Court.

A Victim Impact Statement may be received where the offence is being dealt with on indictment in the Supreme Court, or where the offence is being dealt with on indictment or summarily in the District Court, or where the offence is being dealt with in the Industrial Court where the offence results in:

- the death of any person, or
- actual physical bodily harm to any person.

Victim impact statements cannot be tendered in relation to a general duty offence where the offence results in non-physical harm, such as mental illness, nervous shock, post-traumatic stress syndrome etc unless bodily harm is also present.

Who can make a victim impact statement?

5.46 The following people can make a victim impact statement:

1. A primary victim.
2. A family victim.

A victim impact statement is voluntary

- 5.47 A victim does not have to make a statement if they do not want to – the decision is his or hers. No one may make a statement on behalf of a victim if the victim objects to the statement being made. If the primary victim is incapable of objecting to the statement, a member of the primary victim's immediate family or other representative may object to a victim impact statement about the personal harm suffered by the victim.

The court cannot infer that because there is no victim impact statement that there was little or no impact on a victim.

A victim impact statement can only relate to the offence(s) for which the Offender has been convicted

- 5.48 The victim impact statement describes the direct effects of the offence on the victim. The court will only consider the effect of offences for which the offender is convicted. If the victim statement refers to other offences for which the offender was not convicted by the court, those parts cannot be admitted into evidence. It is best to speak to WorkCover before preparing the statement if it is unclear as to the offences for which the offender was convicted.

What information should be contained in a victim impact statement?

- 5.49 There must be accurate detail about any personal harm suffered – that is any physical injury, short or long term and any psychological/emotional harm, short or long term. If the victim is preparing his or her own statement, he or she may attach any relevant medical reports that support the statement.

The defence is entitled to cross-examine the victim or the author of the report about the contents of the statement. This may happen because the offender does not agree with parts of the statement.

The victim impact statement must not contain anything that is offensive, threatening, intimidating or harassing towards the offender. The victim impact statement is about the impact on the victim. It gives the victim an opportunity to participate in the justice process by fully informing the court about the effects of the offence upon the victim.

Professional reports

5.50 In some circumstances the victim may attach a professional report such as a medico-legal report or a social work/psychological assessment. The emphasis of this report must be on the impact of the offence and the resultant personal harm on the victim.

Who can prepare a victim impact statement?

5.51 A victim impact statement may be prepared by:

1. Any qualified person nominated by the victim or their representative; or nominated by the prosecutor in the proceedings to which the statement relates.

A qualified person is either:

- a. A counsellor who is authorised to provide approved counselling services under section 21A of the *Victims Support and Rehabilitation Act 1996*, or
 - b. Any other person who is qualified by training, study or experience to provide the particulars required for inclusion in a victim impact statement.
2. The victim.
 3. A victim's representative.

Role of workcover

5.52 WorkCover's solicitor in the matter will write to relevant parties and advise when a victim impact statement is available.

5.53 Where a victim or their representative requests WorkCover assistance in preparing a victim impact statement, assistance will be provided by the WorkCover Coordinator, Counselling and Liaison.

Representatives of the primary victim

5.54 Where a primary victim is incapable of providing information for a victim impact statement, a member of the primary victim's immediate family, friend or a qualified person e.g., counsellor, psychologist, social worker, medical specialist, may act on behalf of the victim.

Similarly, a member of the primary victim's immediate family or other representative may object to a victim impact statement about the personal harm suffered by the victim if the primary victim is incapable of objecting to the statement.

When should a victim impact statement be prepared?

- 5.55 A court may receive and consider a victim impact statement at any time after it convicts but before it sentences an offender. In practice, as convictions are generally not recorded until the sentencing judge publishes his or her reasons, it may be advisable to prepare a victim impact statement after the offender has entered a plea of guilty but prior to the sentencing hearing. WorkCover will liaise with a victim to advise and assist if necessary with the preparation of a victim impact statement.

When may a victim impact statement be received and considered by a court?

- 5.56 If the court considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after a person has been convicted, but before the person is sentenced.

Only the prosecutor in the proceedings may actually tender the victim impact statement to the court.

If the primary victim has died as a direct result of the offence, the court must receive a victim impact statement given by a family victim and acknowledge its receipt. A court may make any comment on the statement that the court considers appropriate.

However, the court must not consider a victim impact statement unless it has been given by or on behalf of the victim to whom it relates, or by or on behalf of the prosecutor.

Also, the court must not consider a victim impact statement given by a family victim in connection with the determination of punishment for the offence, unless it considers that it is appropriate to do so.

Amending a victim impact statement

- 5.57 A victim impact statement can be amended by WorkCover's prosecutor in consultation with the person who wrote the statement before it is handed up to the court.

Attendance at court

- 5.58 WorkCover's prosecutor will give the victim impact statement to the court and will inform the victim if he or she is required at the court. If the victim is not required to attend by the court, the victim may still attend if she or he wishes.

Reading out a victim impact statement in court

5.59 If a victim impact statement has been given to a court, the victim or a member of the immediate family of the victim, or other representative of the victim, is entitled to read out the whole or any part of the statement to the court.

The statement can be read out when the court decides it is appropriate. This will be at some point after the offender has been convicted but before the offender is sentenced.

Who can see the victim impact statement?

5.60 When a victim impact statement is received by the court, the court may make the statement available to the prosecutor, the offender or to any other person as it considers appropriate. If the court gives the offender access to the victim impact statement, it must do so on the basis that the offender will not keep copies of the statement.

Formal requirements for a victim impact statement

5.61 The victim impact statement must comply with the requirements as to format and content set out in the *Crimes (Sentencing Procedure) Regulation 2005*.

5.62 A court may only receive or consider a victim impact statement if it complies with the following requirements:

- is in writing
- identifies the victim or victims.
- includes the full name of the person who prepared the statement and is signed and dated by that person.
- does not contain anything that is offensive, threatening, intimidating or harassing.
- is legible,
- is on A4 size paper
- is no longer than 20 pages in length (including medical reports or other annexures), except with the leave (or consent) of the court.

A victim impact statement may be either typed or hand-written.

If the statement has been prepared by a person who is not a victim or a victim's representative, the victim impact statement must state that the victim does not object to the statement being given to the court. The victim, or the victim's representative, must sign the statement to verify that they do not object.

If the victim impact statement concerns a family victim

- 5.63 The victim impact statement must identify the primary victim and state the nature and duration of the relationship between the primary victim and the family victim. However, it is not necessary to state the duration of the relationship between the primary and family victim if the family victim is a relative by blood or marriage.

If a victim's representative acts on behalf of a primary victim to provide Information for a victim impact statement

- 5.64 The victim impact statement must indicate the name of the victim's representative and the nature and duration of the relationship between the primary victim and the victim's representative. However, it is not necessary to state the duration of the relationship between the primary victim and their representative if the representative is a relative by blood or marriage.

Please note, only one victim impact statement can be given in respect of each victim.

Some points to note

- 5.65 Victim impact statements are tendered by WorkCover's prosecutor and become exhibits in the case. It is possible for the person who makes the statement to be cross-examined.

A copy of the victim impact statement must be supplied by the prosecutor to the offender.

It is not possible for a victim impact statement to be treated confidentially or to prevent its publication.

Appeals

- 5.66 A person convicted of a Category 3 offence under section 33 of the *Work Health and Safety Act 2011* in the Local Court may appeal to the Industrial Court under the *Industrial Relations Act 1996*.
- 5.67 A person convicted of a Category 2 offence under section 32 of the *Work Health and Safety Act 2011* in the District Court in its summary jurisdiction may appeal to the Court of Criminal Appeal under section 5AA of the *Criminal Appeal Act 1912*. A person convicted of a Category 1 offence (reckless conduct) under section 31 of the *Work Health and Safety Act 2011* in the District Court or Supreme Court may appeal to the Court of Criminal Appeal under section 5 of the *Criminal Appeal Act 1912* against both the conviction and sentence.

In deciding whether to appeal a sentence, WorkCover will be guided by the principles set out in the ODPG Guidelines. The key factors to be taken into account are:

- (a) appeals should only be brought to establish and maintain adequate standards of punishment for offences under the WHS legislation or to correct sentences that are so disproportionate to the seriousness of the offence as to lead to a loss of confidence in the administration of criminal justice; and
- (b) appellate courts will intervene only where it is clear that the sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate.

5.68 In general, an appeal will only be instituted where it is considered likely to succeed. Any such appeal should be brought promptly.

Enforceable undertakings

5.69 Part 11 of the WHS Act allows the regulator to accept a written undertaking, known as a WHS undertaking, given by a person in connection with a matter relating to a contravention or alleged contravention by the person of the Act. A WHS undertaking cannot be accepted for a contravention that is a Category 1 offence. WorkCover is developing a separate policy in relation to WHS undertakings in conjunction with the WHS regulators in other jurisdictions.

Procedure if prosecution is not brought

5.70 Section 231 of the WHS Act provides for a person to request that the regulator bring a prosecution in certain circumstances. Please see WorkCover's separate policy for making a request to the regulator to bring a prosecution.

Conclusion

5.71 These Guidelines do not attempt to cover all questions that can arise in the prosecution process for breaches of the legislation administered by WorkCover. They address those issues which WorkCover considers are of immediate concern and in respect of which clarification is desirable. These Guidelines will be reviewed regularly, and any changes will be made public.

Catalogue No. **WC04437** WorkCover Publications Hotline **1300 799 003**
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Locked Bag 2906, Lisarow, NSW 2252 | WorkCover Assistance Service **13 10 50**
Website workcover.nsw.gov.au

ISBN 978 1 74341 056 1 © Copyright WorkCover NSW 0312
