

Annual Report 2018–19

Office of the Work Health
and Safety Prosecutor



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Annual Report 2018–2019

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State of Queensland 2019

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PN12547



Office of the Work Health Safety Prosecutor

14 October 2019

The Honourable Grace MP
Minister for Education and
Minister for Industrial Relations
1 William Street
BRISBANE QLD 4000

Dear Minister

I was appointed the inaugural Work Health and Safety Prosecutor (WHSP) on 18 March 2019.

The WHSP is required by Schedule 2, s.49(1), of the *Work Health and Safety Act 2011* to give to the Minister, as soon as practicable after the close of each financial year, but not later than four months after the close, a report on the performance of the functions of the WHSP during that year.

The functions of the WHSP are to:

- conduct and defend proceedings under the Act before a court or tribunal; and
- advise the regulator on matters relating to the Act; and
- any other function given to the WHSP under the Act or another Act.

The Minister must table a copy of the report in the Legislative Assembly within 14 days after the Minister receives it, pursuant to Schedule 2, s.49(3), of the *Work Health and Safety Act 2011*.

The report includes a copy of each guideline made by the WHSP, in force during the year, as required by Schedule 2, s.49(2), of the *Work Health and Safety Act 2011*.

I am pleased to present my report for the financial year ending 30 June 2019.

Yours faithfully

Aaron Guilfoyle
Work Health and Safety Prosecutor

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Aaron Guilfoyle
Work Health Safety Prosecutor

Work Health and Safety Prosecutor

2018–2019 Review

Introduction

The Office of the Work Health and Safety Prosecutor (OWHSP) is an independent prosecution office, established under the *Work Health and Safety Act 2011* (the Act), to conduct and defend proceedings for breaches of Queensland's work health and safety laws. Reporting to the Minister for Industrial Relations, it is the first independent prosecution office in Australia dedicated to the prosecution of work health and safety offences. The establishment of the OWHSP, headed by an independent prosecutor, was recommended in the 2017 Best Practice Review of Workplace Health and Safety in Queensland. The OWHSP commenced operation on 18 March 2019, to coincide with the commencement of my appointment as Queensland's first Work Health and Safety Prosecutor (WHSP).

The WHSP is appointed under the Act by the Governor in Council on the recommendation of the Minister. The appointment is for a renewable term of a maximum of five years. The WHSP represents the State, but is not under the direction or control of the Minister.

The functions of the WHSP under the Act are:

- to conduct and defend proceedings under the Act before a court or tribunal
- to advise the regulator on matters relating to the Act
- any other function given to me under the Act or another Act.

The OWHSP consists of the WHSP and the staff of the WHSP. The WHSP controls the OWHSP, which may be attached to the department for the purpose of the supply of administrative support services, to ensure the efficient and effective function of the OWHSP. The WHSP has powers given under the Act, together with the power to do all things necessary or convenient for the performance of the functions of the WHSP.

The WHSP is not a statutory body for the *Statutory Bodies Financial Arrangements Act 1982* or the *Financial Accountability Act 2009*.

As soon as practicable after the close of each financial year, but not later than four months after the close, the WHSP must give the Minister a report on the performance of the WHSP's functions during that year, which must include a copy of any guidelines issued by the WHSP during the financial year.

I am honoured to lead an organisation which contributes in an important way to both the improvement of safety in Queensland workplaces and to the justice system in general, by the provision of independent, specialist prosecution services.

I am pleased to present to the Minister the first annual report of the OWHSP, covering the abbreviated period from 18 March 2019 to 30 June 2019.

WHSP establishment

Upon its commencement, the OWHSP took carriage of prosecutions and referrals previously undertaken by the Prosecution Services Unit of the Office of Industrial Relations (OIR). Those matters, together with new referrals received to 30 June 2019, were referred by, or on behalf of, various units of OIR, which was the sole referring agency for the OWHSP for 2018-19.

The OWHSP was staffed by the transfer of existing staff of the former Prosecutions Services Unit of OIR. As at 30 June 2019, the OWHSP was comprised of a staff of 12, the majority of whom were legal staff engaged as prosecutors.¹

The OWHSP receives its budget and administrative support from OIR, which presently sits within the Department of Education. Like every public office, our resources are necessarily finite. We implemented several efficiency measures in 2018-19 to ensure that we achieved the results expected of us by our stakeholders within those resources. Our actual expenditure in 2018-19 enabled us to meet those expectations.²

I am grateful for the tremendous support of OIR in the very busy, early months of operation, during which we had to establish policies and procedures for a new office, whilst continuing to manage a large cache of existing files and litigation, much of it complex and high profile. I am particularly grateful for the time and support of the then-Acting Deputy Director-General, Tony James; Acting Executive Director, WHS Engagement and Policy Services, Bradley Bick and the other Executive Directors of OIR.

I thank all the staff of OWHSP, who dealt in 2018-19 with tremendous and rapid change. The professionalism and composure with which they approached that change was commendable, and I thank each of them for contributing to the success of the establishment of the office.



¹ An organisational chart appears later in this report at Annexure 1. An establishment of 13.43 full-time equivalents (FTEs) was available but not all positions were filled.

² Information on the full financial year's expenditure for FY 2018-19 appears later in this report at Annexure 2, although OWHSP's expenditure necessarily only relates to the last quarter.

WHSP and Director of Public Prosecutions Guidelines

The Act provides for the mandatory issue by the WHSP of general guidelines in relation to the prosecution of offences under the Act, which must be published on the website of the WHSP. I propose to issue those guidelines in the first half of the 2019-20 financial year, upon the launch of the WHSP website, the planning for and construction of which commenced in 2018-19.

On 17 April 2019, I issued a guideline on the advice and charging function of the OWHSP, to ensure that the roles and responsibilities of the OWHSP, and those who refer matters to it, are understood and are transparent. That delineation was important to ensure both the independence and the effectiveness of the prosecution and advice work undertaken by the OWHSP. It is intended very much to ensure that we enjoy a productive partnership with OIR as a referring agency. Pursuant to s.48(2) of the Act, the guideline, a copy of which is annexed³, applies to OWHSP staff, the Regulator, and relevant staff of OIR.

The Guidelines of the Director of Public Prosecutions (DPP) (Director's Guidelines) continue to apply to any decision by me, or on my behalf, to commence a prosecution.

The two-tiered test requires that there be sufficient evidence and that the public interest require a prosecution. In respect of sufficiency of evidence, a prima facie case is necessary but not enough. A prosecution should not proceed if there is no reasonable prospect of conviction before a reasonable jury (or Magistrate). In respect of the public interest discretion, the guidelines provide that, whilst the relevance of discretionary factors will depend upon the individual circumstances of each case, the more serious the offence, the more likely that the public interest will require a prosecution. They provide further, "Indeed, the proper decision in most cases will be to proceed with the prosecution if there is sufficient evidence. Mitigating factors can then be put to the Court at sentence".

In prosecution decisions made by me in 2018-19, those guidelines were applied in 100 per cent of matters.

Any general or specific guidelines issued by me are to be read with, and subject to, the Director's Guidelines. In the second quarter of 2019-20, I will issue a guideline on disclosure, applicable to the OWHSP staff, the Regulator, and relevant staff of OIR, to ensure that this important ongoing obligation is met in every referral and prosecution.



Efficiency, effectiveness and transparency

The work of the OWHSP is comprised largely of assessing briefs of evidence against the Director's Guidelines. It is important for those who are the subject of investigations into suspected work health and safety offences, and for victims and their families, that the process of brief assessment occurs in a timely manner. In 2018-19, timeliness in brief assessments was a major focus of the office.

With support from OIR in the form of dedicated funding, and the significant efforts of the staff of the OWHSP, there was a marked reduction in both the number of delayed matters on hand and the assessment times for new referrals. In 2019-20, we have committed to assessing briefs of evidence in order to make a prosecution decision within 90 days, in 85 per cent of matters. As at 30 June 2019, in the OWHSP where a complete brief of evidence had been received, only 11 matters on hand exceeded the 90 day brief assessment target.⁴

Upon commencement, we indicated our commitment to providing pre-brief advice to OIR investigators in appropriate matters, to assist in ensuring that investigative resources are directed where necessary. Appropriately timed and targeted advice should contribute to continued improvement in the quality of briefs of evidence, which in turn will assist prosecutors within the OWHSP to continue to meet brief assessment timeframes in 2019-20. To ensure efficiency, effectiveness and transparency in the process of prosecution decision making, we implemented a standard means of recording assessment by prosecutors against the Director's Guidelines and their recommendations to commence or not commence a prosecution. That process was implemented to ensure that, in 100 per cent of matters, the relevant limbs of the test in the Director's Guidelines are considered, and a record is made of that consideration.

It further ensures:

- all relevant legal considerations are factored into decision-making
- appropriate supervisor oversight of those recommendations
- consultation with the referring agency prior to the commencement of a prosecution or the decision not to prosecute
- consideration of the interests of victims and their families.

The OWHSP briefs external counsel to appear on behalf of the WHSP in appropriate matters. Our expenditure on external counsel was our most significant expense, save for staffing costs. In 2018-19, we introduced a new procurement process to ensure efficiency in this expenditure, and to ensure the selection of appropriate external counsel, who continue to provide an excellent service in complementing the capacity and capability of our in-house prosecutors. We sought to expand the panel used by the OWHSP and briefed a number of new junior counsel this year. We set a goal to equal or better the equitable briefing policy of the Law Council of Australia, to brief women in at least 30 per cent of all matters and paying 30 per cent of the value of all briefs. We briefed women in 50 per cent of the matters in the reporting period, and paid women 42 per cent of the value of all briefs.

³ Annexure 3

⁴ KPI report prepared on 1 July 2019

Stakeholder engagement

I spent considerable time in the early weeks and months of the operation of the OWHSP meeting with and consulting the OWHSP's broad range of stakeholders to understand their priorities insofar as they relate to our work, and to canvass the early key priorities of the OWHSP together with the service that we aim to provide.

Those stakeholders included the:

- Work Health and Safety Queensland Board
- Deputy Director-General and Executive Directors of OIR
- Director of the Coronial and Investigation Liaison Unit of OIR
- Chief Magistrate and Deputy Chief Magistrates
- Electrical Safety Commissioner
- Chief Executive Officer of WorkCover Queensland
- Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee (Affected Persons Committee)
- Deputy President of the Queensland Industrial Relations Commission
- Director of Public Prosecutions (DPP).

My consultation in 2018-19 extended also to meetings with the various heads of interstate and Commonwealth work health and safety regulators, and/or those responsible for the prosecution of work health and safety offences in those jurisdictions. Through those meetings, the OWHSP sought to gain an understanding of the operations and priorities of each of those agencies, and the prosecution trends in their respective jurisdictions. Likewise, we sought to share with those jurisdictions our priorities and initiatives. That information sharing is directed towards ensuring best practice within the OWHSP, but also to endeavour to ensure, as far as might be possible, consistency in approach to work health and safety prosecutions across the country. I have proposed, and there has been overwhelming support for, ongoing liaison with those jurisdictions, in the form of a network of the heads of work health and safety prosecutions in Australia and New Zealand, which will aim to meet three to four times per year. I look forward to the establishment of that network in 2019-20.

Our most important and significant stakeholder engagement is with the investigation unit within OIR. In 2018-19, we established formal monthly liaison meetings with that unit, with standing items including training and brief quality. Through our liaison, we have quickly established what I consider to be a very productive, candid and mutually beneficial relationship.

We have agreed with the investigation unit of OIR that in 2019-20 we will develop a policy to facilitate post-trial reviews of contested prosecutions, conducted at the request of either office, to ensure that lessons learned are captured and acted upon. That process, together with our provision of pre-brief advice, will contribute to ongoing investigation and brief quality improvement. It will enable both offices to understand and respond to emerging work health and safety prosecution trends. The most notable in 2018-19 have been the risks posed by silicosis and overhead powerlines, the former of which we have discussed and will continue to discuss with interstate counterparts to position ourselves to respond to any increase in referrals for those matters, if or when they occur. In 2018-19, OWHSP staff presented at the annual OIR investigators conference. We also assisted to facilitate mock court training for inspectors. We will continue to provide training upon request in 2019-20, commencing with training on the investigation and prosecution of industrial manslaughter offences.

OWHSP staff

Like any organisation, the staff of the OWHSP are the key to its success. In order to ensure their professional development, we commenced an in-house CLE program in 2018-19, which will continue in 2019-20. That program was complemented by the attendance of a number of staff at external conferences.

Whilst some of the advocacy work of the OWHSP is briefed to external counsel, commonly in the most complex and high profile of matters, much of the advocacy work is conducted in-house by prosecutors within the OWHSP. In 2018-19, we committed to ensuring the development of the advocacy ability of the OWHSP prosecutors. Budget permitting, we will offer a tailored advocacy training course to all staff in 2019-20.

The wellbeing of the OWHSP staff is paramount. It is an unfortunate reality that the majority of matters referred to the OWHSP for consideration of prosecution routinely involve serious injuries and fatalities suffered by workers and members of the public. In the course of their work the OWHSP staff are exposed to traumatic material related to those injuries and fatalities. We identified in 2018-19 the need for a staff wellbeing program, including a component of annual staff training on dealing with vicarious trauma⁵, to complement the employee assistance program to which staff have access.



⁵ The vicarious trauma training was delivered to staff for the first time on 22 August 2019.

Victim liaison

Serious injuries and fatalities are the outcome in too great a percentage of work health and safety offending. Those who are injured in the course of that offending, and their families, are significant stakeholders in the work of the OWHSP and are vested in the decisions that we make. It is important that prosecution decisions occur in a timely manner, and that victims and families are supported, including by the timely provision of updates. Communication needs to occur in the course of the decision-making process and during the subsequent prosecution, in the event that one is commenced. Support for victims and their families is provided directly by Investigation and Litigation Support Officers, who sit within the Coronial and Investigation Liaison Unit of OIR.

In 2018-19, we entered a formal communication protocol with OIR's Coronial and Enforceable Undertakings Services unit to ensure that the OWHSP consults and updates victims and their families in a timely manner.

Key aspects of the protocol include:

- a joint commitment to working cooperatively and professionally to ensure the obligations to the next of kin and certain injured people and their representatives are met
- a flexible approach and encouragement to communicate with each other about issues that may impact upon service delivery by the respective units.

Families of those that are fatally injured in workplace incidents are offered support in every instance. The protocol dictates that a referral should be considered by prosecutors in matters involving injuries that do not result in a fatality as soon as they identify an injured person as requiring additional support. Factors to be considered include social isolation with limited natural supports, intellectual impairment, illiteracy, Aboriginal and Torres Strait Islander people (A&TSI), cultural and linguistic diversity, and financial disadvantage, amongst others.





Requests to commence a prosecution and referrals to the Director of Public Prosecutions

The Act provides a regime in which, in certain circumstances, a request can be made to me under s.231 of the Act (and the equivalent provisions in the *Electrical Safety Act 2003* and the *Safety in Recreational Water Activities Act 2011*) to commence a prosecution where a suspected work health and safety offence has been committed.

The regime provides for referral of matters for consideration by the Director of Public Prosecutions (DPP) where I have declined to prosecute.

In order to expedite such requests, the OWHSP published a form for applicants on the OIR website in 2018-19. That form, and the availability of the regime, will be made available on the website of the OWHSP once it is launched.

A number of requests to prosecute and requests for referral to the DPP were received and responded to by the OWHSP in 2018-19. I thank the DPP, Michael Byrne QC, and his staff, for the timely response in those matters referred for consideration in 2018-19, and for their assistance in facilitating that process.

Indictable prosecutions and engagement with the DPP

The suite of work health and safety Acts under which the OWHSP prosecutes contain indictable offences for both reckless conduct and industrial manslaughter.

Under the *Director of Public Prosecutions Act 1984*, the DPP must authorise indictable prosecutions conducted by the OWHSP prior to the presentation of an indictment. Those prosecutions are otherwise conducted and funded by the OWHSP. A number of such prosecutions were before the courts in 2018-19.

Again, I thank the DPP for his support and timely response in our dealings in those matters in 2018-19 and look forward to furthering a collegial relationship between our offices in 2019-20.

Business plan 2019–2020



Office of the Work Health and Safety Prosecutor

Business plan 2019–2020

About us

The Office of the Work Health and Safety Prosecutor (OWHSP) is an independent prosecution office, established by the Queensland parliament under the *Work Health and Safety Act 2011*, to conduct and defend proceedings for breaches of Queensland's work health and safety laws.



Purpose

Our purpose is to provide an independent prosecution service which:

- meets the expectations of our stakeholders
- responds to the priorities of our referring agencies
- contributes to the safety of Queensland workers and improving safety at Queensland workplaces.



Aim

We aim to:

- act with professionalism and consistency
- conduct our work as model litigants
- assist to support victims of workplace injuries and their families
- ensure that prosecution outcomes are shared with stakeholders.



Strategic priorities

- Provide an efficient, effective and transparent prosecution service.
- Undertake productive stakeholder engagement.
- Develop our people.



Performance measures

Effectiveness

- Compliance in applying the Guidelines of the Director of Public Prosecutions in decisions to commence, not commence, continue or discontinue a prosecution 100%.
- Prosecutions¹ resulting in a conviction 90%².
- Defendants in defended summary hearings resulting in conviction 70%.
- Defendants in defended committals resulting in a committal order 90%.
- Defendants tried on indictment and convicted 70%.
- Prosecution sentence appeals upheld 60%.



Efficiency

- Briefs of evidence assessed within 90 days of referral 85%.



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

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

Performance data 2018–2019

Referrals

254

open files inherited from OIR on commencement of OWHSP on 18 March 2019 (inherited files).

20

new briefs of evidence were referred to the OWHSP by OIR during the reporting period (new files).

1

new request for general legal advice was received.

22

inherited files were closed. In those matters, OIR did not require pre-brief legal advice and determined that a brief of evidence would not be submitted to OWHSP.

84

pre-brief files remained open, pending the provision of pre-brief legal advice by OWHSP or the referral of a brief of evidence from OIR as at 30 June 2019.

35

open files (inherited and new), for which a complete brief of evidence had been received, remained open in brief assessment phase as at 30 June 2019.

Cases finalised

14

prosecutions were successfully finalised by the OWHSP and \$2.2 million in fines were ordered.



One prosecution was withdrawn as an Enforceable Undertaking (EU) was accepted by the Regulator. Three other successful prosecutions were appealed by the defendant (with fines amounting to \$1,450,000). The appeals are ongoing.

Decisions made

29

prosecutions commenced against 21 companies, one officer and seven individuals.

In the eight matters where the WHSP determined that no prosecution should commence:

6

were determined to have no prima facie case

2

were determined to have no reasonable prospects of conviction

37

Total prosecution decisions made

Matters before the court

44

matters were before the Court during the period, including matters which commenced before the OWHSP was established.

Effectiveness measures		Result
Compliance in applying the Guidelines of the DPP in decisions to commence, not commence, continue or discontinue a prosecution 100%	37 decisions	100%
Prosecutions resulting in a conviction 90%	Of 13 prosecution which were all successful at first instance 3 have been appealed. (Calculation excludes one prosecution withdrawn due to an EU).	100%
Defendants in defended summary hearings resulting in conviction 70%	One defendant (out of 14) pleaded not guilty and was found guilty	100%
Defendants in defended committals resulting in a committal order 90%	2 out of 2 committals resulted in committal orders	100%
Defendants tried on indictment and convicted 70%	NIL matters meet the criteria	-
Prosecution sentence appeals upheld 60%	2 out of 2 unsuccessful	0%

Efficiency measure		Result
Briefs of evidence assessed within 90 days of referral 85%	37 briefs of evidence (BOEs) were assessed and decided during the period and brief assessment timelines for 10 of these met the 90-day timeframe. However, only three of these BOEs were received during the reporting period (new BOEs). All of these assessments met the 90 day timeframe. 17 other new BOEs were received during the reporting period but were not yet assessed as at 30 June 2019. Of the 34 inherited briefs of evidence which were assessed and decided, they had been received by OIR between the period 21/11/2017 and 4/03/2019. 20.6% of these brief assessments met the OWHSP assessment timeframe at the time they were decided by the OWHSP.	100%

Significant prosecutions 2018–2019



A company and a sole director – fall from height

The first two reckless conduct charges in Queensland under the Act were complaints laid against a company and its sole director after a roofer fell 5.9 metres from the edge of a roof onto a concrete slab below and was fatally injured.

On 6 February 2019, a jury returned guilty verdicts against both defendants. The company was fined \$1,000,000 and the director was sentenced to 12 months imprisonment, to be suspended after serving four months.

The director appealed against conviction and sentence to the Court of Appeal. The court ordered that the conviction be set aside and a retrial was ordered, commencing in the Maroochydore District Court in October 2019.

Indictable prosecutions

The *Work Health and Safety Act 2011* includes two indictable offences:

1. Industrial manslaughter, which was enacted on 23 October 2017
2. Reckless conduct – Category 1¹, which was enacted when the *Work Health and Safety Act 2011* was first enacted 1 January 2012.

No prosecutions for industrial manslaughter had been commenced in Queensland as at 30 June 2019. A number of reckless conduct – category 1 prosecutions remained on foot between 18 March 2019 and 30 June 2019.

A company – fire at waste facility

On 13 October 2017, a company and its sole director were each charged with reckless conduct in relation to incident on 5 November 2015 at a waste recycling facility operated by that company. It is alleged that, at the time of the incident, the areas at the facility for the storage of liquids were full and, as a result, the contents of a tanker (containing water and unleaded petrol) were being unloaded into an open bunded driveway spill containment area. It is further alleged that an employee of the company was standing in the driveway area using a heat gun to fix a hose to a pump, and vapour from the petrol was suddenly ignited by the heat gun, causing the employee to be enveloped in flames and tragically burn to death.

It is alleged by the prosecution that the defendants were indifferent towards, or in disregard of, the probable consequences of their conduct, namely the risk to the employee of death or serious injury.

Both defendants were committed to stand trial before a jury in the Beenleigh District Court and an indictment has been presented. The matter should proceed to trial in early 2020.

Eagle Farm double fatality

On 6 October 2016, at a construction site within the Eagle Farm Racecourse in Brisbane, two workers were crushed to death by a nine to ten tonne precast concrete slab when it toppled. The Office of Industrial Relations (OIR) and the Queensland Police Service (QPS) conducted a parallel investigation in respect of the matter.

A company was sentenced in September 2018, however that decision is now under appeal by the prosecution on the ground the penalty was inadequate.

One individual has been charged with two Category 2 offences under the Act. Another has been charged with a reckless conduct offence under the Act, which will proceed to committal early in 2019-20.

The QPS has also charged the latter person with manslaughter.

Complaints against two other individuals were discontinued for public interest reasons prior to 18 March 2019.

Other significant prosecutions

Amilcar Appel – unlicensed electrical work

Amilcar Appel, a Brazilian national, was convicted and fined a total of \$100,000 in the Brisbane Magistrates Court on 29 March 2019 in relation to thirteen complaints under the *Electrical Safety Act 2002*. In the first electrical safety prosecution of its kind, the defendant committed the offences after having offered electrical services via an online platform.

He was charged with four s.40C (category 2) offences, concerning particularly dangerous electrical work performed, which exposed individuals to a risk of death or serious injury. He was charged with a further eight s.55(1) offences relating to the performance of electrical work while not holding an electrical work licence, and one s.56(1) offence relating to conducting a business or undertaking including the performance of electrical work while not holding an electrical contractor licence.

The defendant failed to appear and was convicted and sentenced *ex parte*.

Fatality – regional showgrounds

On 19 April 2016, an 18-year-old man was killed after he fell from a flatbed trailer on which he was being transported whilst undertaking work at a regional showground, as a participant of the Commonwealth ‘Work for the Dole’ program.

An employment services company was sentenced on 25 October 2018 and fined \$90,000.

One complaint against an individual was discontinued on 28 September 2018 on public interest grounds.

On 26 July 2019, an incorporated charitable organisation pleaded guilty to one offence contrary to s.32 of the Act (for a breach of s.19(1)). It was convicted and fined \$100,00. The conviction was not recorded.¹

A company – collapse of block wall

A company was found guilty after a hearing in the Beenleigh Magistrates Court and fined \$35,000. They were charged under s.33 of the Act for a breach of s.19(2). It was alleged they failed to put in place vertical steel reinforcing, prior to the process of core filling a block wall. The wall subsequently collapsed. This decision was appealed by the defendant. On 24 August 2018, the appeal was allowed in the Brisbane District Court and the conviction set aside. The decision to allow the appeal was further appealed by the prosecution. That appeal was heard in the Court of Appeal on 24 July 2019, with the decision reserved.

The appeal to the Court of Appeal concerns, *inter alia*, the question of whether a breach of s.33 of the Act can be a continuing offence.

A company – zip line failure

On 19 February 2019, a company was fined \$40,000 in the Beaudesert Magistrates Court after a zip line failure cause a member of the public to collide first with a guide and then a tree.

On 13 March 2019, a sentence appeal was lodged by the prosecution against the inadequacy of the sentence.²

A company and the sole director – import of unsafe electrical equipment

On 10 May 2019, the company pleaded guilty in the Magistrates Court at Townsville and was convicted and fined \$1 million for an offence under the *Electrical Safety Act 2002*. The company imported electrical equipment and failed to ensure that the electrical equipment was electrically safe, which failure exposed individuals to a risk of death or serious injury.

The sole director was also convicted and fined \$200,000 for failing to exercise due diligence to ensure that the person conducting the business or undertaking complied with that duty, which failure exposed individuals to a risk of death or serious injury.³

An individual – Intimidate inspector

On 17 June 2019, a complaint was made against an individual under section 190 of the Act. It is alleged that the individual intimidated an Inspector at a Cairns construction site. The matter remains before the Cairns Magistrates Court.

¹ An appeal against the inadequacy of the sentence was filed in the District Court at Toowoomba on 23 August 2019 by the Office of the Work Health Safety Prosecutor.

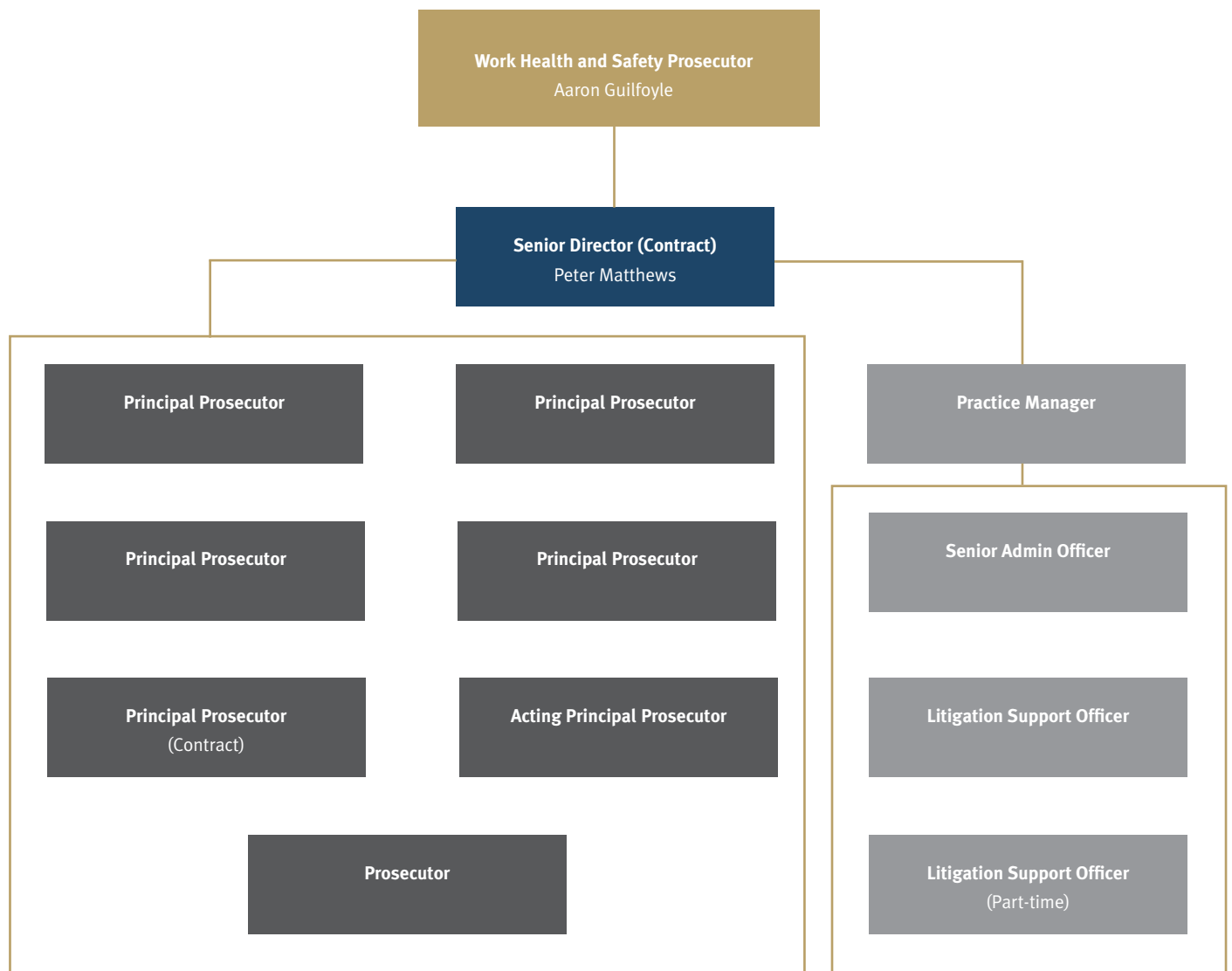
² On 21 August 2019, the prosecution appeal was allowed in the District Court at Beaudesert. The court indicated that the appropriate fine was \$60,000 but imposed a fine of \$50,000 given the matter was a prosecution appeal.

³ Both defendants have appealed against the sentences. The appeal is listed in the District Court on 14 November 2019.

Annexure 1

Organisation structure

Positions filled as at 30 June 2019





Annexure 2

Financial performance

Financial year 2018–19 noting OWHSP commenced 18 March 2019

Period 1 July 2018 to 17 March 2019 = Prosecution Services unit OIR

Period 18 March 2019 to 30 June 2019 = OWHSP

Overview	Year to date actual
Revenue	
Output revenue	(250,000)
Other revenue	(90,951)
Revenue total	(340,591)
Expense	
Employee expenses	1,811,092
Supplies and services	460,961
Depreciation	2,235
Savings	
Expense total	2,274,289
Operating result	1,933,698

Detailed expense information	Year to date actual
Employee expenses	
Allowances	25,508
On-costs	359,855
Other employee expenses	51,606
Professional development	9,894
Salaries and wages	1,364,229
Employee expenses total	1,811,092
Supplies and services	
Accommodation	129
Advertising	14,371
Computer expenses	45
Fleet	110
Legal costs	333,903
Other supplies and services	28,608
Portable, attractive and minor equipment	1,087
Telecommunications	14,127
Travel	68,582
Supplies and services total	460,961
Depreciation	
Depreciation	2,235
Depreciation total	2,235
Savings	
Savings	-
Savings total	-
Expense total	2,274,289
Grand total	2,274,289

	July	August	September	October	November
Employee expenses					
Allowances	1,955	2,932	1,955	1,955	1,955
On-costs	30,715	35,215	28,224	37,477	28,450
Other employee expenses	(18)	2,323	8,664	4,250	10,533
Professional development	-	0	2,742	718	691
Salaries and wages	112,891	120,755	105,183	130,337	122,545
Employee expenses total	145,543	161,225	146,769	174,737	164,174
Supplies and services					
Accommodation	16				16
Advertising			604	13,240	
Computer expenses			45		
Fleet	4	0	6	14	
Legal costs	11,655	(1,107)	(4,192)	34,158	34,322
Other supplies and services	1,763	(454)	1,729	3,206	4,387
Portable, attractive & minor equipment					
Telecommunications	11	1,133	2,215	1,115	1,202
Travel	2,565	6,212	14,400	(8,733)	5,697
Supplies and services total	16,013	5,784	14,808	43,000	45,623
Depreciation					
Depreciation	186	186	186	186	186
Depreciation total	186	186	186	186	186
Savings					
Savings					
Savings total					
Monthly total	161,742	167,195	161,764	217,923	209,983

December	January	February	March	April	May	June
1,955	2,834	1,955	2,053	1,955	2,051	1,955
26,355	32,574	24,411	22,082	31,361	36,056	26,936
4,657	93	11,158	44	1,729	2,436	5,736
-	445			99	5,198	0
104,641	94,369	91,476	94,652	129,563	143,099	114,720
137,607	130,315	128,999	118,830	164,707	188,839	149,347
		405		16	16	66
				122	0	
				1	85	
38,006	8,822	78,134	15,429	22,364	17,936	78,375
(4,010)	1,566	320	2,801	7,435	(1,470)	11,335
				1,087	0	
1,159	1,522	971	1,228	1,236	1,137	1,198
7,363	946	15,504	1,920	3,225	5,663	13,820
42,518	12,856	95,334	21,377	35,486	23,367	104,795
186	186	186	186	186	186	186
186	186	186	186	186	186	186
						-
						-
180,311	148,358	224,520	140,394	200,378	212,392	254,328

Annexure 3

Work Health and Safety Prosecutor Guidelines

Advice function and the decision to charge

Provision of pre-brief advice

The Office of the Work Health and Safety Prosecutor (OWHSP) regards the provision of pre-brief advice to the Office of Industrial Relations (OIR) as a valuable practice that is in the interests of both the OWHSP and OIR. When providing pre-brief advice, it is important that the separation of the investigative and prosecutorial functions is maintained and recognised.

The OWHSP is available to provide pre-brief advice to OIR in:

- matters which are significant, complex or major
- sensitive matters
- matters of particular importance for OIR's enforcement strategy
- matters that are likely to have an impact on a broader class of cases;

as agreed by the OWHSP and OIR, as resources permit for both offices.

It is OIR's responsibility to make operational decisions, including as to whether an investigation would be warranted, an investigation's scope, the ongoing management of an investigation, the prioritisation of investigations and the deployment of resources during investigations. The OWHSP will take into account OIR's prioritisation of their matters in providing pre-brief advice.

The OWHSP may be requested to provide legal advice on such things as:

- the identification of the elements of offences
- evidentiary issues
- substantive impediments to proving the offence and how these might be addressed
- identifying particular witnesses who could be spoken to and lines of inquiry that may assist
- the seriousness of the offending.

In requesting advice, OIR should identify the legal issues and potential offences on which advice is sought. Whilst a full brief of evidence is not required for the purpose of pre-brief advice, sufficient factual background against which to frame the advice should be provided. This information should be provided in writing.

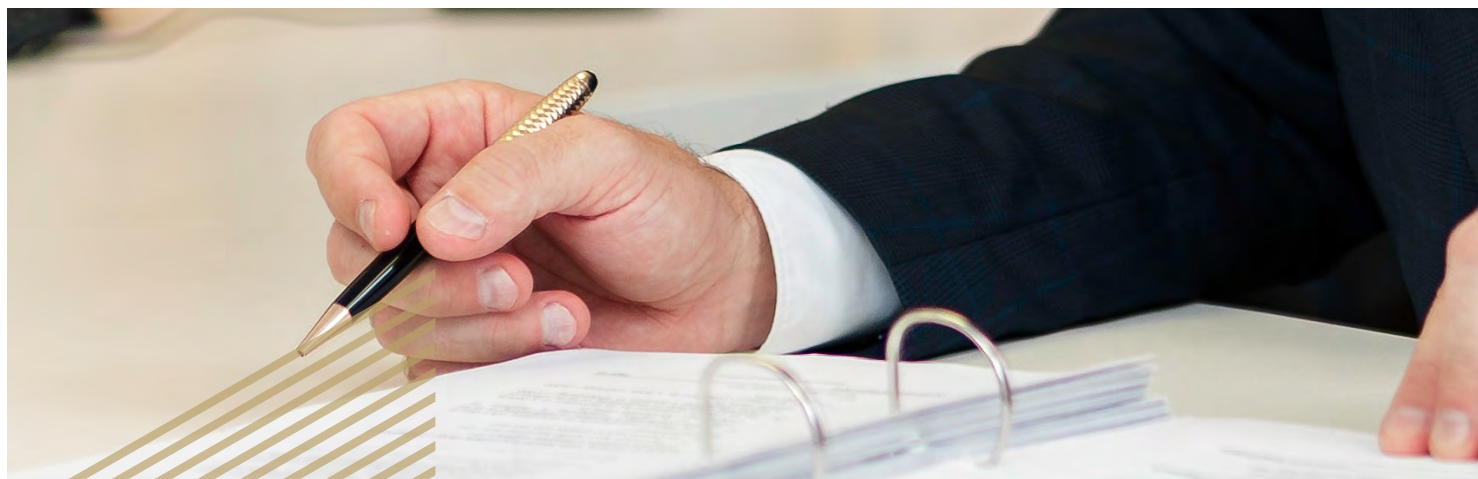
In drafting pre-brief advice, the OWHSP lawyer should consider consulting with the Work Health and Safety Prosecutor (WHSP) or the Senior Director (SD) before coming to a concluded view, and should be settled by the WHSP or the SD before it is provided to OIR. It will not be possible in every case for the OWHSP to give legal advice on whether, on the evidence, there are reasonable prospects of a conviction when consulted in the investigative stage. The material that has been assembled for the consideration of the OWHSP at the investigation stage and particularly in urgent matters may be inadequate to make that assessment even with a number of provisos. In some instances, it will still be of assistance to OIR to identify areas of deficiency, in order that they may be addressed.

Requests for advice should be settled by the nominated senior officer in OIR and the decision to accept a request for advice will be made by the WHSP or the SD.

The OWHSP is also available to discuss in general terms a matter with OIR and provide an indication of the issues that may arise for consideration or deal with any straight forward issues. Any thoughts expressed in such a discussion or consultation are done so on the basis that they represent a best view on the information provided and are not determinative of an any more informed OWHSP view.

Requests for urgent legal advice may be made and the OWHSP will assist where possible, however, advice can only be provided when there is adequate time to consider the material. In some circumstances, it may not be possible to give legal advice in the time available. Any advice provided orally should be confirmed in writing at the earliest possibility.

The decision to grant an indemnity is one for the Attorney General. If it becomes apparent in the investigation that a successful prosecution will depend on an indemnity being given to a participant in the crime, OIR as the investigative agency should seek the early advice of the OWHSP. Where investigators consider that an indemnity or a commitment to obtain the testimony or evidence of a person by way of an induced statement may be required, OWHSP should be consulted. This consultation should take place prior to an induced statement being taken.



The decision to charge

The decision to commence a prosecution under the WHS Act is one ultimately for the WHSP (save for where a delegation has been given to an inspector to take proceedings for a category 3 offence under the WHS Act). That decision is made by applying the Guidelines of the Director of Public Prosecutions.

The decision to proceed on indictment, ultimately reflected in the filing of an indictment, is a decision for the Director of Public Prosecutions or a prosecutor who holds a commission from the Director to sign indictments.

Whilst the decision to charge does not rest with OIR, the decision will have regard to the views of OIR in its recommendation to the OWHSP.

Ordinarily, a brief of evidence must be referred to the OWHSP before a prosecution is instituted by the WHSP (or for definitive advice on whether to commence a prosecution under the Guidelines of the Director of Public Prosecutions where OIR proposes to institute proceedings subsequent to that advice).

Upon the receipt the brief of evidence the OWHSP will:

- examine the brief to determine whether a prosecution should be instituted and, if so, on what charge or charges
- if a prosecution is to be instituted, prepare a complaint
- provide the draft complaint to OIR for the purpose of consultation prior to the complaint being made
- contingent upon the outcome of that consultation, commence a prosecution by making and filing a complaint.

Where OIR has the ability to commence a prosecution under certain legislation, it will often refer a brief of evidence to the OWHSP for assessment. In those circumstances, upon the receipt the brief of evidence the OWHSP will:

- examine the brief to determine whether a prosecution should be instituted and, if so, on what charge or charges
- advise OIR of the outcome
- if a prosecution is to be instituted, prepare a complaint
- send the complaint to the agency for execution and service.

Where OIR has the ability to commence a prosecution for certain offences, including by reason of authorisation by the WHSP, there may nevertheless be instances where it requests that the WHSP institute proceedings contingent upon the assessment of a brief of evidence. In those circumstances, OIR should indicate in the referral for assessment to OWHSP if such a request is being made.

Where OWHSP determines that there is insufficient evidence to commence a prosecution, or that there is sufficient evidence but that the public interest does not require a prosecution, reasons for that decision will be provided to OIR.



