

Work Health and Safety Prosecutor Guidelines
Advice function and the decision to charge
OWHSP Guideline 1/2019

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Pursuant to s.48 of Schedule 2 to the Work Health and Safety Act 2011 (the Act), this guideline is issued to:

- a. the staff of the WHS Prosecutor;
- b. the regulator; and
- c. any public service employees employed in the department undertaking work relevant to the WHS Prosecutor's functions under the Act.

Provision of pre-brief advice

1. The Office of the Work Health and Safety Prosecutor regards the provision of pre-brief advice to the Office of Industrial Relations 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.
2. The OWHSP is available to provide pre-brief advice to OIR in:
 - a. matters which are significant, complex or major;
 - b. sensitive matters;
 - c. matters of particular importance for OIR's enforcement strategy; or
 - d. matters that are likely to have an impact on a broader class of cases;
 - e. as agreed by the OWHSP and OIR, as resources permit for both offices.
3. 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.
4. The OWHSP may be requested to provide legal advice on such things as:
 - a. the identification of the elements of offences;
 - b. evidentiary issues;
 - c. substantive impediments to proving the offence and how these might be addressed;
 - d. identifying particular witnesses who could be spoken to and lines of inquiry that may assist; and
 - e. the seriousness of the offending.
5. 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.

6. In drafting pre-brief advice, the OWHSP lawyer should consider consulting with the Work Health and Safety Prosecutor (WHSP) or the WHSP's delegate before coming to a concluded view and the final advice should be settled by the WHSP or the WHSP's delegate 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, 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.
7. Requests for advice should be settled by nominated senior officer in OIR and the decision to accept a request for advice will be made by the WHSP or the WHSP's delegate.
8. 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 discussion or consultation are done so on the basis that they represent a best view on the information provided and are not determinative of a more informed OWHSP view.
9. 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 by the OWHSP lawyer.
10. 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

11. 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.

12. 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.
13. 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.
14. 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).
15. 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;
 - a. if a prosecution is to be instituted, prepare a complaint;
 - b. provide the draft complaint to OIR for the purpose of consultation prior to the complaint being made;
 - c. contingent upon the outcome of that consultation, commence a prosecution by making and filing a complaint.
16. 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:
 - a. examine the brief to determine whether a prosecution should be instituted and, if so, on what charge or charges;
 - b. advise OIR of the outcome;
 - c. if a prosecution is to be instituted, prepare a complaint; and
 - d. send the complaint to the agency for execution and service.
17. 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.
18. 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.