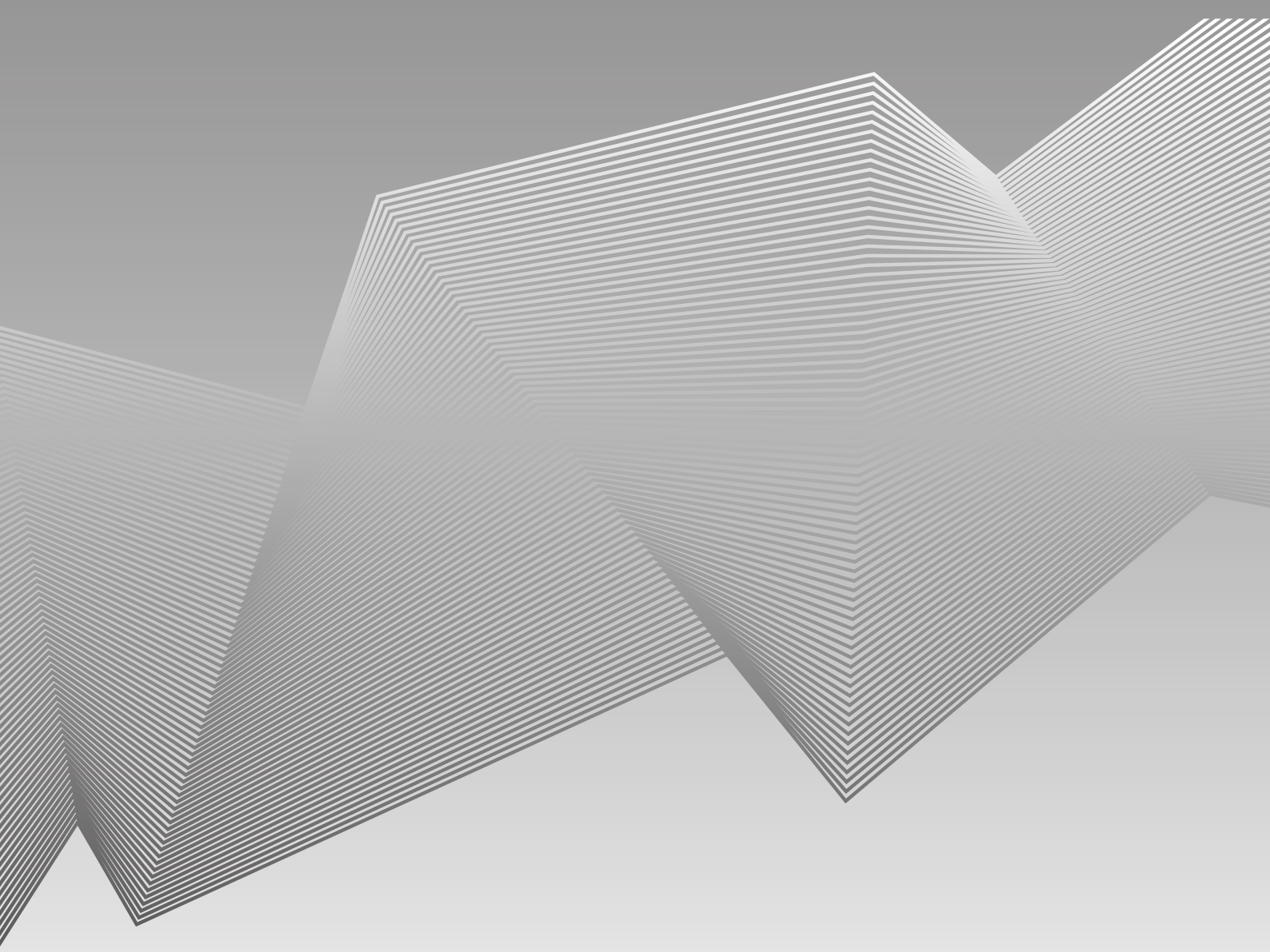


Office of the Work Health  
and Safety Prosecutor

# ANNUAL REPORT 2020–2021



**Queensland**  
Government



State of Queensland 2021

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PN12725

**Office of the Work Health  
and Safety Prosecutor**

**ANNUAL REPORT  
2020–2021**

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Office of the Work Health and Safety Prosecutor

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6 October 2021

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

Dear Minister,

As the appointed Work Health and Safety Prosecutor (WHSP), I am pleased to present my report for the period 1 July 2020 until 30 June 2021.

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
- advise the regulator on matters relating to the Act
- 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 sitting 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*.



Yours faithfully  
Aaron Guilfoyle  
**Work Health Safety Prosecutor**

Level 23, State Law Building  
50 Ann Street  
GPO Box 69  
Brisbane QLD 4001  
Telephone 07 3406 9898

# Work Health and Safety Prosecutor 2020–2021 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). Its role is to conduct and defend proceedings for breaches of Queensland's work health and safety laws, including in the resources sector. The OWHSP commenced operation on 18 March 2019. This report covers our second full financial year of operation.

Reporting to the Minister for Industrial Relations, the OWHSP is headed by the 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 the WHSP 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 guideline in force during the financial year.

I am pleased to present to the Minister the 2020–21 annual report of the OWHSP.

## Summary of operation

In 2020–21, the OWHSP prosecuted matters investigated and referred by the Office of Industrial Relations (OIR) and by Resources Safety and Health Queensland (RSHQ), having gained responsibility for the prosecution of offences under Queensland resources legislation on 1 July 2020.

At 30 June 2021, the OWHSP was comprised of a staff of 21.<sup>1</sup>

In 2020–21, OWHSP received its budget jointly from OIR and RSHQ.<sup>2</sup> Our budget was sufficient for us to meet and exceed some key performance indicators, but not others. There was again in 2020–21 a significant increase in the number of prosecutions considered, commenced and finalised over the previous financial year. The cap on the number of full-time equivalent staff the OWHSP can engage was inadequate, given the significant increase in workload, to meet our timeliness targets. There was a reduction in the percentage of briefs of evidence assessed within our target of 120 days and a corresponding increase in the average time taken to reach a prosecution decision.

An increase in the number of full-time equivalent positions within the OWHSP is necessary to improve timeliness, and to ensure that the effectiveness of the operation of the OWHSP, including our target conviction rate, does not diminish. At 30 June 2021, the OWHSP had carriage of 164 prosecutions which were before various levels of Queensland courts. That is largely the result of the increase in the number of prosecutions commenced by the OWHSP in the 2020–21 and 2019–20 financial years. The resources required to prepare and appear on those matters impacts upon the resources remaining to assess new referrals, noting the increase in the number of referrals, which I expect will continue.

The first two quarters of 2020–21 were impacted by the initial lockdown in Queensland, in 2019–20, related to the COVID-19 pandemic. As staff returned to the office and court appearances in person resumed, there was an increased rate of hearings and sentences given the large number of adjournments at the commencement of the pandemic and during the initial lockdown. That increase impacted upon our capacity to assess new referrals for a number of months. Our operation has in most respects though been largely unaffected by the pandemic given the lockdown periods in Queensland have been relatively short. Staff are also now far more accustomed to transitioning to work from home arrangements as required. So too are Queensland Courts accustomed to remote appearances when required.

In the third quarter of 2020–21, the OWHSP moved to new premises within the State Law Building, having outgrown our previous tenancy. Our move was timely given the increase in the workload of the OWHSP. Prosecutors now have more convenient access to the Brisbane courts precinct, and to improved video conferencing facilities within the OWHSP.

I thank the staff of OWHSP for their tireless work in 2020–21. They are a talented, dedicated and resilient workforce. They have again achieved remarkable results, particularly in respect of the conviction rate, which is a testament to their capability as prosecutors. I am indebted also to the administrative and other support staff within my office and within OIR, whose work is critical to the success of the OWHSP. My staff have demonstrated the ability to embrace change and to adapt to our work environment as necessary to pursue best practice in public prosecution and to meet and exceed the expectations of our stakeholders. I am proud to lead them.

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<sup>1</sup> A copy of the OWHSP organisational chart as at 30 June 2021 appears later in this report, at Annexure A. The FTE number at 30 June 2021 was 18.0 (against an FTE cap of 18.43) taking into account part-time arrangements, and excluding the WHSP and a contract staff member.

<sup>2</sup> Information on the full financial year's expenditure for FY 2020–21 appears later in this report at Annexure B.

## **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.

The Act also provides that the WHSP may issue written guidelines to any of the staff of the WHS prosecutor, the Regulator or public service employees employed in the department undertaking work relevant to the WHS prosecutor's functions under this Act.

On 17 April 2019, I issued a guideline on the advice and charging function of the OWHSP. Pursuant to s.48(2) of the Act, the guideline, a copy of which is annexed<sup>3</sup>, applies to OWHSP staff, the Regulator, and relevant staff of OIR. The guideline continued in force in 2020–21 (and was reissued on 21 September 2020).

On 7 November 2019, I issued a guideline on prosecution disclosure, a copy of which is also annexed.<sup>4</sup> The offences under the Act include indictable offences, for which lengthy sentences of imprisonment are available. It is vital to the proper conduct of all prosecutions, and particularly those for serious offences, that appropriate disclosure is made by investigators and prosecutors. The guideline aims to ensure that occurs. Pursuant to s.48(2) of the Act, the guideline applies to OWHSP staff, the Regulator, and relevant staff of OIR. The guideline continued in force in 2020–21 (and was reissued on 21 September 2020).

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.

Any general or specific guidelines issued by me are to be read with, and subject to, the Director's Guidelines.

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<sup>3</sup> Annexure D

<sup>4</sup> Annexure E

## **Efficiency, effectiveness and transparency**

We are committed to our strategic priority of providing an efficient, effective and transparent service. That was our principal priority in 2020–21 and will remain so in 2021–22.

A significant component of the work of the OWHSP involves the assessment of briefs of evidence against the Director's Guidelines. The OWHSP recognises the importance for all stakeholders of ensuring that prosecution decisions are made in a timely manner.

In 2020–21, we set a revised target of assessing 100 per cent of all briefs of evidence within 120 days. We achieved a result of 23.1 percent within that timeframe. Our average assessment time across all matters which proceeded to a decision was 202 days. Whilst we fell significantly short of our target, the average assessment time reached was a commendable achievement, taking into account the impact of the COVID-19 pandemic and the increase in the number of prosecutions which were before the court. We will continue to pursue improvements to our efficiency in 2021–22. As I noted above, however, further resourcing will be necessary to meet our target, which remains the same for 2021–22.<sup>5</sup>

One of the means by which we seek to improve prosecution efficiency is through the provision of advice and training to investigators. OIR investigators used that service routinely through 2020–21, which saw a continued increase in the quality of briefs of evidence referred by OIR. We will continue in 2021–22 to provide that service, including to RSHQ investigators.

Essential to the effectiveness of the OWHSP as a prosecution service is consistency in our prosecution decision making, including in the application of the Director's Guidelines. I am pleased to report that again in 2020–21 the Director's Guidelines were considered, applied and recorded in 100 percent of matters assessed by the OWHSP.

That process has ensured:

- consideration of prosecution action against all duty holders and potential suspects identified during both the investigation and brief assessment
- relevant legal considerations were factored into decision-making
- appropriate supervisor oversight of those recommendations
- consultation with the referring agency prior to the commencement of prosecutions or decisions not to prosecute
- consideration of the interests of victims and their families.

Our effectiveness, including in the quality of our advice and decision-making, is reflected principally by our conviction rate. We maintained our high target of 90 per cent across all matters in 2020–21, and exceeded that target, achieving 94.3 per cent.

There were a high number of decisions not to commence a prosecution for reasons of a lack of evidence (where there was either no prima facie case or no reasonable prospect of securing a conviction). That figure evidences the thorough consideration of every potential suspect or duty holder in the course of both investigations and assessment of briefs of evidence by the OWHSP.

The OWHSP briefs external counsel to provide advice and appear on behalf of the WHSP in appropriate matters. Our expenditure on external counsel was again our most significant expense in 2020–21, save for staffing costs.

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<sup>5</sup> Annexure C - OWHSP Business Plan 2021–22.



The private bar continues to provide an excellent service in complementing the capacity and capability of the OWHSP prosecutors. We committed 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 37.5 per cent of the matters in the reporting period, and paid women 31.2 per cent of the value of all briefs.

## **Stakeholder engagement**

We worked throughout 2020–21 towards maintaining our excellent stakeholder relationship with Statewide Investigations, Workplace Health and Safety Queensland, the investigative unit from which the OWHSP receives the significant majority of its referrals. We also worked towards establishing a similar relationship with the Chief Inspectors with RSHQ, from whom referrals from that regulator are received by OWHSP. Those relationships play an important role in ensuring the efficiency, effectiveness and transparency in the prosecution service provided by OWHSP.

The WHSP also met throughout the year with the Work Health and Safety Queensland and Electrical Safety Boards. The WHSP presented to RSHQ inspectors and investigators, to WHS investigators at their annual conference, and to other work health and safety and resources safety industry stakeholders in various forums.

The OWHSP again hosted a meeting of the Australian and New Zealand WHS Prosecutors' Network, which is comprised of the heads of work health and safety prosecutions in Australia and New Zealand. The Network is dedicated to information sharing which ensures best practice within the OWHSP. Establishment of the network also endeavours to achieve, to the extent possible, and through our information sharing, consistency in approach to work health and safety prosecutions across the region. The Network is scheduled to meet again in the second quarter of 2021–22.

## **OWHSP staff**

The OWHSP is committed to the ongoing professional development of all staff.

In addition to our in-house CLE program, in 2020–21 the majority of OWHSP prosecutors participated in an advocacy training course conducted by the Australian Advocacy Institute. We aim to offer a similar course to prosecutors in 2021–22.

The wellbeing of the OWHSP staff is paramount. In the course of their work the OWHSP staff are routinely exposed to traumatic material. In 2020–21, we provided training to all staff on vicarious trauma. We will again provide that assistance in 2021–22, in addition to the services provided through our attachment to OIR, including access to our employee assistance provider.

## **Victim liaison**

Preventable injuries, including fatal injuries, continue to be sustained in incidents across Queensland workplaces, and the vast majority of prosecutions commenced in 2020–21 involved serious injuries and fatalities to workers and members of the public.

Victims of workplace offending and their families are heavily invested in the prosecution process and outcomes. Support for victims and their families, in both work health and safety and resources safety jurisdictions, is provided by Investigation Liaison Support Officers, who sit within the Coronial and Investigation Liaison Unit (CILU) of OIR. We reviewed and revised our communication protocol with CILU in 2020–21. The protocol provides for:

- 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.

The OWHSP is cognisant of the importance of supporting victims and their families during the prosecution process, including through the timely provision of information from the OWHSP. The WHS Prosecutor met with *The Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee* (affected persons committee) in 2020–21 to ensure the OWHSP understands and responds to the needs and requests of those impacted by workplace injuries and fatalities. Together with support from CILU Investigation Liaison Support Officers, and in accordance with our commitment under the protocol, OWHSP prosecutors are committed, and will remain committed, to the support of victims and their families during the prosecution process.

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

The Act provides a regime in which a request can be made to me to commence a prosecution where a suspected work health and safety offence has been committed. Equivalent provisions also exist in the *Electrical Safety Act 2002*, the *Safety in Recreational Water Activities Act 2011* and the Queensland resources legislation.<sup>6</sup>

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

Four requests to prosecute were received and responded to by the OWHSP in 2020–21. None of those matters resulted in a request to refer the matter to the DPP.

### **Indictable prosecutions and engagement with the DPP**

The OWHSP prosecutes indictable offences for reckless conduct and industrial manslaughter. The rate of prosecution of those offences continues to increase.

Under the *Director of Public Prosecutions Act 1984*, the Director of Public Prosecutions (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.

I thank the DPP, Mr Carl Heaton QC, and his staff for their support of the conduct by the OWHSP of indictable prosecutions in 2020–21.

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<sup>6</sup> Section 231 of the *Work Health and Safety Act 2011*; section 186A of the *Electrical Safety Act 2002*; by virtue of section 36 of the *Safety in Recreational Water Activities Act 2011*; section 256B of the *Coal Mining Safety and Health Act 1999*; section 118C of the *Explosives Act 1999*; section 235B of the *Mining and Quarrying Safety and Health Act 1999*; and section 837C of the *Petroleum and Gas (Production and Safety) Act 2004*.

## Performance data 2020–2021

### Referrals

**96**

new briefs of evidence (BOEs) were referred to the OWHSP by regulators during the reporting period<sup>1</sup>

**9** requests for formal legal advice were received prior to referral of a BOE.<sup>2</sup>

**NIL** pre-brief advice files remained open, pending the provision of legal advice by OWHSP or the referral of a BOE, as at 30 June 2021.

**22** brief assessments were in progress as at 30 June 2021, in relation to at least 38 suspects.<sup>3</sup>

**7** brief assessments (relating to at least 25 suspects) were suspended as at 30 June 2021 whilst investigators responded to requisitions.

**29** BOEs (relating to 63 suspects) remained in brief assessment phase (including those where requisitions had been raised) as at 30 June 2020.

### Cases finalised

**83**

prosecutions were successfully finalised<sup>4</sup> by the OWHSP and \$8,430,600 in fines were imposed.<sup>5</sup>

**5** prosecutions were unsuccessful.<sup>6</sup>

**18** prosecutions were withdrawn.

**1** prosecution was withdrawn as an Enforceable Undertaking (EU) was accepted by the Regulator.

### Decisions made

**387**

decisions made (to prosecute or not prosecute), in relation to **104** BOEs.<sup>7</sup>

**149** decisions to commence prosecutions were made, against **77** bodies corporate and **72** individuals (of whom 16 were officers).

**238** decisions were made by the WHSP not to prosecute an identified potential suspect: **197** were determined to have no prima facie case. **20** were determined to have no reasonable prospects of conviction. **21** were determined to be not in the public interest.

### Complaints before the Court

**164**

complaints were before the Court as at 30 June 2021.

<sup>1</sup>88 briefs of evidence from the Office of Industrial Relations and 8 briefs of evidence from Resources Safety and Health Queensland. The number of suspects considered from those new BOEs was 252. <sup>2</sup>Five requests were for pre-brief advice (in anticipation of receiving a brief of evidence) and four were for general legal advice. <sup>3</sup>The final number of suspects considered may not be known until the brief assessment is completed and the matter decided by the WHSP. This figure does not include matters where the brief assessment was in suspension, awaiting a response to requisitions. <sup>4</sup>Final court order date was between 1/07/2020 and 30/06/2021. <sup>5</sup>Of the 83 successful prosecutions, four were contested prosecutions. 77 defendants entered pleas of guilty and a further two matters proceeded ex-parte. <sup>6</sup>Three were acquitted at first instance. In one of those cases the acquittal was appealed by the prosecution, but the appeal was withdrawn by the WHSP. In the other two cases, the convictions were overturned on appeal by the defendant. <sup>7</sup>Against 146 bodies corporate and 241 individuals.

| Effectiveness measures  |   | Result |
|---|---|--------|
| Compliance in applying the Guidelines of the DPP in decisions to commence, not commence, continue or discontinue a prosecution 100% | 408 <sup>1</sup> decisions  | 100%   |
| Prosecutions resulting in a conviction 90% <sup>2</sup>   | 83 out of 88 prosecutions which proceeded to a decision or verdict resulted in a conviction | 94.3%  |
| Defendants in defended summary hearings resulting in conviction 70%   | 4 out of 9 defended summary hearings resulted in a conviction <sup>3</sup>                  | 44.4%  |
| Defendants tried on indictment and convicted 70%  | Nil cases <sup>4</sup>  | -      |

| Efficiency measure   | Result   |
|--|--|
| <p>387 prosecutorial decisions (to prosecute or not prosecute) were made in the FY2020–21. These related to 104 briefs of evidence.</p> <p>The average decision time per brief of evidence was 202 days.</p> <p>91 individual suspects, out of 387 were assessed within the 120 days.</p>  |  |
| <p>Briefs of evidence assessed within 120 days of referral 100%</p> <p>Quarter 1 = 47 Decisions – Average time taken 237 days<br/>14 met 120-day KPI = 29.8%</p> <p>Quarter 2 = 101 Decisions – Average time taken 180 days<br/>42 met 120-day KPI = 41.6%</p> <p>Quarter 3 = 114 Decisions Average time taken 258 days<br/>14 met 120-day KPI = 12.3%</p> <p>Quarter 4 = 125 Decisions – Average time taken 179 days<br/>21 met 120-day KPI = 16.8%</p> | 23.1%  |
| <p>Pre-brief advice provided within 30 days 100%</p>   | 5 out of 9 requests met the KPI of 30 days 55% |

<sup>1</sup> 387 total decisions to prosecute (149) or not prosecute (238) were made. There were also an additional 19 decisions to discontinue proceedings (one was the result of an enforceable undertaking being entered). There were also two decisions made to appeal decisions of the Magistrates Court.

<sup>2</sup> “Conviction” includes any finding of guilt and is not limited to prosecutions in which a conviction is recorded. This category excludes cases where the prosecution offered no evidence (discontinued), where an Enforceable Undertaking (EU) was entered, or where the prosecution has commenced an appeal against dismissal of a complaint. (1) E255569 – Defendant successfully appealed conviction; (2) E262093 – Complaint dismissed; (3) RS2020-001 - WHSP withdrew the prosecution appeal commenced against dismissal of the complaint; (4) E238615 - Complaint dismissed. Prosecution appeal of costs order remains on foot; (5) E173447 - Defendant successfully appealed conviction. Application for costs remains on foot. <sup>3</sup> These were contested summary matters which were finalised in FY2020–21 (except with respect to costs), including where an appeal against conviction or dismissal was finalised, and where the conviction or appeal may have occurred in a previous financial year. Ten further summary matters were still being contested or awaiting a decision after the hearing as at 30 June 2021. <sup>4</sup> Eleven indictable prosecutions were before the Court over the course of FY2020–21 but none were contested matters resulting in a conviction or acquittal within FY2020–21.

## Noteable prosecutions 2020–21

### **Intimidate Inspector<sup>1</sup>**

The defendant, a union organiser, was found guilty after a hearing in the Magistrates Court of intimidating a work health and safety Inspector pursuant to s.190 of the *Work Health and Safety Act 2011*.

The defendant appealed to the District Court against his conviction.

On 25 June 2021, in the District Court at Cairns, Judge Morzone QC allowed the appeal, set aside the conviction and did not order a retrial.

The decision is available at [sclqld.org.au/caselaw/QDC/2021/127](https://sclqld.org.au/caselaw/QDC/2021/127).

### **A company and a sole trader – heat exhaustion claims life of contract worker<sup>2</sup>**

This was a prosecution of a pumpkin picking contractor and a farm operator, for failing to protect an individual against the risk of serious illness or death from exposure to heat. A foreign worker engaged by the contractor died from prolonged exposure to heat, where both defendants failed, *inter alia*, to provide adequate access to shade.

The corporate defendant failed to comply with a primary health and safety duty and that failure exposed an individual to a risk of death or serious injury pursuant to ss.32 and 20 of the *Work Health and Safety Act 2011*. On 3 June 2021, the corporate defendant was convicted and fined \$100,000 in the Townsville Magistrates Court.

The sole trader defendant employed approximately 200 workers annually, primarily holidaying backpackers, to undertake produce picking work. On 2 October 2020, the defendant pleaded guilty in the Townsville Magistrates Court for failing to comply with his work health and safety duty under ss.32 and 19(1) of the *Work Health and Safety Act 2011*. The court convicted and fined the defendant \$65,000.

No conviction was recorded against either defendant.

### **A flooring company and a director – fall from height<sup>3</sup>**

The defendant company was engaged by a flooring system company to install the flooring system at a construction site in West End, Brisbane. The flooring system company and the principal contractor had created a safe work method statement (SWMS) that failed to identify penetrations as a hazard. The defendant company's director reviewed and signed the SWMS, and also failed to ensure the SWMS addressed penetrations.

On 7 March 2018, a labour hire worker engaged by the defendant company was working close to a penetration on the first level above ground (Level 1). Infill boards of the flooring system were placed over the penetration with the words “no standing peno” and “peno no standing” but were unsuitable for covering penetrations. The worker was working next to the penetration and fell through it, sustaining serious spinal injuries.

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<sup>1</sup> E255569

<sup>2</sup> E249362

<sup>3</sup> E254412

On 18 December 2020 in the Brisbane Magistrates Court, the Magistrate convicted and fined the defendant company \$90,000, under ss.30 and 19(1) of the *Work Health and Safety Act 2011* (the Act) for failing to comply with a duty, to ensure so far as was reasonably practicable, the health and safety of workers whose activities it directed or influenced, which failure exposed an individual to a risk of death or serious injury. Likewise, the defendant director was convicted and fined \$8,000 under ss.32 and 27(1) of the Act for failing to comply with his duty to exercise due diligence, as an officer of the business or undertaking to ensure the PCBU complied with its duty.

Both defendants appealed the conviction.

On 25 June 2021, in the District Court at Brisbane, the defendants' appeals were dismissed. The decision confirmed that persons conducting a business or undertaking owe a primary duty of care to workers engaged, or caused to be engaged by the person, and to workers whose activities in carrying out work are influenced or directed by the person. That is, the duty arises in either instance, and not only where workers are both engaged and influenced or directed by the person conducting a business or undertaking.

The decision is available at <https://www.sclqld.org.au/caselaw/QDC/2021/124>.

#### **A company – fail to report<sup>4</sup>**

The defendant company operated a transport business that specialised in the transportation of livestock. On 8 March 2018, two workers employed by the defendant transported a broken-down truck on the tray of a tilt tray truck to a site in Wacol for repair. While at that site, one of the workers fell from the tray of the stationary tilt tray truck, striking his head on the ground below. The other worker contacted the director of the defendant that day to report the incident.

The injured worker was transported to hospital by ambulance where he was admitted as an inpatient for seven days and received treatment for a fractured skull.

On 7 April 2021, the defendant was convicted and fined \$5,000 pursuant to s.38(1) of the *Work Health and Safety Act 2011* for failing to ensure that the regulator was notified immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking had occurred. The learned sentencing Magistrate observed that the only allegation in this case was the defendant's failure to report the incident. The incident remained unreported for one year and three months, which was an aggravating factor. Her Honour considered the need to penalise the defendant company for its omission, in addition to the need to deter the offender and other persons from failing to comply with their positive duty to notify the regulator of a notifiable incident.

#### **A not-for-profit charity – death of a teenager<sup>5</sup>**

The defendant was prosecuted for an offence under s.32 of the *Work Health and Safety Act 2011*, involving the death of a teenage boy at a gymnasium in North Brisbane on 26 September 2017. The boy tragically sustained fatal injuries when he became trapped under the bar of a weight machine.

On 16 November 2020, in the Pine Rivers Magistrate Court, the defendant was convicted, having pleaded guilty, and fined \$300,000.

The sentencing Magistrate stated that general deterrence was an important component of the sentence, and that a message needed to be sent to employers and businesses, particularly those working with children, that this was

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<sup>4</sup> E273268

<sup>5</sup> E247911

a very serious matter. Her Honour considered that denunciation was relevant and that a significant penalty was necessary to show the community's condemnation of such conduct. Her Honour took into account the harm done to parents and friends. Her Honour commented that the defendant was solely to blame, including for the acts and omissions of its staff. Her Honour noted that the defendant is a not-for-profit organisation and a large organisation that provides services targeted at children and young people. Her Honour observed that those placed at risk were members of the public under the age of 16 years old.

### **Oil Tech International Pty Ltd – fatality at waste facility<sup>6</sup>**

On 8 September 2020, Oil Tech International Pty Ltd, a company which operated a waste liquid treatment facility at Yatala, was sentenced in the Beenleigh District Court. It was convicted and fined \$800,000 after pleading guilty to one offence of reckless conduct pursuant to s.31 of the *Work Health and Safety Act 2011*, after a worker was enveloped in flames and burned to death.

On 5 November 2015, a bulk tanker truck arrived at the facility filled with approximately 6,900 litres of waste liquid to deliver. The liquid had been collected from a service station earlier that morning and contained a mixture of water and unleaded petrol. At the time, all the areas at the facility for the storage of liquids were full, including the tanks and the bunded area surrounding them. The driver was directed that the waste from the tanker be deposited onto a sloped concrete depression, referred to as the driveway. The worker was standing on the driveway using a 240V heat gun to conduct repairs when the vapours from the petrol which had accumulated around the driveway were suddenly ignited, also igniting the worker, who sustained fatal injuries.

It was not uncommon for the facility to receive deliveries containing flammable substances and there was no adequate system in place for testing loads of liquid to determine their contents before their reception at the facility. Deliveries of waste liquid had previously been deposited onto the driveway. That conduct exposed workers to the risk of death or serious injury from flammable liquids or vapours becoming ignited and the defendant was reckless as to that risk.

The sentencing Judge considered a substantial fine was appropriate in this distressing case, having regard to the catastrophic result. In deciding to record a conviction, his Honour observed that, although the defendant had no previous convictions for work health and safety offences, the circumstances of the offending were serious, and the incident could have been easily prevented.

### **Ardent Leisure Limited<sup>7</sup>**

Ardent Leisure Limited operated the Dreamworld Theme Park on the Gold Coast. On 25 October 2016, four guests on the Thunder River Rapids Ride at the park were fatally injured.

On 28 September 2020, the defendant pleaded guilty and was sentenced in the Southport Magistrates Court in relation to three charges pursuant to s.32 of the *Work Health and Safety Act 2011*, each concerning a failure to comply with its primary safety duty under s.19(2) of the Act. The defendant failed to ensure, so far as was reasonably practicable, the provision and maintenance of safe plant and structures, the provision and maintenance of safe systems of work, and the provision of training, instruction and supervision necessary to protect all persons against risks to their health and safety arising from work carried out as part of its business, and exposed persons to a risk of serious injury or death.

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<sup>6</sup> E220713

<sup>7</sup> E234526

The defendant was convicted and fined \$3.6M. The conviction was recorded.

The defendant knew of the particular risk of rafts colliding and overturning, and that such an event posed a risk of serious injury or death. The defendant could have implemented various engineering control measures which would have prevented an incident in the event of a pump failure, none of which were cost prohibitive. This included a water level sensor to automatically shut down the conveyor where the water level dropped, which could have been implemented for an estimated cost less than \$3,000. The defendant did not have a system in place for effective risk assessments, which could have identified the risk posed by the gap at the top of the conveyor, the control measures available and the need to implement those controls. The defendant recognised the need to audit rides against Australian Standard 3533 from as early as March 2015 but did not commit sufficient resources to see an audit of this ride prior to the incident.

In sentencing the defendant, her Honour determined that, in this case, the potential consequences of the risk were catastrophic, steps were available to remove the risk, and those steps were not complex or burdensome but, rather, only mildly inconvenient and inexpensive. Her Honour accepted the submission that the failures of the defendant were not momentary or confined to a discrete safety obligation and observed that, while the defendant had implemented some control measures over time, its efforts were grossly below the standard expected of it. In imposing the penalty, the Magistrate determined that the matter was a rare case in which a penalty close to the maximum was appropriate.

#### **A company and a director – obstruction charge<sup>8</sup>**

On 18 December 2019, Workplace Health and Safety Queensland ('WHSQ') Inspectors attended the business premises of the defendant company at Seventeen Mile Rocks and sought entry to undertake compliance activities. The Inspectors identified themselves and showed their Inspector identification to the director and a health and safety manager, who both refused the Inspectors permission to enter. The following day, the Inspectors again attended the workplace and repeated their request for entry were refused again by the same individuals. On each occasion, the Inspectors were obstructed in carrying out their duties as WHSQ Inspectors.

On 22 July 2021, the defendants were sentenced in the Brisbane Magistrates Court for offences of obstructing Inspectors, contrary section 188 of the *Work Health and Safety Act 2011*. The sentencing Magistrate fined the company \$6,000 and released the director on an undertaking pursuant to section 239 of the Act, in the sum of \$4,000 for a period of 12 months.

In sentencing, the Magistrate observed that WHSQ are not to be impeded in their lawful work activities, in order to maintain public confidence in ensuring worker safety at workplaces. He noted the Inspectors repeatedly requested access, which was repeatedly refused.

The Magistrate commented there was considerable public interest in ensuring safety of workers by WHS Inspectors attending workplaces and exercising, unimpeded, their lawful compliance powers.

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<sup>8</sup> E265850



## Notable prosecutions – not finalised

### First industrial manslaughter charge against an individual<sup>9</sup>

This is the first matter in Queensland involving the prosecution of an individual for industrial manslaughter under s.34C of the *Work Health and Safety Act 2011*. The defendant is alleged to have operated a forklift in the vicinity of another worker, who sustained fatal injuries after being struck by a generator which fell from the forklift.

On 2 December 2020, the matter was committed to the Gympie District Court and adjourned for mention, on a date to be fixed.

### A company – industrial manslaughter<sup>10</sup>

On 28 July 2019, a worker was fatally electrocuted in the course of carrying out work for the defendant company when a 25 tonne Franna Crane contacted overhead power lines at a cane rail construction site near Little Mulgrave, south of Cairns.

One complaint alleges that the company engaged in conduct that caused the death of the worker by failing to implement adequate control measures to manage the risk of overhead powerlines on or near the area where the work was to be conducted. The company is charged that it was negligent in causing the death of the worker by its conduct, contrary to section 48N of the *Electrical Safety Act 2002*. Another complaint alleges the company failed to ensure its business or undertaking was conducted in a way that was electrically safe and that failure exposed an individual to a risk of death or serious injury, contrary to ss.40C and 30 of the *Electrical Safety Act 2002*.

The complaints will next be mentioned in the Cairns Magistrates Court on 19 October 2021.

### A company, an officer, and two former directors – fatality at fertilizer factory<sup>11</sup>

On 13 August 2021, a complaint was made against a company alleging one offence of industrial manslaughter under s.34C(1) of the *Work Health and Safety Act 2011*. The company operates a factory manufacturing fertilizer. It is alleged that a worker sustained fatal injuries after becoming entangled in a conveyer belt system.

The chief executive officer of the company and two previous directors have each been charged with one offence pursuant to ss.32 and 27(1) of the *Work Health and Safety Act 2011*. It is alleged they failed to exercise due diligence as officers of the defendant company, and that the failure exposed a worker to a risk of death or serious injury.

The matters are before the Caboolture Magistrates Court on 24 November 2021.

### A company and a director – fatality at abattoir<sup>12</sup>

On 29 July 2019, a worker was fatally injured at an abattoir. He fell whilst manually loading goat carcasses into a dehairer machine and was crushed by the hydraulic lift bucket of the machine.

On 13 August 2021, industrial manslaughter charges under s.34C of the *Work Health and Safety Act 2011* were laid against the company which operates the abattoir and its sole director. Further category two complaints were made against both defendants for allegedly failing in their health and safety duties and exposing workers to a risk of death or serious injury.

The matters are due for mention in the Charleville Magistrates Court on 8 December 2021.

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<sup>9</sup> E273866

<sup>10</sup> E274819

<sup>11</sup> E284394

<sup>12</sup> E275083

**Fraser Island fatalities<sup>13</sup>**

This matter relates to the double fatality that occurred when two boys from a Japanese tourist group drowned in Lake McKenzie on Fraser Island. A corporation and two individuals are each charged with category 2 offences under s.32 of the *Work Health and Safety Act 2011*.

One of the defendants will appear for mention on 28 October 2021 in the Hervey Bay Magistrates Court.

The proceedings concerning the two remaining defendants are listed for mention on 15 October 2021, in the Brisbane Magistrates Court.

**Eagle Farm double fatality<sup>14</sup>**

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 prosecution which remains before the Brisbane Magistrates Court is of an individual who was a sub-contractor at the construction site. He is charged with an indictable offence (Category 1) pursuant to ss.31 and 28 of the *Work Health and Safety Act 2011*, which relates to his conduct on 30 September 2016, a week before the fatalities. That prosecution is yet to proceed through committal. The matter has been referred to the Mental Health Court. The defendant is also charged with manslaughter. That prosecution, which is being conducted by the Director of Public Prosecutions, has also been referred to the Mental Health Court.

The matter has been adjourned to the Brisbane Magistrates Court for mention on 26 November 2021, pending determination of the matter by the Mental Health Court.

The principal contractor was dealt with in the Queensland District Court on 13 December 2019, fined \$625,000 for failing in its health and safety duty to ensure that the health and safety of workers was not put at risk from work it carried out as part of the conduct of its business or undertaking and that failure exposed individuals to a risk of death or serious injury.

**Zipline failure<sup>15</sup>**

This matter relates to an incident where a couple fell 20-25 metres whilst travelling on a zipline during a guided tour at Cape Tribulation on 22 October 2019. One person died as a result of his injuries and the other sustained serious injuries. Following the incident, a third person was injured during a rescue operation.

A complaint was made on 30 August 2021 against the corporate defendant under ss.31 and 19(2) of the *Work Health and Safety Act 2011* (the Act). It is alleged the defendant without reasonable excuse, engaged in conduct that exposed an individual to whom a health and safety duty was owed a risk of death or serious injury, and was reckless as to that risk. Further, a complaint was made against a director under ss.32 and 27(1) of the Act, alleging the defendant as an officer failed to exercise due diligence to ensure that the person conducting the business or undertaking complied with that duty or obligation, and that failure exposed an individual to a risk of death or serious injury.

The complaint against the corporate defendant is listed for mention in the Cairns Magistrates Court on 14 December 2021. The complaint against the director is returnable to the Mossman Magistrates Court on 13 October 2021 for mention.

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<sup>13</sup> E270071

<sup>14</sup> E233697

<sup>15</sup> E278717

**Silica exposure<sup>16</sup>**

This is the first prosecution in Queensland relating to the dry cutting of manufactured stone benchtops. It is a Category 3 prosecution against a company and its director. It is alleged that workers were dry cutting a stone benchtop at a residential unit development whilst in the process of fitting the benchtop.

The matters have been listed for mention on 17 December 2021 in the Brisbane Magistrates Court.

**A company and a director – Reckless conduct charge<sup>17</sup>**

This is an indictable prosecution (Category 1) of a person conducting a business or undertaking and its sole director for reckless conduct, which led to the serious injury of a worker, who is alleged to have been impaled on an unprotected starter bar at a Brisbane construction site. It is alleged that workers were negotiating a narrow, slippery path beside an unguarded trench, and were directed to continue to do so after raising safety concerns with the director who was onsite.

The defendants have been committed for trial to the Brisbane District Court. An indictment is yet to be presented.

**A school camp supervisor – Reckless conduct charge<sup>18</sup>**

On 18 March 2020, whilst on a school camp at Conondale National Park, two year-nine students suffered burn injuries. It is alleged the two boys were taking part in a cooking activity when the defendant, a camp facilitator, allegedly attempted to refuel a camp stove with methylated spirits. The methylated spirits ignited, and the two boys were sprayed with ignited spirits.

The complaint alleging one offence contrary to s.31 (Category 1) of the *Work Health and Safety Act 2011* has been committed to the Maroochydore District Court for trial on a date to be fixed.

**A company and a director – Reckless conduct charges<sup>19</sup>**

This is an indictable prosecution (Category 1), pursuant to s.31 of the *Work Health and Safety Act 2011* of a company and one of its directors for reckless conduct, which led to the serious injury of a worker. It is alleged that the injury occurred in the course of work by two workers who had been lifted in the bucket of a loader to work at a height of approximately 4.5 metres.

Both defendants are due to be sentenced in the Maroochydore District Court on 6 October 2021.

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<sup>16</sup> E263313

<sup>17</sup> E254123

<sup>18</sup> E284689

<sup>19</sup> E269519

**A company and a director – Reckless conduct and duty breach charges<sup>20</sup>**

The defendant company operated a business in meat preparation, packaging and delivery, and used a frozen meat slicer. It is alleged the guarding on the slicer had been removed by the director.

On 21 August 2019, a worker was using the frozen meat slicer to slice meat, when the guillotine operated and severed his hand.

Complaints were laid against the director alleging offences under ss.31 and 32 of the *Work Health and Safety Act 2011*.

The matters have been adjourned to 26 November 2021.

**An individual – Reckless conduct charge<sup>21</sup>**

The defendant is alleged to have been conducting a business or undertaking which undertook demolition work. On 11 July 2019, an inexperienced worker allegedly engaged by the defendant was seriously injured removing the framing around a doorway during the demolition of a domestic house. Structural elements of the timber framing were removed, causing framing and roof trusses to fall and crush the worker.

The defendant has been charged with reckless conduct pursuant to s.31 of the *Work Health and Safety Act 2011* (the Act). He has also been charged with failing to notify of the incident and failing to ensure the site of the incident was not disturbed until the arrival of inspectors, contrary to ss.38 and 39 of the Act respectively.

All charges are to be mentioned in the Brisbane Magistrates Court on 17 December 2021.

**Alleged reckless conduct by worker<sup>22</sup>**

It is alleged that, on 30 June 2020, the defendant, who was a worker installing air-conditioning in a building at a new construction at a Brisbane school, threw a round concrete billet weighing approximately 6kgs from a scissor lift at a height of approximately six metres. A worker below was struck on the head and suffered serious injuries including a fractured skull and bleeding on the brain.

The defendant is charged with one offence of reckless conduct contrary to ss.31 and 28 of the *Work Health and Safety Act 2011*.

The matter is listed for mention in the Richlands Magistrates Court is on 26 October 2021.

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<sup>20</sup> E275873

<sup>21</sup> E274218

<sup>22</sup> E288431

**A company – reckless conduct<sup>23</sup>**

On 27 August 2018, a worker was undertaking irrigation work while operating an all-terrain vehicle on a farm. At the same time, another worker was operating a skirter machine with an attachment with five large blades. The worker collided with the skirter and his left arm was amputated below the elbow. During the investigation it was revealed that another incident had occurred on 3 August 2018, which had not been reported to WHSQ.

Four complaints were made alleging two Category 2 offences under s.32, one Category 1 offence of reckless conduct under s.31, and one offence of failing to notify the Regulator of an incident pursuant to s.38 of the *Work Health and Safety Act 2011*.

The three summary charges are for listed for mention in the Bundaberg Magistrates Court on 9 December 2021.

The reckless conduct charge has been committed for trial to the Bundaberg District Court on a date to be fixed.

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<sup>23</sup> E261083

## Notable prosecutions – On appeal

### Appeal against electrical safety conviction<sup>24</sup>

On 12 July 2016, a worker employed by the defendant sustained an electric shock while replacing an advertising skin on a billboard owned by the defendant, who was charged with breaching its duty under ss.40C and 30 of the *Electrical Safety Act 2002* in failing to ensure its business was conducted in a way that was electrically safe.

The defendant entered a plea of not guilty with the matter proceeding to hearing over two days on 19 and 20 February 2019. On 17 April 2019 his Honour delivered his decision, finding the defendant guilty. On 7 June 2019 the defendant was fined a sum of \$250,000 and ordered to pay the complainants costs and the filing fee of \$7,475.38.

The defendants appealed against the conviction on 20 May 2019 in Mackay District Court. This appeal was dismissed on 15 December 2020 by Judge Dearden.

On 18 December 2020, the defendant further lodged an appeal against conviction in the Queensland Court of Appeal. On 24 August 2021 the Court heard the parties' oral submissions and reserved its decision to a date to be fixed.

### Appeals against dismissal of complaints<sup>25</sup>

On 20 June 2018, at a construction site at South Brisbane, workers installed a 5.98 tonne pre-cast concrete panel at level 7 of a tower. Approximately three hours after installation of the panel, the installation failed and the panel fell from level 7 of the tower to level 5. It is alleged workers were onsite and in the vicinity of where the panel fell.

A complaint was made against the principal contractor, a company, alleging one offence contrary to ss.19(1) and 32 of the *Work Health and Safety Act 2011*.

On 14 April 2021, in the Brisbane Magistrates Court, the complaint was dismissed as a nullity on the application of the defendant. The magistrate held that the complaint did not plead essential factual ingredients of the offence.

The prosecution appealed the dismissal.

On 15 September 2021 the District Court allowed the prosecution appeal and remitted the matter to the Magistrates Court to proceed according to law.

In an unrelated matter, two charges were laid against a company<sup>26</sup> under ss.32, 19(1) and 19(2) of the *Work Health and Safety Act 2011*. The offences are alleged to have occurred in the course of work on the Toowoomba Second Range Crossing construction.

On 29 April 2021, in the Toowoomba Magistrates Court, the complaint was held to be a nullity or, in the alternative, so defective that it was incapable of amendment.

The prosecution appealed the decision.

The appeal is listed for mention on 6 October 2021 in the Toowoomba District Court.

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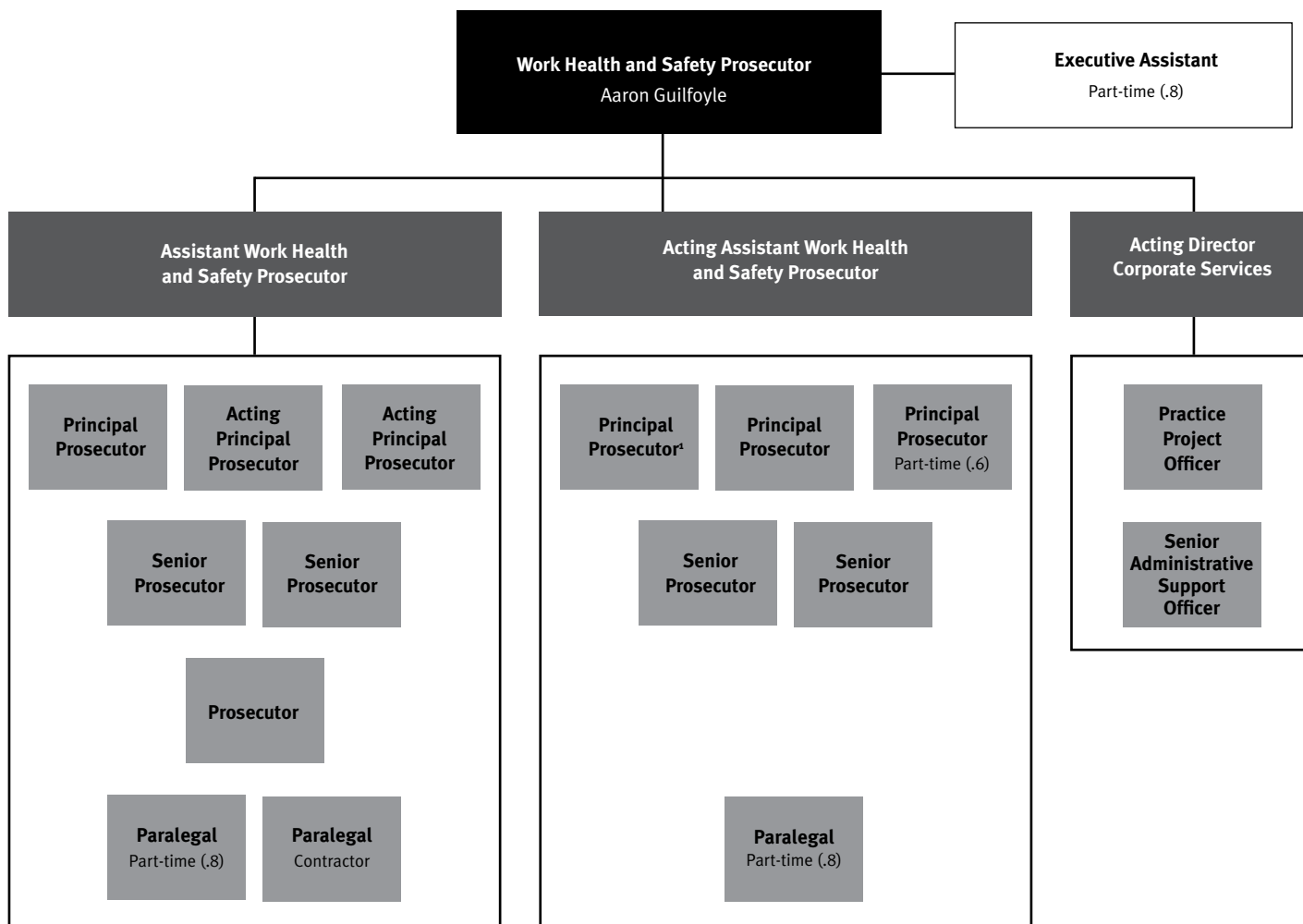
<sup>24</sup> E230299

<sup>25</sup> E258648

<sup>26</sup> E261646

# Annexure A

## Organisational structure



<sup>1</sup> This Principal Prosecutor position was backfilled by a temporary Prosecutor as at 30 June 2021.

## Annexure B

### Financial expenditure

Year to date actual

|  |                              |
|--|------------------------------|
| <b>Employee expenses</b>               |                              |
| Allowances                             | 12,245                       |
| On-costs                               | 466,221                      |
| Other employee expenses                | 37,453                       |
| Professional development               | 11,527                       |
| Salaries and wages                     | 1,787,130                    |
| <b>Employee expenses total</b>         | <b>2,314,576</b>             |
| <b>Supplies and services</b>           |                              |
| Accommodation                          | 532                          |
| Advertising                            | 1,191                        |
| Contingent labour                      | 133,669                      |
| Contractors                            | 3,675                        |
| Fleet                                  | 8,256                        |
| IT services and support                | 1,889                        |
| Legal costs                            | 431,868                      |
| Other supplies and services            | 41,724                       |
| Outsourced works                       | 106,064                      |
| Payment for shared services            | 3,039                        |
| Portable, attractive & minor equipment | 10,544                       |
| Print post and stationery              | 12,163                       |
| Telecommunications                     | 14,199                       |
| Travel                                 | 28,128                       |
| Witness and juror costs                | 3,675                        |
| <b>Supplies and services total</b>     | <b>810,174</b>               |
| <b>Depreciation</b>                    |                              |
| Depreciation                           | 3,959                        |
| <b>Depreciation total</b>              | <b>3,959</b>                 |
| <b>Savings</b>                         |                              |
| Savings                                | -                            |
| <b>Savings total</b>                   | <b>-</b>                     |
| <b>Expense total</b>                   | <b>3,128,709</b>             |
| <b>Grand total</b>                     | <b>3,128,709<sup>1</sup></b> |

<sup>1</sup>This expenditure does not include corporate support or accommodation costs incurred directly by OIR for the operation of the OWHSP.



# Annexure C

## Business plan 2021–2022

### 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*. OWHSP conducts and defends proceedings under Queensland’s workplace and resources health and safety laws.



### Purpose

Our purpose is to provide an independent prosecution service which:

- meets the expectations of our client agencies and other stakeholders
- understands the priorities of our client agencies
- contributes to the safety of Queensland workers and members of the public.



### Aim

We aim to:

- act with professionalism and consistency
- ensure consistency in decision-making
- work as model litigants
- ensure the timely advice of decisions and outcomes to our stakeholders.



### Strategic priorities

- Provide an efficient, effective and transparent prosecution service.
- Establish and maintain effective engagement with our stakeholders.
- Develop and recognise our people.



### Performance measures

#### Effectiveness

- Compliance in applying the Guidelines of the Director of Public Prosecutions<sup>1</sup> in decisions to commence, not commence, continue or discontinue a prosecution 100%.
- Prosecutions<sup>2</sup> resulting in a conviction 90%.
- Defendants in defended summary hearings resulting in conviction 70%.
- Defendants tried on indictment and convicted 70%.



#### Efficiency

- Briefs of evidence assessed within 120 days of referral 100%.
- Pre-brief advice provided within 30 days 100%.



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

<sup>2</sup> 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.

## Annexure D

### Advice function and the decision to charge (Guideline 1/2019)

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
- 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
  - 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
  - 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 of 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 of 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
  - 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.

## Annexure E

### Disclosure (Guideline 2/2019)

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
- c. any public service employees employed in the department undertaking work relevant to the WHS Prosecutor's functions under the Act.

#### Disclosure principles

1. The guiding principle in determining what material should be disclosed by the prosecution is that there is a need to ensure that the accused receives a fair trial.
2. In order to ensure that the accused receives a fair trial, there must be adequate notice of the evidence to be adduced as part of the prosecution case.
3. The prosecution's duty of disclosure is ethical in nature and it is an obligation that is owed to the court. It is a significant aspect of the administration of criminal justice and the court's capacity to ensure the accused's right to a fair trial. Accused are entitled to know the case against them, so that they can properly defend the charges they face. An accused is entitled to know the evidence that will be adduced in support of the charges and whether there is any other material which may be relevant to the defence of the charges, including material relating to the credibility or reliability of a prosecution witness. A failure to disclose may result in a miscarriage of justice.
4. In addition to fulfilling statutory obligations relating to disclosure, the prosecution must disclose to the accused any material which:
  - a. can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or
  - b. might reasonably be expected to assist the accused in advancing a defence; or
  - c. might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.
5. The prosecution duty of disclosure under this guideline does not extend to disclosing material which is:
  - a. relevant only to the credibility of defence (as distinct from prosecution) witnesses
  - b. relevant only to the credibility of the defendant
  - c. relevant only because it might deter the defendant from giving false evidence or raising an issue of fact which might be shown to be false
  - d. relevant in that it might alert and prevent the defendant from creating a trap for themselves based on suspect evidence (i.e. a suspect alibi), if at the time the prosecution became aware of the material it was not disclosable pursuant to Paragraph 4.
6. A precondition for prosecution disclosure is that the material is in the possession of, or the information is known by, the prosecution. For the purposes of this guideline, and at common law, there is no distinction between the prosecuting agency and the investigative agency. The courts generally regard the investigative agency and the prosecuting agency as 'the prosecution'. Consequently, the OWHSP largely depends on OIR as the investigative agency to inform it of the existence of material which should be disclosed to the defence, whether the investigative agency holds it or is aware it is held by a third party including another, State, Territory or Commonwealth agency, private entity or individual.
7. If a matter involves investigation by more than one agency, the OWHSP depends on OIR, as the investigative agency which refers the brief to the OWHSP, to inform the OWHSP of all disclosable material which any of the agencies involved hold or are aware of.
8. Disclosure should be timely and occur as soon as is reasonably practicable. The disclosure obligation is ongoing throughout the prosecution process and continues after trial and the conclusion of any appeals.
9. Disclosure of the prosecution case will ordinarily be by provision of a copy of the brief of evidence. A copy of the brief should always be provided where requested. There may be matters, however, where a defendant wishes to plead guilty quickly without a copy of a brief of evidence being requested and provided. The duty of

disclosure is not incompatible with a defendant wanting to plead guilty before a full brief is served and a plea of guilty may well be accepted by the prosecution in such circumstances.

10. The prosecution may hold or be aware of information or material, other than the material in the brief of evidence, which has:
  - a. been gathered or come to the attention of investigators in the course of the investigation; or
  - b. is otherwise held within any part of OIR, other agencies, or a third party;

that satisfies the requirements for disclosure set out in the Disclosure Principles in this guideline.

11. Examples of material that may fall within this category of material appear below.

#### **Disclosure affecting credibility or reliability of a prosecution witness**

12. The prosecution should disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:
  - a. a relevant previous conviction or finding of guilt
  - b. a statement made by a witness which is inconsistent with any other statement made by the witness
  - c. a relevant adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission)
  - d. evidence before a court, tribunal or Royal Commission which reflects adversely on a witness
  - e. any physical or mental condition which may affect reliability
  - f. any concession or benefit which has been offered or granted to a witness in order to secure that person's testimony for the prosecution
  - g. where credibility is in issue, that the witness has been charged with a relevant offence.
13. Some examples of material of the kind referred to in paragraph 12. are further discussed below.

#### **Previous convictions**

14. Minor prior convictions for formal or non-contentious witnesses may not meet the requirements for disclosure, whereas previous convictions for perjury and offences involving dishonesty should always be disclosed to defence.
15. The prosecution must, on request, disclose a copy of a criminal history of a proposed witness which is in the possession of the prosecution. Where blanket requests for 'all witnesses' are made, the prosecution should attempt to negotiate with defence practitioners to ensure that unnecessary checks do not have to be undertaken for formal or non-contentious witnesses.
16. The duty to disclose relevant prior convictions is not confined to cases of specific requests for the criminal histories of witnesses. For that reason, it is appropriate for the prosecution to ensure, prior to the commencement of any trial or summary hearing, that criminal history checks have been undertaken for significant civilian witnesses whose credit may be in issue. In addition to paragraph 14, in some cases convictions relating to Driving Under the Influence or illicit substances might be relevant particularly if the proposed witness is to give evidence relating to operation of plant/machinery.

#### **Adverse findings**

17. Where a prosecution witness has been the subject of an adverse finding (including a finding of dishonesty) in other criminal proceedings, disciplinary proceedings, civil proceedings or a Royal Commission, such adverse findings should be disclosed by the prosecution to the defence. That is, unless the finding does not meet the requirements for disclosure set out in the Disclosure Principles in this guideline. Regard should be had to the nature of the evidence expected to be given and the issues likely to arise in the case at hand. For example, it may not be necessary to disclose adverse findings which arise from inefficiency, incompetence or disobedience of orders, but it might be necessary to disclose any history relevant to those matters in paragraph 16.

#### **Concessions to witnesses**

18. The prosecution must disclose:
  - a. any concession offered or provided to a witness with respect to his or her involvement in suspected offences in order to secure his or her evidence for the prosecution, whether as to choice of charge, the grant of an undertaking or otherwise
  - b. any monetary or other benefit or inducement that has been claimed by, or offered or provided to, a witness. This does not include any payments made in the ordinary and usual course of a witness coming to court to

- give evidence (e.g. the payment of travel and accommodation expenses or the fees of expert witnesses) and disclosure will be subject to any legislative requirements such as witness protection legislation
- c. where the witness participated in the suspected offending that is the subject of the charges against the defendant, whether the witness has been dealt with in respect of his or her own involvement and, if so, whether the witness received a discount on sentence as a result of undertaking to cooperate with the prosecution in relation to the current matter.

#### **Disclosure affecting the competence or credibility of an expert witness or of expert or scientific evidence**

19. The prosecution should disclose to the defence information of which it is aware that is relevant or potentially relevant to the competence or credibility of an expert witness the prosecution intends to rely on.
20. The prosecution should also disclose to the defence information of which it is aware that is in the form of an expert opinion and/or in the nature of scientific evidence, which differs from such evidence already received by the prosecution or in some way casts doubt on the opinions or evidence on which the prosecution intends to rely where that opinion or evidence is relevant and not merely speculative.

#### **Disclosure of a statement by a witness who is not credible**

21. If the prosecution has a statement from a person whose evidence meets the requirements for disclosure as set out in the Disclosure Principles in this guideline, but who will not be called because they are not credible, the defence should be provided with copy of the statement of that witness. The witnesses contact details may also be provided in certain circumstances – see s.590AP Criminal Code (Qld).<sup>1</sup>

#### **Material withheld from disclosure**

22. Where material has been withheld from disclosure as:
  - a. it is considered that the material is immune from disclosure on public interest grounds; or
  - b. disclosure of the material is precluded by statute; or
  - c. it is considered that legal professional privilege should be claimed in respect of the material;

the defence should ordinarily be informed of this. In most cases it should be possible to provide some general information as to the nature of the material concerned. The extent of any further information will be determined by reference to the particular matter, but as a general rule information about the nature of the claim should be provided unless it will compromise that claim (e.g. the fact of there being an informer claim is not usually disclosed). Notification of the existence of such material may in some circumstances generate the issuing of a summons or subpoena to produce the material.

23. If the existence of material that otherwise meets the requirements for disclosure as set out in the Disclosure Principles in this guideline cannot be disclosed at all because of one of the matters identified in paragraph 22, or where a claim for immunity has been upheld by a court, then consideration will need to be given as to whether it is fair for the prosecution to proceed or continue in the absence of such disclosure. In some circumstances a prosecution may not be able to proceed and may need to be discontinued.

#### **Disclosure and sentencing**

24. While disclosure most frequently arises in the context of hearings and trials there are some important obligations on the prosecution in the context of the sentencing process. In particular, any information or material that may affect an assessment of the moral culpability of a defendant on sentence should be disclosed. Such material will often be in the possession of OIR and should be disclosed to the OWHS in that event.

#### **Other matters**

##### ***Timing of Disclosure***

25. Disclosure should be timely, and occur as soon as practicable, always remembering the obligation is ongoing throughout the prosecution process, including during the sentencing process and continues after trial and the conclusion of any appeals (see s.590AL Criminal Code (Qld))<sup>2</sup>. However, in certain circumstances, it may be appropriate to delay disclosure. Some examples of this may include the following:
  - a. where disclosure might prejudice ongoing investigations (see paragraphs 22 and 23), and OIR requests the non-disclosure of material that would otherwise be disclosable under this guideline, disclosure may be able to be delayed until after the investigations are completed

<sup>1,2</sup> See Annexure to Disclosure Guideline 2/2019\_Disclosure legislation

- b. where the prosecution is of the opinion that to disclose evidence is likely to lead to a witness being intimidated, or a risk to the safety of a witness, or to some other interference with the course of justice.
26. Where disclosure of material has been delayed in accordance with the preceding paragraph, the defence should ordinarily be so informed, unless to do so might compromise the reason for the delay (e.g. the existence of an ongoing investigation).

***How material should be disclosed***

27. There are various ways material may be disclosed, and this guideline does not purport to prescribe a necessary means of disclosure. Material may be disclosed in hard copy or electronic form. Disclosure may occur via a schedule listing the material, or by making the material available for inspection or copying. Where a schedule listing material is provided, it should include a description making clear the nature of that material and the defence should be informed that arrangements may be made to inspect the material. This is because the essence of disclosure is that the defence be made aware of the existence of the material – in many instances they may not actually wish to have a copy of the material.
28. There may be cases where, having regard to:
- a. the absence of information available to the prosecution as to the lines of defence to be pursued; and/or
  - b. the nature, extent or complexity of the material gathered in the course of the investigation;

there may be special difficulty in accurately assessing whether particular material meets the requirements for disclosure set out in the Disclosure Principles in this guideline. In these cases, after consultation with OIR, the prosecution may permit the defence to inspect such material.

***Disclosure of material held by third parties***

29. Where the prosecution is aware of disclosable material that is in the possession of a third party, the defence should be informed of:
- a. the name of the third party
  - b. the nature of the material
  - c. the address of the third party (unless there is good reason for not doing so and if so, it may be necessary for the prosecution to facilitate communication between the defence and the third party).

# Annexure E

## Annexure to Disclosure (Guideline 2/2019)

### Indictable offences

#### Criminal code (Qld) Chapter 62, Chapter Division 3 - Disclosure by the prosecution

1. The provisions apply to a ‘relevant proceeding’, which is defined in s.590AD to mean:
  - a. A committal proceeding, or a trial on indictment; or
  - b. A prescribed summary trial (defined in s.590AD as meaning a summary trial of certain indictable offences pursuant to nominated provisions under the Criminal Code (Qld), or summary proceedings in relation to an indictable offence against the *Drugs Misuse Act 1986* (Qld) where the prosecution has elected summary jurisdiction, or a charge for an offence prescribed under a regulation).
2. s.590AO provides that the prosecution does not have to disclose ‘sensitive evidence’ (which is defined in s.590AF). A court may make an order in relation to disclosure of such material.
3. Nothing requires the prosecution to disclose information which it is otherwise unlawful to disclose (s.590AC(1)).

#### Mandatory disclosure

4. A copy of each of the following:
  - a. Bench charge sheet, complaint or indictment containing the charges against a person.
  - b. The accused’s criminal history in the prosecution’s possession.
  - c. Any statement of the accused in the prosecution’s possession.
  - d. For each proposed prosecution witness who is or may be an ‘affected child’ (defined in s.590AD by reference to the *Evidence Act 1977*, s.21AC), a written notice naming the child and describing why they may be an affected child.
  - e. For all other proposed prosecution witnesses, any statement in the prosecution’s possession, or if there is no statement, written notice of the witness’s name.
  - f. If s.93B of the *Evidence Act 1977* (Qld) is to be relied upon (pre-recording of a child’s evidence), a notice stating that intention and the matters set out in s.590C(2) of the Criminal Code (Qld).
  - g. Any report of any test or forensic procedure relevant to the proceeding and in the prosecution’s possession.
  - h. A written notice describing any test or forensic procedure, including one that is not yet completed, on which the prosecution intends to rely.
  - i. A written notice describing any ‘original evidence’ (defined in s.590AD as a thing that may be tendered in the proceeding) on which the prosecution intends to rely. (An exhibit list should usually suffice.)
5. Anything else on which the prosecution intends to rely. (This may include maps or charts etc. to be used as an aid for the Court or jury. It may also include a submission on a legal issue, for example, the reversal of the onus of proof, or a submission for an alternative verdict.)
6. Written notice of, or a copy of, anything else in the prosecution’s possession prescribed by regulation.
7. Pursuant to s.590AI(2), this material must be disclosed as soon as practicable, but at least:
  - a. For a committal hearing or prescribed summary trial, 14 days before the date set by the court for the commencement of the hearing of evidence.
  - b. For a trial on indictment, no more than 28 days after presentation of the indictment, or if the trial starts less than 28 days after presentation, before the evidence starts to be heard.
8. A number of paragraphs in s.590AH(2) refer to items in the ‘possession of the prosecution.’ The expression ‘possession of the prosecution’ is given an extended definition by s.590AE, and it includes things the ‘arresting officer’ (defined in s.590AD as including a person who brought a charge if the accused was not arrested) or prosecutor were aware of, and which could be located without unreasonable effort. This definition would extend the expression ‘possession of the prosecution’ to include things held by third parties and known to the police or prosecutor.



9. The obligation to disclose an exculpatory thing continues post trial until the accused is discharged or acquitted or dies (that is, the obligation continues indefinitely even after the person has been convicted and has been unsuccessful on appeal) (s.590AL(3)). Exculpatory material is defined in s.590AD as ‘reliable evidence of a nature to cause a jury to entertain a reasonable doubt as to the guilt of the accused person.’

#### **Disclosure on request**

10. The matters listed below, which are disclosable on request, must all be disclosed as soon as practicable:
  - a. Particulars of a charge against the accused if a proposed prosecution witness is or may be an affected child. Must be disclosed as soon as practicable (s.590AJ(2)(a), s.590AK(2)).
  - b. A criminal history of a proposed witness for the prosecution that is in the possession of the prosecution (s.590AJ(2)(b), s.590AK(2)). ‘Possession of the prosecution’ is given an extended definition in s.590AD. The common law requires the prosecution to disclose any criminal history of a witness, where their credit or reliability is in issue, whether requested by defence or not.
  - c. A copy or notice of anything in the possession of the prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution (s.590AJ(2)(c), s.590AK(2)).
  - d. Notice of anything in the possession of the prosecution that may tend to raise an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding (s.590AJ(2)(d), s.590AK(2)).
  - e. Any statement of any person relevant to the proceeding and in the possession of the prosecution but on which the prosecution does not intend to rely at the proceeding (s.590AJ(2)(e), s.590AK(2)).
  - f. A copy or notice of any other thing in the possession of the prosecution that is relevant to the proceeding but on which the prosecution does not intend to rely at the proceeding (s.590AJ(2)(f), s.590AK(2)). This may include documents such as accounting records, correspondence and emails seized pursuant to a warrant, but upon which the possession does not rely.

#### **Summary offences**

##### **Magistrates Court PD No.13 of 2010**

11. The Practice Direction defines ‘Prosecution’ to mean either the DPP or Police Prosecution Corps, but should be read to include OWHSP.
12. Prior to the initial appearance, and within a reasonable time of any request, a statement of facts is to be delivered to the Defence by the prosecution which had carriage of the matter at the time the request was made. If there has been no earlier request for a Statement of Facts, it is to be handed personally to a defendant, who is not legally represented, at an appropriate time before his/her first appearance.
13. Written notices which may be given pursuant to Chapter 62 Chapter Division 3 may, in addition to hard copy documents, be given by means of electronic communication.
14. In the event that the defence requests the Prosecution to provide to it certain specified statements and/or exhibits then the Prosecution will make copies of the same available for collection by the defence (and advise the Defence of same) within 14 days of the request or such longer time as directed by the Court.
15. The full brief of evidence must be made available by the Prosecution for collection within 35 days of the matter being set for trial and at least 14 days prior to the date set for the hearing of the trial. ‘Full brief’, means a brief which contains copies of signed statements of witnesses and exhibits upon which the prosecution proposes to rely on in the proceeding and all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the defendant;
16. Briefs of evidence and any specified statements and/or exhibits shall have the statements endorsed with original signatures.

17. 'Specified statements and/or exhibits' means statements of the prosecution witnesses who will provide the 'substantial evidence' in the matter and copies of exhibits of substantial evidence as requested by the defence or prosecution for the purposes of finalising a case conference.
18. 'Substantial evidence' means the evidence which tends to prove an offence but does not include corroborative evidence or continuity evidence or evidence of ownership (except where it is expected that such evidence will be a major point of the litigation).

### **Professional rules**

#### **2011 Barristers' Rules (made pursuant to the Legal Profession Act 2007 (Qld)) - R.86 and 87**

#### **Australian Solicitors Conduct Rules 2012 - R.29.5 and 29.6**

19. 86/29.5 - A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.
20. 87/29.6 - A prosecutor who has decided not to disclose material to the opponent under Rule 86/29.5 must consider whether:
  - a. the charge against the accused to which such material is relevant should be withdrawn
  - b. the accused should be faced only with a lesser charge to which such material would not be so relevant. That consideration must occur as soon as practicable after the prosecutor has decided not to disclose material.

