

Office of the Work Health
and Safety Prosecutor

**ANNUAL
REPORT
2021–2022**



**Queensland
Government**



State of Queensland 2022

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PN12824

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

**ANNUAL REPORT
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29 September 2022

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

Dear Minister,

As the person appointed to act as the Work Health and Safety Prosecutor (WHSP), I am pleased to present my report for the period 1 July 2021 until 30 June 2022.

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
David Gore
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Work Health and Safety Prosecutor 2021–2022 Review

Introduction

The Office of the Work Health and Safety Prosecutor (the OWHSP) is an independent prosecution office established under the *Work Health and Safety Act 2011* (the Act). The role of the OWHSP is to conduct and defend proceedings for breaches of Queensland’s work health and safety laws, including in the resources sector. This report covers the OWHSP’s third full financial year of operations, the office having been established on 18 March 2019.

Although the OWHSP is an independent statutory office, the OWHSP is attached to the Department of Education for administrative support services, which is effected through the Office of Industrial Relations (OIR). The OWHSP consists of both the Work Health and Safety Prosecutor (WHS Prosecutor) and their staff.

The WHS Prosecutor is appointed by the Governor in Council on the recommendation of the Minister for Industrial Relations (the Minister).¹ The WHS Prosecutor’s functions 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 WHS Prosecutor under the Act or another Act.

In performing these functions, the WHS Prosecutor 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 WHS Prosecutor. The WHS Prosecutor represents the State and, although the WHS Prosecutor reports to the Minister, the WHS Prosecutor is not under the control or direction of the Minister.

This financial year saw unprecedented change in the OWHSP’s leadership. On 11 March 2022, the inaugural WHS Prosecutor, Mr Aaron Guilfoyle, resigned to commence practice in the private sector after nearly three years as the WHS Prosecutor,² and a commendable 21 years in the public service. On behalf of the OWHSP’s staff, I would like publicly to thank Mr Guilfoyle for his stewardship of the OWHSP. Mr Guilfoyle’s visionary leadership created the foundation for a lasting legacy, which will continue to influence the culture of the OWHSP for years to come.

Following Mr Guilfoyle’s resignation, the Minister appointed Ms Jodie Wooldridge QC, as her Honour then was, to act as the WHS Prosecutor on and from 10 March 2022, pending the recruitment and appointment of Mr Guilfoyle’s successor. However, on 20 June 2022, her Honour was appointed as a judge of the District Court of Queensland. On behalf of the OWHSP’s staff, I’d also like to thank her Honour for her contribution to the OWHSP, which was significant despite the brevity of her Honour’s tenure.

¹ If there is a vacancy in the office of the WHS Prosecutor or the WHS Prosecutor is absent or for any other reason is unable to perform the functions of the office, the Minister may appoint a person to act as the WHS Prosecutor for a period of not more than 6 months.

² Mr Guilfoyle’s appointment having commenced on 18 March 2019. As at the date of this report, Mr Guilfoyle’s remains the only person to have held a permanent appointment as the WHS Prosecutor by the Governor in Council.

Following her Honour Judge Wooldridge QC's judicial appointment, on 20 June 2022, the Minister appointed me to act as the WHS Prosecutor, again pending the appointment of Mr Guilfoyle's successor. Having now had the privilege to lead the OWHSP for a number of months, I can assure any successor that they will not find a more talented and dedicated team of public servants, than those which I have had the privilege to lead these last few months.

In light of the above, the honour of presenting the OWHSP's 2021–22 annual report to the Minister falls to me.

Summary of operation

In 2021–22, the OWHSP prosecuted matters investigated and referred by both OIR and Resources Safety and Health Queensland (RSHQ).

At the close of 2021–22, the OWHSP had:

- carriage of 138 prosecutions which were still before various levels of Queensland courts
- received 81 new referrals of briefs of evidence over the financial year
- successfully finalised 72 prosecutions pursuant to which \$3,589,600 in fines were imposed
- made 184 decisions to prosecute or not prosecute (58 decisions to prosecute including against 12 officers and 126 decisions not to prosecute).

In 2021–22 the OWHSP incurred direct costs of \$3.633M (being mainly employee expenses and legal costs).³

- 770 mentions (in person, by phone or administratively)
- 14 interlocutory hearings
- 102 sentence hearings
- 2 contested committal hearings
- 34 days of summary trial
- 20 days of trial on indictment
- 7 District Court appeals
- 4 appeals in the Court of Appeal.

The COVID-19 pandemic continued to impact the office in 2021–22, with several staff needing to take leave or work from home in isolation towards the end of the financial year.

³ OWHSP is funded jointly by OIR and RSHQ.

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 the Act.

On 17 April 2019, the former WHS Prosecutor, Aaron Guilfoyle, issued a guideline on the advice and charging function of the OWHSP, which was reissued on 21 September 2020. Pursuant to s.48(2) of the Act, the guideline, a copy of which is annexed⁴, applies to OWHSP staff, the Regulator, and relevant staff of OIR. The guideline continued in force in 2021–22.

On 7 November 2019, Mr Guilfoyle, also issued a guideline on prosecution disclosure, which was also reissued on 21 September 2020, a copy of which is annexed.⁵

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 disclosure 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 2021–22.

The Guidelines of the DPP (Director's Guidelines) continue to apply to any decision of the WHS Prosecutor in respect of the conduct of prosecutions. Consequently, any guidelines issued by the WHS Prosecutor are to be read with, and subject to, the Director's Guidelines.

Efficiency, effectiveness and transparency

In 2021–22 we remained focused on our strategic priority of providing an efficient, effective and transparent prosecution service.

The timely assessment of briefs of evidence against the Director's Guidelines is a high priority for the OWHSP. In 2021–22, we retained the previous year's target of assessing all briefs of evidence within 120 days of referral. Despite our best efforts, we were able to assess only 25 per cent of briefs within that timeframe, although this represents a slight improvement on the previous year's performance, which was 23.1 per cent. Also, the total average assessment time across all briefs in respect of which the prosecutorial discretion was exercised was 178.2 days, which is also an improvement on the previous year, where we achieved a 202 day average. Whilst our performance targets have, once again, proved aspirational, I have decided to retain those targets into 2022–23.⁶ Indeed, I am confident that through the continued dedication of the OWHSP's staff, along with increased resourcing, if provided, we will be able to achieve those targets in future reporting periods.

⁴. Annexure C

⁵. Annexure D

⁶. Annexure B - OWHSP Business Plan 2022–23.

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 2021–22 the Director's Guidelines were considered, applied and recorded in 100 per cent of briefs assessed. This insistence on consistency 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, principally is reflected by our conviction rate. In that regard, we maintained our high target of 90 per cent in 2021–22, and exceeded that target, achieving 91.4 per cent.

As with the previous year, many decisions were made 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 continued to brief external counsel to provide advice and appear on behalf of the WHS Prosecutor where appropriate. Our expenditure on external counsel was again our most significant expense in 2021–22, save for staffing costs. In line with our commitment to equal or better the equitable briefing policy of the Law Council of Australia, which prescribes the briefing of female counsel in at least 30 per cent of matters and paying them at least 30 per cent of the total fees, I am pleased to announce that, during 2021–22, the OWHSP briefed female counsel in 39.3 per cent of the matters and paid them 30.5 per cent of the total fees paid to counsel. I wish to acknowledge the significant contribution the private bar continues to make towards complementing the capacity and capability of the OWHSP.

Stakeholder engagement

We worked throughout 2021–22 towards maintaining effective working relationships with key stakeholders, including OIR (principally Workplace Health and Safety Queensland's investigations unit) and RHSQ. The effectiveness of those relationships are fundamental to the OWHSP ensuring the efficiency, effectiveness and transparency of its functions.

OWHSP staff

At 30 June 2022, the OWHSP had a staff of 19, plus the WHS Prosecutor⁷. The OWHSP's staff are employed under the *Public Service Act 2008*, but, not being itself an employing entity, the OWHSP's staff are, strictly, employees of the Department of Education.

We remain committed to developing our staff professionally and protecting their physical and psychological wellbeing. In the course of their work, the OWHSP staff are routinely exposed to material concerning serious injuries and death. For this reason, the OWHSP provided annual vicarious trauma training to all staff during 2021–22, and will provide this again in the coming financial year. This is in addition to the services provided through OIR, which includes access to our employee assistance provider.

Victim liaison

Preventable injuries, including fatal injuries, continue to be sustained in work-related incidents across Queensland and, naturally, victims and their families are heavily invested in the prosecution process and outcomes.

In 2021–22, the Coronial and Investigation Liaison Unit (CILU) of OIR continued to provide support for victims and their families, in respect of both work health and safety and resources safety jurisdictions. Indeed, we maintained our communication protocol with CILU, which 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 regarding the status of referred matters. Notably, during her tenure as acting WHS Prosecutor, her Honour Judge Wooldridge QC met with the *Affected Persons Committee* established under the Act and attended the Workers' Memorial Breakfast.

⁷ A copy of the OWHSP organisational chart as at 30 June 2022 appears later in this report, at Annexure A. The occupied FTE number at 30 June 2022 was 16.8 (against an FTE cap of 18.43) taking into account part-time arrangements, excluding the acting WHS Prosecutor and 1.8 staff employed by RSHQ to work in OWHSP.

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 the WHSP to commence a prosecution where a suspected work health and safety offence has been committed. Equivalent provisions also exist in the *Safety in Recreational Water Activities Act 2011*, the *Electrical Safety Act 2002* and the various resources safety acts.⁸

The regime also provides for the referral of matters for consideration by the Director of Public Prosecutions (DPP) where the WHS Prosecutor declines to prosecute.

Only one such request was received in 2021–22, which was responded to by the OWHSP. That matter was not the subject of a request for referral 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 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 2021–22.

⁸ See s.231 of the *Work Health and Safety Act 2011*; s.36 of the *Safety in Recreational Water Activities Act 2011*; s.256B of the *Coal Mining Safety and Health Act 1999*; s.118C of the *Explosives Act 1999*; s.235B of the *Mining and Quarrying Safety and Health Act 1999*; and s.837C of the *Petroleum and Gas (Production and Safety) Act 2004*. Requests under the *Electrical Safety Act 2002* are to the Regulator: s.186A of that Act.

Performance data 2021–2022

Referrals

81 new briefs of evidence (BOEs) were referred to the OWHSP during the reporting period.¹

13 requests for formal legal advice were received prior to referral of a BOE.²

NIL pre-brief advice files remained open, pending the provision of legal advice by the OWHSP or the referral of a BOE, as at 30 June 2022.

49 brief assessments were in progress as at 30 June 2022, in relation to at least 110 suspects.³

15 brief assessments (relating to at least 45 suspects) were suspended as at 30 June 2022 whilst investigators responded to requisitions.

64 BOEs (relating to 155 suspects) remained in brief assessment phase (including those where requisitions had been raised) as at 30 June 2022.

Cases finalised

72 prosecutions were successfully finalised⁴ and \$3,589,600 in fines were imposed.⁵

7 prosecutions were unsuccessful.⁶

18 prosecution were withdrawn.⁷

8 prosecutions were withdrawn as an Enforceable Undertaking (EU) was accepted by the Regulator.

Decisions made

184 decisions were made (to prosecute or not prosecute), in relation to 51 BOEs.⁸

58 decisions to commence prosecutions were made, against 35 bodies corporate and 23 individuals (12 of whom were officers).

126 decisions were made by the WHSP not to prosecute an identified potential suspect.

94 were determined to have no prima facie case.

21 were determined to have no reasonable prospects of conviction.

11 were determined to be not in the public interest.

Complaints before the Court

138 complaints were before the Court as at 30 June 2022.

¹ 79 briefs of evidence from the Office of Industrial Relations and 2 briefs of evidence from Resources Safety and Health Queensland. The number of suspects from those new BOEs was 205.

² 11 requests were for Pre-brief advice, in anticipation of referring a brief of evidence and 2 requests were for General Legal Advice.

³ 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.

⁴ Final court order date was between 1/07/2021 and 30/06/2022.

⁵ Of the 72 successful prosecutions, 7 were contested, that is, a plea of not guilty was entered. 64 defendants entered pleas of guilty and a further 1 matter proceeded ex-parte.

⁶ Six defendants were acquitted (found not guilty) after a hearing or trial (four in WHSQ matters and three in resources safety matters). In three of these matters costs were still to be finalised. In one WHSQ matter the charges were dismissed and the complaints struck out. There were eight other resources safety matters where the defence sought to have the matters struck out. Whilst the Magistrate granted the defendant's application to strike out these complaints in 2021–22, the orders (including costs) were made on 2/08/2022 and these cases will be reported in 2022–23 on that basis.

⁷ Not related to enforceable undertakings. Prosecution offered no evidence.

⁸ Against 69 bodies corporate and 115 individuals.

Effectiveness measures		Result
Compliance in applying the Guidelines of the DPP in decisions to commence, not commence, continue or discontinue a prosecution 100%	215 decisions ¹	100%
Prosecutions resulting in a conviction 90% ²	74 out of 81 prosecutions which proceeded to a decision or verdict resulted in a conviction	91.4%
Defendants in defended summary hearings resulting in conviction 70%	1 out of 6 defended summary hearings resulted in a conviction ³	16.7%
Defendants tried on indictment and convicted 70%	2 out of 3 defendants tried on indictment resulted in a conviction ⁴	66.6%

Efficiency measure	Result
<p>184 prosecutorial decisions (to prosecute or not prosecute) were made in the FY2021–22. These related to 51 briefs of evidence.</p> <p>The average decision time per brief of evidence was 178.2 days</p> <p>46 individual suspects, out of 184 were assessed within the 120 days.</p> <p>Briefs of evidence assessed within 120 days of referral 100%</p> <p>Qtr 1 = 74 Decisions – Average time taken 180.1 days 20 met 120-day KPI = 27.03%</p> <p>Qtr 2 = 41 Decisions – Average time taken 148.4 days 14 met 120-day KPI = 34.1%</p> <p>Qtr 3 = 39 Decisions Average time taken 210.3 days 6 met 120-day KPI = 15.4%</p> <p>Qtr 4 = 30 Decisions – Average time taken 237.8 days 6 met 120-day KPI = 20%</p> <p>Assessment time range was 34 days to 429 days</p>	25%
Pre-brief advice provided within 30 days 100%	5 out of 11 requests met the KPI of 30 days
	45.5%

- 215 total decisions were made, of which 58 were to prosecute and 126 were not to prosecute (184 in total). There were 28 decisions to discontinue a prosecution, including eight in relation to an enforceable undertaking (EU) being entered by the defendant with the regulator. There were also three decisions made by the WHSP to appeal decisions of the Magistrates Court in 2021–22.
- “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) E206310 - Four defendants were convicted and appealed against their convictions before they were sentenced. However, these appeals were discontinued in August 2022; (2) E273866 – The defendant has appealed their conviction and sentence in relation to an “industrial manslaughter” offence; (3) E269519 - The defendant company and director have appealed their sentences only; and (4) E259950 - The prosecution successfully appealed the sentence.
- These were contested summary matters which were finalised in FY2021–22 (except with respect to costs), including (if relevant) where any appeal against conviction or dismissal was finalised, and where the conviction or appeal may have occurred in a previous financial year. Two further summary matters were still being contested or awaiting a decision after the hearing as at 30 June 2022.
- (1) E254123 - Two related matters were successful; (2) E284689 was unsuccessful; and (3) E273866 - One further contested indictable matter was successful at first instance, however, the defendant has appealed conviction and sentence.

Notable prosecutions 2021–22

A corporate PCBU¹ and an officer – Category 1 charges – Construction site injury²

These matters relate to a serious injury incident at a residential construction site at Balmoral in 2018.

On 3 September 2019, the company, which had been sub-contracted to erect block retaining walls at the site, and its director each were charged with a category 1 offence against the *Work Health and Safety Act 2011*.

On 8 April 2022, following a five-day trial in the District Court at Brisbane, both defendants were convicted. The company was fined \$300,000 and the director was sentenced to 12 months imprisonment, wholly suspended for an operational period of 12 months. Convictions were recorded against each defendant.

A corporate PCBU and an officer – Category 2 offences – Fatality at factory³

These matters relate to the death of a worker after he become trapped in machinery at a factory at Narangba in 2020.

On 13 August 2021, the company that operated the business and its CEO each were charged with a category 1 offence against the *Work Health and Safety Act 2011*.

Both defendants later offered to plead guilty to category 2 offences, which the WHS Prosecutor accepted. On 20 April 2022, a magistrate fined the CEO \$60,000 and, on 23 May 2022, fined the company \$250,000. Convictions were not recorded.⁴

A corporate PCBU – Category 2 offences – Macadamia farming injuries⁵

This matter relates to multiple serious injury incidents at macadamia farms near Bundaberg.

The farming company was charged with three category 2 offences and one offence of failing to notify the regulator of an incident against the *Work Health and Safety Act 2011*.

On 5 January 2022, the defendant was sentenced in the Bundaberg Magistrates Court, where it received fines totalling \$410,000. Convictions were recorded.

A corporate PCBU – Category 2 offence – Electrocutation⁶

This matter relates to an electrocution injury incident at business premises at Gatton in 2018.

On 12 September 2019, the company that owned the business was charged with a category 2 offence against the *Electrical Safety Act 2002*.

On 2 September 2021, the defendant was convicted following a trial in the Toowoomba Magistrates Court and, on 30 September 2021, was fined \$80,000. No conviction was recorded.

The defendant later appealed against its conviction and the WHS Prosecutor appealed against the sentence on the ground that it was manifestly inadequate. The appeal was heard on 14 February 2022, with judgment being delivered on 31 March 2022. The defendant's conviction was affirmed and the fine was increased to \$100,000.

1. Person conducting a business or undertaking

2. E254123

3. E284394

4. Two former directors of the company were also charged with category 2 offences, which remain before the Caboolture Magistrates Court. They are listed for mention on 21 September 2022.

5. E261083

6. E259550

A corporate PCBU – Category 2 offence – Appeal against conviction dismissed⁷

This matter relates to an electrocution injury incident at a billboard adjacent to the Bruce Highway at Balberra in 2016.

On 24 April 2018, the injured worker's employer was charged with a category 2 offence against the *Electrical Safety Act 2002*.

On 17 April 2019, following a summary trial in the Mackay Magistrates Court, the company was convicted and fined \$250,000. No conviction was recorded.

The defendant unsuccessfully appealed against its conviction to the District Court. The defendant was also unsuccessful in its appeal to the Court of Appeal, that decision being delivered on 5 July 2022.

Notable prosecutions – not finalised

An individual PCBU - Industrial manslaughter – Fatality at electrical repair business⁸

This matter relates to the death of a worker involving a forklift at business premises in Gympie in 2019.

This was the first prosecution in Queensland of an individual PCBU for industrial manslaughter against s.34C of the *Work Health and Safety Act 2011*.

On 25 March 2022, following a trial in the District Court at Gympie, the defendant was convicted and sentenced to five years' imprisonment, suspended after serving 18 months for an operational period of five years.

On 22 April 2022, the defendant appealed against his conviction and sentence. The appeal is listed for hearing on 24 November 2022 in the Court of Appeal.

A corporate PCBU – Industrial manslaughter – Electrocution fatality⁹

This matter relates to the death of a worker after being electrocuted when a Franna crane contacted an overhead powerline during the construction of a cane railway near Cairns in 2019.

On 28 July 2021, the operator of the cane rail network was charged with industrial manslaughter and a category 2 offence against the *Electrical Safety Act 2002*.

The matter is listed for a committal hearing in the Cairns Magistrates Court on 28 October 2022.

A corporate PCBU and an officer – Industrial manslaughter – Abattoir fatality¹⁰

This matter relates to the death of a worker at an abattoir in south-western Queensland in 2019.

On 13 August 2021, the company that operated the business and its sole director each were charged with industrial manslaughter and a category 2 offence against the *Work Health and Safety Act 2011*.

The matters are listed for mention in the Charleville Magistrates Court on 18 November 2022.

7. E230299

8. E273866

9. E274819

10. E275083

A company and two individuals – Category 2 offences – Double fatality on Fraser Island¹¹

These matters relate to two drowning-related fatalities at Lake McKenzie on Fraser Island in 2019.

On 3 July 2020, a tour company and two individuals each were charged with a category 2 offence against the *Work Health and Safety Act 2011*.

The company and one of the individuals are listed to be sentenced in the Brisbane Magistrates Court on 24 November 2022. The other individual's matter is listed for mention in the Hervey Bay Magistrates Court on 27 October 2022.

A corporate PCBU and an individual PCBU – Category 1 and 2 offences – Double fatality at Eagle Farm¹²

This matter relates to a double fatality at a construction site at Eagle Farm Racecourse in 2016.

On 13 December 2019, the principal contractor pleaded guilty to two category 2 offences against the *Work Health and Safety Act 2011* and was fined \$625,000. No convictions were recorded.

An individual sub-contractor was charged with a category 1 offence, but that matter has been adjourned pending a determination by the Mental Health Court.

A corporate PCBU and an officer – Category 1 and 2 offences – Zipline fatality¹³

The matter relates to a fatality involving a zipline at Cape Tribulation in 2019.

On 30 August 2021, the company that operated the zipline was charged with a category 1 offence against the *Work Health and Safety Act 2011* and a director of that company was charged with a category 2 offence against that Act.

The company has been committed for trial in the District Court at Cairns on a date to be fixed. The director's matter is listed for mention in the Cairns Magistrate Court on 8 November 2022.

A corporate PCBU and an officer – Category 3 offences – Silica exposure¹⁴

This is the first prosecution in Queensland relating to the dry cutting of manufactured stone benchtops.

On 27 March 2020, a company and its director were each charged with a Category 3 offence against the *Work Health and Safety Act 2011*.

The matters are listed for mention on 16 December 2022 in the Brisbane Magistrates Court.

11. E270071

12. E233697

13. E278717

14. E263313

An individual PCBU – Category 1 offence – Demolition injury¹⁵

This matter relates to a serious injury incident at a residential demolition site in 2019.

On 7 May 2021, the defendant was charged with a category 1 offence, failing to notify the regulator of the incident and failing to ensure the site of the incident was not disturbed, contrary to the *Work Health and Safety Act 2011*.

On 21 January 2022, a magistrate issued a warrant for the defendant's arrest after he failed to appear at the Brisbane Magistrates Court.

A worker – Category 1 offence – Worker injured at construction site¹⁶

This matter relates to a serious injury incident at a construction site at Richlands in 2020.

On 5 July 2021, the defendant, who was a worker at the site, was charged with a category 1 offence against the *Work Health and Safety Act 2011*.

The matter is listed for a three-day trial in the District Court at Brisbane, commencing 26 September 2022.

A corporate PCBU and an officer – Category 1 and 2 offences – Factory worker injured¹⁷

These matters relate to a serious injury incident at a noodle factory at Slacks Creek in 2019.

On 28 July 2021, the company that conducted the business and its sole director each were charged with both a category 1 offence and a category 2 offence against the *Work Health and Safety Act 2011*.

These matters are listed for mention in the Beenleigh Magistrates Court on 11 November 2022.

A corporate PCBU – Category 2 offence – Child fatality at an aquatic centre¹⁸

This matter relates to the drowning-related death of a five-year-old boy at an aquatic centre in Brisbane in 2019.

On 24 February 2022, the company that managed the centre was charged with a category 2 offence against the *Work Health and Safety Act 2011*.

The matter is listed for mention in Brisbane Magistrates Court on 18 November 2022.

A local council, a corporate PCBU and an officer – Double fatality at public lagoon¹⁹

These matters relate to the drowning-related deaths of a man and his five-year-old son at a public lagoon in Queensland.

On 27 October 2020, the company responsible for lifeguard and water maintenance services at the lagoon and its director each were charged with a category 2 offence against the *Work Health and Safety Act 2011*. The local council, which owned the lagoon, was also charged with the same offence.

These matters are listed for mention in the Proserpine Magistrates Court on 7 November 2022.

15. E274218

16. E288431

17. E281420

18. E279695

19. E263527

A corporate PCBU and an officer – Category 1 and 2 offences – Serious injury at tyre recycling plant²⁰

These matters relate to a serious injury incident at a tyre recycling plant at Rocklea in 2020.

On 28 July 2021, the company that conducted the business and its director were each charged with a category 1 offence against the *Work Health and Safety Act 2011*. The company was also charged with failing to ensure that the regulator was notified of the incident and failing to ensure that the site of the incident was not disturbed, contrary to ss.38 and 39 of the Act respectively.

The defendants offered to plead guilty, subject to the charge against the director being downgraded to a category 2 offence, which the WHS Prosecutor accepted.

These matters are listed for sentence in the Brisbane Magistrates Court on 27 October 2022.

A corporate PCBU – Category 2 offence – Fatality at recycling plant²¹

This matter relates to a fatality at a recycling plant at Rocklea in 2019.

On 3 December 2020, the company that conducted the business was charged with a category 2 offence against the *Work Health and Safety Act 2011*.

The matter is listed for mention in the Holland Park Magistrates Court on 4 November 2022.

A corporate PCBU and an officer – Category 2 offences – Abattoir worker contracts zoonotic illness²²

This matter relates to an abattoir operator's alleged failure to control the risk of workers contracting Q Fever.

On 3 November 2020, the company that conducted the business and its sole director each were charged with a category 2 offence against the *Work Health and Safety Act 2011*.

The matters are listed for mention in the Toowoomba Magistrates Court on 7 October 2022.

A corporate PCBU and an officer – Category 2 offence – Diesel mechanic fatality²³

This matter relates to the death of a worker while carrying out maintenance work on a tilt-cab truck at a business premises at Coolum in 2017.

On 27 October 2020, the company that conducted the business and its director were charged with category 2 offences against the *Work Health and Safety Act 2011*.

These matters are listed for mention in the Maroochydore Magistrates Court on 15 December 2022.

20. E285377

21. E269562

22. E266171

23. E240647

A corporate PCBU – Fatality at Worker fatally crushed by unrestrained pipe²⁴

This matter relates to a fatality at a business premises in Townsville in 2018.

On 19 March 2020, the company that conducted the business was charged with a category 2 offence against the *Work Health and Safety Act 2011*.

The matter is listed for mention in the Townsville Magistrate Court on 21 October 2022.

A corporate PCBU and an officer – Category 1 offence – Appeals against sentence²⁵

This matter relates to a serious injury incident at a sand wash plant on the Sunshine Coast in 2019.

On 13 August 2020, the company that conducted the business and its director each were charged with a category 1 offence against the *Work Health and Safety Act 2011*.

On 8 October 2021, the defendants pleaded guilty and were sentenced in the District Court at Maroochydore. The company was fined \$500,000 and the director was sentenced to six months' imprisonment, wholly suspended for an operational period of 12 months.

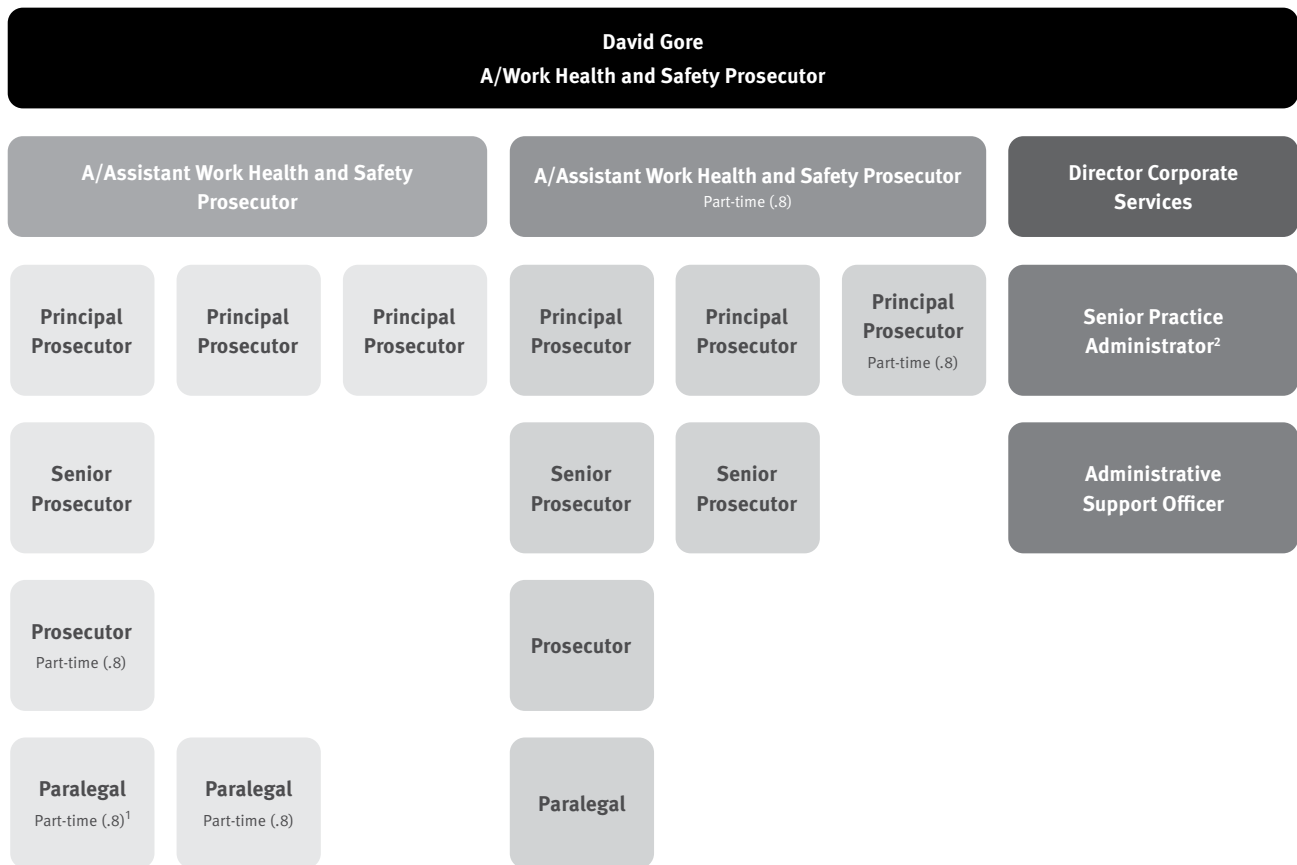
On 3 November 2021, both defendants appealed against their sentences. The appeals were heard in the Court of Appeal on 4 May 2022, the Court reserving its decision.

24. E265825

25. E269519

Annexure A

Organisational structure



1. Employed by RSHQ, Non FTE

2. As above

Annexure B

Business Plan 2022-23

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.

Decisions of the OWHSP in relation to whether to commence or discontinue charges in proceedings are made in accordance with the guidelines of the Director of Public Prosecutions (Qld).



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 courtesy and professionalism
- 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

- Prosecutions resulting in a conviction - 90%.¹
- Defendants in defended summary hearings resulting in conviction - 70%.
- Indictments for presentation in the District Court prepared and signed within four months of the committal date - 60%.
- Defendants tried on indictment and convicted - 70%.



Efficiency

- Briefs of evidence assessed within 120 days of referral - 100%.



1. 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 C

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; 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
 - 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
 - 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 D

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*.¹

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.

1. See Annexure to Disclosure Guideline 2/2019_Disclosure legislation

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*).² 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
 - 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).

2. See Annexure to Disclosure Guideline 2/2019_Disclosure legislation

Annexure to Disclosure (Guideline 2/2019) - Disclosure Legislation

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*, or summary proceedings in relation to an indictable offence against the *Drugs Misuse Act 1986* 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* 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*.
 - 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 any thing 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; and
 - 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.

