

Annual Report 2019–20

Office of the Work Health
and Safety Prosecutor



State of Queensland 2020

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Office of the Work Health
and Safety Prosecutor



Office of the Work Health and Safety Prosecutor

9 October 2020

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 2019 until 30 June 2020.

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

Work Health and Safety Prosecutor 2019–2020 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 serious offences in the resources sector. The OWHSP commenced operation on 18 March 2019. This report covers our first 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 2019–20 annual report of the OWHSP.

Summary of operation

In 2019–20, the OWHSP prosecuted matters investigated and referred by the Office of Industrial Relations (OIR). On 1 July 2020, the OWHSP gained responsibility for the prosecution of serious offences under Queensland resources legislation. Potential breaches under that legislation will be investigated and referred by the new resources regulator, Resources Safety and Health Queensland (RSHQ). That change has led to an increase in the size and workload of the OWHSP for 2020–21.

As at 30 June 2020, the OWHSP was comprised of a staff of 12.2, the majority of whom were legal staff engaged as prosecutors¹. On 1 July 2020, a further 5 prosecutors were recruited including by way of transfer from the Department of Natural Resources, Mines and Energy (DNRME).

In 2019–20, OWHSP received its budget and administrative support from OIR, which presently sits within the Department of Education². Our budget in 2019–20 was sufficient for us to meet and exceed most key performance indicators. Where we did not meet those indicators, we nevertheless made significant improvements in our efficiency. Our budget from OIR remains largely unchanged for 2020–21. Our ability to meet the indicators outlined in our 2020–21 Business plan³, within our current budget, will be contingent largely upon whether there is any marked increase in either the rate of referrals to the OWHSP and the rate of contested trials.

At the time of the provision of this report, OIR and the OWHSP were yet to finalise funding arrangements with RSHQ. There is not yet a commitment to provide resources to the OWHSP to the extent I anticipate they are necessary to provide an effective prosecution service to RSHQ. I am hopeful that commitment is made in the near future, so that the OWHSP can meet stakeholder expectations and the challenges that lie in prosecuting breaches of safety offences within the resources sectors.

A significant portion of the year was impacted by the COVID-19 pandemic, which saw all staff of the OWHSP working from home and dealing with the challenges that all in the legal profession, particularly those practising in litigation, experienced during that time.

I thank the staff of OWHSP, who have achieved what I consider to be remarkable results, particularly in respect of brief assessment output and conviction rate, in our first full year of operation. I am proud of their achievements and am honoured to lead them. They are incredibly dedicated to the very important work the OWHSP performs and have worked tirelessly, and with exceptional professionalism, to meet the challenges that work has brought.

¹ An organisational chart appears later in this report at Annexure A. An establishment of 13.43 full-time equivalents (FTEs) was available but not all positions were filled, plus 1.0 FTE for a temporary Assistant WHS Prosecutor position was filled from 10 June 2020, funded by the Department of Natural Resources Mines and Energy, to manage the transition of serious Resources Safety and Health prosecutions into the OWHSP.

² Information on the full financial year's expenditure for FY 2019–20 appears later in this report at Annexure B.

³ Annexure C

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.

On 20 December 2019, we launched our new website. My general guidelines were published on the date of launch.

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 annexed⁴, applies to OWHSP staff, the regulator, and relevant staff of OIR. The guideline continued in force in 2019–20.

On 7 November 2019, I issued a guideline on prosecution disclosure, a copy of which is also annexed⁵. 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, but 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 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.

⁴ Annexure D

⁵ Annexure E

Efficiency, effectiveness and transparency

Once again in 2019–20, a significant component of the work of the OWHSP was the assessment of briefs of evidence against the Director’s Guidelines. Alongside adherence to the Director’s Guidelines, we also recognise the importance for all stakeholders of ensuring that prosecution decisions are made in a timely manner. Accordingly, timeliness in that brief assessment process was a major focus of the office in 2019–20. We set an ambitious target of assessing 85 per cent of all briefs of evidence within 90 days and were ultimately able to achieve 33.6 per cent within that timeframe. A number of factors contributed to that result, including the complexity of the work we received. Some of those factors will not be at play in 2020–21, but we have adjusted our target to achieving 100 per cent of brief assessments to within 120 days to account for the complexity and volume of work expected. Whilst we fell significantly short of our target in 2019–20, our average assessment time of 161 days across all matters is nevertheless a commendable achievement given the resources which were available to us and the number and complexity of the prosecutions that we commenced. I am confident that we will continue in 2020–21 to reduce that average.

One of the means by which we have sought to improve prosecution efficiency is provision of both formal and informal pre-brief advice to OIR investigators in select matters. That advice is assisting to improve the quality of briefs of evidence and, consequently, to reduce brief assessment timeframes. We will continue in 2020–21 to provide that service.

We are committed to our strategic priority of providing an efficient, effective and transparent service. A cornerstone of that priority is consistency in prosecution decision making, including in the application of the Director’s Guidelines. I am pleased to report that, in 100 per cent of matters decided in 2019–20, the Director’s Guidelines were considered and applied in our recorded decision-making process.

The 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 OIR as 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 set a very high target of 90 per cent across all matters, and exceeded that target, achieving 95.4 per cent in 2019–20.

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 2019–20, save for staffing costs. 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 19.5 per cent of the value of all briefs⁶.

⁶ No female senior counsel were briefed, which in part led to the lower overall dollar value of briefs to female counsel.

Stakeholder engagement

We have worked throughout 2019–20 towards developing and maintaining our most important stakeholder relationship, with Statewide Investigations, Workplace Health and Safety Queensland, being the investigative unit from which we receive the majority of OWHSP's referrals. That relationship is vital to the success of the OWHSP and Work Health and Safety prosecutions in Queensland. I thank Mr David McKenzie, Director, Statewide Investigations, and the investigations managers for their commitment to developing an effective relationship with the OWHSP and for their dedication to ensuring constant improvement in investigation standards and brief quality.

In pursuing those improvements, the OWHSP dedicated significant resources towards inspector and investigator training in 2019–20.

Training included:

- Officer due diligence investigations
- Industrial manslaughter investigations
- The lifecycle of a prosecution
- Overview of the operations and expectations of the OWHSP
- Disclosure.

I reported last year on my meetings with the various heads of interstate and Commonwealth work health and safety regulators, and/or those responsible for the prosecution of work health and safety offences in those jurisdictions. I continued those meetings, including with the New Zealand regulator, in 2019–20. I also proposed ongoing liaison with those jurisdictions in the form of a network of the heads of work health and safety prosecutions in Australia and New Zealand (network), dedicated to information sharing which ensures best practice within the OWHSP.

Establishment of the network also endeavours to ensure, as far as possible, consistency in approach to work health and safety prosecutions across the country. In 2019–20, the OWHSP established and chaired the first meeting of the Australian and New Zealand WHS Prosecutors Network, comprised of representatives from New Zealand and all States and Territories other than Western Australia and Tasmania. The Network resolved to meet three times per year.

OWHSP staff

In order to ensure the continued professional development of OWHSP's staff, we continued our popular in-house CLE program in 2019–20. That program was complemented by the attendance of a number of staff at external conferences. Whilst a limited amount of the advocacy work of the OWHSP is briefed to external counsel, the majority of advocacy is conducted by OWHSP prosecutors. In 2019–20, we committed to ensuring the development of the advocacy ability of the OWHSP prosecutors, including through the provision of a tailored advocacy training course to all staff. COVID-19 restrictions were such that we were regrettably unable to provide that training. We will endeavour to do so in 2020–21 subject to the lifting of those restrictions.

The wellbeing of the OWHSP staff is paramount. In the course of their work the OWHSP staff are routinely exposed to traumatic material. In 2019–20, we provided training to all staff on vicarious trauma. We will again provide that assistance in 2020–21, in addition to the services provided through our attachment to OIR, including access to our employee assistance provider.

Victim liaison

Unfortunately, preventable injuries, including fatal injuries, continue to be sustained in incidents across Queensland workplaces, and the vast majority of prosecutions commenced in 2019–20 involved serious injuries and fatalities to workers and members of the public.

Victims of workplace offending and their families are heavily vested in the prosecution process and outcomes. Support for victims and their families is provided by Investigation Liaison Support Officers, who sit within the Coronial and Investigation Liaison Unit (CILU) of OIR. Our communication protocol with CILU 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.

We recognise the importance for all stakeholders of our decisions occurring in a timely manner, the need to progress prosecutions in a similarly timely manner, and the need to support victims and their families during the prosecution process. Together with support from CILU Investigation Liaison Support Officers, and in accordance with our commitment under the protocol, OWHSP prosecutors were focused throughout 2019–20 on meeting our commitment to victims, including through consultation and timely updates.

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 under s.231 of the Act (and the equivalent provisions in the *Electrical Safety Act 2002* and the *Safety in Recreational Water Activities Act 2011*) to commence a prosecution where a suspected work health and safety offence has been committed.

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

In 2019–20, in order to expedite such requests, the OWHSP published a form for applicants on our new website.

Eight requests to prosecute were received and responded to by the OWHSP in 2019–20.

Indictable prosecutions and engagement with the DPP

The OWHSP prosecutes indictable offences for reckless conduct and industrial manslaughter.

Under the *Director of Public Prosecutions Act 1984*, the DPP must authorise indictable prosecutions conducted by the OWHSP prior to the presentation of an indictment. Those prosecutions are otherwise conducted and funded by the OWHSP. A number of such prosecutions were commenced and before the courts in 2019–20.

I thank the former DPP, Mr Michael Byrne QC, and the newly appointed DPP, Mr Carl Heaton QC, and their staff, for their support in the conduct of indictable prosecutions by the OWHSP in 2019–20.

Performance data 2019–2020

Referrals

85

new briefs of evidence (BOEs) were referred to the OWHSP by OIR during the reporting period¹ leading to a prosecution decision (in the same FY) in respect of **134** suspects identified from those BOEs. The number of suspects requiring prosecution consideration was **233** from these new BOEs.

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

11 pre-brief advice files remained open, pending the provision of legal advice by OWHSP or the referral of a brief of evidence from OIR as at 30 June 2020.

31 assessments were in progress as at 30 June 2020, in relation to at least 61 suspects.³

11 brief assessments (relating to 20 suspects) were suspended as at 30 June 2020 whilst investigators responded to requisitions.

42 briefs of evidence remained in brief assessment phase (including ones where requisitions had been raised) as at 30 June 2020.⁴

Cases finalised

42

prosecutions were successfully finalised⁵ by the OWHSP and \$5.5 million in fines were imposed.⁶

2 prosecutions were unsuccessful.⁷

1 prosecution was withdrawn.⁸

2 prosecutions were withdrawn as an Enforceable Undertaking (EU) was accepted by the Regulator.⁹

Decisions made

105

decisions to commence prosecutions were made, against 64 bodies corporate and 41 individuals (of whom 15 were officers¹⁰). **18** defendants from those decisions were convicted in the same FY.

202 decisions made¹² (to prosecute or not prosecute), in relation to **85** briefs of evidence.

107 decisions were made by the WHSP not to prosecute an identified potential suspect¹³: **82** were determined to have no prima facie case. **1** was discontinued.¹⁴ **12** were determined to have no reasonable prospects of conviction. **12** were determined to be not in the public interest.

Complaints before the Court

108

complaints were before the Court as at 30 June 2020.¹⁵

¹85 BOEs were received between 1/07/2019 and 30/06/2020, and from those BOEs 134 prosecution decisions were made that same FY. The number of files opened for individual suspects for prosecution consideration was 233. Accordingly, some of the BOEs and suspects were still in Brief Assessment phase at the EOFY. ²18 requests were made, and 16 advices provided. Regarding the two advices not provided, they were put into abeyance at the request of OIR.

³The final number of suspects considered may not be known until the brief assessment is completed and the matter decided by the WHSP. Also, this figure does not include matters where the brief assessment was in suspension, because requisitions had been sent back to OIR to respond to. ⁴Relating to 83 suspects. ⁵Final court order date was between 1/07/2019 and 30/06/2020. ⁶\$5,501,200. ⁷E201155 and E234174. ⁸E253136 (Prosecution offered no evidence).

⁹E233275 and E243124. ¹⁰13 under the WHS Act s27 and one under the ESA s38. ¹¹105 decisions to prosecute were made in 2019/20. All but eight of the those resulted in complaints being laid in FY 2019/20. The remaining eight were charged in July 2020. ¹²Includes one matter which was decided as a prosecution in FY2019/20 and later discontinued in FY2019/20 (E253136) (two decisions counted as one). Doesn't include 11 prosecutions which were decided in June 2019 (FY2018/19) where the complaints were laid in July 2019 (FY2019/20). Does include 8 prosecution decisions made in June 2020, where the complaints were laid in July 2020. Doesn't include 2 matters withdrawn as a result of Enforceable Undertakings being entered E233275 and E243124 as the decision to enter the EU sits with the Regulator in OIR. ¹³These 107 decisions not to prosecute related to 39 BOEs. Out of those BOEs, 20 BOEs also resulted in prosecutions of 32 defendants. Doesn't include two matters withdrawn due to an Enforceable Undertaking being entered. E233275 and E243124. The decision sits with the Regulator, not the WHSP. ¹⁴107 no prosecution decisions includes E253136 which was discontinued by decision of the WHSP on 17/05/2020 (the prosecution offered no further evidence). The original decision to prosecute was made on 10/12/2019. ¹⁵Open prosecutions before the Courts as at 30 June 2020, excluding E172610 (with the Coroner) and E185222 (Prosecution withdrawing).

Effectiveness measures		Result
Compliance in applying the Guidelines of the DPP in decisions to commence, not commence, continue a prosecution 100%	202 decisions	100%
Prosecutions resulting in a conviction 90% ¹	42 out of 44 prosecutions which proceeded to a decision or verdict resulted in a conviction	95.4%
Defendants in defended summary hearings resulting in conviction 70% ²	1 out of 2 defended summary hearings resulted in a conviction	50%
Defendants in defended committals resulting in a committal order 90% ³	3 out of 3 committals resulted in committal orders	100%
Defendants tried on indictment and convicted 70% ⁴	One defendant was retried after an appeal and was found not guilty.	0%
Prosecution sentence appeals upheld 60% ⁵	3 out of 3 prosecution appeals against quantum were upheld	100%

Efficiency measure	Result
	202 prosecution decisions were made in the FY2019–20. ⁶
	The average decision time was 161 days. ⁷
Briefs of evidence assessed within 90 days of referral 85%	68 cases were decided within 90 days. ⁸ That is, 33.6% of brief assessments were completed within 90 days. 33.6% Quarter 1 – 54 Decisions – 18 were decided within 90 days = 33.3% Quarter 2 – 64 Decisions – 27 were decided within 90 days = 42.1% Quarter 3 – 39 Decisions – 4 were decided within 90 days = 10.25% Quarter 4 – 45 Decisions – 19 were decided within 90 days = 42.2%

¹“Conviction” includes any finding of guilt and is not limited to prosecutions in which a conviction is recorded. Two additional matters were withdrawn due to Enforceable Undertakings being entered by the Regulator. One matter was discontinued by the WHSP. ²Two summary matters went to trial in the reporting period. One was unsuccessful (E234174) and one was successful (E233252). Both complaints were laid prior to the commencement of the OWHSP. ³Seven (7) indictments, of which three (3) have proceeded to committal (so far). These three matters relate to E272143 (which has now been finalised with all defendants pleading guilty). The charges included one of Industrial Manslaughter against a company (s34C) plus one charge each of reckless conduct against the two company directors (s31) under the *Work Health and Safety Act 2011*. The remaining four (4) matters are yet to proceed to committal being E254123 (company- s31); 254123 (company director-s31) (both of these are still in the Magistrate’s Court for mention); E260708 will proceed via Registry Committal soon (company – s31). The last matter is E255075 (company- s40C *Electrical Safety Act 2002*). ⁴E201155 was a Category 1 matter that was unsuccessful at the retrial in the Maroochydore District Court. The complaint was laid prior to the commencement of the OWHSP. ⁵Three appeals against quantum lodged by the prosecution were decided in the reporting period. All three were allowed resulting in increased fines. E232417 (*Reynolds v Tailored Adventures Pty Ltd* [2019] QDC 150); E233697 (1) and E233697 (2). (For both the latter matters the fine was increased to \$625,000 from \$405,000). ⁶43 of those decisions related to 17 briefs of evidence inherited by OWHSP at commencement on 18 March 2019. ⁷The overall decision period ranged between 91 and 514 days. ⁸134 decisions exceeded the KPI.

Noteable prosecutions

First industrial manslaughter conviction¹

On 11 June 2020, in the Brisbane District Court, Australia's first conviction and sentence for industrial manslaughter was handed down. The defendant, Brisbane Auto Recycling Pty Ltd, entered a guilty plea to one offence contrary to s.34C of the *Work Health and Safety Act 2011* (the Act).

The conviction related to an incident in May 2019 at a wrecking yard in Rocklea, Brisbane, in which a worker suffered fatal injuries when a forklift was reversed, crushing him between the forklift and a stationary tilt-tray truck. The investigation into the incident by Workplace Health and Safety Queensland (WHSQ) and Queensland Police revealed that the business had no documented safety systems and that the driver of the forklift was unlicensed.

Guilty pleas were also entered by the company's two directors, Mohammad Karimi and Asadullah Hussaini, to Category 1 charges of reckless conduct under s.31 of the Act. Each failed in their duty to exercise due diligence to ensure the corporate defendant complied with its safety obligations under the Act.

The corporate defendant was convicted and fined \$3M. The directors were each convicted and sentenced to 10 months imprisonment, wholly suspended for 20 months.

Fatality – regional showgrounds²

On 19 April 2016, an 18-year-old man was killed after he fell from a flatbed trailer on which he was being transported whilst undertaking work at a regional showground, as a participant of the Commonwealth 'Work for the Dole' program. The defendant failed to implement appropriate control measures to prevent passengers riding on mobile plant, in particular, the tray of the trailer whilst being towed by the tractor, in breach of ss.19(1) and 32 of the *Work Health and Safety Act 2011*.

On 26 July 2019, an incorporated charitable organisation which operated the showground pleaded guilty to one offence contrary to s.32 of the Act. It was convicted and fined \$100,000. The conviction was not recorded.

A sole director acquitted – fall from height³

A Category 1 – reckless conduct charge under s.31 of the Act against a director was laid after a roofer fell 5.9 metres from the edge of a roof onto a concrete slab below and was fatally injured. It was alleged the defendant engaged in reckless conduct without reasonable excuse contrary to s.31 of the *Work Health and Safety Act 2011*, and that such conduct exposed a worker to a risk of death.

The matter first proceeded to trial in 2019 with a jury returning a majority verdict of guilty. The defendant appealed against his conviction and sentence, with the Court of Appeal determining that the trial judge had misdirected the jury and a retrial was ordered.

The retrial commenced on 29 October 2019, with the jury ultimately returning a verdict of not guilty.

¹ E272143

² E227230

³ E201155

A company – collapse of block wall⁴

A company was found guilty after a hearing in the Beenleigh Magistrates Court and fined \$35,000. It was charged under s.33 of the *Work Health and Safety Act 2011* for a breach of s.19(2). It was alleged they failed to put in place vertical steel reinforcing, prior to the process of core filling a block wall. The wall subsequently collapsed.

The conviction was appealed by the defendant. On 24 August 2018, the appeal was allowed in the Brisbane District Court and the conviction set aside. The decision to allow the appeal was further appealed by the prosecution. That appeal was heard in the Court of Appeal on 24 July 2019, with the decision reserved.

The appeal to the Court of Appeal concerned, inter alia, the question of whether a breach of s.33 of the Act could be a continuing offence. On 27 March 2020, the Court of Appeal allowed the prosecution appeal, set aside the order of the District Court and, in lieu, ordered the defence appeal to the District Court be dismissed with costs.

A company – zip line failure⁵

On 19 February 2019, a company was fined \$40,000 in the Beaudesert Magistrates Court after a zip line failure cause a member of the public to collide first with a guide and then a tree. The defendant was charged under ss.21 and 32 of the *Work Health and Safety Act 2011* for failing to ensure that the fixtures and fittings, namely the zipline course were without risks to the health and safety of any person.

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

On 21 August 2019, the prosecution appeal was allowed in the District Court at Beaudesert and the fine increased to \$50,000.

A corporation – tree lopping tragedy⁶

On 25 September 2016, a fourteen-year-old boy was killed when struck by a large tree trunk that fell and struck him. He was among members of a church taking part in tree-logging activities as part of a fundraising activity. The defendant was charged under ss.19(1) and 32 of the *Work Health and Safety Act 2011* for failing to ensure the health and safety of a young worker while he was at work. They failed to develop or implement any safe systems of work for tree felling, provide adequate training and implement and enforce exclusion and drop zones when felling trees.

The charge was contested, and after a two-day trial, the defendant was found guilty. On 28 October 2019, the defendant was convicted and fined \$450,000.

⁴ E206142

⁵ E232417

⁶ E233252

Notable prosecutions – not finalised

Company – billboard and high voltage wires⁷

On 12 July 2016, a worker changing an advertising skin on a roadside billboard contacted a high voltage powerline with an aluminium sail track he was fitting to the sign. The worker sustained an electric shock and serious injuries when thrown more than five metres to the ground.

The defendant company was charged under s.40C of the *Electrical Safety Act 2002* in relation to the incident. It was alleged the defendant failed in its duty to ensure that its business or undertaking was conducted in a way that was electrically safe, exposing a worker to a source of electrical risk causing him to sustain serious injuries.

The defendant was found guilty on 17 April 2019 in the Mackay Magistrates Court following a trial. It was convicted and fined \$250,000. An appeal against conviction was heard before Judge Dearden on 26 May 2020, with his Honour reserving his decision to a date to be fixed.

Ardent Leisure Limited⁸

Four people were tragically killed at Dreamworld on 25 October 2016 after the Thunder River Rapids malfunctioned.

The Coronial inquest was heard over 31 days with hearings in June, October, November and December 2018, with Coroner James McDougall releasing his findings in February 2020.

The matter was referred to the Work Health and Safety Prosecutor (WHSP) following the release of the inquest findings.

The assessment of the brief was a large exercise, to which significant resources of the OWHSP were dedicated within the reporting period.

The assessment led to charges against Ardent Leisure shortly after the end of the financial year on 21 July 2020. The WHSP laid three charges against Ardent Leisure Limited under s.32 of the *Work Health and Safety Act 2011*, for failing to comply with its health and safety duty under the Act and exposing individuals to a risk of serious injury or death.

Each of the three charges alleged the company failed to comply with its primary safety duty under s.19(2) of the Act. It was alleged Ardent Leisure failed to ensure, so far as was reasonably practicable:

- the provision and maintenance of safe plant and structures
- provision and maintenance of safe systems of work
- the provision of information, training, instruction or supervision that was necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.

The maximum penalty was a fine of \$4.5M, with each charge carrying a maximum penalty of a \$1.5M fine.

On 28 September 2020, in the Southport Magistrates Court, the defendant plead guilty. It was convicted and fined \$3.6M. The matter will be reported as a finalised prosecution in 2020–21.

⁷ E230299

⁸ E234526

Eagle Farm double fatality⁹

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

The charges against one individual are for summary offences, under s.32 of the *Work Health and Safety Act 2011*, which remain before the Magistrates Court.¹⁰

Another individual is charged with an indictable offence, under s.31 of the *Work Health and Safety Act 2011*, which relates to alleged conduct on 30 September 2016, a week before the incident involving the fatalities. That prosecution is yet to proceed through committal, having been delayed due to the defendant's ongoing health issues.¹¹

An association - death of a teenager¹²

This is a prosecution for an offence under s.32 of the *Work Health and Safety Act 2011*, which resulted from the investigation into the death of a teenage boy at a PCYC in north Brisbane. The fatal injuries were sustained when the boy became trapped under the bar of a weight machine. The PCBU is alleged to have failed to prevent children entering the gym where they did not have appropriate adult supervision.

The matter is listed for sentence on 16 November 2020.

A company and a sole trader – heat exhaustion claims life of contract worker¹³

This prosecution alleges that a farm operator (the company) and a contractor (the sole trader) failed to protect against the risk of serious illness or death from exposure to heat. A foreign worker engaged by the contractor is alleged to have died on 31 October 2017 from prolonged exposure to heat, where inadequate access to shade was provided by both defendants.

The defendant company has indicated the charge against it will be contested.¹⁴

A company and sole director – young worker impaled¹⁵

This is an indictable prosecution under s.31 of the *Work Health and Safety Act 2011* of a PCBU and its sole director for reckless conduct, which led to the serious injury of a worker, who was impaled on an unprotected starter bar. It is alleged that workers were negotiating a narrow, slippery path beside an unguarded trench on a residential construction site and were directed to continue to do so after raising safety concerns with the director who was onsite.¹⁶

⁹ E233697

¹⁰ A preliminary hearing occurred on 15 September 2020 concerning the particulars. His Honour reserved his decision.

¹¹ The next mention of the matter is on 16 October 2020.

¹² E247911

¹³ E249362

¹⁴ The matter against the company is listed for mention on 12/10/2020. The sole trader was sentenced on 2/10/2020. This will be reported in the year 2020/21.

¹⁵ E254123

¹⁶ This matter has been adjourned to 16 October 2020 in the Brisbane Magistrates Court for mention.

Toowoomba Second Range Crossing

Prosecutions were commenced against seven subcontractors, charged on 14 complaints, for safety breaches during their work on the Toowoomba Second Range Crossing project. None of the breaches resulted in injuries, but it is alleged that workers were nevertheless exposed to risk of serious injury or death. Two defendants have pleaded guilty and been sentenced¹⁷, whilst the balance remain before the courts, with pleas yet to be confirmed.

Company – worker injured¹⁸

The company has been charged with reckless conduct pursuant to s.31 of the *Work Health and Safety Act 2011* after a worker was struck by a removeable gate which weighed approximately 400kg, when it fell from lifting lugs attached to a front-end loader bucket. The worker was cleaning cement and other material from the door when it fell onto his foot, causing a serious injury.

The matter remains before the Magistrates Court pending committal to the District Court.

A company – mobile crane struck overhead powerline¹⁹

On 22 March 2018, a 23-year-old diesel fitter engaged by a mining company received moderate electrical burns and ongoing psychological injuries from electricity, when the boom of a mobile crane he was guiding struck a high voltage overhead powerline at a Blackwater yard.

A complaint has been laid against the company, charging it with an indictable offence contrary to s.40B of the *Electrical Safety Act 2002*. It is alleged that the defendant failed to ensure that its business was conducted in a way that was electrically safe. It is further alleged that the defendant was reckless as to the electrical risk to individuals of death or serious injury.

The matter remains before the Magistrates Court pending committal to the District Court.

A company and a director – silicosis exposure²⁰

The company conducts a business which includes the installation of stone bench tops. It is alleged that the company failed to ensure the safety of the workers, who were fitting and installing stone benches, as well as others present, from airborne crystalline silica dust exposure (with a potential to cause silicosis related illness).

Complaints have been made against the company and director alleging six breaches of ss.19(1), 19(2), 27(1) and 33 of the *Work Health and Safety Act 2011*.²¹

¹⁷ E257784, E257785 Convicted of breaching sections 19(1), 19(2) and 32 of the *Work Health and Safety Act 2011* and fined \$75,000; E247435 Convicted of breaching sections 19(1) and 32 of the *Work Health and Safety Act 2011* and fined \$50,000.

¹⁸ E260708

¹⁹ 255075

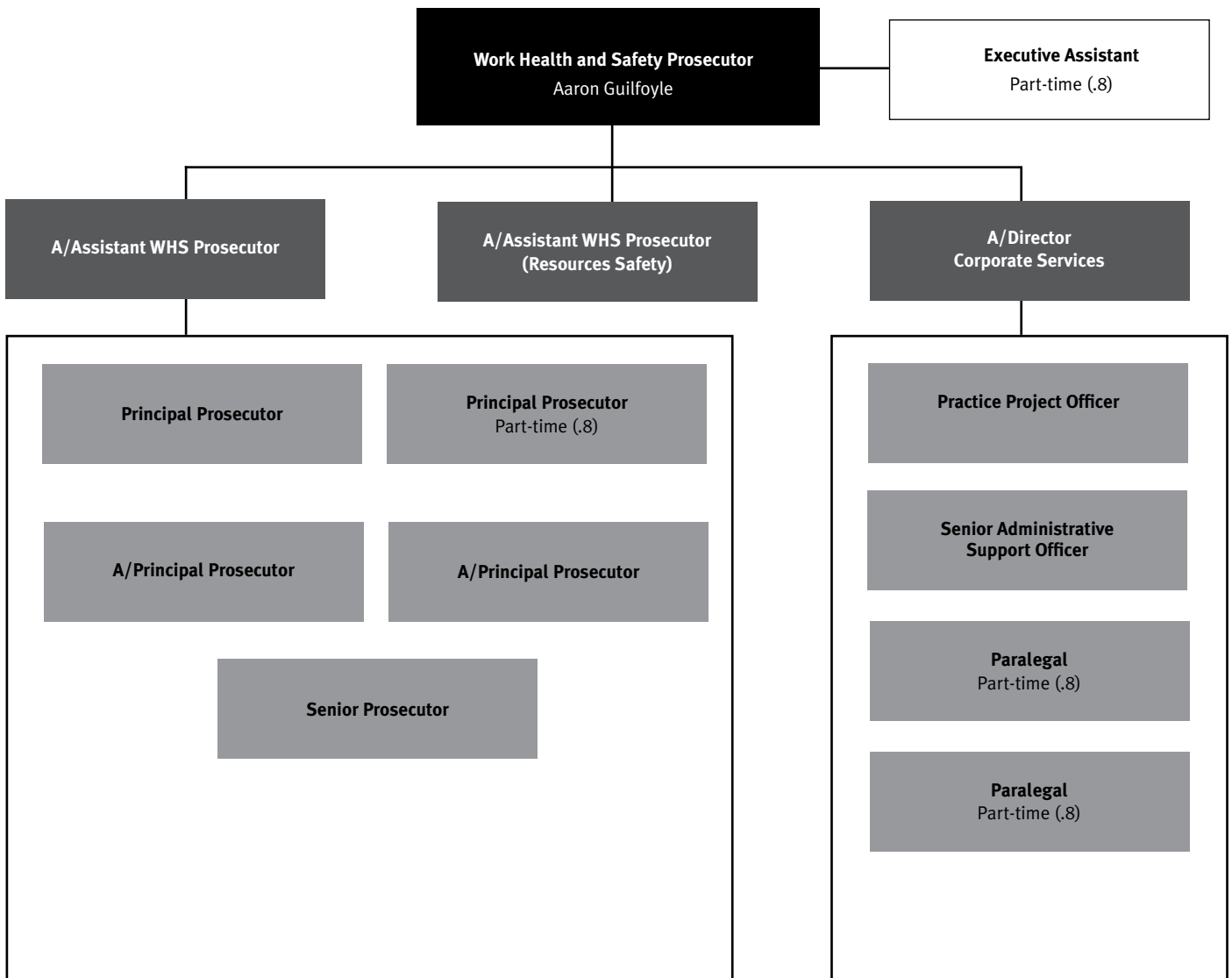
²⁰ E263313

²¹ The next mention is in the Brisbane Magistrates Court on 16 October 2020.

Annexure A

Organisational structure

Positions filled as at 30 June 2020



Annexure B

Financial performance

	Year to date actual
Employee expenses	
Allowance	17,217
On-costs	389,731
Other employee expenses	18,956
Professional development	(18)
Salaries and wages	1,450,499
Employee expenses total	1,876,385
Supplies and services	
Accommodation	365
Advertising	17,483
Contingent labour	6,531
Fleet	244
Legal costs	348,427 ¹
Other supplies and services	43,716
Portable, attractive & minor equipment	7,591
Telecommunications	11,186
Travel	41,061
IT services and support	1,654
Supplies and services total	478,256
Depreciation	
Depreciation	2,235
Depreciation total	2,235
Savings	
Savings	-
Savings total	-
Expense total	2,356,963
Grand total	2,356,963

¹ On 29 May 2020 regarding E172610 the court ordered costs in the amount of \$724,183.05 to be paid by the complainant to the defendant. The WHSP determined that no appeal should be instituted. The prosecution was commenced by the Office of Industrial Relations.

Annexure C

Business plan 2020–2021

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
- assists to improve safety at Queensland workplaces.



Aim

We aim to:

- act with professionalism and consistency
- ensure consistency in decision-making
- work as model litigants
- support victims of workplace injuries and their families
- 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 Prosecutions¹ in decisions to commence, not commence, continue or discontinue a prosecution 100%.
- Prosecutions² 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%.



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

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

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).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.

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 OWHSP 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))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.

^{1,2} See Annexure to Disclosure Guideline 2/2019_Disclosure legislation

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.



Office of the Work Health
and Safety Prosecutor