Review of WorkSafe's Prosecution Function

August 2024
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Te Tari Ture o te Karauna
Crown Law

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This review is conducted as part of the Solicitor General's general oversight of public prosecutions pursuant to section 185 of the Criminal Procedure Act 2011.

Reviewer: James Carruthers, Barrister
Date review finalised: August 2024

INTRODUCTION

1. Crown Law's Public Prosecution Unit instructed me in November 2022 to review WorkSafe's prosecution function. The instruction was reasonably open-ended, coming only with the following broad guidelines:

    1.1 Review available documents regarding WorkSafe's prosecution function;

    1.2 Assess the governance controlling the prosecution function;

    1.3 Consider WorkSafe's application of the Solicitor-General's Prosecution Guidelines;

    1.4 Consider any feedback from internal and external stakeholders; and

    1.5 Benchmark WorkSafe's prosecution function with similar agencies.

2. I began my review in February 2023. I decided, as a first step, to speak to as many people as possible who have longstanding and meaningful experience with WorkSafe as a prosecuting agency. I made contact with several dozen such people – panel prosecutors and defence counsel outside of WorkSafe, and investigators, lawyers, and managers within it – and invited them to share with me their impressions of WorkSafe as a prosecuting agency – i.e. how it was performing from the early stages of investigations right through to sentencing. I thought that by speaking to enough people I would get a feel for the field and a range of considered views as to how WorkSafe was tracking. And so it proved.

3. After those conversations, I made my way through WorkSafe's various policy, guideline, and template documents, as well as 20-or-so prosecution files that WorkSafe made available to me. Most of those I asked for specifically after consulting WorkSafe's website, conducting case law searches on Westlaw, and reviewing media and other articles. I tried to ensure I had a meaningful cross-section of files, by which I mean files from different industries and different parts of the country, and in which the outcomes varied – i.e. charges not being filed, charges being filed and withdrawn, enforceable undertakings being agreed, defendants pleading guilty, charges being dismissed for lack of evidence, defendants being found guilty after trial, and so on.

WorkSafe made helpful suggestions to fill in gaps, although no doubt some remained.

4. The conversations I had during the first stage of my review helped considerably when it came to reviewing those prosecution files. They did not equip me to assess the merits of WorkSafe's prosecution decisions, and I quickly determined that I should not try to go down that path.[1] The files are too voluminous and the evidence at times too technically complex to master in the time available. Rather, the benefit of those conversations was that they alerted me to the sorts of issues that often arise in WorkSafe's prosecutions. I could therefore spot them when I came across them and try to trace their causes and effects in the particular circumstances.

5. After completing the above steps and organising the information I had gathered, I then had to decide how best to structure this report. I chose not to break it into the topics Crown Law asked me to address, but instead to follow the natural path of a prosecution, from the decision to become involved and launch an investigation right through to sentencing and everything in between. That, obviously, is how prosecution files tend to be structured, and it is how most of the conversations I had with stakeholders progressed. Accordingly, I have broken the report into the following sections:

    5.1 When WorkSafe intervenes;

    5.2 How WorkSafe investigates;

    5.3 The Centralised File Support Unit;

    5.4 Legal review;

    5.5 Charging decisions and documents;

    5.6 Post-charge to sentencing; and

[1] Nor is it the Solicitor-General's responsibility to certify the merits of individual prosecution decisions made by public prosecuting agencies: s 185(1) and (3) Criminal Procedure Act 2011.

5.7 Miscellaneous.

6. In structuring the report like this, I have not lost sight of the topics Crown Law asked me to address. I have addressed them as and when they arise. All sections, for example, canvass feedback received about WorkSafe's performance as a prosecutor; most contain some discussion of WorkSafe's documents and decision-making arrangements; and about half contain discussion of WorkSafe's adherence to the Solicitor-General's Prosecution Guidelines. The final section – Miscellaneous – covers comparisons made with other prosecuting agencies, as well as issues that do not fit comfortably into the topics Crown Law asked me to address but were raised with sufficient frequency to merit inclusion.

7. A few further points are worth covering before getting to the report itself. First, it is important to emphasise what this review is not. It is not a review of WorkSafe's function or performance as a health and safety regulator generally; rather, it is a review of WorkSafe's prosecution function, which makes up a part of one of its 16 statutory functions.[2] And within that, it is not a review of any particular prosecution or prosecution decision; rather, it is a review of how WorkSafe is tracking generally as a prosecuting agency.

8. Second, I gathered a lot of information over the course of my review, far more than I could sensibly include in this report. Accordingly, I have had to summarise or paraphrase to a significant extent. While I have tried to do so accurately, I am mindful that I probably have not captured every nuance or detail. I am equally mindful that there will be areas I have not covered at all. Although both Crown Law and WorkSafe have had an opportunity to provide feedback on draft versions of this report,[3] any errors or oversights are mine alone.

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2 These are listed in s 10 of the WorkSafe New Zealand Act 2013. In its Statement of performance expectations 2023/24, WorkSafe condenses and applies these statutory functions to its areas of activities as follows: Lead, engage and influence; Educate, guide, inform and learn; Build capability and worker participation; Innovate, design, implement, and evaluate; Authorise, oversee, assess and audit; and Investigate, enforce and hold to account.

3 I sent a first draft to Crown Law on 1 March 2024 and to WorkSafe on 15 March 2024, and a further draft to both Crown Law and WorkSafe on 19 April 2024. Crown Law provided feedback on both drafts, while WorkSafe provided feedback on the second only.

9. Third, one of the challenges of conducting a review of this sort is that busy prosecuting agencies such as WorkSafe are constantly evolving, trying to improve, or otherwise going through changes. As a result, policies and practices that are in place at a certain point in time might not be in place six months down the line. To avoid having endlessly to revise content, I decided against updating the body of the report to reflect changes to practices or policies made or communicated since the second draft was circulated on 19 April 2024. I have, however, tried to acknowledge those changes – and other feedback received – in footnotes as and when appropriate.

10. Fourth, I have included as an appendix a list of people I spoke to during my review. (I contacted more people than appear on the list but did not manage to speak to them all.) Because I spoke to them on the condition that their feedback would not be attributable to them personally, I have simply referred in the report itself to feedback coming from panel prosecutors, defence counsel, solicitors, investigators, and so on. For the same reason, I have not distinguished between positions in the legal or other teams within WorkSafe (such as principal or manager). Anyone in the legal team is referred to as a solicitor, while anyone in another team is referred to as an investigator.

11. Fifth, there are several teams within WorkSafe that have the ability to conduct investigations and file charges. These include Investigations (which for ease of reference I will call "SI"[4]), the General Inspectorate (GI), Energy and Public Safety, and Kaimahi Hauora. Of these, SI is by far the most active when it comes to investigating incidents and filing charges. For that reason, the report draws primarily on investigations conducted by SI and prosecutions that stem from those investigations.

12. Finally, a brief introduction to the key teams and where they fit into the prosecution process. SI is made up of four teams – three in the North Island and one in the South. Each has an area manager (and possibly a deputy), one or more principal investigators, and a number of investigators. Above them all sits a national manager

[4] This is to avoid the clumsiness and potential for confusion that comes with referring to investigations conducted by Investigations. Also, the team was previously known as Specialist Interventions.

of investigations.[5] If, following an investigation, SI recommends charges be filed, it sends the file to the Centralised File Support Unit (CFSU), which prepares it for the legal team.

13. The legal team is split between Auckland and Wellington. Each office has, for present purposes, a manager and a number of solicitors. There is then a roving principal legal advisor (or two) and above them all the Chief Legal Advisor. On receipt of a file from the CFSU, the legal team assesses whether the test for prosecution set out in the Solicitor General's Prosecution Guidelines is met and refers it back to SI. A decision about whether to file charges is then made.

SUMMARY

14. WorkSafe largely has in place the framework, precedents, and processes needed to conduct thorough investigations and reach evidentially sound and well-reasoned decisions about whether to file charges and, if so, what they should be. Those decisions are generally made at an appropriate level and after serious and careful consideration has gone into them.

15. That said, a range of factors have plagued WorkSafe's prosecution function over the years, and some continue to do so. There seems to be a level of confusion and uncertainty as to what WorkSafe's remit, priorities, and goals are when it comes to enforcement, which leads to an excess of matters making their way to SI. That is problematic because SI is – anecdotally at least –seriously under-resourced. Perhaps unsurprisingly, the timeliness and quality of investigations can suffer as a result. That then has flow-on effects for the legal team, which can find itself providing advice about whether to file charges under significant time pressure and in the absence of information it should have.

16. WorkSafe is alive to these issues and has taken, or is taking, steps to try to address them. It is apparently working on a fresh regulatory strategy which pegs its

[5] SI is part of a wider team known as the Inspectorate. Also in the Inspectorate are Triage, Kaimahi Hauora, Energy and Public Safety, and three regions of GI. Those teams report to the Head of the Inspectorate, who in turn reports to the Deputy Chief Executive of Operations.

prosecution function to its core role as a health and safety regulator.[6] It has introduced a more structured triage process which should assist in identifying at an early stage and with confidence which matters need investigating. It has tweaked its policy as to when prosecution will be in the public interest in a way which should inject more discretion into the assessment.[7] It has introduced the CFSU, which performs a quality control function before investigation files pass from SI to the legal team. And the managers from SI, the CFSU, and the legal team now hold fortnightly meetings to keep tabs on investigations, which assists in identifying investigations that might benefit from early legal intervention and reduces the likelihood of the legal team being taken by surprise. These are all positive developments.

17. As to further steps that could be taken, given the time it inevitably takes for investigation files to make their way to the legal team, I would encourage WorkSafe to explore ways of getting that team involved – and take advantage of their expertise – during the investigation stage.[8] This might reduce the risk of files arriving at the legal team late *and* undercooked. I would also encourage WorkSafe to clarify the procedure to be followed when deciding whether to add, withdraw, amend, or resolve charges, which at present is arguably unclear.[9] That procedure should ideally involve meaningful input from the legal team and SI, a clear and principled pathway for resolving any disputes, and oversight by the Chief Legal Advisor or their delegate.

18. Otherwise, I would simply encourage WorkSafe to carefully consider the content of this report – in terms of both the feedback I have included and the conclusions I have drawn – and think seriously about how it might improve its prosecution function in light of it.

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6 WorkSafe advised that its new strategy, which it considers will address various issues identified in this review, has been finalised and is being implemented.

7 WorkSafe advised that further work on this and other prosecution policies – such as pathways for certain decision-making – may be carried out once the updated Solicitor-General's Prosecution Guidelines have been released.

8 WorkSafe advised that changes to its current processes, which will allow for greater involvement by the legal team at an earlier stage while still preserving the independence of prosecution decision-making, are likely to be made in the near future.

9 WorkSafe advised that work to clarify this process and lines of decision-making will be assisted by the release of the amended Solicitor-General's Prosecution Guidelines and the changes to its prosecution and enforcement policies that will necessarily follow.

WHEN WORKSAFE INTERVENES

19. WorkSafe has a range of interventions available to it, of which investigating is one. This section focuses on how WorkSafe decides to investigate a health and safety incident with a view to potentially bringing a prosecution – in effect, the triage system it has in place to decide which matters to investigate.

The Theory

20. When matters come to WorkSafe's attention, they are referred to a team of triage inspectors. Comprised of four or five warranted inspectors drawn from GI and SI, the team is tasked with making an initial assessment as to how the matter might best be dealt with and referring it to the appropriate team. To assist it in making that assessment, the team can make any initial inquiries it considers necessary or draw on the expertise of SI, GI and others. If the team considers an investigation might be warranted, it refers the matter to SI, which then conducts a similar exercise. (More on that in the discussion below.)

21. In terms of policies and guidelines decision-makers draw on at this stage, initial decisions about whether to intervene are made by applying four criteria, which are set out in a document headed "When we intervene". They are:

    21.1 Whether the risk or harm sits within WorkSafe's responsibilities;

    21.2 Whether it is best placed to intervene;

    21.3 Whether the significance of the risk or harm warrants intervention; and

    21.4 Whether intervening is an effective use of its resources.

22. WorkSafe will only intervene if all criteria applicable in the circumstances are met. A range of factors is listed under each criterion to help decision-makers determine whether that is the case. For example, in determining whether WorkSafe is best placed to intervene, decision-makers are referred to memoranda of understanding with other agencies and given guidance on how to resolve any uncertainty; and in determining whether the significance of the risk or harm warrants intervention, decision-makers are invited to consider the degree of risk and harm, the duty-

holder's contribution and track record, the public interest, and WorkSafe's strategic focus areas.

23. If a decision is made to intervene, a decision must then be made as to what form that intervention will take. Investigating is just one form of intervention. As WorkSafe lacks the resources to investigate all matters that might theoretically warrant investigation, it has to whittle down matters it could investigate to matters it will investigate. When doing so, decision-makers consider a range of factors, which are set out in a document headed "How we investigate". These include:

    23.1 What it wants to find out and is trying to achieve and whether an investigation is the right way to go about that;

    23.2 How an investigation supports its strategic goals, which include creating systemic or sector-specific change, eradicating particular risks or behaviours, and maintaining regulatory integrity; and

    23.3 Whether an investigation is an effective use of its resources.

Feedback

24. A fair number of those I spoke to gave feedback about this aspect of WorkSafe's decision-making. Of those within WorkSafe, many felt there was insufficient guidance around when WorkSafe should intervene by way of an investigation. While not expressed in exactly those terms, that was the tenor of the feedback. And it came from all walks – investigators, solicitors, and those up the ranks. They said, for example:

    24.1 WorkSafe lacks a clear regulatory strategy in this respect. It needs to be firmer about what it will do, might do, and will not do. At present, too many matters make their way through the initial triage stage to SI, including some that are clearly more suited to other agencies.

    24.2 There is a lack of clarity about what WorkSafe's goals are and how it is trying to achieve them. As a result, too many matters pass through the initial triage stage to SI, which can have flow-on effects.

24.3 WorkSafe lacks a clear regulatory strategy and has strayed from its core role as a health and safety regulator into areas perhaps better suited to other agencies. A return to its core role would help it more effectively allocate its limited enforcement resources.

25. Several defence counsel expressed simlar views:

25.1 One felt WorkSafe suffers from a lack of clarity around its role in the wider government network, while another felt it simply tries to do too much and would benefit from sticking to its focus areas.

25.2 Several commented on what they perceived to be a lack of focus or coherence in WorkSafe's interventions. They saw too much time and effort going into obscure points and a seemingly random assortment of cases, which left them wondering what long-term change WorkSafe was trying to effect. One barrister characterised the issue as a lack of strategic direction.

26. Given where much of the feedback came from, it is safe to say WorkSafe is aware of these concerns. As I understand, it is taking at least two steps to address them.

27. First, and as mentioned above, matters that pass through the initial triage process to SI are now subject to a further triage process. While SI has always had the discretion and flexibility to decide not to investigate a matter, the process for making such decisions has now been formalised. Like the initial triage inspectors, investigators from SI make inquiries sufficient to enable them to decide whether a matter should be investigated further or be dealt with in another way. In the interests of both oversight and consistency, any proposal to deal with a matter other than by way of an investigtion has to be signed off by the area manager and then stress-tested before, and peer-reviewed by, a panel of area managers.

28. The idea, obviously, is to weed out matters that perhaps should not have made it through the initial triage process and thereby ensure effective and efficient deployment of the limited investigation resources at WorkSafe's disposal. But that additional triage process will only be as effective as the policies and guidelines

investigators are required to apply when making decisions about whether matters warrant full investigation. This is where the second step WorkSafe is taking comes in. It is working on a new regulatory strategy which it hopes will take it back to its core role as a health and safety regulator and provide decision-makers with better and clearer guidance around when WorkSafe should investigate.[10]

29. For reasons that should become clear in the next section, these are welcome developments.

HOW WORKSAFE INVESTIGATES

30. If WorkSafe decides to investigate an incident, it has 12 months from the date on which it became, or should have become, aware of the incident to file charges[11] – half the time its Australian counterparts enjoy.[12] If the investigation proceeds according to WorkSafe's internal policies and guidelines, and charges are thought to be appropriate, that time period should be split roughly as follows:

    30.1 By six months, the investigation will have been completed, an investigation report will have been drafted and proposed charges identified, and the file will have been transferred to the CFSU;

    30.2 By about nine months,[13] the CFSU will have reviewed the file to ensure it meets internal standards and transferred it to the legal team;

    30.3 By about 11 months,[14] the legal team will have reviewed the file, finalised advice about whether charges should be filed, and transferred the file back to SI; and

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10 WorkSafe advised that the objective of its new strategy, which has been finalised and is being implemented, is to ensure focus on its core role as a health and safety regulator. It is also intended to provide frontline staff who are advising or making decisions on enforcement more clarity as to WorkSafe's focus areas and enforcement priorities.

11 Health and Safety at Work Act 2015, s 146(1)(a).

12 See for example: Work Health and Safety Act 2011 (NSW), s 232.

13 This date is taken from WorkSafe's Standard timeframes document, which notes that the legal team should allow 40 working days (roughly two months) to review a prosecution file for filing of charges.

14 As above. This also allows some time for discussion between SI and the legal team following the latter's advice.

30.4 By 12 months, a decision about filing charges will have been made and, if necessary, charges will have been filed in the appropriate court.

31. The focus of this section is the first of these steps – the investigation and preparation of the file for transfer to the CFSU and then the legal team. The other three steps are considered in the next three sections.

The Theory

32. At a general level, WorkSafe splits investigations into three stages:

32.1 The first is the planning stage. Having decided to investigate a matter, SI will plan how to go about it. The plan should identify with clarity the purpose of the investigation, its likely scale and scope, and the specific factors that will need to be investigated in order to achieve that purpose.

32.2 The second stage is carrying out the investigation itself. In essence, this involves executing the plan formulated at the previous stage, always bearing in mind that the nature of the investigation, as well as the decision to investigate, may need to be revisited as the landscape changes.

32.3 The final stage is closing the investigation, which generally consists of a decision not to pursue the matter any further, or a recommendation that charges be filed.

33. Looking in more detail at how WorkSafe envisages investigations playing out, when SI decides to investigate a matter it assigns it to an investigator, usually but not always from the same geographical area. That investigator then conducts the investigation under the supervision of a principal investigator. The form that supervision is meant to take is set out in a document headed "6-Month Investigation Milestones and Timeline", the purpose of which is to:

> Provide clarity and consistency to both Investigators and Investigation Principals in relation to timeliness and expectations around what milestones need to be achieved within investigations and by when they should be achieved. The introduction of structured and consistent reviews will help to ensure that demands, workloads and caseloads are appropriately managed and apportioned across the investigator resource within Specialist Interventions. This process also brings a more stringent case

management focus across investigation workloads and the decision making around those same investigations.

34. The guidance envisages up to nine meetings betweeen the investigator and the principal investigator held roughly every three weeks. There are detailed template documents for each meeting, intended to track progress and guide planning. For example:

34.1 The first meeting involves discussion of a summary of the matter prepared by the principal investigator, and an investigation plan prepared by the investigator on the back of that summary. Topics to be covered include: the aim and priority of the investigation; possibly applicable offences and the sort of evidence that might be required to prove them; identification of priority actions, possible witnesses, and relevant interview topics; and a timeline for the completion of each agreed action.

34.2 At the meetings over the next few months, investigators and principal investigators should review the progress of the investigation against the investigation plan, identify dead-ends or new avenues of inquiry, and revisit whether an investigation is still the appropriate form of intervention. There are also prompts to consider whether early legal support is required. (WorkSafe does not, as a matter of course, assign lawyers to investigations. Investigators can, however, submit requests for legal advice if they feel they need it. More on this later.)

34.3 The templates for meetings at the back end of the process contemplate that, by 20 weeks, all formal statements from lay and expert witnesses will have been finalised, a duty holder interview will have been conducted, and the investigation report will be well underway. By the 26 week mark, that report will have been completed and, if charges are recommended, charging documents and a summary of facts will have been drafted. The principal investigator and the area manager will have reviewed those documents and, if the latter agrees with the recommendation, the file will be ready for transfer to the CFSU.

35. Several points are worth expanding on. First, WorkSafe has numerous guideline and policy documents aimed at assisting investigators with specific practical aspects of investigations. These include scene attendance and security, taking statements from witnesses, interviewing potential defendants, making notebook entries and taking photographs and video footage, managing exhibits, and exercising various statutory powers. They set out in some detail how to handle those aspects of an investigation, issues that can arise, pitfalls to avoid, and so on. They strike me as potentially very useful tools.

36. An equally useful tool for investigators are the evidential matrices WorkSafe has compiled for the offences it routinely considers and prosecutes. These matrices deconstruct those offences into their constituent elements and identify the types of evidence that might satisfy each element. In short, they break down into simple terms for investigators what has to be proved and how it might be proved. This is useful because the offences WorkSafe deals in and the task of identifying the evidence most relevant and useful to proving them are not always straightforward.

37. Next, during the final stages of an investigation, and ideally once all relevant evidence has been obtained, investigators have to form a view as to whether charges should be filed and, if so, what they should be. That view and the reasons for it are captured in a draft investigation report. Once written, that report is reviewed first by the principal investigator who oversaw the investigation and then by the area manager. If the area manager approves the recommendation that charges be filed, the file is transferred to the CFSU.

38. As with almost all other steps in the proceess, there is a template for investigation reports. The template is designed to ensure decisions are thoroughly considered and properly supported by evidence and other relevant factors. For example, it requires:

    38.1 An account, with reference to the evidence, of what happened;

    38.2 A description of relevant health and safety measures in place, and an analysis of where they fell short and why;

38.3 A list of witnesses who can give relevant evidence together with a summary of that evidence;

38.4 A list of relevant exhibits, which witnesses would produce them, and what they assist in proving;

38.5 Identification of public interest factors, including those specific to WorkSafe;

38.6 Identification of other potentially relevant considerations, such as the proposed defendant's attitude and history, the views of the victim(s), media or political interest, and so on; and

38.7 A recommended course of action together with reasons as to why it is appropriate.

39. The above is by no means an in-depth account of how WorkSafe envisages investigations unfolding. But it should be sufficient to convey that, in theory at least, WorkSafe has investigations down-pat. All going according to its guidelines and policies, WorkSafe should be able to conduct timely and thorough investigations that reach well-reasoned and evidentially sound conclusions as to whether charges should be filed. The reality, however, can sometimes be quite different.

Feedback and file analysis

40. Two main issues emerged from the feedback I received about WorkSafe's investigations and the files I reviewed. The first is that a significant number of investigation files do not make it to the CFSU within the target timeframe of six months. Those in the CFSU said they still receive a good deal of files between eight and 11 months, while some files have to bypass the CFSU altogether and go straight to the legal team. For obvious reasons, this places pressure on the CFSU and the legal team, as they have to work to compressed timeframes.

41. The second issue is that some files – no percentage was offered but the feedback was sufficiently consistent for it to be characterised as an issue – arrive at the legal team undercooked. This might mean that an investigation report has not been

completed, statements have not been sought or obtained from important witnesses, expert witnesses have not been engaged, proposed defendants have not been interviewed, and so on. This also places pressure on the legal team because it means that, when drafting advice about whether charges should be filed, they have to make do with an incomplete set of materials.

42. Before exploring why investigations sometimes suffer from these problems, it is important to emphasise that the feedback was not universally critical. Though still present, the problem of files arriving at the legal team late is not as prevalent as it once was;[15] and while some files arrive undercooked, others arrive in excellent condition. As some observed, that sort of natural variation – where the quality of the investigation file tends to reflect the ability and experience of the investigator – is common across prosecution agencies. As set out below, though, other factors can be at play, too.

43. In terms of why WorkSafe's investigations sometimes suffer from the above issues, several reasons emerged from the conversations I had. The five most common were:

    43.1 Issues with initial triaging;

    43.2 A lack of resources in SI;

    43.3 The complexity of investigations;

    43.4 Defence counsel assuming a more active role; and

    43.5 The strict divide between SI and the legal team.

44. I have already addressed the issue with triaging so will begin with the lack of resources in SI. This was widely acknowledged by those I spoke to, with the problem being described at times as "woeful" and "chronic". The feedback was that SI has lost a lot of investigators in recent years, both seasoned investigators who had a genuine

[15] It is worth noting that WorkSafe's counterpart in the Australian Capital Territory, which has double the time to file charges that WorkSafe does, experiences similar difficulties. As the author of a report into that organisation's conduct of health and safety prosecutions observed, "I was informed the two-year statutory deadline for investigating and laying charges often runs right down to the final weeks and days before a decision to prosecute is made": *Conduct of Work Health and Safety Prosecutions Review (WorkSafe ACT)*, Marie Boland, June 2022, p 10.

feel for health and safety investigations and relatively new recruits who were still going through training or had only recently emerged from it. One solicitor went so far as to say the team had effectively been "decimated".

45. According to several investigators, the shortage of investigators is such that GI inspectors are frequently called on to assist with scene attendances and other aspects of investigations. The assistance those inspectors are able to provide, though, is rather limited, as their day-to-day focus and accordingly the nature of their experience are rather different. That was not always the case, as a longstanding inspector recalled: investigators used to perform all aspects of the job.

46. It seems the gap cannot be filled simply by training new recruits. As several investigators frankly acknowledged, it takes about two years to become even a "mediocre" investigator. While some investigators thought the training could be improved, at least in terms of how to actually investigate, another said it was difficult to prepare new investigators for the reality of the job, which involves attending some rather horrific scenes, dealing with traumatised victims and witnesses, and gathering technical and complex evidence.

47. All this was thought to have had an obvious impact on the timeliness and quality of investigations, not to mention the number conducted.[16] With fewer seasoned investigators in the team, those that remained were stretched rather thin. As well as having to supervise more junior investigators, they were having to spearhead more investigations. Assuming more responsibility in each respect ran the risk of detracting from their performance in each. But investigations need to be conducted and less experienced investigators need supervision.

48. The third reason commonly cited for the above issues is the complexity of the investigations WorkSafe conducts. While some are straightforward, others are not. One panel prosecutor likened the prosecutions more to complex civil litigation than 'run-of-the-mill' criminal prosecutions and had considerable sympathy for the time

[16] Going by the data available on WorkSafe's website, the number of investigations it conducts each year has decreased steadily since 2016: https://data.worksafe.govt.nz/graph/summary/investigations.

it generally took WorkSafe to conduct investigations.[17] Others within WorkSafe agreed, as did several defence counsel. Indeed, one defence counsel wondered why WorkSafe does not, in some cases, apply to extend the time to file a charge beyond the standard 12 month timeframe,[18] suggesting that would be preferable to filing a charge in the absence of potentially relevant information. (As a solicitor from the legal team explained, though, pouring time and energy into such applications, which come with no guarantee of success, might not be the best use of already limited resources.)

49. The next reason for the above issues is the sense – widely felt among investigators and lawyers at WorkSafe – that defence counsel are becoming more active during the investigation stage. Several investigators noted, with a degree of admiration and respect, that defence counsel were pushing back during the investigation stage on WorkSafe's interpretation and use of its statutory or investigative powers. Taking this reason together with the two discussed above, it is not difficult to see how it could hamstring the progress of investigations. It also leads naturally to the fifth reason cited for the above problems, which is the strict divide between SI and the legal team.

50. As noted above, investigations are conducted by SI, which is separate from the legal team. Investigation files generally make their way to the legal team once the investigation is complete and the file has passed through the CFSU. Lawyers are rarely assigned to investigations at their inception, or indeed at any stage. Instead, if investigators think they need legal advice, they can submit a formal request through an internal system, or simply pick up the phone for a chat. Otherwise, the first involvement the legal team has with a file is usually when it arrives from the CFSU.

51. The rationale for this arrangement appears to be twofold. First, there is the practical reality that the legal team is not large enough for a lawyer to be assigned to each investigation at an early stage. Second, there is a sense that involving the legal team

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17 The investigation stage includes formulating draft particulars for charges, which can be a very involved and technical process.

18 WorkSafe can do this under s 147 of the Health and Safety at Work Act 2015.

in investigations at an early stage might compromise their independence when they later draft advice about whether charges should be filed. In effect, they would be marking their own homework. The strict divide is seen as a means of preserving the independence required for them to provide honest and objective advice.

52. As numerous people pointed out, though, the policy has its disadvantages. Indeed, the lack of involvement the legal team has during the investigation stage was one of the most commonly raised issues in the conversations I had. There was a strong sense among lawyers external – and to a lesser extent internal – to WorkSafe that, if the legal team were more involved at that stage, investigations would run more efficiently and effectively and the quality of investigation files would improve overall. For example:

    52.1 Several solicitors in WorkSafe's legal team said they prefer it when investigators reach out for help because they feel the legal team has a lot to offer in terms of identifying relevant and irrelevant issues and potential gaps in the evidence.

    52.2 Panel prosecutors and defence counsel gave feedback to the effect that leaving the legal team out of the picture during the investigation stage makes life harder downstream because important lines of inquiry can be missed, time can be wasted on pursuing irrelevant lines, the need for expert evidence can be overlooked, and so on.

53. Investigators gave a mixture of feedback on this issue. One wished the legal team became involved in all investigations at an early stage, and saw the existing request system as a poor substitute for meaningful involvement. Others said the existing request system works well, and expressed gratitude for the help the legal team had provided when called on. Two others acknowledged the potential benefits of increasing the legal team's involvement in investigations, but cautioned against doing so for the sake of it. One suggested the team could become involved around the two or three month mark if SI was uncertain about what it was doing.

54. No doubt there is a middle ground to be struck. It is important not to overstate the contribution the legal team might be able to make during the investigation stage. As will be discussed later, the legal team itself is still maturing. Moreover, it was apparent from the files and judgments I reviewed that issues with WorkSafe prosecutions occasionally escape the lawyers, too, whether members of WorkSafe's legal team or panel prosecutors. But given the tight timeframe for conducting investigations and filing charges and the fact that the legal team brings a different perspective,[19] there is likely to be value in getting them involved in some capacity at an early stage. Insofar as there are concerns about independence,[20] they could be managed by assigning the legal review to another solicitor.

55. Overall, my impression is that SI has a tough brief. After identifying matters that need to be investigated, it has a short window in which to conduct what are at times complex investigations. It has to do that with fewer – and fewer seasoned – investigators than it has previously had, with defence counsel fighting increasingly harder for their clients' interests, and with only ad-hoc input from the legal team. Looked at from another angle, WorkSafe's investigations would likely benefit from more time, more experienced investigators, and more input from the legal team at an early stage. No doubt this is why one investigator said SI does very well with what it has.

56. As should be clear, WorkSafe is aware of these difficulties. Encouragingly, it is doing what it can – with the limited resources it has – to address some of them. As well as formalising a further triage layer when matters first make their way to SI, managers from SI, the CFSU, and the legal team now meet fortnightly to discuss the progress of investigations. The purpose of these meetings is, in part, so SI can keep the CFSU and the legal team informed about investigations that will be heading their way, how complex they are, and whether they are likely to arrive on time. Additionally, these meetings no doubt provide an opportunity for the CFSU and the legal team to identify any assistance they can provide.

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19 A perspective that is crucial to the application of the Solicitor-General's Prosecution Guidelines.

20 Prosecutors are expected to be objective and often have to make decisions about prosecutions they are running.

57. Finally in this section, it is worth recording other – miscellaneous – points that were made about WorkSafe's investigations:

57.1 There was a sense among panel prosecutors and defence counsel that, when it comes to who to investigate, SI tends to play it safe and stick to what is familiar (PCBUs), perhaps because of a lack of understanding of what is required if they branch out (Officers).

57.2 Some defence counsel felt strongly that investigations were unduly influenced by a desire to obtain compensation for the vicitms, which meant the focus became how to pin blame on a defendant who could pay rather than to figure out what actually happened. The point was echoed to an extent by one investigator, who said investigators need to focus on finding out what happened rather than on obtaining a conviction, and by another, who cautioned against WorkSafe prosecutions being viewed as a backdoor compensation scheme.

57.3 Some defence counsel lamented SI's practice of interviewing duty-holders (who commonly end up being charged) at the end of the investigation rather than the outset. They feel that SI views these interviews more as an opportunity to put allegations than an opportunity to find out more about what happened.

57.4 Several investigators commented on the robust nature of the discussions between investigators, principal investigators, and area managers about whether to recommend that charges be filed and, if so, what charges. The sense was that this step of the process was far from a formality. Equally, however, one solicitor from the legal team queried how some of the files they received over the years made it through that process in the shape they were in.

57.5 Lastly, and foreshadowing discussion to come, investigators offered a range of views about when it will be in the public interest to file charges. One asked rhetorically whether public interest corresponded with media

interest; another said it was usually straightforward given SI deals primarily with fatalities or serious injuries; while another suggested it was more nuanced and had to be filtered through WorkSafe's regulatory strategy and priorities.[21]

THE CENTRAL FILE SUPPORT UNIT

58. This short section deals with the CFSU, which is a relatively new initiative. It was introduced a few years ago in an attempt to deal with the problem of files arriving at the legal team late in the 12 month period and in no particular order.[22] For obvious reasons, that placed the legal team under a good deal of pressure.

59. Now, all going to plan, SI provides the CFSU with a complete investigation file within six months. The CFSU then audits the file for compliance with internal standards and expectations, ensuring the necessary documentation is there and that it is presented in a coherent and manageable fashion. In effect, it performs a quality control function. If the file is up to scratch, the CFSU transfers it to the legal team, hopefully within eight months. If it is not up to scratch, the CFSU returns it to SI. WorkSafe's Investigation Milestone Review describes the process as follows:

> All investigation files recommending prosecution will be reviewed by the CFSU prior to referral to the Legal group for prosecution. The CFSU will conduct a file review to ensure timeliness, consistency and quality of all investigation files recommending prosecution to assist WorkSafe achieve its goal of becoming a world class regulator. … Once the investigation file meets agreed quality standards, then the investigation file will be referred to the Legal group for consideration of prosecution.

60. The feedback the legal team gave about the CFSU and the impact it has had was overwhelmingly positive. The CFSU was described as a "godsend", "a great innovation", and "a hugely beneficial team" that has led to "a massive improvement" in the quality of files.

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21 WorkSafe advised that release of the amended Solicitor-General's Prosecution Guidelines will provide it with an opportunity to update the "public interest test" aspect of its prosecution policy and guidance documents.

22 The CFSU also assists with disclosure. Indeed, that is the bulk of the work the team does, estimated at about 60-70 per cent. While the legal team still has ultimate oversight of and responsibility for disclosure, the CFSU helps to prepare and process it.

61. Investigators provided similar feedback in some respects, albeit a few expressed reservations. A number acknowledged the importance of consistency and quality control, and the role the CFSU plays in ensuring the same. Some, however, lamented what they see as unnecessarily complex and time-consuming requirements, which they suspect could act as a deterrent.

62. Few panel prosecutors or defence counsel passed comment on the CFSU, which is unsurprising.

LEGAL REVIEW

63. As noted several times already, if the result of an investigation is to recommend that charges be filed, the investigation file makes its way to the legal team, preferably via the CFSU. Once in receipt of a file, the legal team conducts a legal review, the purpose of which is to advise whether charges should be filed and, if so, what those charges should be. This section considers that aspect of the pre-charge process.

The Theory

64. For the purpose of legal reviews, files are allocated according to a range of criteria. These include the complexity of the matter, the time available to complete the review, the experience and seniority of the solicitor, and their capacity. Once a file has been allocated, the solicitor completes an opinion on whether charges should be filed and, if so, what those charges should be. The template for these opinions encourages – indeed requires – a detailed analysis of the evidence and consideration of potentially relevant public interest factors (including a host specific to WorkSafe).

65. Once complete, the opinion is reviewed by the solicitor's manager or the principal legal advisor. That review involves not only consideration of whether charges should be filed, but consideration of – and often debate about – what the particulars of any charges should be. This is important because particulars lie at the heart of WorkSafe prosecutions. They are meant to identify as meaningfully as possible where the health and safety system the defendant had in place fell short.

66. Once the manager has reviewed the opinion and the legal team has settled on a position, the file is sent back to SI. What happens at that point is the focus of the next section.

Feedback and file analysis

67. Much of the feedback about the legal team's performance at this stage came from the team itself and panel prosecutors that WorkSafe engages once charges have been filed. Starting with those prosecutors, their feedback about the legal team was overwhelmingly positive. They described the team as:

    67.1 A settled, diligent, and capable team that makes sound decisions and – according to one prosecutor – is almost painfully aware of the Solicitor-General's Prosecution Guidelines.

    67.2 An excellent and well supervised team that demonstrates sound judgment and produces files as well as or better than most other in-house teams.

    67.3 A team with excellent knowledge of the Health and Safety at Work Act and developing knowledge of the Evidence Act.

68. Much of this is consistent with what I was able to glean from reviewing the files made available to me. Leaving aside the merits of any recommendations made,[23] the opinions the legal team produced were of a very high standard. They contained thorough accounts of the evidence and equally thorough analyses of whether it was sufficient for charges to be filed; they identified and considered the potential relevance of any gaps they had noticed; and they discussed with reference to specific factors whether filing charges was in the public interest. The opinions plainly were not produced lightly. On the contrary, they reflected considerable effort, often under significant time pressure.

69. An area in which some solicitors in the legal team are arguably lacking, as they and panel prosecutors they work with pointed out, is actual litigation experience. Those

[23] As noted at the outset, the files were too voluminous and evidentially complex for me to meaningfully assess the merits of any decisions made. Accordingly, my comments should not be read as an endorsement or criticism on my part of the merits of those decisions.

who have meaningful amounts of it – and there are a few[24] – commented on how much it helps them when conducting legal reviews. With experience, they said, comes a better working knowledge of the Evidence Act and a better feel for how trials unfold in practice. That, in turn, assists with assessing whether there is sufficient admissible evidence to file charges, and in identifying any evidential gaps that might need filling.

70. There is a general awareness within the legal team of the value of real world litigation experience, and managers try to ensure solicitors under their watch get as much of it as possible. That is easier said than done, though, as few prosecutions proceed to trial, and those that do are generally led by panel prosecutors. But solicitors in the legal team regularly act as second counsel, and outside of actual litigation have ample opportunity to attend litigation skills and other programmes relevant to their development. There is also, I understand, a fair amount of in-house training conducted or organised by the principal legal advisor. This is all very positive.

71. Other points that emerged from the discussions I had with the legal team and are worth noting include:

    71.1 Solicitors generally agree that their managers regulate their workloads appropriately, taking into account their experience and capacity when allocating files. As a result, even when files arrive late from the CFSU or SI, those handling them rarely feel overwhelmed. As one solicitor said, "it's not ideal but we can handle it."

    71.2 A number of solicitors said that having principal legal advisors with significant litigation experience and a sound knowledge of the Health and Safety at Work Act is invaluable, and they are sorely missed when they are not around.

    71.3 Several solicitors commented on how thorough the legal review process is and how robust the conversations they have with their managers are. One

[24] Experience levels within the team vary. A number of solicitors are category three prosecutors and have what could be described as meaningful litigation experience.

added that, overall, it was much more comprehensive than a similar review function they had performed in a similar role elsewhere.

71.4 Like investigators, solicitors offered different views as to when it will be in the public interest to file charges. Some saw it as relatively straightforward given the consequences are generally very serious, while others thought perhaps too much weight was given to consequences alone, and suggested guidance from above about WorkSafe's enforcement priorities and focus areas would assist.[25]

CHARGING DECISIONS AND DOCUMENTS

72. After the legal team has conducted its review, and regardless of the outcome of that review, the file is sent back to SI. A decision is then made about whether to file charges and, if so, what they should be. How such decisions are made is the focus of this section.

The Theory

73. The process to be followed when the legal team returns a file to SI after completing its legal review is set out in a policy document headed "How we make prosecution decisions". The document envisages and caters for three scenarios:

73.1 If the legal team's advice is that the test for prosecution is met, the decision-maker within SI[26] decides whether to file charges.

73.2 If the legal team's advice is that the test for prosecution is not met and the decision-maker within SI agrees, the file is closed.

73.3 If the legal team's advice is that the test for prosecution is not met and the decision-maker within SI disagrees, they have to try to come to an agreement. If they cannot, they can request a binding opinion from the principal legal advisor or a panel prosecutor.

74. As investigators and the legal team are required to when making charging recommendations, decision-makers at this point of the process have to take into

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25 See footnote 20 above.

26 This is a person with the delegation to make the appropriate decision. In many cases it will be an area manager, but in some cases – usually those of greater public or national significance – it will be a national manager.

account WorkSafe's enforcement priorities and specific public interest considerations, which are listed in various of its policy documents. That is in addition to considering the standard limbs of the test for prosecution contained in the Solicitor-General's Prosecution Guidelines.

75. In circumstances where this process produces a decision to file charges, the decision-maker within SI and the legal team have to agree on the content of those charges. If they cannot agree, they can request a binding opinion from the principal legal advisor or a panel prosecutor. Once any issues have been ironed out, the Chief Legal Advisor or their delegate has to approve the charge before it can be filed.

Feedback and file analysis

76. Although updated in November 2023, this process largely reflects the process described by those I spoke to within WorkSafe and which I encountered when reviewing the files made available to me.

77. In the form of the investigation report and the legal review, both SI and the legal team have their say on whether charges should be filed. When they are in agreement, the decision to file charges is relatively straightforward. When they are not, there tends to be robust and respectful debate which quite properly centres around the evidential sufficiency and public interest tests, with each 'side' acknowledging the other's expertise. There are also clear lines of authority for resolving disputes.

78. So, putting aside the merits of charging decisions and focusing on the decision-making process, my impression is that charging decisions are not taken lightly. On the contrary, they are taken seriously, at an appropriate level, and at the conclusion of a process that should be replete with checks and balances.

79. Turning to the content of the charges themselves, in terms of who is charged and what the particulars are, panel prosecutors and defence counsel expressed a range of views. Beginning with panel prosecutors, their feedback included:

79.1 WorkSafe is generally on the money in terms of what went wrong and how serious it was, but could diversify its charging portfolio to take more near miss cases and more cases against officers.

79.2 WorkSafe has a good grasp of the state of the law and seems to understand the importance of taking test cases to help establish the boundaries of offence provisions.

79.3 WorkSafe could tighten up their drafting of particulars and needs to make sure they are always backed by the evidence.

80. Perhaps unsurprisingly, defence counsel were somewhat less complimentary – but not unfairly so, in the sense that their feedback was genuinely expressed. It included:

80.1 WorkSafe's charging decisions are inconsistent and sometimes inexplicable, and it has reached a point where it can be difficult to advise clients on the likelihood of charges being filed.

80.2 WorkSafe's charging decisions sometimes involve strained interpretations of the underlying events, seemingly designed to try to obtain compensation for the victims.

80.3 WorkSafe usually goes for the lowest hanging fruit, or at least what it is familiar with, sometimes at the expense of focusing on what actually happened.

80.4 The particulars attached to charges are often duplicitous, unsupported by the evidence, vague, or meaningless, one counsel suggesting they resemble a "word salad".

81. It is worth elaborating on a couple of these points. The first is the issue of particulars. Particulars lie at the heart of WorkSafe prosecutions, as they identify where and how the defendant failed to meet its health and safety obligations. But drafting them is not necessarily a straightforward task: they require more elucidation than in many other prosecution settings, which in turn requires mastery of both the Health and

Safety at Work Act[27] and, at times, quite technical evidence.[28] Given this, the scope for reasonable minds to differ, and the fact they are a natural point of negotiation, it is perhaps inevitable that particulars will be the subject of disagreement.

82. Reflecting that, WorkSafe's drafting of particulars was a common sore point among defence counsel.[29] As several observed, if particulars are carefully drafted and backed by evidence, they leave defendants with nowhere to go; but if they are drafted loosely, piled on unnecessarily, or only faintly backed by evidence, they can become a sticking point, and prosecutions that might otherwise resolve quickly end up taking a lot longer. A potential rejoinder to this, as solicitors within WorkSafe observed, is that many prosecutions resolve by way of guilty pleas without any – or any meaningful – amendment to the particulars, which arguably suggests they are drafted appropriately.[30]

83. I am not in a position to pass substantive judgment on WorkSafe's drafting of particulars or the impact it has on the passage of prosecutions. In keeping with the point made above, the files are too evidentially complex for me to make a fair and meaningful assessment. What I can say with confidence, though, is that those involved in the process, from both the legal team and SI, generally put a lot of time and effort into this aspect of charges. Particulars tend to be the subject of considerable debate and generally go through several iterations before being finalised. That is not to say, however, that there is no room for improvement. Given the consistency and intensity of the feedback received, there may well be.

84. The second point is the view, expressed by several defence counsel, that WorkSafe's charging decisions sometimes fail to reflect what actually happened and who was most to blame. In particular, they think WorkSafe has a tendency to ignore the

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27 And associated case law.

28 Arguably, there is also a link to be drawn between the drafting of particulars and the quality of investigations. If investigations are undercooked – as they sometimes are – but charges are to be filed, those drafting and finalising the particulars might not have all necessary information at their disposal when doing so. If that occurs, there is every chance that later developments will show some of those particulars to have been misconceived or otherwise off the mark. This further underscores the need for timely and quality investigations.

29 And at least one panel prosecutor saw room for improvement.

30 The point was made without reference to statistics.

sometimes significant role that injured or deceased parties play in events. They feel this can be unfair to businesses that take their health and safety obligations seriously, and query whether it is within the spirit of the Solicitor-General's Prosecution Guidelines.

85. To be clear, there is no suggestion WorkSafe is acting improperly or outside the bounds of the law here. As the High Court recently reiterated, "worker error does not" absolve businesses, which "must be alert to the possibility that workers will not awlays act in perfect, safety-maximising ways."[31] I record this point simply because the veiws expressed by defence counsel resonated to an extent with those expressed by some investigators and solicitors. As they put it:

85.1 There are numerous genuine alternatives short of filing charges which should be treated as genuine alternatives. Filing charges should be a last resort, necessary in the public interest and to advance WorkSafe's specific priorities.[32]

85.2 There seems to be a reluctance to acknowledge the role workers sometimes play in incidents. The focus tends to be on businesses, regardless of the circumstances.[33]

85.3 WorkSafe faces some very difficult charging decisions at times, with factors pulling in opposite directions. The former policy almost created an expectation that charges would be filed in certain circumstances, which fettered the decision-maker's discretion.

86. That last point is important. As noted, the policy referred to above – "How we make prosecution decisions" – is new. It contains a subtle but potentially important tweak to the policy that came before it. The previous policy stated that "WorkSafe expects

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31 *Progressive Meats Limited v WorkSafe New Zealand* [2023] NZHC 3784 at [30]. See also *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526 at [52].

32 WorkSafe advised that it will review its approach to, and the criteria for, alternatives to prosecution as part of a review of its prosecution and enforcement policies following the release of the updated Solicitor-General's Prosecution Guidelines.

33 For context, see para 85 and footnote 30 above.

that prosecution would normally be recommended when one or more" circumstances from an extensive list of WorkSafe specific public interest factors applied. The list included, among a host of other circumstances, non-compliance resulting in death. While the new policy has retained the list, it has done away with the expectation. Instead, it simply requires matters on the list to be considered when determining whether a prosecution is in the public interest. To the extent this change injects discretion into decision-making about filing charges, it strikes me as a positive development.[34]

POST-CHARGE TO SENTENCING

87. This section addresses WorkSafe's involvement in prosecutions from the time charges have been filed to the time the defendant is sentenced (if the prosecution gets that far). It draws on WorkSafe's guideline and policy documents, my review of files made available to me, and feedback I received from those I spoke to.

The theory

88. Once charges have been filed, solicitors from the legal team tend to prepare for, and appear at, the first few administrative hearings (first appearance, case review, etc). If a defendant pleads guilty, those same solicitors will generally prepare for, and appear at, the sentencing hearing, too. If a defendant pleads not guilty, though, and there is a real possibility the matter will proceed to trial, panel prosecutors are generally engaged, on the condition that a solicitor from the legal team will remain involved as junior counsel. Much less often,[35] and usually only in less serious and less complex cases, the file might be kept in-house and the trial conducted by a solicitor from the legal team.

89. As prosecutions progress, the CFSU continues to assist with file management and disclosure, while investigators within SI assist with further inquiries that need to be made, liaise with witnesses, and prepare evidence and exhibits.

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[34] WorkSafe advised that it will consider and build on this further following the release of the updated Solicitor-General's Prosecution Guidelines and as part of the implementation process of its revised regulatory strategy.

[35] WorkSafe advised that, over the past three years, its solicitors have led four defended hearings and two formal proof hearings.

90. WorkSafe has guidelines and policies for resolving prosecutions, withdrawing or adding charges, and so on. They are contained in the document headed "How we make prosecution decisions". That document notes, quite properly, that the solicitor with carriage of a prosecution should periodically review the charges to make sure they remain appropriate. If it is thought that charges need to be withdrawn, added, or amended, or the prosecution resolved, the document provides guidance for how to go about each of those options. Unfortunately that guidance is rather unclear – at least to me – but it seems to envisage such decisions being made by the decision-maker within SI, following input from the legal team and approval from the Chief Legal Advisor or their delegate.

Feedback and file reviews

91. Solicitors in WorkSafe's legal team appear more than capable of preparing for, and appearing at, initial hearings and, if prosecutions progress that far, sentencing hearings. But if there is a chance a defendant will defend the charges at trial, and the file needs to be prepared accordingly, panel prosecutors generally need to step in. That much was widely acknowledged. For example, feedback from panel prosecutors included:

91.1 Although the legal team is very good and tries to do more than other in-house legal teams, some solicitors lack genuine litigation experience and at times seem to underestimate just how much work can be involved when preparing for trial.

91.2 The legal team is very good at resolving prosecutions and dealing with sentencing hearings, but some solicitors lack trial experience and the forensic awareness that comes with it. That is becoming more apparent now that defendants are subjecting charges to more scrutiny.

91.3 Solicitors from the legal team do an okay job as junior counsel. They have an excellent knowledge of the Health and Safety at Work Act, and a developing knowledge of the Evidence Act. They are very enthusiastic, though, and improving with experience.

92. Several defence counsel gave similar feedback and, as noted above, there is a general awareness among solicitors in the legal team that some of them lack trial experience. I also came across, or was told about, a couple of examples of that lack of experience bubbling to the surface in matters that had not been briefed to panel prosecutors:

92.1 In one instance, a relatively minor prosecution, which had an impending trial date and had not been prepared for trial, was briefed to a panel prosecutor in what can fairly be described as a late flurry of activity.

92.2 Two prosecutions that were kept in-house apparently still suffered from rather fundamental deficiencies on the eve of trial.

93. Panel prosecutors and some solicitors in the legal team made similar observations about the performance of investigators after charges had been filed. A few felt that some investigators seemed not to appreciate the significant role they had to play in getting prosecutions ready for trial. (Others lamented the attrition rate within SI in this respect, observing that the lack of continuity – having one investigator after another take over the file – made preparing for trial difficult.)

94. To be clear, these are not criticisms of the legal team or SI. They are simply limitations those teams seem to face – and they come as no surprise. This is because, traditionally, most WorkSafe prosecutions have resolved by way of reasonably early guilty pleas. Unless they gained it elsewhere,[36] solicitors in the legal team and investigators in SI will have had little experience of preparing prosecutions for trial and seeing them through.[37] It is therefore understandable that panel prosecutors are usually asked to lead prosecutions, and that investigators might need a little direction.

95. The fact that most prosecutions resolve by way of guilty pleas leads to another topic on which feedback was received, this time mainly from defence counsel. That topic

[36] Which some have. As noted in footnote 23 above, several solicitors are category three prosecutors.

[37] Inspectors in GI will likely have had even less given investigations and prosecutions are not their primary diet.

was WorkSafe's attitude towards resolving prosecutions. The feedback given varied considerably and included:

95.1 Negotiations are difficult. The legal team is staffed by junior lawyers and has a strange lawyer–client relationship with SI, which means it takes an eternity to get answers. And when they do come, they sometimes demonstrate a fundamental misunderstanding of criminal law concepts and the Solicitor General's Prosecution Guidelines.

95.2 WorkSafe picks some strange battles at times. There seems to be a reluctance to amend or drop particulars. The legal team under the old Department of Labour was much easier to deal with and more practical in its approach. The legal team now seems to take instructions from the investigators who conducted the sub-par investigations in the first place.

95.3 The legal team at WorkSafe is excellent to deal with. The solicitors are smart and pragmatic, very aware of the Solicitor-General's Prosecution Guidelines, and work effectively and collaboratively with defence counsel.

96. The impression I gained from reviewing the files made available to me and speaking to solicitors in WorkSafe's legal team is that WorkSafe takes seriously its obligations to ensure any decisions it makes in respect of live prosecutions are made in accordance with the Solicitor-General's Prosecution Guidelines. Irrespective of whether the decisions are the right ones in the circumstances (which, as already noted, I am not really in a position to judge), they are generally taken after thorough consideration has been given to the particular issue by both the legal team and SI. These include such decisions as:

96.1 Whether charges or particulars are supported by the evidence, defence counsel having suggested they are not;

96.2 Whether expert evidence obtained and intended to be adduced by defence counsel renders the prosecution unsustainable;

96.3 Whether charges or particulars should be amended or withdrawn in order to achieve a resolution; and

96.4 Whether it is still in the public interest to prosecute a defendant for actions which were criminal at the time but likely would no longer be.

97. The new policy mentioned above largely appears to carry that over, although – as noted – it is not particularly clear. As long as it allows for meaningful and substantive input from both the legal team and SI, provides a principled route for resolving any disagreements, and requires the oversight of the Chief Legal Advisor or their delegate, decisions of this sort will continue to be made after appropriately thorough consideration. If it does not, it should be amended accordingly.

98. Another issue on which both panel prosecutors and defence counsel gave feedback was disclosure. One panel prosecutor praised the performance of the CFSU in this respect, especially given the complex nature of some of the disclosure and the sheer volume of it. Overall, though, he said that WorkSafe has a pretty good understanding of its disclosure obligations but needs to bear in mind that they are ongoing. Another prosecutor said WorkSafe was improving in terms of meeting its disclosure obligations, but suggested it could be better attuned to what is relevant and what is not.

99. Defence counsel made similar observations. One thought WorkSafe did a pretty good job – better than other prosecuting agencies – while others said disclosure was occasionally little more than a massive dump of information, which seemed not to have been screened for relevance. A common gripe was that disclosure was frustratingly slow, often to the point that adjournments of initial hearings were inevitable.[38] A final, and slightly more targeted, piece of feedback was that WorkSafe could perhaps take a more pragmatic approach when it comes to certain material that it can technically withhold. Several counsel said that making such material available would assist them in providing early – and frank – advice to their clients.

[38] As noted elsewhere, though, investigations can generate a lot of material, which will naturally have flow-on effects for disclosure.

100. Finally in this section, a few words about sentencing. As noted, WorkSafe generally appears at sentencing hearings for prosecutions that resolve before panel prosecutors have been engaged. I reviewed the sentencing submissions on the files made available to me, as well as decisions on Westlaw from early 2022 to mid-2023. When going through those decisions, I compared the starting point and sentence WorkSafe submitted were appropriate with the starting point and sentence the judge considered appropriate.

101. WorkSafe's submissions were generally clear and helpful. They appeared to contain relevant information required for sentencing – about the offending, the defendant, the victims, and similar cases – and were not overwritten. At a guess, I would say judges find them helpful too, as the starting points they adopted when sentencing defendants usually did not differ significantly from the starting points WorkSafe proposed. In this respect, the feedback given by one defence counsel – that WorkSafe's submissions were usually well-pitched and responsible – resonated more than the feedback given by another – that it tended to strive for needlessly high sentences.

102. As for other feedback, one investigator queried whether the various sentencing options available under the Health and Safety at Work Act were being underutilised. Mention was made, in particular, of project orders, training orders, and adverse publicity orders.

MISCELLANEOUS

103. This section deals with a range of issues raised by those I spoke to which do not fall naturally into any of the above sections but are worth mentioning. They are:

103.1 Enforceable undertakings;

103.2 Comparisons with other regulators;

103.3 Cost-effectiveness; and

103.4 Crown Law.

Enforceable undertakings

104. A topic on which most of those I spoke to had an opinion was the role of enforceable undertakings, which are an enforcement tool provided for in the Health and Safety at Work Act.[39] An alternative to prosecution, enforceable undertakings are binding agreements that defendants enter into with WorkSafe. Their purpose, as set out in WorkSafe's relevant Operational Policy, is to:[40]

- Support progressviely higher standards of work health and safety in a given industry or sector for the benefit of the:
    - workers and/or work and/or workplace
    - wider industry or sector; and
    - community.
- Provide acceptable amends to any victim(s).
- Support WorkSafe to meet its strategic priorities.

105. Defendants can apply to WorkSafe for an enforceable undertaking at any time during an investigation or prosecution. A specific team at WorkSafe ("EU"), which includes neither the investigators nor the solicitors involved in the initial decision to file charges, considers the application and decides whether to accept it. If EU accepts it, the parties inform the Court and the charges (almost inevitably filed by that stage) are withdrawn.[41] If EU rejects the application, the charges proceed as normal.

106. Enforceable undertakings are not available if there is an argument that, in respect of the incident underlying the charges, the defendant acted recklessly.[42] In other words, they are not available in respect of the most serious alleged offending that WorkSafe deals in. In practice, this generally means that EU does not consider applications for enforceable undertakings until the investigation and legal review are complete,

39 See Health and Safety at Work Act 2015, Part 4, Subpart 4; WorkSafe's Practice Guide to Enforceable Undertakings, September 2019; Enforceable Undertakings, Operational Policy, September 2019.

40 Enforceable Undertakings, Operational Policy, September 2019, para 2.2.

41 Also, if defendants breach enforceable undertakings, they can be prosecuted for doing so and have the charges they originally faced reinstated as well: Health and Safety at Work Act 2015, ss 126-127.

42 Health and Safety at Work Act 2015, s 123(2).

which in turn generally means that it does not consider applications until charges have been filed.[43]

107. According to its website,[44] WorkSafe has accepted 44 applications for enforceable undertakings since 2017. Almost everyone who expressed an opinion on this issue – investigators, solicitors from the legal team, and defence counsel – thought the uptake was disappointingly low. The general consensus was that, while enforceable undertakings could be a very useful tool in improving workplace health and safety, they have been placed out of reach of most defendants.

108. As numerous people observed, WorkSafe cannot prosecute its way to better health and safety outcomes. In support, they pointed out that the convictions WorkSafe has secured over the years have barely made a dent in the statistics around workplace fatalities and injuries.[45] As is the case with attempts to combat other forms of criminal offending, general deterrence does not seem to be working. This is where some – WorkSafe included[46] – see value in the concept of enforceable undertakings.

109. As well as providing for the interests of victims and requiring defendants to improve their own health and safety practices, enforceable undertakings come with industry-wide benefits. In order to succeed, an applicant must be able to demonstrate how it "would raise the bar or promote progressively higher standards of work health and safety in the given sector or industry".[47] As one investigator remarked, whether small or large, any improvement is surely welcome.

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43 As noted elsewhere in this report, the investigation and legal review stages often soak up most of the 12-month period within which any charges must be filed.

44 At the time the second draft of this report was circulated.

45 Going by data available on WorkSafe's website, workplace fatalities have ranged between 59 and 80 per year between 2014 and 2023, while workplace injuries requiring at least one week away from work have risen steadily over the same period (from 24,480 in 2014 to 35,805 in 2022): https://data.worksafe.govt.nz.

46 WorkSafe expressed its strong support for enforceable undertakings as a valuable enforcement tool and referred to an external evaluation it commissioned two years ago which, it says, found robust evidence that enforceable undertakings were supporting progressively higher standards for health and safety for workers: *Enforceable Undertakings – The nature of health and safety changes; an opportunity for progressively higher standards*, Anne Dowden, March 2022.

47 WorkSafe's Practice Guide to Enforceable Undertakings, p 2.

110. On the whole, those I spoke to expressed frustration that enforceable undertakings were relatively uncommon, and offered a number of explanations for that. Their feedback included:

110.1 The threshold for obtaining an enforceable undertaking is too high or is applied too rigidly by WorkSafe, leading to a number of missed opportunities to make improvements.

110.2 The cost of preparing an application for an enforceable undertaking, which involves identifying a contribution that could be made on an industry-wide scale, is prohibitive, especially for smaller businesses.

110.3 Rather than be pro-active and share its knowledge and ideas with defendants in order to help them put together strong applications, WorkSafe waits for defendants to come to it.

110.4 Defendants can only apply for enforceable undertakings once they have been charged, even though it might be clear from the outset that an enforceable undertaking would be an appropriate outcome.

111. Pulling some of this feedback together, the general consensus was that enforceable undertakings could be of great benefit to health and safety overall if they were made available pre-charge and if WorkSafe took a pro-active approach to identifying and suggesting opportunities for industy-wide improvements.

112. WorkSafe acknowledges the value of enforceable undertakings, as well as the frustrations defendants and others have expressed about its (actual and perceived) approach to them. Recently, and to its credit, WorkSafe has sought to engage with stakeholders to better understand these frustrations and to dispel any misconceptions.[48] As I understand, it has also made changes to the feedback it provides to ensure unsuccessful applicants are better placed to succeed should they

[48] In WorkSafe's view, there were several misconceptions about its approach to enforceable undertakings. These included that it requires the monetary value of the undertaking to meet the monetary penalty that would likely be imposed at sentencing; that it prefers quantity over quality; and that it requires a "gold standard".

try again;[49] and it is considering the feasibility of both making enforceable undertakings available before charges are filed, and compiling a list of industry-led initiatives that applicants can draw on when formulating applications.[50]

Comparison with other prosecuting agencies*[51]*

113. A number of panel prosecutors and defence counsel drew comparisons between WorkSafe and other prosecuting agencies, some of which have been mentioned already. Among other points made – and beginning with panel prosecutors – were that:

113.1 WorkSafe is not as experienced and thorough as some prosecuting agencies, which seem to have a greater appreciation for the complexities of litigation. But WorkSafe is steadily maturing and, while not the best, is by no means the worst.

113.2 The legal team is one of the best among prosecuting agencies. They are very knowledgeable, well supervised, and demonstrate sound judgment. They try to do as much of the required work as they can, and put together files as well as, or better than, most.

114. Feeback given by defence counsel included that:

114.1 Other prosecuting agencies tend to conduct more thorough investigations and get their legal teams involved earlier in the piece. As a result, their prosecution decisions tend to be of better quality overall.

114.2 WorkSafe compares reasonably well with other prosecuting agencies, or at least is no worse than they are. They are more amenable and flexible than some, and lack the 'power trip' air that some seem to have.

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49 WorkSafe advised that these efforts have, since January 2024, seen an increase in both applications for enforceable undertakings and applications being accepted.

50 WorkSafe hopes this might address issues defendants face in terms of cost and resource allocation, and assist smaller businesses with limited resources and less influence in their industries.

51 When attempting comparisons, it is important to keep in mind the different contexts in which prosecuting agencies operate and the challenges and limitations that come with them.

115. It is easy to be overly critical in this respect and to read too much into negative publicity or the outcome of certain prosecutions. That is not to say there is no room for improvement. There is. But perspective is important. As one defence counsel remarked, WorkSafe's conviction rate – with most convictions following guilty pleas – speaks for itself.[52] Those matters that proceed to trial generally[53] do so because there is an argument to be had, not because the prosecution is completely misconceived.[54] Sometimes defendants will be found guilty, but often – due to the high bar prosecutors have to meet – they will not. There is nothing remarkable about that, and WorkSafe is not alone in experiencing outcomes of that sort.

Cost effectiveness*[55]*

116. When Crown Solicitors conduct prosecutions for government departments, the fees they can charge for doing so are governed by an appendix to the Crown Solicitors Terms of Office. The same does not apply, however, when they – or other prosecutors – conduct prosecutions for WorkSafe, which is a Crown entity as opposed to a government department. Accordingly, WorkSafe enjoys more discretion over who they instruct and what fees they are willing to pay. That said, there remains an expectation that the public nature of the work will be borne in mind, and that the appendix mentioned above will serve as a guide to what is appropriate.

117. Before setting out the various measures WorkSafe appears to take to keep costs in check, it is worth considering the fee scheme set out in the appendix to the Crown Solicitors Terms of Office in the light of the sorts of prosecutions WorkSafe undertakes. The fee scheme sets out the hourly rate chargeable by prosecutors from junior to principal (with intermediate and senior in between) and the number of hours able to be charged per stage of the prosecution process. For example, unless

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52 An investigator made a similar point. Of the 35-or-so prosecutions they had been involved in, all but a couple had resolved by way of guilty pleas and only one had gone to trial.

53 But not always.

54 The sheer range of feedback received on, for example, WorkSafe's charging decisions and drafting of particulars – all of it genuinely expressed – suggests there is ample room in this developing area of law for reasonable minds to disagree. The same is arguably evidenced by the range of outcomes WorkSafe experiences – from having costs awarded against it to securing guilty verdicts – even when represented by seasoned panel prosecutors.

55 This was a late addition to the instructions I received. The comments in this section are pitched at a general level and do not stem from an examination of the actual costs of any prosecutions.

agreed otherwise, ten hours are available for each of the following stages: pre-charge review; preparation for initial hearings such as first appearance and case review; preparation for pre-trial hearings; and preparation for trial.

118. Only the hourly rates in the fee scheme are meant to serve as a guide.[56] There is no expectation, in other words, that preparation be limited to 10 hours per stage. This is sensble. As noted above, WorkSafe prosecutions can be technically complex and document heavy, so much so that some panel prosecutors and defence counsel likened them more to civil litigation than traditional criminal prosecutions. The work that goes into opinions about whether charges should be filed and, if so, what they should look like, is considerable and I struggle to see it being done adequately in ten hours.

119. WorkSafe seems to take a variety of steps to try to keep the costs of prosecutions down. For example:

    119.1 WorkSafe tries to do as much legal work as it can in-house. The legal team provides most of the legal advice to investigators, does most of the legal reviews, drafts most of the charging documents, and handles most of the administrative and sentencing hearings. WorkSafe tends to engage panel prosecutors only when its legal team lacks the capacity or expertise to do the work itself.

    119.2 When WorkSafe engages panel prosecutors to appear on files that might proceed to trial, it insists that a solicitor from its legal team act as junior counsel. This not only reduces the cost of engaging panel prosecutors, it adds to the experience and capacity of its solicitors going forwards.

    119.3 WorkSafe has established a competitive panel of prosecutors.

120. As it observed, WorkSafe is also accountable for its performance and expenditure in other ways. For example:

[56] As Crown Law pointed out when providing feedback on the second draft.

120.1 The Minister for Workplace Relations and Safety is responsible for overseeing and managing the Crown's interests in WorkSafe;

120.2 WorkSafe is accountable to its Minister and to Parliament for its performance, including in relation to expenditure;

120.3 The Ministry of Business, Innovation and Employment scrutinises WorkSafe's performance on the Minister's behalf; and

120.4 WorkSafe is obliged to appear before Select Committee to answer questions related to its expenditure in the course of the annual financial review, and the Select Committee is able to obtain any relevant evidence it wants in respect of that.

Crown Law

121. Finally, several investigators, members of the legal team, and panel prosecutors commented on the role Crown Law could play in developing the law in this area. They generally felt that Crown Law could be more receptive of requests to appeal District Court decisions. Their rationale was that, with the Health and Safety at Work Act being relatively new legislation, it was in all stakeholders' interests that opportunities to clarify the law be taken. The uptake from Crown Law, however, was described as "frustratingly low".

27 August 2024

James Carruthers, Barrister

APPENDIX: LIST OF PEOPLE I SPOKE TO

- Ben Finn – partner, Luke Cunningham Clere
- Dale la Hood – (former) partner, Luke Cunningham Clere
- Steve Symon – partner, MC
- Ian Brookie – barrister
- James Cairney – barrister
- Paul White – barrister
- Fletcher Pilditch KC – barrister
- Nicholas Chisnall KC – barrister
- Shane Elliott – barrister
- Rachael Woods – barrister
- Oliver Skilton – barrister
- Brett Harris – barrister
- Ellie Harrison – partner, Wynn Williams
- Grant Nicholson – partner, Anthony Harper
- Sid Wellik – chief legal advisor, Legal
- Samantha Forrest – principal legal advisor, Legal
- Sarah Backhouse – manager, Legal
- Emma Jeffs – manager, Legal
- Trina Williams McIlroy – senior solicitor, Legal
- Angus Everett – senior solicitor, Legal
- Alexandra Simpson – senior solicitor, Legal
- Tanya Braden – senior solicitor, Legal
- Viliami Veikune – senior solicitor, Legal
- Karina Sagaga – senior solicitor, Legal
- Kane Patena – deputy chief executive, Operations
- Hayden Mander – (former) national manager, Investigations
- Catalijne Pille – acting national manager, Investigations
- Catherine Gardner – head of Specialist Interventions
- Danielle Henry – area manager, Specialist Interventions
- Kevin Hooper – principal investigator, Specialist Interventions
- Peter Wilms – investigator, Specialist Interventions
- Nigel Richards – investigator, Specialist Interventions
- Carl Baker – manager, General Inspectorate
- Graham Bates – principal inspector, General Inspectorate
- Mark Wogan – manager, Energy Safety
- Kim Severinsen – manager, Centralised File Support Unit