

# Prosecution

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*REGULATORY FUNCTION POLICY*

August 2020

The Prosecution Policy describes the high level approach WorkSafe uses regarding prosecution.

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# 1.0 Background

## **IN THIS SECTION:**

- 1.1** WorkSafe's approach to enforcement

WorkSafe was established as a Crown Entity under the *WorkSafe New Zealand Act 2013*. It is New Zealand's primary health and safety regulator.

New Zealand has high rates of workplace fatalities, serious harm injuries, and work related illness compared to other OECD countries. WorkSafe will lead the achievement of the Government targets of reducing workplace fatalities and serious injuries by 25 percent in 2020; and reduce the incidence of pleural cancer (mesothelioma), asbestos related lung cancer and asbestosis by 50 percent by 2040.

The Health and Safety at Work Act ('HSWA') will assist WorkSafe to achieve these targets. HSWA provides a range of enforcement tools, including prosecution, and compliance mechanisms for the use by the regulator, inspector and District Court.

## 1.1 WorkSafe's approach to enforcement

WorkSafe's enforcement approach is designed so that all duty holders take their health and safety responsibilities seriously. An enforcement response should be credible and proportionate to the situation it is addressing.

Enforcement decisions may not necessarily be scalable in response (moving from a low level approach initially through to the use of stronger enforcement action later). For example: WorkSafe may make a decision that its first response is prosecuting an otherwise well performing PCBU based on the seriousness of the behaviour and severity of consequence.

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# 2.0 Purpose

WorkSafe's purpose in prosecuting is to deter non-compliance with the laws it is responsible for enforcing, and hold persons who breach those laws to account.

Prosecution action may be taken whether or not a breach has resulted in death, injury, illness or disease. By deterring non-compliance with health and safety law, prosecution encourages<sup>1</sup> the sort of positive health and safety behaviour required in the workplace that is needed to ensure compliance; prevent harm; manage risks; and supports effective health and safety management.

<sup>1</sup> *R v Radich* (1954) NZLR 86 (CA)



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# 3.0 Scope

This policy describes how WorkSafe decides to initiate a prosecution following an investigation, inspection or assessment.

It applies to all WorkSafe staff involved in prosecutions within WorkSafe's jurisdiction.

The *Enforcement Policy*<sup>2</sup> describes WorkSafe's approach to enforcement and the range of available enforcement tools. It guides the regulator and inspectorate on the use of the appropriate enforcement tool for the circumstances. Prosecution action is one of the potential enforcement tools that may be used by WorkSafe and, where it is, must be used in accordance with this policy.

Other supporting policy documents can be found [here](#)<sup>3</sup>

<sup>2</sup> [WorkSafe's Enforcement Policy](#)

<sup>3</sup> [Other supporting documents](#)

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4.0

# WorkSafe's approach to prosecution

# WorkSafe will prosecute in a deliberate and targeted manner.

Decisions to prosecute and whether or not to continue with prosecutions will be made fairly and consistently, and proportionately to the seriousness of the behaviour. This is consistent with the principles in WorkSafe's Intervention Approach<sup>4</sup>. Prosecutions have serious implications for victims, witnesses and defendants. The New Zealand public should have confidence in the way WorkSafe conducts its prosecutions.

WorkSafe's prosecution decisions are made in accordance with the Solicitor General's Prosecution Guidelines<sup>5</sup> (SG's Prosecution Guidelines). This prosecution policy builds on the requirements of the SG's Prosecution Guidelines, and establishes a structured approach for all prosecution activity conducted by WorkSafe.

WorkSafe may publish specific enforcement policies or guidelines that apply to particular sectors, industries or issues. WorkSafe may also provide detailed guidance on the making of prosecution decisions, but any such guidance must be read in conjunction with this prosecution policy.

<sup>4</sup> [WorkSafe's Intervention](#)

<sup>5</sup> Solicitor General's Prosecution Guidelines [www.crownlaw.govt.nz](http://www.crownlaw.govt.nz) and including the supplementary documents Victims of Crime – Guidance for Prosecutors (1 July 2013) and Media Protocol for Prosecutors (1 July 2013).

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# 5.0 WorkSafe's prosecution decision-making framework

WorkSafe will consider each case on its own merits when considering whether or not to prosecute.

It must consider the following:

- the factors set out in the SG's Prosecution Guidelines
- the facts of each case
- the relevant legislation
- WorkSafe's Enforcement Policy and any relevant internal operational policies/guidelines.

The process that will be followed by WorkSafe when making a prosecution decision is set out below.

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# 6.0 Prosecution recommendations

WorkSafe's enquiries into health and safety matters are conducted by:

- Health and safety inspectors under HSWA and regulations, and Health and Safety in Employment Act 1992 (to be repealed)
- Energy safety investigators (under the Gas Act, Electricity Act and regulations).
- Enforcement officers under the Hazardous Substances and New Organisms Act and regulations.

Where, following investigation, these staff consider that prosecution action is warranted, they will make a recommendation to their manager. If their manager (or Energy Safety Compliance Officer) is satisfied that evidential and enforcement criteria have been met, the recommendation will be referred to the National Manager – Investigations, or the relevant Chief Inspector<sup>6</sup> (or delegate) who will decide whether or not to endorse it.

If the recommendation is endorsed by the National Manager – Investigations or Chief Inspector, the report and case file will be referred to WorkSafe's Legal Services Group in the first instance for consideration. If the recommendation is not endorsed by the National Manager – Investigations or Chief Inspector, the file may be referred back for further work to support the recommendation.

In cases of public significance, all recommendations (that is, to prosecute or not) will be reviewed by the National Manager – Investigations or the relevant Chief Inspector. Cases of public significance include where:

- it involves a fatality or risk of harm to multiple people
- it involves offending against a vulnerable victim(s)
- the decision is contentious: perhaps perceived as contrary to a stated government policy or priority
- multiple agencies are involved in the investigation which may result in disagreement
- the prosecution decision is likely to be queried or challenged by a victim or their representative, union, or employer organisation
- a 'Notification of interest in knowing of enforcement action taken' has been received
- there is a high likelihood of media attention.

<sup>6</sup> Or the Manager, Energy Safety, in the case of investigations by Energy Safety staff.



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# 7.0

## Review by prosecutor

- 7.1 The evidential test
- 7.2 The public interest test
- 7.3 The decision
- 7.4 Choice of charges
- 7.5 Ongoing review of charges
- 7.6 Disclosure
- 7.7 Plea discussions and arrangements
- 7.8 Withdrawal and dismissal of charges
- 7.9 Sentencing options
- 7.10 Appeals
- 7.11 Other agencies
- 7.12 Victims and witnesses
- 7.13 Private prosecutions
- 7.14 Use of external prosecutors
- 7.15 Media and publicity

Each prosecution recommendation will be reviewed by a prosecutor, either within WorkSafe or externally, to ensure that the ‘test for prosecution’ set out in the SG’s Prosecution Guidelines is met.

This review is an integral independent check within the process.

The test for prosecution is a two part test, made up of:

- the evidential test
- the public interest test.

Both parts of the test for prosecution must be met in order for a prosecution to be commenced.

### **7.1 The evidential test**

The first stage of the test for prosecution is the evidential test. If this test is not met, then no charges may be filed, no matter how important or serious the matter may be. To meet the evidential test, the prosecutor must be satisfied that the evidence to be given in court is sufficient to provide a reasonable prospect of conviction.

A reasonable prospect of conviction will exist if in relation to an identifiable individual, there is credible evidence:

- which could be given before a court
- upon which a judge or jury could reasonably be expected to be satisfied beyond a reasonable doubt that the individual has committed a criminal offence.

### **7.2 The public interest test**

If the evidential test is met, the next step is the public interest test. Not all offences for which there is sufficient evidence must be prosecuted. WorkSafe will exercise its discretion as to whether a prosecution is required in the public interest.

There are multiple factors that may be considered in determining whether prosecution is in the public interest. A non-exhaustive list of such factors is contained in the SG’s Prosecution Guidelines.

The SG's Prosecution Guidelines also make clear that, in regulatory prosecutions, an agency's statutory objectives and enforcement priorities will be relevant public interest considerations.

Whilst the key factors and non-compliant behaviours that would contribute towards a decision by WorkSafe to prosecute will vary, WorkSafe expects that prosecution would normally be recommended when one or more of the following circumstances apply:

- where non-compliance resulted in death
- the gravity of the offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender warrants it
- where there has been a reckless and/or negligent disregard of health and safety requirements
- where work has been carried out without an appropriate authorisation or license or in serious non-compliance with a safety case
- where a duty holder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk
- where there has been adverse conduct for a prohibited health and safety reason under Part 3 of HSWA
- where a provisional improvement notice (which an inspector has not been required to review) has not been complied with
- where a breach of a worker participation or engagement duty is considered to have contributed to the occurrence of death or serious injury or the risk of death or serious injury
- where there has been a failure to comply with a notice or direction given by an inspector or WorkSafe, especially where the risk that was subject to the notice or direction:
  - still exists
  - was not remedied until a significant time after the date specified in the notice or direction
- where there has been coercion or inducement in breach of s92 of HSWA
- where there has been a contravention of an enforceable undertaking
- where there has been an obstruction of an inspector while exercising their statutory powers
- where there is offending within an identified focus areas for WorkSafe.

Where the evidential test has been met, the prosecutor will then weigh the relevant public interest factors that are applicable. The prosecutor will then determine whether or not the public interest requires prosecution.

Generally, the expectation of prosecution in these circumstances should align with decisions made using WorkSafe's Enforcement Decision-making Model (EDM). Where they do not align, careful consideration must be given at Step 6 of the EDM process to ensure that the level, focus and overall impact of the proposed enforcement decision is appropriate.

### 7.3 The Decision

The SG's Prosecution Guidelines highlight the importance of independence in the prosecution decision-making process. WorkSafe's Intervention Approach principles of transparency and consistency align with this directive. WorkSafe's Board has delegated its prosecution decision-making powers to the Chief Executive of WorkSafe, who has in turn delegated these powers to certain staff ('decision-makers'). The WorkSafe Board will monitor the making of prosecution decisions over time.

In most cases, the decision-maker will be the investigator's manager, though in cases of public significance, the decision-maker will be a Chief Inspector, the National Manager – Investigations, General Manager or the Chief Executive (and in accordance with any internal procedures). In cases of public significance, the decision-maker may convene an internal panel to discuss the prosecution decision, though the prosecution decision ultimately remains one for the decision-maker.

If the prosecutor is satisfied that the test for prosecution has been met, they will document and confirm this to the decision-maker who will make the ultimate decision whether to initiate prosecution.

If the prosecutor is not satisfied that the test for prosecution has been met, they will provide written advice to the decision-maker that a decision of 'no prosecution' be made. This advice will be in a form to be determined by WorkSafe, but at a minimum should include:

- an outline of the facts of the case
- the evidence considered by the prosecutor
- any possible issues of admissibility that have been identified
- the advice on whether the evidential and public interests tests have been met
- the reasons for that advice.

The decision-maker's decision will conform to the legal advice provided, but there are internal procedures for escalation where the advice is not agreed with.

A decision of 'no prosecution' does not preclude any further consideration of a case by the prosecutor if new and additional information becomes available, or if a review of the original decision is required.

## 7.4 Choice of charges

If a decision to prosecute is made, consideration will be given to the charges that are most appropriate. Sections 17-20 of the Criminal Procedure Act 2011<sup>7</sup> set out the requirements on the content and choice of charges.

WorkSafe may bring charges under the legislation that it administers or other legislation, including the Crimes Act. When deciding which legislation to file a charge under, WorkSafe will consider the nature of the alleged conduct and the charge that would most appropriately reflect that conduct.

Some offences, due to their seriousness, require the consent of the Attorney-General before a charge can be filed. Where these charges are contemplated by WorkSafe, such consent will always be obtained prior to the filing of charges.

Where any charge is to be filed, the content of the charge must first be approved by WorkSafe's Chief Legal Advisor or delegate.

## 7.5 Ongoing review of charges

After filing charges, prosecutors are responsible for periodically reviewing them to determine whether they should continue to be prosecuted, or whether any charges:

- should be amended
- should be added
- should be withdrawn (if, for example, they are no longer supported by the evidence, or are not considered necessary in the public interest).

<sup>7</sup> [Criminal Procedure Act 2011](#)

## 7.6 Disclosure

Disclosure in prosecutions is governed by the Criminal Disclosure Act 2008.<sup>8</sup> Under the Criminal Disclosure Act, a 'prosecutor' is the person in charge of a file or files relating to a criminal prosecution. The prosecutor is responsible for disclosure and ensuring that it occurs within statutory timeframes.

## 7.7 Plea discussions and arrangements

The SG's Prosecution Guidelines recognise that principled plea discussions and arrangements have a significant value for the administration of the criminal justice system. These discussions may be initiated by the prosecutor or defence counsel.

All decisions to offer or agree to a plea arrangement must first be approved by the Chief Legal Advisor or delegate. The decision to offer or agree to the arrangement, if approved, will be made by the decision-maker.

## 7.8 Withdrawal and dismissal of charges

A prosecutor may withdraw a charge before trial with the leave of the court. The court may dismiss a charge at any time before or during a trial, but prior to the defendant being found guilty or entering a plea of guilty.

A dismissal is deemed to be an acquittal and therefore precludes subsequent proceedings. Given the significance of this course of action, any decision to seek or consent to a dismissal will be made at Chief Inspector and National Manager – Investigations level or above, and must:

- be made only if the test for prosecution is no longer met
- first be approved by WorkSafe's Chief Legal Advisor.

## 7.9 Sentencing options

Where a prosecution results in a finding of guilt, a range of sentencing options are available to the court. WorkSafe will seek sentencing options that take into account the circumstances of each case, are proportionate to the offending, consistent with precedent and aimed at reducing reoffending.

Where appropriate, WorkSafe may also apply for other orders (for example, restoration orders, reparation orders, cost orders).

WorkSafe will, consistent with the provisions of the Sentencing Act 2002, seek sentences of reparation and will request such information as may be necessary to assist the Court in quantifying reparation. In seeking reparation, WorkSafe is fulfilling its role as a prosecutor and is not acting as an advocate for the victim(s). Where the victim(s) or their representatives wish to volunteer information to assist the Court in determining reparation, WorkSafe will receive this, consider it and, where relevant, provide it to the Court.

Should a victim(s) seek the Court's permission to be separately represented at sentencing, this will not be opposed by WorkSafe.

<sup>8</sup> Criminal Procedure Act 2011

## 7.10 Appeals

WorkSafe may appeal the following decisions of a court:

- a pre-trial ruling (with leave of the court)
- a sentence imposed
- a ruling by the trial court (on a question of law, with leave of the court).

In accordance with section 246 of the Criminal Procedure Act 2011, WorkSafe must obtain the leave of the Solicitor-General to appeal against a sentence imposed. Before seeking leave from the Solicitor-General, WorkSafe will first review the matter and obtain legal advice as to whether an appeal is warranted.

Any decision by WorkSafe to appeal must be made only by either the relevant General Manager, or Chief Executive, on advice from the Chief Legal Advisor.

## 7.11 Other agencies

It is not uncommon that more than one agency may investigate a particular matter, in circumstances where prosecution by any one of those agencies could result. Depending on the circumstances, this may result in one of those agencies being designated a 'lead agency' for the purposes of the investigation.

WorkSafe will work collaboratively with those other agencies to ensure that investigations are carried out in the most expedient and robust manner.

## 7.12 Victims and witnesses

WorkSafe will ensure that victims of crime are treated at all times with courtesy and compassion and with respect for their dignity and privacy. The inspector will be the primary point of contact with victims and will ensure that they are provided with information at each stage of the process to ensure that they understand the process and are aware of what is happening. WorkSafe will comply with the Crown Law protocol Victims of Crime – Guidance for Prosecutors,<sup>9</sup> and the Victims' Rights Act 2002.<sup>10</sup> Upon request by or on behalf of a victim, WorkSafe will seek the Court's permission for Victim Impact Statements (or parts of) to be read to the Court.

Where there is a victim of offending, the Court is obliged to consider whether restorative justice (RJ) is appropriate as a part of the sentencing process. The RJ process involves the victim and the offender coming face to face at a meeting (called a restorative justice conference) which allows the victim to express how the offending has affected them, and allows all the people present to acknowledge the harm that has been caused. Participation in the RJ process is voluntary. Prior to sentencing, the inspector will contact the victim(s) to discuss whether they wish to participate in such a process.

WorkSafe employees who act as expert witnesses in any prosecution must comply with the required standards of conduct applicable to expert witnesses, including the Code of Conduct for Expert Witnesses.<sup>11</sup>

<sup>9</sup> [Victims of Crime – Guidance for Prosecutors](#)

<sup>10</sup> [Victims' Rights Act 2002](#)

<sup>11</sup> [Code of Conduct for Expert Witnesses, Schedule 4, High Court Rules 2016](#)

### 7.13 Private prosecutions

There is provision under both the Health and Safety in Employment Act 1992 and Health and Safety at Work Act 2015 for private prosecutions. Whilst the provisions of these Acts differ, generally a private prosecution may be brought where:

- a person has given notice to WorkSafe of their interest in knowing of any enforcement action or prosecution action taken in respect of a particular incident, situation or set of circumstances
- that person is notified that neither WorkSafe nor a regulatory agency (for example, the Police) has taken or intends to take enforcement action in respect of that incident, situation or set of circumstances.

Outside of these circumstances, a private prosecution may be brought with leave of the Court.

### 7.14 Use of external prosecutors

Prosecutions for WorkSafe are undertaken using a mix of in-house and external prosecutors. Some prosecutions must be undertaken by Crown prosecutors and are set out in the Crown Prosecution Regulations 2013 made under the Criminal Procedure Act 2011.

For all other prosecutions, the decision whether to use an internal or external prosecutor is made by WorkSafe, but the table below sets out some situations in which an external prosecutor may be instructed to lead or support a prosecution.

REASON	EXAMPLE
To support WorkSafe's capacity to provide services	Where there are insufficient staff within a particular district or area of regulation to meet needs.
Complex legal issues	Likely to require complex advocacy with national implications.
High profile	Case is high profile with considerable media interest. This may be because of the defendant's identity, international aspects, or circumstances surrounding the case or the victims' identity.
Independence from WorkSafe required	When the case calls for independent advice or advocacy – for example when there is a perceived or actual conflict of interest.

**TABLE 1:**  
Reasons  
for external  
prosecutors

### 7.15 Media and publicity

Publishing the nature and outcome of enforcement actions draws attention to the consequences of violating the law. It is a valuable tool for both educating duty holders and deterring non-compliance.

WorkSafe will publish and use information and enforcement data in accordance with its Publishing Policy<sup>12</sup> to maximise the outcome of its assessment, inspection, investigation and enforcement activity.

WorkSafe may:

- Publish information as to the nature and outcome of prosecutions and where appropriate, other enforcement measures to support specific and general deterrence.

<sup>12</sup> [WorkSafe Publishing Policy](#)

- Inform duty holders in the same or similar industries of the nature and outcome of prosecutions (and, where appropriate, other enforcement measures) and provide advice as to how to prevent similar breaches.
- Use information resulting from assessments, inspections, investigations and enforcement, to inform its targeting.

In communicating with the public through the media in relation to a prosecution, WorkSafe staff will act in accordance with the Crown Law Media Protocol for Prosecutors,<sup>13</sup> and will act in a way:

- that does not prejudice the right to a fair trial
- that supports the administration of justice and the integrity of the criminal justice system
- that respects the principle of open justice
- that treats victims of crime with courtesy and compassion, and respects their privacy.

WorkSafe will publicise the outcome of a prosecution where it considers it appropriate. This will be managed by the National Manager – Investigations, or relevant Chief Inspector, together with the communications and legal teams.

<sup>13</sup> Crown Law Media Protocol for Prosecutors [www.crownlaw.govt.nz](http://www.crownlaw.govt.nz)



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