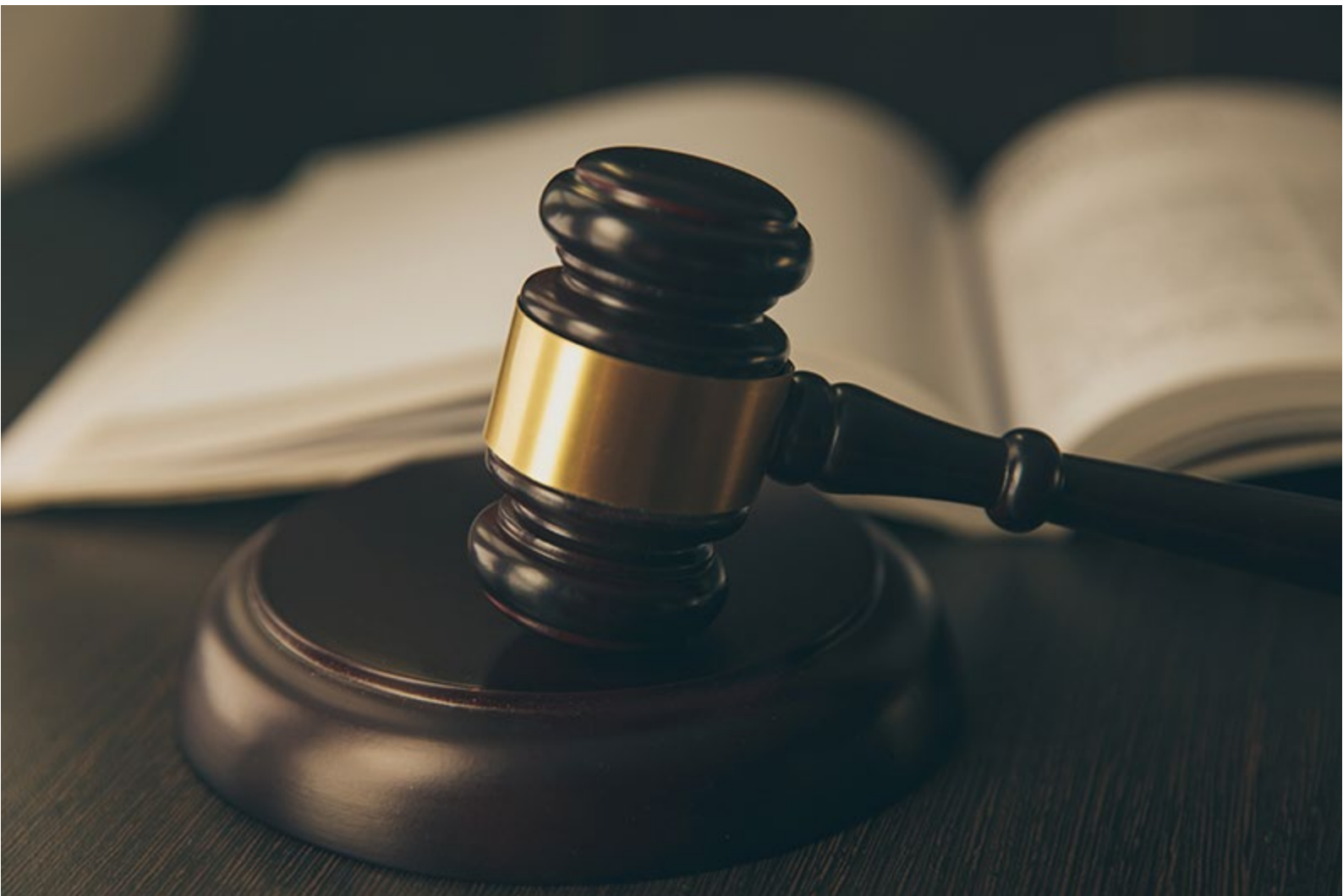


Prosecution Guidelines

NT WorkSafe



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V1.2	8 March 2021	J. Mu	New version with details on prosecutions and offences and recognition of new Strategic Plan.
V1.3	4 October 2022	C. Wicks	Minor edits.

Acronyms	Full form
DPP	Director of Public Prosecutions
NCEP	National Compliance and Enforcement Policy
WHS	Work Health and Safety

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These guidelines provide an overview of NT WorkSafe’s approach to prosecution under the [Work Health and Safety \(National Uniform Legislation\) Act 2011](#) (the Act) and the [Work Health and Safety \(National Uniform Legislation\) Regulations 2011](#) (the Regulations).

These guidelines are published in accordance with [section 230\(3\)\(a\) of the Act](#).

National Compliance and Enforcement Policy

All Australian work health and safety (WHS) regulators, including NT WorkSafe, are signatories to the [National Compliance and Enforcement Policy \(NCEP\)](#).

The NCEP outlines a nationally consistent approach to compliance and enforcement under the Act and the Regulations.

The NCEP includes the following diagram which represents how WHS regulators can use compliance and enforcement tools in a proportionate way, and the ability to escalate compliance and enforcement if the initial intervention does not achieve the desired outcome.



Source: Safe Work Australia; National Health and Safety Compliance and Enforcement Policy.

In doing so, the NCEP balances a number of considerations, including:

- community expectations that businesses and undertakings will be monitored and held accountable if they breach WHS laws;
- the need to support individual workplaces and industry bodies to build capability to achieve compliance with WHS laws; and
- the need to work with stakeholders to continue to promote innovation and continuous improvements in WHS standards.

Director of Public Prosecutions

NT WorkSafe adopts and applies the [Prosecution Guidelines of the Northern Territory Director of Public Prosecutions \(DPP\)](#). These Guidelines are considered in relation to any decision by NT WorkSafe to initiate a prosecution under the Act.

The decision to prosecute

Prosecution for an offence is a discretionary action. The dominant consideration in deciding whether or not to prosecute is if it is in the public interest.

NT WorkSafe aims to change the behaviour of the alleged offender and deter future offenders by commencing a prosecution.

Consistent with the NCEP, NT WorkSafe is committed to a policy of prosecuting whenever significant breaches of WHS legislation occur.

Significant breaches generally include cases involving fatalities and/or serious injury or where potential risks to WHS are high.

Factors to take into account

The DPP Guidelines require careful consideration to determine whether:

- the admissible evidence available is capable of establishing each element of the offence;
- there is a reasonable prospect of conviction; and
- if it is in the public interest to prosecute.

For more information, [refer to the DPP Guidelines](#).

Reasonable prospect of conviction

This consideration requires an exercise of judgment which will depend upon an evaluation of the weight of the available evidence, and the strength of the prosecution case in light of anticipated court proceedings.

For instance, the evaluation of the strength of a prosecution case will be whether the alleged offender ensured, so far as reasonably practicable, that the alleged risk was addressed, and the existence of evidence to support any defence that may be raised.

Public interest test

In considering the public interest element, the main criteria to take into account include:

- a) the seriousness or, conversely, the triviality of the alleged offence; or that it is of a “technical” nature only;
- b) whether or not the alleged offence is of considerable public concern;
- c) the obsolescence or obscurity of the law;
- d) whether or not the prosecution would be perceived as counterproductive for example, by bringing the law into disrepute;
- e) special circumstances that would prevent a fair trial from being conducted;

- f) the necessity to maintain public confidence in such basic institutions as the Parliament and the Courts;
- g) the staleness of the alleged offence;
- h) the prevalence of the alleged offence and any need for deterrence, both personal and general;
- i) the availability and efficacy of any alternatives to prosecution;
- j) whether or not the alleged offence is triable only on indictment;
- k) the likely length and expense of a trial;
- l) whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory;
- m) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;
- n) whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive;
- o) the degree of culpability of the offender in connection with the offence;
- p) any mitigating or aggravating circumstances;
- q) the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the offender, a witness or a victim;
- r) the offender's antecedents and background;
- s) the circumstances in which the alleged offence was committed;
- t) whether or not the offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the offender has done so;
- u) the attitude of a victim or in some cases a material witness to a prosecution; and/or
- v) any entitlement or liability of a victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken.

The applicability of and weight to be given to these and other factors will vary and depend on the particular circumstances of each case.

Irrelevant considerations

NT WorkSafe adopts the principle that a prosecution must not be brought for improper purposes. A decision to prosecute will not be influenced by:

- a) any discriminatory factor – for example race, nationality; or
- b) personal empathy or antipathy towards a person; or
- c) the political or other affiliations of those responsible for the prosecution decision; or
- d) possible political advantage to the government or any political party, group or individual.

Target areas for prosecution

While NT WorkSafe has identified in its Strategic Plan priority industries and mechanisms of injury, every incident and possible breach of WHS duties is assessed on its own merits.

Request for prosecution

Under [section 231 of the Act](#), a person may request NT WorkSafe to bring a prosecution if the person reasonably believes that the alleged breach constitutes a Category 1, Category 2 or Category 3 offence, or industrial manslaughter, and no prosecution for the offence has been brought within 6 months of it occurring.

NT WorkSafe may not accept a request by a person if it has been more than 12 months since the alleged breach occurred.

If a request is made, then the person must ensure that the request is in writing and contains information about the alleged breach, and the grounds for the belief that the offence occurred.

In turn, NT WorkSafe must – within three (3) months of receiving a request for prosecution – give written notice to the person who made the request and any person alleged to be responsible for the offence advising whether a prosecution has been or will be brought, or give reasons why a prosecution will not be brought.

NT WorkSafe may also publish information via a written notice on the [NT WorkSafe website](#).

Referral and consent from the Director of Public Prosecutions

When considering a prosecution in respect of a death for a Category 1, Category 2 or Category 3 offence, or industrial manslaughter, NT WorkSafe is required to:

- seek the views of the DPP on the merits of a prosecution; and
- obtain consent from the DPP prior to commencing a prosecution.

Categories of offences

There are four categories of offences for failing to comply with a work health and safety duty under the Act.

Industrial manslaughter

The industrial manslaughter offence ([section 34B of the Act](#)) applies when a person intentionally breaches a work health and safety duty owed to a worker by engaging in negligent conduct which is responsible for the death of the worker.

The prosecution needs to prove that a person charged with this offence intentionally engages in reckless or negligent conduct that breached the health and safety duty and such conduct led to the death of an individual. If an individual is found guilty of this offence, they can be sentenced to imprisonment for life. If a body corporate is found guilty of this offence, a court can impose a penalty of up to 65,000 penalty units.

Category 1 offence

This category of offending ([section 31 of the Act](#)) involves reckless conduct that exposes an individual to a risk of death or serious injury or illness without reasonable excuse.

The prosecution will be required to prove that the charged person or business was reckless (awareness that a risk exists or will exist), in addition to proving the whole of the offence. The maximum penalties

which apply is imprisonment of 5 years or a monetary penalty ranging from \$300,000 to \$3,000,000 depending if the person charged is an individual, or a body corporate.

Category 2 and Category 3 offences

Category 2 ([section 32 of the Act](#)) and 3 ([section 33 of the Act](#)) offences are at a lower level than Category 1 offences as they do not involve recklessness.

The prosecution still need to prove the case however the level of proof required is lower than the higher offences.

Category 2 offences require proof that the failure to comply with the work health and safety duty exposed an individual to a risk of death or serious injury or illness.

Offences without this exposure element would be prosecuted as Category 3 offences. The charge would simply be that the person or business had a duty and failed to meet it.

Alternative offence

[Section 34D of the Act](#) allows the Court to find a person charged with industrial manslaughter guilty of an alternative offence, if the Court:

- is not satisfied beyond reasonable doubt that the person is guilty of industrial manslaughter; but
- is satisfied beyond a reasonable doubt that the person committed an alternative offence.

Note: An 'alternative offence' means a Category 1 or Category 2 offence.

Limitation periods for prosecutions

Strict timeframes, known as limitation periods, apply to the commencement of a prosecution. The purpose of adhering to these limitation periods is to balance the need of a duty holder (to have proceedings brought and resolved quickly) with the public interest in having a matter thoroughly investigated so that a sound case can be brought.

[Section 232\(1\) of the Act](#) sets out the limitation periods for when proceedings for an offence may be commenced. These are as follows:

- within 2 years after the offence first comes to the Regulator's attention;
- within 1 year after a finding in a coronial or other official inquiry that an offence has occurred;
- within 6 months of a contravention or withdrawal of an enforceable undertaking.

If fresh evidence relating to a Category 1 offence is discovered, then proceedings may be brought:

- at any time after the applicable limitation period in section 232(1) has ended; and
- the court is satisfied that the evidence could not reasonably have been discovered within the applicable limitation period.

Note: The limitation periods in section 232(1) do not apply in respect of industrial manslaughter.

Sentencing options

[Part 13, Division 2 of the Act](#) provides a range of sentencing options available to the Court for WHS offences. In addition to any monetary penalty or imprisonment imposed in relation to finding a person guilty of an offence, the Court may also make one or more orders, with or without recording a conviction, specifically:

- adverse publicity orders;
- orders for restoration;
- WHS project orders;
- court-ordered WHS undertakings;
- injunctions; and
- training orders.

In line with the DPP Guidelines, NT WorkSafe may make submissions on sentences to:

- inform the court of all relevant circumstances of the case;
- inform the court of any relevant authority or legislation relevant to the appropriate sentence;
- provide an appropriate level of assistance on the sentencing range; and
- assist the court to avoid appealable error on the issue of sentence.

Purposes of sentencing

The court may sentence an offender for the following reasons:

- to ensure that the offender is adequately punished for the offence;
- to deter the offender and other persons in the industry from committing similar offences;
- to protect the community from the offender;
- to promote the rehabilitation of the offender;
- to make the offender accountable for their actions;
- to condemn the conduct of the offender; and
- to recognise the harm done to the victim of the crime and the community.

Enforceable undertakings

Enforceable undertakings are legally binding agreements entered into as an alternative to prosecution for an alleged breach of the Act which is of a serious nature.

Under [section 216 of the Act](#), NT WorkSafe has discretion to accept an enforceable undertaking. If accepted, the person who proposed the undertaking is obliged to carry out the specific activities outlined in the enforceable undertaking.

NT WorkSafe has published [enforceable undertaking guidelines](#) on the [NT WorkSafe website](#).

Note: An enforceable undertaking is not available for an alleged Category 1 or industrial manslaughter offence.