Chapter ten: Investigations & prosecutions

Most of SafeWork SA’s compliance and enforcement work relates to the WHS Act.771 Accordingly, in this chapter I will focus on the investigation and prosecution of offences under the WHS Act. Of course SafeWork SA also conducts investigations and prosecutions in respect of offences arising under other legislation.

The investigation and prosecution functions were the focus of a number of submissions received during the course of this evaluation. In particular, I received submissions from families of victims affected by work health and safety incidents.772 I also received a submission from the Voice of Industrial Death, an organisation founded to support families impacted by a workplace death.773

Those submissions provided me with an understanding of the difficulties faced by family members of persons who have died or been injured at work; the impact that the investigation and prosecution process has in dealing with their trauma; and the manner in which SafeWork SA’s investigation policies and procedures have been applied in practice. I have had particular regard to those submissions in preparing this chapter of the report.

A number of those submissions made reference to particular incidents or events. As I have mentioned, it was not a function of my evaluation to conduct an investigation into the manner in which SafeWork SA has dealt with any particular matter.774 The focus of my evaluation was on the practices, policies and procedures of the regulatory arm of SafeWork SA and how those practices, policies and procedures address risks of corruption, misconduct or maladministration in public administration.

10.1 Overview of the investigation & prosecution functions

Under the WHS Act, prosecutions may be brought by the regulator or an inspector with the written authorisation of the regulator.775 Those proceedings generally need to be commenced within two years of the offence coming to the attention of the regulator.776 A longer time period may apply if fresh evidence is discovered; the offence has been identified following a coronial report, inquiry or inquest; or a WHS undertaking has been given in relation to the offence and that undertaking has been contravened or withdrawn.777

SafeWork SA’s investigators have the task of obtaining the evidence and providing a brief to the CSO, well prior to the expiry of the limitation period.778 A solicitor in the CSO reviews the brief and provides advice about the evidence and potential charges.

771: See, EXH 0212, p. 2.
772: EXH 0405; EXH 0402; EXH 0425; EXH 0395.
773: EXH 0396.
774: Chapter 1.
775: Work Health and Safety Act 2012 (SA) s 230(1).
778: EXH 0212, pp. 18-20.
Having considered the CSO's advice, SafeWork SA decides whether to commence a prosecution. The exercise of the prosecutorial discretion is guided by SafeWork SA's General Guidelines for Prosecutions. Those guidelines provide that the following factors will be considered in deciding whether to prosecute:

1. The existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of proceedings; and

2. A reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court (taking into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, the admissibility of any confession or other evidence, and any lines of defence available to the defendant); and

3. A public interest test which may include the following considerations:
   - The seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature
   - Any mitigating or aggravating circumstances
   - The characteristics of the duty holder—any special infirmities, prior compliance history and background
   - The age of the alleged offence
   - The degree of culpability of the alleged offender
   - Whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
   - The efficacy of any alternatives to prosecution
   - The prevalence of the alleged offence and the need for deterrence, both specific and general, and
   - Whether the alleged offence is of considerable public concern.

The maximum penalty for a Category 1 offence under the WHS Act for a PCBU or an officer of a PCBU is $600,000 or 5 years imprisonment or both. For an individual who is not a PCBU or an officer of a PCBU the maximum penalty is $300,000 or 5 years imprisonment or both. In the case of a body corporate, the maximum penalty is $3 million. Category 2 and 3 offences are not punishable by imprisonment.

Because of the severe penalties that may be imposed defendants often engage lawyers to represent them. It is not unusual for charges arising under the WHS Act to be fiercely contested.
10.2 Investigation Team

The Investigation Team predominantly conducts investigations into workplace fatalities and other critical events.\footnote{EXH 0212, p. 3.}

The National Compliance and Enforcement Policy provides that:

The following circumstances or allegations are priority areas for investigations:

- work-related fatalities and serious injuries or where there is a risk of such outcomes
- non-compliance with inspectors’ notices or directions
- offences against inspectors
- offences against health and safety representatives and matters relating to entry permit holders
- discrimination against workers on the basis of their work health and safety activities, and
- failure to notify incidents.\footnote{EXH 0554, p. 5.}

As part of an investigator’s functions the investigator usually attends workplaces following incidents\footnote{EXH 0212, p. 13; EXH 0209, p. 3.} to take witness statements, samples, photographs, videos or audio recordings and to obtain or seize documents, plant or material.\footnote{EXH 0212, pp. 6-7.} Investigators also prepare investigation plans and evidence matrices;\footnote{EXH 0212, pp. 5.} identify the need for expert evidence;\footnote{EXH 0212, pp. 6-7.} and liaise with police and staff from other government agencies.

Investigators do not attend all workplace incidents. Many are dealt with solely by inspectors.\footnote{EXH 0220, p. 2. EXH 0841, p. 8.]

Investigations conducted by SafeWork SA, particularly those under the WHS Act, can be complex because:

- The investigation of Category 1 and 2 offences under the WHS Act must focus on the exposure to risk and the action which should have been taken to eliminate or minimise that risk.\footnote{Work Health and Safety Act 2012 (SA) ss 31, 32.} Obtaining evidence to provide that a particular act or event has occurred alone is insufficient to satisfy the elements of those offences.
- It can be difficult to identify the appropriate defendant or defendants as multiple persons (and often multiple PCBUs) can have duties under the WHS Act in relation to a particular work site.\footnote{Work Health and Safety Act 2012 (SA) Part 2.}
- The investigations and prosecutions may involve highly technical matters which may require experts.\footnote{EXH 0842, pp. 3-4, 14, 25.}
10.2.1 STRUCTURE OF THE INVESTIGATION TEAM

In late 2017, SafeWork SA reviewed the structure of its Investigation Team. As a result of that review the Investigation Team was restructured. An organisational chart provided by SafeWork SA shortly after the commencement of this evaluation depicted 16 positions in the team. In response to my draft report, SafeWork SA advised there are now currently 17 positions. The current structure is shown on the following page.

Merit based selection processes were used for most of the positions in the restructured Investigation Team. Some of the existing members of the Investigation Team prior to the restructure remained in the team (albeit, in some cases, in different roles). Other staff from the former team have transitioned into roles as inspectors in an industry team. New staff have been recruited into the Investigation Team.

The new Investigation Team is responsible for improving the investigation and prosecution functions of SafeWork SA.

10.2.2 RELATIONSHIP WITH THE INSPECTORATE

In recent years a culture developed whereby the Investigation Team was segregated from the rest of the organisation.

Differing views about the required skills of investigators have adversely affected the relationship of the Investigation Team with the inspectorate. Current and former staff differed as to whether recruitments for investigator roles should seek out a person with investigation experience to be trained in work health and safety issues or whether a person with expertise in work health and safety issues should be recruited and trained to conduct investigations.

795: EXH 0842, p. 2. See also, Work Health and Safety Act 2012 (SA) s 182.
796: EXH 0842, pp. 2, 4.
797: EXH 0055.
798: EXH 0016.
799: See, Appendix A.
800: See, Appendix A.
801: EXH 0841, p. 9; EXH 0918.
802: EXH 0841, p. 9; EXH 0918.
803: EXH 0841, p. 9; EXH 0918.
804: EXH 0841, p. 9; EXH 0918.
805: EXH 0918.
806: EXH 0406; EXH 0918.
SAFEWORK SA’S ORGANISATIONAL CHART FOR THE INVESTIGATION TEAM

SAES1
DIRECTOR, INVESTIGATIONS

MAS3 MANAGER
INVESTIGATIONS

AS07 TEAM LEADER
AS07 TEAM LEADER

AS06 PRINCIPAL INVESTIGATOR
AS06 PRINCIPAL INVESTIGATOR

AS06 PRINCIPAL INVESTIGATOR
AS06 PRINCIPAL INVESTIGATOR

INVESTIGATOR TEAM
INVESTIGATOR TEAM

AS05
INVESTIGATION LIASION OFFICER

AS04
INVESTIGATION SUPPORT OFFICER

AS02
ADMINISTRATION OFFICER

LIASION OFFICERS
Many of the staff recruited to the Investigation Team following the recent restructure are former police officers. Some staff are concerned that persons with a policing background do not have the necessary understanding of work health and safety issues and fear that the continuing recruitment of such persons will only mean that previous mistakes will be repeated.

The implementation of an appropriate policy framework and a robust training program will assist in upskilling the recently appointed investigators. Experience in the role will also assist. It was suggested that ‘it takes three years until you know what you are doing [as an inspector].’ It must therefore take years to build up a comprehensive knowledge of work health and safety issues. Utilising the knowledge of both inspectors and investigators will achieve the best prosecution outcomes for the public. Investigators must rely upon the skills the inspectors have in work health and safety issues in order to ensure investigations are appropriate.

SafeWork SA must continue to develop a collaborative investigation approach which draws on the expertise of both inspectors and investigators. There are some signs that such collaboration is improving.

10.2.3 INVESTIGATORS’ DISCRETIONARY POWERS

Investigators are appointed inspectors under the WHS Act which enables them to exercise discretionary powers. They are subject to the same risks identified in Chapter 9.

I consider that those risks would be reduced by making some similar recommendations to those made in that chapter:

- That SafeWork SA requires investigators to keep an accurate and complete record of all of the statutory powers that the investigators have exercised (including by reference to the specific sections and sub-sections) and the reasons for exercising those powers. The record is to be stored electronically in a form which allows data to be easily extracted.

- That, at the commencement of an investigation, the investigator appointed to carry out the investigation be accompanied by an inspector on at least the first visit to the workplace.

- That SafeWork SA provides investigators with body worn cameras for use when attending workplaces.

In my view during an investigation an investigator should, as a general rule, attend with an inspector to help ensure that someone with an appropriate knowledge of work health and safety issues will be available to provide relevant knowledge and expertise. I understand that that may already occur in respect of many critical events.

808: EXH 0918.
809: EXH 0918.
810: See, Chapters 7 and 11.
811: EXH 0918.
812: EXH 0220, p. 2; EXH 0841, p. 7.
10.3 The Crown Solicitor’s Office (CSO) advice

In 2017 Special Counsel to the Crown Solicitor conducted a comprehensive review of the investigation and prosecution arrangements at SafeWork SA. The review resulted in the preparation of legal advice and a number of recommendations.

Prior to the review, there had been very few successful prosecutions resulting from investigations conducted by SafeWork SA. The following statistics were collated in 2017 as part of the CSO Advice.\(^{813}\)

<table>
<thead>
<tr>
<th></th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017(^{814})</th>
</tr>
</thead>
<tbody>
<tr>
<td>The number of investigations commenced</td>
<td>77</td>
<td>108</td>
<td>136</td>
<td>25</td>
</tr>
<tr>
<td>The number of prosecutions where guilty plea was entered</td>
<td>17</td>
<td>7</td>
<td>17</td>
<td>2</td>
</tr>
<tr>
<td>The number of prosecutions that proceeded to trial and resulting in a not-guilty verdict</td>
<td>1</td>
<td>1</td>
<td>Nil</td>
<td>Nil</td>
</tr>
<tr>
<td>The number of prosecutions that proceeded to trial and resulting in a guilty verdict</td>
<td>Nil</td>
<td>1</td>
<td>Nil</td>
<td>Nil</td>
</tr>
<tr>
<td>The number of prosecutions that did not proceed to trial (ie charges were withdrawn)</td>
<td>Nil</td>
<td>Nil</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>The number of Enforceable Undertakings agreed and charges withdrawn</td>
<td>Nil</td>
<td>3</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

\(^{813}\): EXH 0842, Appendix F, p. 87.
\(^{814}\): The statistics for 2017 were not for a full year.
A reduction in the number of successful prosecutions does not necessarily mean that the investigations have been conducted poorly. It may be a result of less workplace hazards and risks and therefore safer workplaces. However, a reduction in the number of successful prosecutions may indicate that the investigations have not been adequate.

I have been provided with a copy of the CSO Advice and I am satisfied that, historically, SafeWork SA has conducted investigations poorly.

In the course of preparing the CSO Advice, Special Counsel reviewed 27 of the CSO’s files relating to investigations conducted by SafeWork SA, some of which did not result in successful prosecutions.

The CSO Advice concluded that those tasked with investigations did not have the fundamental skills required to carry out the investigations effectively. The CSO Advice identified that SafeWork SA’s investigators had a poor understanding of:

- the elements of the offences under the WHS Act;
- the steps necessary for evidence to be admissible;
- the techniques to be used to obtain relevant information during interviews, and
- the appropriate engagement and instruction of experts.

The CSO Advice contained 18 recommendations which have been published and which were accepted by the government.

The Executive Director chairs a Steering Committee to oversee the implementation of the recommendations.

I have set out in Appendix 4 the recommendations in the CSO Advice and SafeWork SA’s initial response, together with the status of the implementation of each recommendation as at 21 September 2018.

Two of the recommendations are to be implemented by the CSO.

Approximately half of the remaining 16 recommendations have been fully implemented and implementation of the remainder is still in progress.

815: EXH 0842, pp. 5-6, 8.
816: EXH 0842, p. 6.
817: EXH 0842, pp. 6, 13, 15.
820: EXH 0842, EXH 0875, pp. 1-6, EXH 0876, p. 2.
821: EXH 0876, p. 2.
822: EXH 0842, Recommendations 11, 15.
823: See, Appendix 4.
10.3.1 CORONIAL INQUEST

SafeWork SA’s investigation practices were also recently considered in the course of a coronial inquest into the death of Jorge Alberto Castillo-Riffio.

Mr Castillo-Riffio died in November 2014 following an incident at his workplace. SafeWork SA investigated the incident and laid charges against three defendants alleging breaches of the WHS Act. All three defendants pleaded not guilty. One defendant entered into a WHS undertaking, which resulted in the prosecution proceedings against that defendant being discontinued. SafeWork SA did not tender any evidence against the other two defendants, resulting in the complaints being struck out.

On 1 November 2018, the State Coroner released his findings in respect of the inquest into the death of Mr Castillo-Riffio.

Because it was not a function of the evaluation to conduct a detailed review of the manner in which SafeWork SA has dealt with a particular incident, I only considered submissions about the workplace incident involving Mr Castillo-Riffio as an example of the application of SafeWork SA’s practices, policies and procedures. I did not traverse the same ground that was covered by the State Coroner. That was because the State Coroner was inquiring into the cause and circumstances of Mr Castillo-Riffio’s death, while I was evaluating the practices, policies and procedures of SafeWork SA in so far as they might impact upon issues of corruption, misconduct and maladministration in public administration.

The State Coroner was ‘not impressed by the SafeWork SA investigation as a whole’.

The State Coroner was critical of the manner in which experts were briefed.

The State Coroner found that SafeWork SA relied on SAPOL investigators to conduct the investigation for a six week period while a SafeWork SA investigator was on leave.

The State Coroner commented that ‘there is a need for a clear protocol between SAPOL and SafeWork SA under which SafeWork SA commits to working collaboratively with SAPOL to obtain the best possible evidence as to the cause and circumstances of the death of a person involved in an industrial accident’.

I agree that SafeWork SA would benefit from a protocol of that kind.

824: EXH 0930, [19.2].
825: EXH 0930, [19.2].
826: Work Health and Safety Act 2012 (SA) s 222(4); EXH 0930, [19.4].
827: EXH 0930, [19.5].
828: EXH 0930.
829: EXH 0930, [31.3].
830: EXH 0930, [31.2].
831: EXH 0930, [31.2].
832: EXH 0930, [33.13].
10.3.2 MY FURTHER OBSERVATIONS

In light of observations in the CSO Advice the recent findings of the State Coroner in respect of the inquest into the death of Mr Castillo-Riffo are unsurprising.833

I consider that the 16 recommendations identified in the CSO Advice which relate to the practices, policies and procedures of SafeWork SA are appropriate, particularly given the issues identified in that advice, some of which were also identified in the coronial inquest.

Counsel Assisting recommended, and I agree, that SafeWork SA should continue the process of implementing the recommendations in the CSO Advice until they have all been fully implemented.834 The effectiveness of the recommendations made in the CSO Advice is of course dependent upon the manner in which they are implemented. The recommendations must be fully implemented and rigorously applied so that SafeWork SA does not repeat the poor outcomes of the past.

‘...SafeWork SA should continue the process of implementing the recommendations in the CSO Advice until they have all been fully implemented.’

Given the comprehensive nature of the CSO Advice, it is not necessary for me to further examine the functions of the Investigation Team addressed in that advice. However, I will briefly address SafeWork SA’s use of its evidence storage facilities which was not the subject of a recommendation in the CSO Advice.

833: EXH 0930.
10.4 Evidence storage facilities

SafeWork SA’s Standard Operating Procedure: Evidence Management outlines the procedure for the storage of items in SafeWork SA’s evidence storage facilities.835

Small to medium size items are stored within an evidence storage facility located at SafeWork SA’s head office at Keswick (the evidence storage room).836

Large items, dangerous and hazardous substances and items affected by asbestos are transported to an evidence storage facility which is located within the Government Explosives Reserve.837

My evaluation team attended at both facilities.838

The Standard Operating Procedure: Evidence Management recognises the need to account for all dealings with all pieces of evidence from the time that a piece of evidence comes into SafeWork SA’s possession.839

At the time of my evaluation team’s visit to the evidence storage facility at the Government Explosives Reserve in July 2018, all items were clearly labelled; dealings with those items were recorded in triplicate; and access to the facility was controlled by the site manager. However, there was no access log recording who had entered and exited the facility and the time and date at which that had occurred.840 Such a log ought to exist.

SafeWork SA is in the process of improving its evidence management practices:

- All items in the evidence storage room will be appropriately labelled.841
- All dealings with those items are recorded in triplicate in an evidence log stored in the evidence storage room.842
- Swipe card access to the evidence storage room is now restricted to a small number of staff.843
- Members of OLST will conduct quarterly audits of the evidence storage room.844
- A new policy relating to the storage of evidence has been drafted and will soon be the subject of consultation.845
- The staff undertaking the CSU training846 will be provided training about the fundamental principles of evidence management.847

835: EXH 0209.
836: EXH 0209, p. 6.
837: EXH 0209, p. 6.
838: My evaluation team viewed the evidence storage facility at the Government Explosives Reserve on 9 July 2018 and the evidence storage facility at SafeWork SA’s head office on 10 October 2018.
839: EXH 0209, pp. 4, 7.
840: EXH 0918.
841: EXH 0878.
842: EXH 0878.
843: EXH 0878.
844: EXH 0878.
845: EXH 0878.
846: CSU training is defined in Appendix 1 and is discussed in Chapter 11.
847: EXH 0547, p. 16.
The management of evidence in regional offices is still deficient. The *Standard Operating Procedure: Evidence Management* provides:

“The Manager [sic] Primary Industries, Resources, Country Compliance and Engineering Team (PIRCCE) is responsible for ensuring each regional office has a suitable area set aside for the storage of evidence. The areas selected must be secure, have controlled access, and hold a SafeWork SA Evidence [sic] Management Receipt Book.

Regional Inspectors shall discuss with their manager alternative storage arrangements for evidence that is too large or hazardous to be stored in a regional office.”  

I am not sure that SafeWork SA is complying with its own standard operating procedure.

At the time of my visit to SafeWork SA’s office in Mt Gambier there was no secure location for the storage of evidence.

Similar problems may also exist in other regional offices.

I recommend that SafeWork SA review its evidence management practices in its regional offices with a view to ensuring that:

- all offices have an evidence storage facility which is secure
- access to each evidence storage facility is restricted, and
- all dealings with evidence stored in the facility are documented in accordance with the standard operating procedure.

The facilities need not be large but must be secure.

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848: EXH 0209, p. 6 (Emphasis omitted).
849: EXH 0918.
10.5 Recommendations

**RECOMMENDATION 24**
That SafeWork SA continues to develop a collaborative investigation approach which allows investigators to draw on the expertise of inspectors.

**RECOMMENDATION 25**
That SafeWork SA requires investigators to keep an accurate and complete record of all of the statutory powers that the investigators have exercised (including by reference to the specific sections and sub-sections) and the reasons for exercising those powers. The record is to be stored electronically in a form which allows data to be easily extracted.

**RECOMMENDATION 26**
That SafeWork SA puts in place a process or procedure whereby at the commencement of an investigation the investigator appointed to carry out the investigation be accompanied by an inspector on at least the first visit to the workplace.

**RECOMMENDATION 27**
That SafeWork SA provides investigators with body worn cameras for use when attending workplaces.

**RECOMMENDATION 28**
That SafeWork SA implements the 16 recommendations contained in the CSO Advice applicable to SafeWork SA’s practices, policies and procedures, to the extent that those recommendations have not already been implemented.

**RECOMMENDATION 29**
That SafeWork SA reviews its evidence management practices in its regional offices with a view to ensuring that:

- all offices have an evidence storage facility which is secure
- access to each evidence storage facility is restricted, and
- all dealings with evidence stored in the facility are documented in accordance with the standard operating procedure.