

**PARLIAMENTARY INQUIRY INTO THE WORK HEALTH AND
SAFETY AMENDMENT (REVIEW) BILL 2019**

**QUESTIONS ON NOTICE – Response from Better Regulation
Division, Department of Customer Service**

QON 1 – REVIEW OF CASES

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The Hon. ANTHONY D'ADAM: Have you, in considering this proposal, looked back at the cases that were not proceeded with to make an assessment of whether they would have proceeded under the new proposal?

ANSWER:

SafeWork NSW has not sought any formal legal advice as to whether the revised version of the Category 1 offence proposed in the *Work Health and Safety Amendment (Review) Bill 2019* would have enabled the regulator to commence a Category 1 prosecution, in a matter where no such prosecution was previously bought.

QON 2 - DATA

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The Hon. TAYLOR MARTIN: Just on that point, would you happen to have any data around prosecutions that you could provide to the Committee?

Ms WEBB: Apart from those numbers that I read out?

The Hon. TAYLOR MARTIN: Yes

Ms WEBB: About what they are? What sort of cases, and things like that?

The Hon. TAYLOR MARTIN: Which particular charges.

Ms WEBB: Yes, absolutely.

The Hon. TAYLOR MARTIN: Thank you. Over the medium term—five years or so.

Ms WEBB: Okay. And outcomes, or something?

The Hon. TREVOR KHAN: Yes.

...

Ms WEBB: First of all, I do not accept the proposition that the number of prosecutions has declined over time.

The Hon. ADAM SEARLE: You will provide us with the stats.

Ms WEBB: I have figures in front of me going back five years. It is 33, 50, 36, 48 and 61. As I have said, we have done 30—

The Hon. TREVOR KHAN: That is matters?

Ms WEBB: Matters that we have prosecuted.

The Hon. TREVOR KHAN: Do you have charges?

Ms WEBB: Sometimes they are more because we might double up on some of the same matters. I can give you that data. I just wanted to put on record that I do not accept the proposition that the number of prosecutions has declined. In terms of the structural arrangement, WorkCover split into the State Insurance Regulatory Authority [SIRA] and SafeWork NSW. SafeWork NSW is part of the department and SIRA is an independent regulatory authority because it regulates insurance agencies and has a board. The secretary is the regulator but all her powers and functions under the Work Health and Safety Act are delegated down to SafeWork NSW inspectors. We still have a rigorous process where someone comes in and does quite a lot of training to be appointed as a SafeWork NSW inspector. People are clearly appointed as a SafeWork NSW inspector and their only duty is to work under the Work Health and Safety Act. They do not have any other functions. That is the only regulatory function they have.

ANSWER:

The following table contains data on prosecutions for all matters under the *Work Health and Safety Act 2011* for the previous five years.

DATA ON PROSECUTIONS FOR ALL MATTERS UNDER THE *WORK HEALTH AND SAFETY ACT 2011* GOING BACK 5 YEARS

Financial Year Ending	No. of matters	No. of defendants	No. of charges	Enforceable Undertakings
FY ENDING 2015				
Commenced	33	64	80	
Successful	67	88	97	5
FY ENDING 2016				
Commenced	50	72	82	
Successful	33	45	55	12
FY ENDING 2017				
Commenced	36	55	62	
Successful	29	32	33	10
FY ENDING 2018				
Commenced	48	87	130	
Successful	36	50	59	7
FY ENDING 2019				
Commenced	61	102	134	
Successful	31	41	59	5
FY ENDING 2020 – FIGURES ONLY COVER FIRST HALF OF YEAR 1 JULY 2019 TO 31 DECEMBER 2019				
Commenced	39	71	91	
Successful	39	43	56	8

We note the following:

- “Successful outcome” means a conviction before the courts.
- These figures reflect prosecutions commenced and successful outcomes in a particular financial year. However, the figures in a single financial year do not necessarily relate to the same prosecutions due to the time taken for matters to proceed through court processes.

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The Hon. ADAM SEARLE: Maybe I could put it this way: Can you give us the number of prosecutions by year for workplace fatalities since, say, 2012, and what penalties have attached to each of those outcomes? And can you give us the same statistics for, say, the five years before 2012—how many prosecutions involving workplace deaths and what were the penalties imposed for those?

...

Ms WEBB: Yes, so perhaps in the data that we have already agreed to provide, we can pull out, particularly, the cases that relate to a fatality.

The Hon. ADAM SEARLE: Yes, that would be useful.

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The Hon. NATALIE WARD: Can I just be clear on the data that you are providing on notice? That is all prosecutions, not just on workplace deaths?

Ms WEBB: Yes, we will do all prosecutions, but we will highlight how many of those were fatality related ones and the penalty outcome. Is there a time frame that you need it?

The Hon. TREVOR KHAN: As soon as possible, I think.

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Ms WEBB: Yes, that is true. And I do not think we will change our approach of always looking to every person who might be culpable and then thinking about the appropriateness of what charge we took against the person, depending on what the fact scenario was as to who was the most culpable. That would include who was responsible for the system of work, as opposed to people who might have been there at the time that something happened. I think that is our approach and this provision will not change that overall approach. We are certainly increasing our number of prosecutions. I do not think there is any indication that we are prosecuting workers at a rate that we are not prosecuting employers. But we will give you some data about those prosecutions. I do not think I can say much more in terms of our actual practice on the ground. Anything else is really a policy issue for the Government to determine.

ANSWER:

The following tables (attached) contain data on prosecutions in relation to fatality matters commenced:

- in the last five years before repeal of the *Occupational Health and Safety Act 2000* (Tab A)
- since commencement of the *Work Health and Safety Act 2011* (Tab B).

In relation to this data, it is noted that prior to the introduction of the national model work health and safety legislation in 2012, NSW legislation placed a 'reverse onus of proof' on the defendant to prove they had a reasonable excuse not to comply with the provision of the Act or the Regulations. This was a feature of the former *Occupational Health and Safety Act 2000* (OHS Act) which was repealed on 31 December 2011. Up until June 2011, the OHS Act also allowed for officers of corporations to be convicted on the basis of a successful conviction brought against the corporation.

Since 1 January 2012, the onus is on SafeWork NSW to prove, beyond reasonable doubt, that the PCBU did not do what was 'reasonably practicable' to ensure the health and safety

of a person. Similarly, the onus is on SafeWork NSW to prove, beyond reasonable doubt, that officers did not exercise due diligence in ensuring the PCBU complies with its work health and safety obligations.

QON 3 – SIZE OF LEGAL TEAM

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The Hon. ADAM SEARLE: So the legal section is no longer separate? There is no longer a dedicated legal function?

Ms WEBB: There are dedicated lawyers.

Ms SNELL: There is a dedicated team of lawyers within the larger legal team that services the whole department. There is quite a substantive group of lawyers that came across.

Ms WEBB: Ms Snell looks after both—

The Hon. TREVOR KHAN: How many of them are there—including yourself, I take it? Is that right?

Ms SNELL: Yes. I have to take that on notice, but I think there is about 40.

Ms WEBB: Not just dedicated to SafeWork NSW?

Ms SNELL: No, 40 staff. **Ms WEBB:** Forty lawyers, but they do Fair Trading prosecutions.

Ms SNELL: No, this is separate.

The Hon. ADAM SEARLE: We are interested in the SafeWork NSW function.

Ms SNELL: They support SIRA as well.

ANSWER:

The Legal team that is funded from the Workers Compensation Operational Fund, which provides support to SafeWork NSW currently consists of 37 staff including lawyers, paralegals, administrative staff and the Family Liaison Coordinator.

QON 4 – BUDGET

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The Hon. ADAM SEARLE: Again, if you could take this on notice, we would like to know over the past four years what the budget has been to support what we will call SafeWork NSW functions—that is, the inspectors, the legal advising's and the prosecutions, but only for work health and safety matters. Ms WEBB: Yes, that is okay.

ANSWER:

The following table contains information on the recurrent budget allocated to the WorkCover Work Health and Safety Division in 2014/15 and 2015/16 and to SafeWork NSW in 2016/17 to 2018/19:

RECURRENT BUDGET OVERVIEW	2015/16 \$'000 (2mth only) WorkCover WHSD	2015/16 \$'000 (10mth only) SafeWork NSW	2016/17 \$'000 SafeWork NSW	2017/18 \$'000 SafeWork NSW	2018/19 \$'000 SafeWork NSW
Budgeted Expenses	\$161,420 total		\$150,896 ((\$144,146 exclusive of carry over)	\$157,706 ((\$154,801 exclusive of carry over)	\$158,733
	\$15,034	\$146,386			
Actual Expenses	\$14,074	\$124,891	\$136,677	\$151,560	\$174,641

- There was a significant increase in the 2015/16 budget following the establishment of SafeWork, SIRA and icare as separate organisations with each being funded to incur Shared Services and Corporate expenses.
- In 2018/19, a negative variance (overspend) of \$15.9m in actual expenditure to budget allocated was due to an adjustment for corporate matters, including long-service leave, IT services and office fit out costs.

QON 5 – WORKERS COMPENSTION LEVY

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The Hon. ADAM SEARLE: You said it is separately funded. It used to be that the premiums on workers compensation payments by employers were put into a pool. There was a levy on the pool. The levy would finance WorkCover, as it then was, then SafeWork NSW and now the Workers Compensation Commission.

...

The Hon. ADAM SEARLE: In a legal sense, who sets the levy that sets the amount of resources from year to year?

Ms WEBB: I think we would have to take that on notice.

The Hon. ADAM SEARLE: That is fine.

ANSWER:

The Workers Compensation Operational Fund (WCOF) is administered by SIRA and is funded from:

- a contribution from the Workers Compensation Insurance Fund (which is managed by the nominal insurer, for whom icare act) (represents 83 percent of the WCOF). This contribution is approved by the Minister annually.
- contributions by specialised insurers and non-government self-insurers (represents 14 percent of WCOF). These contributions are determined by SIRA in line with legislation as a percentage of their premium income or deemed premium income; and
- other revenue (represents 3 percent of WCOF).

SafeWork NSW annually estimate their projected expenditure for the coming financial year and submit to both the Department of Customer Service and SIRA in the form of a budget submission.

This estimate (along with estimates from SIRA, Workers Compensation Commission, Workers Compensation Independent Review Officer & Independent Legal Assistance and Review Service) form the basis of an annual WCOF budget and is approved by the SIRA Board.

**TAB A – DATA ON PROSECUTIONS FOR FATALITY MATTERS UNDER THE
OCCUPATIONAL HEALTH AND SAFETY ACT 2000**

CHARGES COMMENCED IN THE FINANCIAL YEAR (FY)				OUTCOMES OF THE CHARGES COMMENCED (NOTE OUTCOME MAY HAVE BEEN IN A LATER FY)				
No. of matters commenced	No. of defendants commenced against	No. of charges commenced	Details of charges commenced +	No. of successful charges (resulting in a conviction)	No. of unsuccessful charges (resulting in a not guilty verdict)	No of charges withdrawn *	No of charges still awaiting outcome	Fine amounts imposed (NB Some matters involved an appeal in which case the final appeal outcome is reflected in the table)
FY ENDING 2008								
15	Company/Govt: 24 Individual: 12 Total: 36	41	- 8(1): 22 - 8(2): 12 - 10(1): 2 - 10(2): 2 - 11(1)(a): 2 - 11(1)(b): 1	32	1	8*	0	Fine range: \$0 to \$50,000: 10 \$50,001 to \$100,000: 9 \$100,001 to \$150,000: 9 \$150,001 to \$200,000: 3 \$200,001 to \$250,000: 1 \$250,001 to \$300,000: 0 \$300,001 to \$400,000: 0 \$400,001 to \$500,000: 0 Greater than \$500,001: 0
FY ENDING 2009								
18	Company/Govt: 21 Individual: 16 Total: 37	45	- 8(1): 23 - 8(2): 15 - 10(1): 6 - 10(2): 1	29	0	16*	0	Fine range: \$0 to \$50,000: 8 \$50,001 to \$100,000: 14 \$100,001 to \$150,000: 2 \$150,001 to \$200,000: 1 \$200,000 to \$250,000: 2 \$250,001 to \$300,000: 2 \$300,001 to \$400,000: 0 \$400,001 to \$500,000: 0 Greater than \$500,001: 0
FY ENDING 2010								
15	Company/Govt: 17 Individual: 20 Total: 37	42	- 8(1): 24 - 8(2): 13 - 10(1): 5	29	0	13*	0	Fine range: \$0 to \$50,000: 15 \$50,001 to \$100,000: 5 \$100,001 to \$150,000: 5 \$150,001 to \$200,000: 4 \$200,001 to \$250,000: 0

QUESTION ON NOTICE - INQUIRY INTO THE WORK HEALTH AND SAFETY AMENDMENT (REVIEW) BILL 2019

CHARGES COMMENCED IN THE FINANCIAL YEAR (FY)				OUTCOMES OF THE CHARGES COMMENCED (NOTE OUTCOME MAY HAVE BEEN IN A LATER FY)				
No. of matters commenced	No. of defendants commenced against	No. of charges commenced	Details of charges commenced +	No. of successful charges (resulting in a conviction)	No. of unsuccessful charges (resulting in a not guilty verdict)	No of charges withdrawn *	No of charges still awaiting outcome	Fine amounts imposed (NB Some matters involved an appeal in which case the final appeal outcome is reflected in the table)
								\$250,001 to \$300,000: 0 \$300,001 to \$400,000: 0 \$400,001 to \$500,000: 0 Greater than \$500,001:0
FY ENDING 2011								
24	Company/Govt: 31 Individual: 19 Total: 50	58	- 8(1): 18 - 8(2): 36 - 9: 1 - 10(1): 3	42	4	12*	0	Fine range: \$0 to \$50,000: 14 \$50,001 to \$100,000: 8 \$100,001 to \$150,000: 7 \$150,001 to \$200,000: 6 \$200,001 to \$250,000: 5 \$250,001 to \$300,000: 1 \$300,001 to \$400,000: 1 \$400,001 to \$500,000: 0 Greater than \$500,001:0
FY ENDING 2012								
14	Company/Govt: 14 Individual: 11 Total: 25	29	- 8(1): 18 - 8(2): 5 - 10(2): 2 - 11(1)(a): 2 - 11(1)(b): 2	17	0	12*	0	Fine range: \$0 to \$50,000: 5 \$50,001 to \$100,000: 6 \$100,001 to \$150,000: 3 \$150,001 to \$200,000: 0 \$200,001 to \$250,000: 1 \$250,001 to \$300,000: 0 \$300,001 to \$400,000: 1 \$400,001 to \$500,000: 0 Greater than \$500,001:0 *One charge resulted in a conviction with no penalty

+ NOTE: Some charges referred to in this column may have proceeded against a director/officer of a corporation pursuant to the liability provision for those officers in s. 26 of the *Occupational Health and Safety Act 2000*.

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The section numbers referred to in this column relate to the following offences:

- S. 8(1): Failure of an employer to ensure the health, safety and welfare at work of its employees
- S. 8(2): Failure of an employer to ensure that people, other than its employees, are not exposed to risks to their health and safety arising from the conduct of its undertaking while they are at its place of work.
- S. 9: Failure of a self employed person to ensure that people other than his/her employees are not exposed to risks to their health and safety arising from the conduct of his/her undertaking while they are at his/her place of work.
- S. 10(1): Failure of a person who has control of premises used by people as a place of work to ensure that the premises are safe and without risks to health.
- S. 10(2): Failure of a person who has control of any plant or substance used by people at work to ensure that the plant or substance is safe and without risks to health when properly used.
- S. 11(1)(a): Failure of a person who designs, manufactures or supplies any plant or substance for use by people at work to ensure that the plant or substance is safe .and without risks to health when properly used
- S. 11(1)(b): Failure of a person who designs, manufactures or supplies any plant or substance for use by people at work to ensure provide adequate information about the plant or substance to the persons to whom it is supplied to ensure its safe use.

* NOTE: Charges can be withdrawn for a variety of reasons including:

- As part of plea negotiations whereby pleas are accepted to other charges
- Where the relevant defendant is a corporation, the corporation goes into liquidation
- A decision is made that it is not in the public interest to proceed with a prosecution
- A decision is made that there are not reasonable prospects of securing a conviction

**TAB B – DATA ON PROSECUTIONS FOR FATALITY MATTERS UNDER THE
WORK HEALTH AND SAFETY ACT 2011**

CHARGES COMMENCED IN THE FINANCIAL YEAR (FY)				OUTCOMES OF THE CHARGES COMMENCED (NOTE OUTCOME MAY HAVE OCCURED IN A LATER FY)				
No. of matters commenced	No. of defendants commenced against	No. of charges commenced	Details of charges commenced +	No. of successful charges (resulting in a conviction)	No. of unsuccessful charges (resulting in a not guilty verdict)	No of charges withdrawn *	No of charges still awaiting outcome	Fine amounts imposed (NB Some matters involved an appeal in which case the final appeal outcome is reflected in the table)
FY ENDING 2012 – NO FATALITY MATTERS COMMENCED UNDER WHS ACT IN THIS FIN YEAR – NOTE WHS ACT COMMENCED 1 JAN 2012								
FY ENDING 2013 – NO FATALITY MATTERS COMMENCED UNDER WHS ACT IN THIS FIN YEAR – NOTE WHS ACT COMMENCED 1 JAN 2012								
FY ENDING 2014								
13	Company/Govt: 16 Individual: 10 Total: 26	27	S. 32/19(1): 12 S. 32/19(2): 4 S. 32/27(1): 9 S. 32/28: 1 S. 32/29: 1	16	3	8*	0	Fine range: \$0 to \$50,000: 2 \$50,001 to \$100,000: 6 \$100,001 to \$150,000: 2 \$150,001 to \$200,000: 0 \$200,001 to \$250,000: 2 \$250,001 to \$300,000: 1 \$300,001 to \$400,000: 1 \$400,001 to \$500,000: 2 Greater than \$500,001: 0
FY ENDING 2015								
8	Company/Govt: 14 Individual: 0 Total: 14	14	S. 32/19(1): 13 S. 32/20(2): 1	7	1	6*	0	Fine range: \$0 to \$50,000: 0 \$50,001 to \$100,000: 1 \$100,001 to \$150,000: 1 \$150,001 to \$200,000: 1 \$200,001 to \$250,000: 2 \$250,001 to \$300,000: 0 \$300,001 to \$400,000: 0 \$400,001 to \$500,000: 0 Greater than \$500,001: 1 NOTE: 1 matter resulted in a conviction with no penalty
FY ENDING 2016								
5	Company/Govt: 4 Individual: 1	5	S. 32/19(1): 5	4	0	1*	0	Fine range: \$0 to \$50,000: 0

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CHARGES COMMENCED IN THE FINANCIAL YEAR (FY)				OUTCOMES OF THE CHARGES COMMENCED (NOTE OUTCOME MAY HAVE OCCURED IN A LATER FY)				
No. of matters commenced	No. of defendants commenced against	No. of charges commenced	Details of charges commenced +	No. of successful charges (resulting in a conviction)	No. of unsuccessful charges (resulting in a not guilty verdict)	No of charges withdrawn *	No of charges still awaiting outcome	Fine amounts imposed (NB Some matters involved an appeal in which case the final appeal outcome is reflected in the table)
	Total: 5							\$50,001 to \$100,000: 2 \$100,001 to \$150,000: 0 \$150,001 to \$200,000: 1 \$200,001 to \$250,000: 0 \$250,001 to \$300,000: 1 \$300,001 to \$400,000: 0 \$400,001 to \$500,000: 0 Greater than \$500,001: 0
FY ENDING 2017								
9	Company/Govt: 11 Individual: 2 Total: 13	14	S. 32/19(1): 8 S. 32/19(2): 4 S. 32/27(1): 1 S. 32/28: 1	10	1	3*	0	Fine range: \$0 to \$50,000: 0 \$50,001 to \$100,000: 4 \$100,001 to \$150,000: 0 \$150,001 to \$200,000: 1 \$200,001 to \$250,000: 2 \$250,001 to \$300,000: 1 \$300,001 to \$400,000: 1 \$400,001 to \$500,000: 1 Greater than \$500,001: 0
FY ENDING 2018								
9	Company/Govt: 12 Individual: 5 Total: 17	21	S. 32/19(1): 12 S. 32/19(2): 1 S. 32/27(1): 4 S. 33/19(1): 4	6	0	10*	5	Fine range: \$0 to \$50,000: 1 \$50,001 to \$100,000: 3 \$100,001 to \$150,000: 0 \$150,001 to \$200,000: 1 \$200,001 to \$250,000: 0 \$250,001 to \$300,000: 0 \$300,001 to \$400,000: 1 \$400,001 to \$500,000: 1 Greater than \$500,001: 0

QUESTION ON NOTICE - INQUIRY INTO THE WORK HEALTH AND SAFETY AMENDMENT (REVIEW) BILL 2019

CHARGES COMMENCED IN THE FINANCIAL YEAR (FY)				OUTCOMES OF THE CHARGES COMMENCED (NOTE OUTCOME MAY HAVE OCCURED IN A LATER FY)				
No. of matters commenced	No. of defendants commenced against	No. of charges commenced	Details of charges commenced +	No. of successful charges (resulting in a conviction)	No. of unsuccessful charges (resulting in a not guilty verdict)	No of charges withdrawn *	No of charges still awaiting outcome	Fine amounts imposed (NB Some matters involved an appeal in which case the final appeal outcome is reflected in the table)
FY ENDING 2019								
12	Company/Govt: 16 Individual: 6 Total: 22	22	S. 32/19(1): 14 S. 32/19(2): 4 S. 32/27(1): 2 S. 32/28: 2	4	0	5*	13	Fine range: \$0 to \$50,000: 2 \$50,001 to \$100,000: 1 \$100,001 to \$150,000: 0 \$150,001 to \$200,000: 0 \$200,001 to \$250,000: 0 \$250,001 to \$300,000: 1 \$300,001 to \$400,000: 0 \$400,001 to \$500,000: 0 Greater than \$500,001: 0
FY ENDING 2020 – FIGURES ONLY COVER FIRST HALF OF YEAR 1 JULY 2019 to 31 DECEMBER 2019								
9	Company/Govt: 12 Individual: 4 Total: 16	20	S. 32/19(1): 9 S. 32/19(2): 5 S. 32/27(1): 4 S. 33/27(1): 1 S. 38(1): 1	1	0	1*	18	Fine range: \$0 to \$50,000: 1 \$50,001 to \$100,000: 0 \$100,001 to \$150,000: 0 \$150,001 to \$200,000: 0 \$200,001 to \$250,000: 0 \$250,001 to \$300,000: 0 \$300,001 to \$400,000: 0 \$400,001 to \$500,000: 0 Greater than \$500,001: 0

+ NOTE: The section numbers referred to in the “Details of charges commenced column” relate to the following offences:

- S. 32/19(1) - Failure to ensure, so far as is reasonably practicable, the health and safety of workers – Category 2
- S. 32/19(2) - Failure to ensure, so far as is reasonably practicable, the health and safety of persons other than workers – Category 2
- S. 32/20(2) – A person with management or control of a workplace fails to ensure, so far as is reasonably practicable, that the workplace is without risks to the health and safety of any person.
- S. 32/27(1) - Failure to exercise due diligence to ensure a company complied with its duty under section 19(1) of the Act – Category 2
- S. 32/28 - A worker has a health and safety duty, and fails to comply with that duty – Category 2
- S. 32/29 – A person other than a worker has a health and safety duty, and fails to comply with that duty – Category 2

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- S. 33/19(1) - Failure to ensure, so far as is reasonably practicable, the health and safety of workers – Category 3
- S. 33/27(1) - Failure to exercise due diligence to ensure a company complied with its duty under section 19(1) of the Act – Category 3
- S. 38(1) – Failure to notify of notifiable incident

* NOTE: Charges can be withdrawn for a variety of reasons including:

- The regulator accepts an enforceable undertaking from the defendant in lieu of proceeding with a prosecution
- As part of plea negotiations whereby pleas are accepted to other charges
- Where the relevant defendant is a corporation, the corporation goes into liquidation
- A decision is made that it is not in the public interest to proceed with a prosecution
- A decision is made that there are not reasonable prospects of securing a conviction.