
ANSWERS TO QUESTIONS ON NOTICE

To Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody NSW

From Adjunct Professor George Newhouse, Director, National Justice Project ('NJP')

Date 17 November 2020

This memorandum is a response to the below request taken on notice in the Select Committee meeting on Monday 26 October 2020.

Adjunct Professor NEWHOUSE: *I gave some evidence earlier about the power of the DPP and SafeWork NSW to investigate, and in particular whether the Attorney General could refer matters. Do you mind if I clarify that?*¹

The CHAIR: *Please take that on notice and come back to us. That will be fine.*²

As such, this memorandum will answer the following questions:

1. What is the NSW Attorney General's power to engage with the Director of Public Prosecutions ('DPP')? and
2. Is the Attorney General empowered to institute proceedings through SafeWork NSW?

By way of context, these inquiries are potential pathways to institute proceedings for Mr David Dungay Jr's death in custody.

ACKNOWLEDGEMENT OF COUNTRY

The NJP pays its respects to First Nations Traditional Owners and Elders, past and present, and extends that respect to all First Nations peoples. The NJP acknowledges the diversity of First Nations cultures and communities and recognises First Nations peoples as the traditional owners and ongoing custodians of the land on which this memorandum was written.

1. Attorney General – Power to engage with the DPP

¹ Select Committee, High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, *UNCORRECTED Transcript of Proceedings at Macquarie Room, Parliament House, Sydney, on Monday 26 October 2020*, at page 69.

² Ibid.

As there have been no charges or convictions made to any party in the Dungay matter, the Attorney General's role remains quite limited. There is a statutory power for the Attorney General to issue proceedings, however, there is little case law to suggest that this power has been exercised in recent times.

There are three potential pathways, each of which are explored further below:

- A. The NSW Attorney General engages their power to find a bill of indictment and initiate proceedings; or
- B. The NSW Attorney General consults with the DPP,³ with the aim that the DPP institute their function to commence proceedings; or, if these fail,
- C. The NSW Attorney General issue directions as to the performance of the DPP's functions (but not in relation to a specific case).

A. Attorney General engages their own power to initiate Proceedings

The *Director of Public Prosecutions Act 1986* (NSW) ('DPP Act') outlines the prosecutorial functions of the Attorney General and the circumstances in which they can be exercised (notably in finding a bill of indictment).

Section 7 of the DPP Act suggests that the Attorney General may detail charges to be laid and commence proceedings in their own right, as it has the same functions as the DPP (referred to in the DPP Act as 'the Director') in relation to finding a bill of indictment.

Section 7 states [emphasis added]:⁴

- (2) The Director has the same functions as the Attorney General in relation to:
 - (c) finding a bill of indictment in respect of an indictable offence, in circumstances where the **person concerned has not been committed for trial**.

In addition, in the event that the DPP makes a determination that there is no bill of indictment found, the DPP can request the Attorney General to exercise their corresponding functions under section 7(2)(c) of the DPP Act and find a bill of indictment.

³ *Director of Public Prosecutions Act 1986* (NSW) s 25(1).

⁴ *Ibid* s 7(2).

Section 29⁵ states [emphasis added]:

If the Director considers it desirable in the interests of justice that the Director should not exercise certain functions in relation to a particular case, the Director may request the Attorney General to exercise the **Attorney General's corresponding functions**.

Further, when the above is read in conjunction with the *Criminal Procedure Act 1986* (NSW),⁶ proceedings can be instituted in the Attorney General's name after finding a bill of indictment.

Section 8 states:⁷

(1) All offences shall be punishable by information (to be called an indictment) in the Supreme Court or the District Court, on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions.

(2) Such an indictment may be presented or filed whether or not the person to whom the indictment relates has been committed for trial in respect of an offence specified in the indictment.

Section 9 states:⁸

Any prosecution or proceedings instituted by the Attorney General or the Director of Public Prosecutions in respect of any offence (whether an indictable offence or a summary offence) may be instituted in either the official name or the personal name of the Attorney General or the Director of Public Prosecutions.

B. Attorney General requests consultation with the DPP

The DPP Act empowers the Attorney General to request consultation with the DPP.

⁵ Ibid s 29.

⁶ *Criminal Procedure Act 1986* (NSW).

⁷ Ibid.

⁸ Ibid s 9.

Section 25 states:⁹

- (1) The Director shall, if requested to do so by the Attorney General, consult with the Attorney General with respect to matters concerning the exercise of the Director's functions.

With regard to section 25, the Attorney General may consult with the DPP specifically on the Dungay matter. The DPP may then 'recommend to any other person who conducts investigations in relation to offences, or institutes or conducts prosecutions for offences that proceedings be instituted in respect of any offence'¹⁰ and 'after consultation with the Attorney General, furnish guidelines to the Commissioner of Police or any such person with respect to the prosecution of indictable offences or prescribed summary offences'.¹¹

This may provide an opportunity for the DPP to charge the guards with offences relating to David Dungay Jr's death.

Further, this may provide an opportunity for the DPP to engage with SafeWork NSW and recommend proceedings under the *Work Health and Safety Act 2011* (NSW) ('*WHS Act*').

Section 14 states:¹²

- (1) The Director may recommend to:
 - (a) the Commissioner of Police, or
 - (b) any other person who:
 - (i) conducts investigations in relation to offences, or
 - (ii) institutes or conducts prosecutions for offences,that proceedings be instituted in respect of any offence.

C. The Attorney General may issue Guidelines to the DPP

⁹ *Director of Public Prosecutions Act 1986* (NSW) s 25(1).

¹⁰ *Ibid* s 14(1).

¹¹ *Ibid* s 14(2).

¹² *Ibid* s 14.

The DPP is subject to the guidelines of the Attorney General. The Attorney General may issue directions as to the performance of the Director's functions, specifically 'circumstances in which the Director should institute or carry on prosecutions for offences'.¹³

Section 26 states [emphasis added]:¹⁴

(1) In the exercise of the Director's functions, the Director is subject to such guidelines as the Attorney General, after consultation with the Director, furnishes to the Director by order in writing.

(2) Without limiting the generality of subsection (1), ***guidelines may relate to the circumstances in which the Director should institute or carry on prosecutions for offences.***

NOTE:

(3) **A guideline may not be furnished in relation to a particular case.**

Current guidelines are set out on the ODPP website and in our view seemingly give the DPP sufficient power and discretion to lay charges in the Dungay matter if they saw fit:

The guidelines are attached to this memorandum for your reference:

- <https://www.odpp.nsw.gov.au/sites/default/files/prosecution-guidelines.pdf>

2. Attorney General – Prosecution Pathways via SafeWork NSW

¹³ Ibid s 26 (2).

¹⁴ Ibid s 26.

For general offences under the WHS Act and WHS Regulations by SafeWork NSW, section 230 of the WHS Act provides that prosecutions may be instituted by:

- (1) Subject to subsection (4), proceedings for an offence against this Act may only be brought by:
 - (a) the regulator; or
 - (b) an inspector with the written authorisation of the regulator (either generally or in a particular case).
- (2) An authorisation under subsection (1)(b) is sufficient authority to continue proceedings in any case where a court amends the charge, warrant or summons.
[...]
- (4) Nothing in this section affects the ability of the Director of Public Prosecutions to bring proceedings for an offence against this Act.¹⁵

For the purposes of the WHS Act, the regulator is the Secretary of the Department of Finance, Services and Innovation.¹⁶

Schedule 2, section 1(6) of the WHS Act states that SafeWork NSW is subject to the control and direction Minister, except in relation to:

- (a) the contents of any advice, report or recommendation given to the Minister, or
- (b) any decision that relates to proceedings for offences under this Act, or
- (c) any decision that relates to a WHS undertaking.¹⁷

Therefore, to prosecute proceedings in breach of the WHS Act, those proceedings must be initiated by SafeWork NSW, not the Minister.

Notwithstanding the above, the Attorney General and the DPP are not prevented from exercising their power to bring proceedings for an offence under the WHS Act.¹⁸

Conclusion

¹⁵ *Work Health and Safety Act 2011* (NSW) s 230.

¹⁶ *Ibid* Schedule 2, s 1(1)(a).

¹⁷ *Ibid* Schedule 2, s 1(6).

¹⁸ *Ibid* s 230(4).

1. Attorney General – Power to engage with the DPP

The Attorney General has powers to institute proceedings in their own right and in engagement with the DPP. Namely, the NSW Attorney General has power to find a bill of indictment and initiate proceedings on those grounds. In the alternative, the NSW Attorney General may consult with the DPP,¹⁹ with the aim that the DPP exercise their function to commence proceedings. In the event that the aforementioned pathways are unsuccessful, the NSW Attorney General may affect change by issuing directions as to the performance of the DPP's functions broadly and without reference to any particular case.

2. Attorney General – Prosecution Pathways via SafeWork NSW

Further, the Attorney General may institute proceedings for breaches of the WHS Act in their own right, where they have determined that there has been a breach.²⁰ However, this power is subject to limitation periods.²¹

Appendix: Categories of offences under the *WHS Act*

Under the WHS Act, a Category 1 offence or Category 2 offence can be prosecuted:

A person commits a Category 1 offence (Reckless conduct) if they:

- (a) Have a health and safety duty, and
- (b) Without reasonable excuse, engage in conduct that exposes an individual to whom the duty is owed to a risk of death or serious injury or illness, and
- (c) Are reckless as to the risk to an individual of death or serious injury or illness.²²

A person commits a Category 2 (Failure to comply with health and safety duty) offence if they:

- (a) Have a health and safety duty, and
- (b) Fail to comply with that duty, and
- (c) The failure exposes an individual to a risk of death or serious injury or illness.²³

The following guidelines provide a useful illustration of SafeWork NSW prosecutions:

- [SafeWork NSW prosecution guidelines](#)

¹⁹ *Director of Public Prosecutions Act 1986* (NSW) s 25(1).

²⁰ *Work Health and Safety Act 2011* (NSW) s 230.

²¹ *Ibid* ss 232(1), 231(a)-(b).

²² *Ibid* s 31.

²³ *Ibid* s 32.