Sentencing Advisory Council

# Sentencing Occupational Health and Safety Offences in Victoria: Report and Recommendations

VICTORIA State Government

**The Sentencing Advisory Council bridges the gap between the community, the courts and the government by informing, educating and advising on sentencing issues.**

The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the *Sentencing Act 1991*. The functions of the Council are to:

- provide statistical information on sentencing, including information on current sentencing practices
- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

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- one senior academic
- one highly experienced defence lawyer
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- the remainder must have experience in the operation of the criminal justice system.

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Sentencing Advisory Council
February 2025

VICTORIA State Government

## Acknowledgement of Country

The Sentencing Advisory Council acknowledges the Traditional Owners of the lands and waters on which we live and work, and we pay our respects to them, their culture and their Elders past and present.

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This report contains material that discusses work-related harms, including cases in which people have been exposed to a risk of, and/or experienced, serious injury, serious illness and death. We acknowledge the often enduring hardship that results from work-related harm.

# About the Sentencing Advisory Council

The Sentencing Advisory Council is an independent statutory agency established in the *Sentencing Act 1991* (Vic). Our mission is to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing.

Our functions include:

- **providing statistical information** on sentencing;
- **conducting research** on sentencing and sharing it with interested persons;
- **gauging public opinion** and **consulting** on sentencing matters; and
- **advising the Attorney-General** on sentencing matters.

# A note on terminology

For simplicity, in this report we use the term ***company*** to broadly refer to all non-natural persons, including companies registered under the *Corporations Act 2001* (Cth), incorporated and unincorporated associations, public entities and charitable organisations.

In Chapter 3, we recommend a number of reforms to **health and safety *undertakings***, including renaming them as **health and safety *orders***. For clarity, throughout the report we use the terminology of health and safety undertakings as that is what these sentencing outcomes are currently called.

# Terms of reference

On 5 January 2024, we received the following request for advice pursuant to section 108C of the *Sentencing Act 1991* (Vic):

> The Sentencing Advisory Council (the Council) is asked to review and report on the sentencing of offences contrary to the *Occupational Health and Safety Act 2004* and make any recommendations for reform that it considers appropriate.
>
> In undertaking this review, the Council should:
>
> - examine current sentencing practices for occupational health and safety offences in Victoria,
> - consult with stakeholders and the broader Victorian community in relation to any issues associated with the sentencing of occupational health and safety offences,
> - consider whether current sentencing practices align with community expectations,
> - consider the role of injured workers and the families of deceased workers in the sentencing of occupational health and safety offences, and
> - examine the enforcement of sentencing orders, especially court fines.

We were asked to deliver our report to the Attorney-General and the Minister for WorkSafe and the TAC by 31 December 2024.

# Executive summary and recommendations

In January 2024, the Victorian Government asked for this Council's advice in relation to the sentencing of occupational health and safety (OHS) offences in Victoria. We were asked to examine current sentencing practices, understand whether those sentencing practices align with community expectations, investigate payment rates of fines for OHS offences, understand the experience of injured workers and their families in sentencing proceedings, and make any relevant recommendations for reform. It is the first time that the sentencing of OHS offences has been reviewed in Victoria since the *Occupational Health and Safety Act 2004* (Vic) ('the *OHS Act*') came into operation on 1 July 2005, following the 2004 *Maxwell Review*.

This report and the recommendations contained within it represent almost two years of work by the Council. During that time, we've collected data from multiple agencies, published a *Statistical Report* detailing sentencing outcomes in OHS cases over the 16-year period after the *OHS Act* came into operation, published a *Consultation Paper* inviting written submissions on a number of topics related to the sentencing of OHS offences, conducted a community survey via Engage Victoria, facilitated eight in-person community consultation events around Victoria, and met with dozens of stakeholders who so generously made time to meet with us, shared their insights, and trusted us to authentically represent their views in trying to achieve real change. Stakeholders included members of the legal profession, unions, employer associations and people affected by workplace incidents.

While our remit has been to review the sentencing of OHS offences generally, our primary focus has been the sentencing of companies that breach their duties to ensure their workplaces, and the conduct of their undertakings, are safe and without risks to the health and safety of others. Our statistical review showed that breach of duty offences make up two-thirds of all OHS offences sentenced in Victoria, and that companies represent 83% of OHS offenders. As a result, many of our recommendations are driven more towards reforming the sentencing of offences committed by companies involving breaches of duties, and less towards the sentencing of other offences in the *OHS Act*, such as failing to notify WorkSafe Victoria ('WorkSafe') of an incident, or assaulting a WorkSafe inspector.

Our consultations, review of case law, and statistical analysis have led us to make a number of key findings, on which our recommendations are based:

1. People injured in workplace incidents, people exposed to risks in workplaces, and the families of deceased workers are not always able to fully and meaningfully participate in sentencing proceedings for OHS offences.
2. Currently, sentencing practices for OHS offences are not aligned with community expectations, are not aligned with recent changes to penalties in the model work health and safety laws ('model laws'), are not consistent with sentencing practices in other regulatory contexts, and are not capable of adequately achieving the purposes of sentencing. There is a need to utilise additional and alternative sentencing orders more frequently, and for fines in some cases to increase substantially, especially in cases involving larger companies.
3. Every year, there is almost $2.5 million in unpaid court fines for OHS offences.

Collectively, these findings lead us to make 12 recommendations for reform. We have grouped them as recommendations relating to (1) victims and other affected persons, (2) changes in sentencing practices, and (3) fine payment and distribution.

## Victims and other affected persons

The regulatory scheme relating to health and safety in the workplace is a risk-based one. That is, the aim of regulating workplace health and safety is to ensure that risks are identified, managed, reduced and/or eliminated *before* someone gets hurt. But people *are* injured in workplaces all too often. And sometimes a person or company will be prosecuted for an OHS offence that contributed to that harm. There are even more people who are *exposed* to risks to health and safety, but who aren't actually injured. Also affected are the friends and family of people who are killed or seriously injured at work. If there is an apparent relationship between the risk caused and the harm suffered, or if someone has been exposed to a risk but has not been harmed, those people affected should not be prevented from participating in the sentencing process. Their participation can assist the court in determining an appropriate sentence by providing a better understanding of the actual or potential consequences of the risks involved. Additionally, allowing participation in the sentencing process better provides an appropriate sense of procedural justice to those affected.

People affected by workplace risks, though, currently face two major impediments to fully participating in the sentencing process.

## Allowing affected persons in OHS cases to make impact statements

The first impediment relates to victim impact statements, which are provided to the sentencing court by victims to describe how criminal offending has affected them. In Victoria, victim impact statements can only be made by people who have been harmed as a 'direct result' of an offence. This can become especially complex in OHS cases because most OHS offences involve failing to reduce or eliminate a *risk*, and it can often be difficult to establish a clear line of causation between a specific risk and someone being actually harmed. As a result, people who have been affected by workplace risks are sometimes prohibited from making victim impact statements because it was not possible to prove they were harmed as a 'direct result' of the offence. This can, for example, occur when there were multiple potential causes of the harm, only one of which was the risk for which the duty-holder was prosecuted. In our view, the current test for admissibility of a victim impact statement is not well-suited to OHS cases, and some people who have clearly been affected by a workplace risk or incident are being precluded from sharing their experiences with the sentencing court.

We therefore recommend that the government amend the *Occupational Health and Safety Act 2004* (Vic) to provide a framework for, and enable the admissibility of, *impact statements* that can be made by *affected persons* in OHS cases. This would include not only people who are injured in workplace incidents but also a broader category of people who have been affected by the offending but who would not meet the narrow definition of 'victim' in the *Sentencing Act 1991* (Vic) ('the *Sentencing Act*'). We especially intend the definition of 'affected person' to include people who have been exposed to risks in a workplace (without being injured), as well as people harmed in a workplace (and their families) where there is an apparent relationship between the risk and their harm. These impact statements would be similar to those in the *Environment Protection Act 2017* (Vic) but incorporate more of the legislative framework about the permissible form, relevance and contents of victim impact statements from the *Sentencing Act*. The one feature of the *Sentencing Act* framework that we would not propose be carried over is the limitation on which components of an impact statement an affected person is permitted to read aloud in court. Given that a court may already receive a *written* version of an impact statement without prior removal of those parts which are inadmissible, we see no reason why the author of an impact statement should be prevented from reading it aloud without it being edited.

### Recommendation 1: Impact statements in OHS cases

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to create a framework that allows affected persons to make impact statements in sentencing proceedings involving OHS offences.

## Allowing affected persons in OHS cases to participate in restorative justice conferences

The second aspect of the sentencing process where we see a need for change is the introduction of restorative justice conferences. There has been growing interest in the potential role of restorative justice processes in addition to, or as an alternative to, criminal justice processes. These conferences – which typically only occur after months of preparatory work with all the parties – involve people who have caused harm (and their support persons) meeting with the people who have been harmed (and their support persons) to talk about the offending and how it has affected them. Often, they will also discuss what those who caused harm will do differently in the future.

What we heard throughout our consultations is that, after some workplace incidents, the criminal process can be especially protracted – sometimes taking years – and the offender and the person(s) affected by their offending are discouraged from contacting one another while legal proceedings are underway. This means that there can be significant delays for those who want to repair their relationship, which is especially difficult for tightknit workplaces. Even for those who don't want an ongoing relationship, a restorative justice process can be a healing one. It provides people affected by workplace incidents the opportunity to share, with those responsible, how the offending has affected them. They can also have a conversation about how things will change to avoid similar incidents in the future.

While the use of restorative justice conferences alongside criminal proceedings is still a relatively new concept in Victoria, we see great promise in their expanded use. There are, though, a number of key features we see as critical. First, there should be a legislative framework that governs the process, as there is in the Australian Capital Territory. Second, the process should only proceed if both the offender and any affected persons provide fully informed consent. This means an experienced facilitator would need to explain the process to them, confirm their genuine willingness to participate, and ensure they understand how the process may affect any sentence to be imposed. Third, there would need to be appropriate limits on the disclosure and use of what is said in restorative justice conferences. The sentencing court should be informed about the level of the offender's participation, as evidence of remorse remains a relevant consideration in sentencing. But any record of

discussions should be prohibited from use in other legal proceedings, and there should be restrictions on public disclosures that can be made (for example, to the media).

### Recommendation 2: A framework for restorative justice conferences

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to provide a framework for restorative justice conferences to occur in cases involving offences contrary to that Act.

Given this would be one of the first formal frameworks for the use of restorative justice conferences in criminal proceedings in Victoria, we also see merit in establishing a continuous cycle of feedback from the outset. This would enable interim and final evaluations to be conducted within two and four years, respectively, of introduction. These evaluations will be crucial to understanding the success or otherwise of restorative justice conferences in OHS cases, whether there are improvements required, and potentially even whether there is scope to expand their availability to other criminal proceedings.

### Recommendation 3: Pilot and evaluate restorative justice conferences

The Victorian Government should establish a program trialling the use of restorative justice conferences in cases involving offences contrary to the *Occupational Health and Safety Act 2004* (Vic), and ensure a system is in place for continuous feedback that results in interim and final evaluations being completed within two and four years, respectively.

## Changes to sentencing practices

The majority of our recommendations relate to changing sentencing practices for OHS offences. These recommendations stem from our analysis of court data on sentencing outcomes, our review of case law about how courts sentence OHS offences, our consultation with stakeholders about how OHS offences are sentenced and, perhaps most importantly, our consultation with the Victorian community to understand their expectations about how OHS offences should be sentenced. One of the ways we gauged the community's expectations was to host in-person events. These involved providing participants with background information on sentencing law and the OHS regulatory scheme, providing details of a real-life OHS case (with details changed for anonymity), and asking participants to sentence the case themselves. We then shared the actual sentence in the case and asked participants whether they felt it was appropriate.

From this work, a few points can be surmised:

- Fines are the predominant outcome of OHS prosecutions. Courts sentencing OHS offences rarely impose orders such as health and safety undertakings or adverse publicity orders. In contrast, stakeholders and the community would clearly prefer to see more frequent use of such orders in OHS cases.
- Like numerous past reviews, our review has also found that fines for OHS offences are too low, both because they do not align with community expectations and because they are often not capable of achieving the purposes of sentencing. That said, fines for smaller companies that breach their duties in ways that do not result in a fatality are only somewhat lower than they should be, while fines for larger companies whose behaviour results in a fatality are far too low.
- There are a number of sentencing considerations that become especially complex in the context of both non-human offenders (companies) and OHS offences. These include the extent to which sentencing outcomes should be calibrated to the size of a company, the extent to which the fact that someone was injured or killed in a workplace incident should be a relevant sentencing consideration, and what role the 'character' of a company – both before and after an OHS offence – should play in sentencing.

The below recommendations are all geared towards increasing the use of sentencing orders other than fines in OHS cases, increasing fine amounts in OHS cases – especially in cases involving larger companies – and improving consistency by providing guidance about some of the complexities involved in sentencing OHS offences.

## Increasing the use of sentencing orders other than fines

We found that over 90% of sentencing outcomes in OHS cases are fines. In the remaining 10%, the vast majority are undertakings – under either the *Sentencing Act* or the *OHS Act* – with the only additional condition in the cases we reviewed being to make a charitable donation. In effect, almost every company received a financial penalty of some sort, and not much else. But there is great potential for the use of other sentencing orders, either on their own or in addition to fines.

If health and safety undertakings are to be utilised more often, some consequential amendments to section 137 of the *OHS Act* are required to make those undertakings more versatile and effective. These amendments include reframing undertakings as health and safety 'orders', making improvement projects an available special condition of those orders (rather than a separate order under another provision), and making the maximum fine for breaching a health and safety order the same as the maximum fine for breaching an enforceable undertaking.

## Recommendation 4: Reforming health and safety undertakings

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to:

- **a.** repeal section 136 (orders to undertake improvement projects);
- **b.** revise section 137 to remove the need for offenders to give an undertaking, and rename these as 'health and safety orders';
- **c.** revise section 137(1) to allow health and safety orders to run for a period of up to five years;
- **d.** revise section 137(3) to clarify that the special conditions listed can be imposed on any offender, not just employers;
- **e.** revise section 137(3) to include a further special condition 'to undertake a specified project for the general improvement of occupational health, safety and welfare within the period specified in the order'; and
- **f.** revise section 138(c) to specify that the maximum penalty for contravening a health and safety order is 2,500 penalty units for a body corporate, and 500 penalty units for an individual.

We know from the use of *enforceable undertakings* – a pre-sentencing option where WorkSafe agrees not to proceed with a prosecution if a company accepts certain conditions – that the financial cost of implementing 'above-and-beyond' safety measures will often be very similar to, or even greater than, the cost of any fine that might be imposed. However, enforceable undertakings have the added advantage of making that workplace, and potentially other workplaces, safer in the process. While health and safety undertakings are already available as a sentencing order after a successful prosecution under the *OHS Act*, they simply aren't used very often. We recommend that WorkSafe develop a policy that both encourages increased use of such orders and assists courts to frame the attached conditions.

## Recommendation 5: Increased use of health and safety undertakings

WorkSafe Victoria should develop a policy relating to health and safety undertakings pursuant to section 137 of the *Occupational Health and Safety Act 2004* (Vic) that (a) specifies criteria for deciding whether to recommend that a sentencing court consider imposing an undertaking, including potential conditions of such an undertaking, and (b) encourages the increased use of undertakings in appropriate cases.

For the last 20 years, courts sentencing OHS offences in Victoria have had the power to make what is known as an 'adverse publicity order', which requires the offender to publish – using certain content, and via a certain medium – the details of their offending. In the context of offending by companies, these orders have the potential to achieve significant deterrent and punitive aims (as a result of the reputational damage inherent in such orders), as well as promote broader awareness about health and safety issues in a particular industry. There has, however, only been one such order made in the last two decades: the owners of a horse-racing facility were required to publish in a horse-racing magazine the details of an incident where a jockey was killed while training in poorly lit conditions. In our community consultation events, 70% of participants indicated that they would have imposed an adverse publicity order in their allocated case study, especially those sentencing the large company, given its wider reputation. We see considerable underutilised potential in the use of these orders. We recommend that WorkSafe develop a policy that both encourages prosecutors to advocate for adverse publicity orders in more OHS cases and provides guidance about the content of the notice and the medium of publication that prosecutors might propose to the court.

### Recommendation 6: Increased use of adverse publicity orders

WorkSafe Victoria should develop a policy relating to adverse publicity orders pursuant to section 135 of the *Occupational Health and Safety Act 2004* (Vic) that (a) specifies criteria for deciding whether to recommend that a sentencing court consider making an adverse publicity order, including the content and medium of the information to be publicised, and (b) encourages the increased use of adverse publicity orders in appropriate cases.

## Increase the maximum penalty to account for worst-case scenarios

If courts are to begin calibrating fine amounts to the size of the company, the current maximum penalty for companies for the most commonly sentenced breach of duty offences (just under $1.8 million) is not capable of adequately accommodating the potential fines that would need to be imposed in cases involving especially egregious offending by large entities. More than half of the community consultation participants sentencing the large company, which had two charges in the case study, allowing for a maximum fine of $3.5 million, imposed that exact amount. This suggests that participants felt constrained by the current maximum. Indeed, 86% of participants in our community consultation events said they felt the maximum fine should be $10 million, $100 million, or (as it is in England and Wales) unlimited. For comparison, the maximum penalty

for industrial manslaughter in Victoria is almost $20 million, the maximum penalty for category 1 offences in the model laws is just over $10 million, and the maximum penalty for offences by companies in some other contexts (such as misleading and deceptive conduct) is $10 million, or potentially even higher. In light of the comparable maximum penalties for companies in many other contexts, especially in the model laws, and the clear results of our community consultation, we recommend that the maximum penalty for companies breaching their health and safety duties be increased to 50,000 penalty units (almost $10 million), with a corresponding increase for individuals to 10,000 penalty units. This maximum is intended to capture the full range of culpability and offence seriousness in breach of duty offences, including what are currently category 1, 2 and 3 offences in the model laws.

### Recommendation 7: Maximum penalties for breach of duty offences

The Victorian Government should increase the maximum penalties for breaches of health and safety duties under the *Occupational Health and Safety Act 2004* (Vic) to:

- 50,000 penalty units for body corporates for offences contrary to sections 21, 23, 26, 27, 28, 29, 30 and 31; and
- 10,000 penalty units for individuals for offences contrary to sections 21, 23, 24, 25(1), 25(2), 26, 27, 28, 29, 30 and 31.

## Repeal and replace the section 32 reckless endangerment offence

If the maximum penalties for breach of duty offences are increased to 50,000 penalty units for companies and 10,000 penalty units for individuals, there is a residual need to consider the continued relevance of the current section 32 offence. Originally introduced as a compromise to the introduction of an industrial manslaughter offence (which Victoria now has), the section 32 offence currently carries a maximum penalty of 20,000 penalty units for companies, and 1,800 penalty units and/or five years' imprisonment for individuals. The offence involves recklessly engaging in conduct that places or may place another person in danger of serious injury. It is almost identical to the offence of reckless conduct endangering serious injury in section 22 of the *Crimes Act 1958* (Vic) ('the *Crimes Act*'). However, the *Crimes Act* also contains the offence of reckless conduct endangering *life* (section 23), which carries a maximum penalty of 10 years' imprisonment.

To reconcile the inconsistencies this offence causes in (a) the revised offence and penalty hierarchy we have proposed by increasing the maximum fine for breach of duty offences, (b) the apparent exclusion of 'serious illness' from its application, (c) limiting its

application to risks 'at a workplace' when many work-related risks can occur outside the workplace, (d) the awkward application of a recklessness *mens rea* to companies, (e) the newly-revised maximum of 10 years' imprisonment for category 1 offences in the model laws, and (f) the enhanced maximum for reckless conduct endangering *life* (as opposed to serious injury) under the *Crimes Act*, we propose that section 32 be repealed and replaced with a revised version. The new section 32 offence would:

- prohibit reckless conduct that places or may place another person in danger of death, serious injury, or serious illness;
- only apply to individuals, not companies (meaning companies that would currently be prosecuted for reckless conduct endangering serious injury would instead be prosecuted for breaching the applicable duty, and the new maximum fine would be high enough to account for that greater level of culpability); and
- retain the maximum fine for individuals who breach their duties of 10,000 penalty units, but also carry a maximum of 10 years' imprisonment.

Given that the current offence was only sentenced seven times in the 16 years to 2021, we don't anticipate that the revised version will apply to many additional cases.

### Recommendation 8: Reckless endangerment offence

The Victorian Government should replace section 32 of the *Occupational Health and Safety Act 2004* (Vic) with a provision specifying a maximum penalty of 10 years' imprisonment, in addition to or instead of the (revised) maximum fine of 10,000 penalty units, for individuals who recklessly contravene a health and safety duty under the Act in a way that places, or may place, another person in danger of death, serious injury or serious illness.

## The relevance of death, injury or illness in sentencing OHS offences

In theory, the fact that someone has died, been injured or been made ill as a result of a workplace risk eventuating should be of relatively little relevance in sentencing for OHS offences, because the wrong is the creation of the risk. The fact that no-one has died, been injured or been made ill will often be a matter of sheer luck. Conversely, there is a risk of hindsight bias if the fact that someone *was* hurt is used as conclusive evidence of the likelihood of that risk eventuating. However, despite this being the premise of the regulatory scheme, the community expects the fact that someone was harmed in a workplace to be a relevant sentencing consideration for OHS offences. And indeed, court data shows that it already is. Our data demonstrates that courts routinely impose much higher fines in cases where there has been a fatality than in cases where there hasn't.

There is no simple solution to this conundrum, but one is required. It is not feasible for the law to continue saying it is doing one thing, when in fact the opposite is occurring. Our proposed solution is that there should be guidance about how courts sentencing OHS offences should take into account the fact that someone has been harmed at work through a *legislated sentencing guideline*. This is discussed in more detail below.

## The relevance of the size of the company in sentencing OHS offences

Section 52 of the *Sentencing Act* requires courts to take into account the financial circumstances of an offender in deciding how much to fine them. To date, this has had an almost exclusively mitigatory effect on sentencing outcomes: smaller companies, and companies on the brink of financial ruin, have received discounted penalties. Very rarely do courts impose *higher* fines on larger and financially stable companies. There are, however, good reasons to do so. Most prominently, it is difficult to achieve some of the purposes of sentencing – just punishment (ensuring the fine has a 'real sting' to it) and deterrence of the offender and other large companies – if fine amounts are not *calibrated* to the size of the company. In both written submissions and community consultation, there was considerable support for more clearly requiring courts to impose higher fines on larger companies. This was not because smaller companies do not have the same health and safety obligations – everyone has the right to be safe, regardless of their employer's resources – but because it is the only way to ensure that fines are sufficiently punitive, and that the potential consequences of inadequate safety protocols are capable of incentivising real change where it is necessary.

Again, our solution to this issue is the introduction of a legislated sentencing guideline, which would provide greater guidance to sentencing courts in Victoria about how to sentence OHS offences committed by companies of different sizes, including by providing sentencing ranges calibrated to the size of the company.

## The relevance of a company's 'character' in sentencing OHS offences

The saying goes that companies have 'no soul to damn, no body to kick', and this makes it difficult to translate to companies the traditional concepts of sentencing that apply to people. Nevertheless, we do anthropomorphise companies in some ways, because their actions are reflective of the collective will of those responsible for their management. For example, this is why we acknowledge their efforts at rehabilitation in the wake of workplace incidents, and why we acknowledge expressions of genuine remorse. One of the more complex considerations in sentencing companies is their 'character', both before

and after a workplace incident (or risk). During our consultations, we heard considerable scepticism about some companies making (tax-deductible) charitable donations to community organisations in the wake of a workplace incident. People saw these donations as reputational damage control and an attempt to receive a reduced sentence. Without ascribing malintent to the companies that do take such measures, there is a need – as the Office of Public Prosecutions outlined in their submission – for greater guidance about the relevance of 'character' in sentencing companies for OHS offences. In written submissions and in community consultation, the overwhelming view we heard was that a company's character should remain a relevant consideration but should always be subsidiary to the objective seriousness of the offence and the need for deterrence. This consideration should also be limited to the company's OHS track record, both before and after the offending in question.

Our view is that the most appropriate solution is to provide courts with clearer guidance on the relevance of the company's character, in addition to the relevance of harm and the size of the company, and to do so within the confines of a *legislated sentencing guideline*.

## Recording convictions against companies

Courts sentencing offenders in Victoria have a discretion to record a conviction, which is separate to and distinct from a finding of guilt. For companies, which make up 83% of OHS offenders, the consequences of recording a conviction appear less serious than those for individuals; however, we heard that the negative effect on reputation, either with consumers and staff, or among peers in the industry, was of significant concern for many defendants. We found that around 56% of sentenced OHS offenders do not have a conviction recorded. Community consultation participants and stakeholders identified a range of factors relevant to determining whether a conviction should be recorded. These included the seriousness of the offending, the offender's prior convictions or OHS history, as well as the effect of the conviction on the offender's economic wellbeing and future prospects. We found that the discretion to record a conviction is one of significance and that the most appropriate reform to achieve greater consistency and transparency in that decision without interfering with judicial discretion is to develop a *legislated sentencing guideline* that provides courts with guidance with respect to OHS offenders that are companies.

## Introduce a *legislated sentencing guideline* for OHS offences

Our major proposal in this report is to introduce an Australian-first, and potentially a world-first, *legislated sentencing guideline*. This would involve crafting an offence-based sentencing guideline similar to those currently produced by the Sentencing Council for

England and Wales, but rather than taking legal force when published by a body external to the legislature, it would only come into effect when enacted in legislation.

Effectively, this would involve creating a new part of, or schedule to, the *OHS Act* that does several things: (1) it would specify sentencing ranges – including types of orders as well as fine amounts – that courts should follow in OHS cases, based on the culpability of the offender, the seriousness of their offending and, where the offender is a company, the size of the company, (2) it would provide guidance about how courts should assess those various factors to identify the applicable range, including, for example, the extent to which it is relevant that someone was killed, injured or suffered an illness as a result of the duty-holder's breach, (3) courts would be required to follow the guideline but would retain discretion to depart from it if following the guideline would be contrary to the interests of justice and they explain their reasons for doing so and (4) the guideline would apply to all OHS cases sentenced after its commencement, and sentencing practices prior to commencement would no longer be a relevant consideration. These features are all consistent with our 2018 recommendations about the most desirable, practical and constitutional features of sentencing guidelines in Victoria, if a sentencing guidelines council were to be established.

Our proposal is that the Victorian Government ask the Council to develop that guideline in consultation with all relevant stakeholders, including employer representatives, employee representatives, the legal profession and the wider community. Our intent is that the guideline would cover all of the breach of duty offences in sections 21 to 31, the (revised) reckless endangerment offence in section 32, and the workplace manslaughter offence in section 39G of the *OHS Act*, and would cover both individual and body corporate offenders. Given the novel nature of a legislated sentencing guideline, it will be critical to have regular input by staff from the Office of the Chief Parliamentary Counsel, given their expertise in drafting legislation. A copy of the draft guideline would then be provided to the Victorian Government, along with an explanatory report, for consideration and possible enactment by parliament.

Overall, we believe this proposal addresses most of the key issues raised by stakeholders. It will ensure a more consistent approach to complex considerations in OHS cases, such as a company's prior character, the recording of convictions, the size of the company, and the relevance of actual harm occurring. It will also drive a seismic shift in sentencing practices, which is especially required in cases involving larger companies, resulting in greater use of sentencing orders other than fines, increasing fine amounts in appropriate cases and decompressing the current range of outcomes.

### Recommendation 9: A legislated sentencing guideline

The Victorian Government should ask the Sentencing Advisory Council to develop and consult on a draft sentencing guideline for inclusion in the *Occupational Health and Safety Act 2004* (Vic) when sentencing offences contrary to that Act.

Key features of the guideline would include:

- the guideline would apply to all breach of duty offences (sections 21 to 31), as well as the reckless endangerment (section 32) and workplace manslaughter (section 39G) offences;
- the guideline would apply to all offences sentenced after enactment;
- the guideline would provide a range of sentencing outcomes based on various characteristics of the offending and the offender;
- for the purpose of section 5(2)(b) of the *Sentencing Act 1991* (Vic), courts applying the guideline would only be permitted to have regard to sentences imposed for an OHS offence pursuant to the guideline;
- courts would be required to follow the guideline but would be permitted to depart from the guideline if following it would be contrary to the interests of justice, and they explain their reasons for doing so;
- the guideline would include guidance about how courts should approach specific factors in sentencing OHS offences, such as the offender's culpability, the objective seriousness of the offence, the offender's financial circumstances, any injury, illness or harm caused by the offence, and the offender's character.

## Fine payment and distribution

Our terms of reference also asked us to investigate the enforcement of sentencing orders for OHS offences, in particular, the payment of fines. Using data provided by multiple agencies, we found that most fines are fully paid (67%), some are partly paid (6% – mostly involving ongoing payment plans), and 27% of fines for OHS offences are not paid at all, amounting to almost $2.5 million in unpaid fines each year. We also found that the most common factor, by far, associated with the non-payment of fines was deregistration of the offender company, either since the offence or since sentencing. Given the ephemeral nature of many corporate entities – some of which are only set up for the purpose of a specific project, others of which fade away only to be replaced by another entity with a strikingly similar make-up of staff, plant, ownership and functions – we consider it necessary to make a number of reforms to ensure that there is more genuine accountability for the payment of fines imposed for breaches of health and safety duties.

## Directing all monies collected for OHS offences to WorkSafe

Our first recommendation about fines paid for OHS offences relates to where the money should be distributed when it is collected. There is a provision in the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) that arguably directs the monies collected from any OHS fines to WorkSafe's WorkCover Authority Fund. It is not, however, an unambiguous provision, and we heard that some fines for OHS offences are directed to consolidated revenue (in Victoria, 'the Consolidated Fund'), rather than to WorkSafe. Our recommendation, which would codify the most common practice, and which was supported by all stakeholders commenting on the topic, is to revise the *OHS Act* to include a provision more clearly directing all monies from OHS fines to WorkSafe.

### Recommendation 10: Distribution of paid court fines

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to more clearly specify that all court fines paid for OHS offences are to be paid into the WorkCover Authority Fund.

## Enhancing director accountability for fines imposed on companies

Since its inception, Fines Victoria has had the power to issue 'declared director' notices to directors of companies that have received fines. These notices render the director jointly and severally liable for the fine imposed on the company, functionally piercing the corporate veil. After the director receives that notice, they have 28 days to challenge it in court by contending that either they were not involved in the management of the company at the time of the offence (for good reason, such as illness) or they took all appropriate steps (or there were none they could take) to ensure the company paid the fine imposed. If a director does not successfully challenge the declared director notice, they are then liable to pay the fine themselves.

Prior to 2024, Fines Victoria had not issued any declared director notices for fines imposed either in OHS cases or in other cases. As of 2024, however, they have now issued four such notices. Our recommendation is not to reform the legislation relating to declared director notices. While they appear to be a largely workable set of provisions, more experience issuing these notices may be needed before an assessment can be made as to whether the provisions are adequate and appropriate. Instead, we recommend that Fines Victoria undertake an initial, and then annual, review of all unpaid fines for OHS offences, and decide whether it would be appropriate to issue any declared director notices. While noting the resources required to undertake these

reviews, we nevertheless feel this is especially appropriate in the context of enforcing OHS fines because they are currently the largest fines imposed by sentencing courts in Victoria. We have already discussed this recommendation with Fines Victoria, which had no objections to undertaking these regular reviews.

### Recommendation 11: Declared director provisions

Fines Victoria should, initially and then annually, review all unpaid court fines imposed on body corporates for offences contrary to the *Occupational Health and Safety Act 2004* (Vic), and consider whether to serve a declared director notice on any relevant persons.

## Successor liability for companies that are substantially similar to deregistered companies

One of the most prominent concerns we heard in consultation was that some companies that receive fines for OHS offences are deregistered, either before or after sentencing, without the fine having been paid. A new version of the same company emerges soon after, commonly known as 'phoenixing'. The corporate structure should not be misused to allow unsafe work practices to occur without consequence. Our proposal to address this behaviour is to introduce a concept known in the United States as 'successor liability'. This involves a company being held financially accountable for the liabilities of a deregistered entity if it is a mere continuation of that predecessor company. Most commonly used in mergers and acquisitions law in the United States, successor liability has a number of non-exhaustive criteria that will point to whether the company is a mere continuation (known as the *MacMillan* factors) such as continuity in management personnel, directors, staff, work product, corporate identity and geographical location of work.

We see great potential in the Director of Fines Victoria being given the power to declare a company a successor company, similar to the declared director provisions in the *Fines Reform Act 2014* (Vic). The company would then be liable for the fines imposed on its predecessor, but it would also have the ability to challenge the notice in court within 28 days, to make a case that they are not, in fact, a mere continuation. Given there is almost $2.5 million in unpaid fines for OHS offences each year, which would likely increase if all the reforms in this report are implemented, and given the factor most commonly associated with non-payment of fines for OHS offences was a company having been deregistered, we believe this legislative reform to the *Fines Reform Act* has the potential to significantly improve accountability for OHS offences. However, the introduction of successor liability would have broad application to fines imposed on companies for criminal offences generally, not just OHS offences, and could potentially even be utilised

for civil liabilities. We therefore recommend the issue be the subject of its own targeted inquiry conducted by the Victorian Law Reform Commission.

### Recommendation 12: Successor liability

The Victorian Government should provide the Victorian Law Reform Commission with terms of reference seeking its advice about whether to introduce a legislative framework for successor liability for corporations and other legal entities in Victoria, and if so, what the key features of that framework should be.

## Recommendations we didn't make

Some questions and issues, raised by stakeholders and discussed in our *Consultation Paper*, did not result in recommendations for reform. We nevertheless address those topics for completeness and to put the above reforms in their full context.

A number of stakeholders supported the increased use of court-ordered diversion in OHS cases, given the potential for more positive OHS-related outcomes, particularly in cases involving lower-level offending. However, WorkSafe advised us that they are in the process of creating more equitable access to enforceable undertakings for smaller organisations, with enforceable undertakings effectively being a form of pre-court diversion. We consider this a more appropriate form of diversion, as it occurs earlier in the process, and as such we do not make any recommendations about actively increasing the use of diversion in OHS cases.

We also considered whether WorkSafe should be seeking compensation orders in more OHS cases, which had support of numerous stakeholders. There is, however, in OHS cases a complex legal framework that inhibits the availability of compensation orders under the *Sentencing Act* for people who may otherwise be entitled to compensation under other legislation (such as through a WorkCover or TAC claim). Moreover, WorkSafe may be conflicted in the process, given they also administer the workers' compensation scheme. Ultimately, we were persuaded that there are few cases where compensation orders could usefully be sought by WorkSafe on behalf of injured or deceased persons, and we do not propose any reforms in this space.

Finally, a number of stakeholders raised other types of sentencing orders, in particular: monetary benefit orders, company dissolution orders and director disqualification orders. We have considered each of these potential options in the context of the overall feedback about sentencing practices, and have concluded that these sorts of reforms are better considered as part of a broader review of the sentencing of companies, rather than as part of a review of the sentencing of OHS offences.

## Concluding remarks

Over the last two years we've met with many people and organisations in relation to this project, ranging from legal professionals to union officials to employer representatives. We have found that everyone has a shared vision for a future where there are fewer health and safety risks arising from work. Our package of 12 recommendations is designed to collectively achieve this shared purpose, whether it be through enabling fine amounts that truly incentivise behavioural change within organisations, facilitating injured workers and their families to meet with employers to ensure risks don't reoccur, encouraging the use of a wider range of sentencing orders focused on improving safety practices within organisations and broader industries, or ensuring genuine accountability for companies that create workplace risks.

The entire OHS regulatory system is appropriately aimed at reducing risks, so it may seem strange that changing how we *respond* to workplace risks can change their prevalence in the future. But, in our view, accountability *is* prevention, and we see potential in these reforms driving real change in workplace safety culture in Victoria.

# 1. Introduction

1.1 This report represents the final stage of the first review of sentencing practices for occupational health and safety (OHS) offences in Victoria since the commencement of the *Occupational Health and Safety Act 2004* (Vic) ('the *OHS Act*'). The report is the result of an extensive program of data analysis, research and consultation, and it addresses the terms of reference we received from the Victorian Government in January 2024. In it, we make 12 recommendations for reform.

## Terms of reference

1.2 On 5 January 2024, the Victorian Government asked the Sentencing Advisory Council for its advice about the sentencing of OHS offences in Victoria. Those terms of reference are outlined below.

### Terms of reference

The Sentencing Advisory Council (the Council) is asked to review and report on the sentencing of offences contrary to the *Occupational Health and Safety Act 2004* and make any recommendations for reform that it considers appropriate.

In undertaking this review, the Council should:

- examine current sentencing practices for occupational health and safety offences in Victoria,
- consult with stakeholders and the broader Victorian community in relation to any issues associated with the sentencing of occupational health and safety offences,
- consider whether current sentencing practices align with community expectations,
- consider the role of injured workers and the families of deceased workers in the sentencing of occupational health and safety offences, and
- examine the enforcement of sentencing orders, especially court fines.

1.3 We were asked to deliver this report to the Attorney-General and the Minister for WorkSafe and the TAC by 31 December 2024.

## Phases of the project

1.4 The project was conducted in a number of stages, including preliminary consultation (in 2023), data analysis and case law review (in late 2023), publication of a *Statistical Report* and a *Consultation Paper* (in early 2024), community and stakeholder consultation (also in early 2024), consultation with key stakeholders on draft recommendations (in late 2024) and, finally, publication of this report (in early 2025).

1.5 The findings and recommendations in this report are built on a body of evidence made up of an extensive and iterative process of data analysis, research and consultation, with both stakeholders and the community.

### Preliminary consultation

1.6 The first stage of this project involved preliminary consultation. In mid-2023, Council staff met with key stakeholders involved in the sentencing of OHS offences – prosecutors, defence lawyers, judicial officers, employer representatives, employee representatives, and people affected by OHS incidents – to identify the key issues we should consider. We took an iterative approach to identifying relevant stakeholders; at each meeting, we asked if there were other organisations or individuals we should meet. In total, we met with 27 organisations and individuals between June and September 2023 (see Appendix 1).

### Data analysis and case law review

1.7 While undertaking that preliminary consultation, we also undertook the data analysis that was published in the *Statistical Report*, as well as the case law review that informed many aspects of the *Consultation Paper*. This involved examining court data relating to all cases in which an OHS offence was sentenced in Victoria from 1 July 2005 to 30 June 2021 (the reference period) and, where possible, linking it up with:

- data provided or published by WorkSafe Victoria ('WorkSafe') (prosecution result summaries[1] and *de novo* County Court appeal outcomes);
- published judgments (on AustLII);
- unpublished sentencing remarks (provided to the Council on a regular basis by the higher courts); and
- fine payment data (from WorkSafe, Fines Victoria and the courts).

1. It was necessary to review WorkSafe prosecution result summaries of Magistrates' Court cases because there are only two published Magistrates' Court judgments in OHS criminal cases, neither of which are sentencing judgments: *VWA v Paper Australia Pty Ltd* [2018] VMC 1 and *VWA v Patrick Stevedoring Pty Ltd* [2011] VMC 14.

## Publication of *Statistical Report* and *Consultation Paper*

1.8 Following data analysis, the case law review and preliminary consultation, we released a *Statistical Report* and *Consultation Paper*. The two publications were complementary, with the *Statistical Report* designed to provide evidence for those responding to the questions in the *Consultation Paper*. The *Consultation Paper* asked 19 questions to gather community and stakeholder views about key issues relating to the sentencing of OHS offences. We found that the key issues identified could be grouped into three themes: the role of victims and affected persons in the sentencing of OHS offences, the appropriateness of sentencing practices for OHS offences, and accountability for penalties imposed for OHS offences.

## Community and stakeholder consultation

1.9 The publication of the *Statistical Report* and *Consultation Paper* then enabled us to commence the next phase of the project, community consultation:

- Throughout February and March 2024, we conducted eight community consultation sessions throughout Victoria (including five sessions in regional Victoria) with interested members of the public. We asked participants to sentence a real-life OHS case themselves, to gauge community expectations regarding the sentencing of OHS offences (see Appendix 2 for an overview of our methodology).
- Between February and May 2024, we accepted written submissions from the Victorian community and key stakeholders on the key issues and questions raised in the *Consultation Paper*.
- Between February and May 2024, we hosted a public online survey on Engage Victoria (the Victorian Government's online consultation platform), inviting members of the Victorian community to share their views on the key issues relating to the sentencing of OHS offences. The survey asked nine multiple-choice questions and also offered respondents the opportunity to elaborate on each response.

## Developing and testing draft recommendations

1.10 Once we had finalised our community and stakeholder consultation, we developed a series of draft recommendations, focusing especially on the reforms for which there was widespread support and an apparent need for reform. We then hosted a series of roundtables and individual meetings with key stakeholders, including all organisations that had made a written submission, to test the workability of those reforms. Following invaluable feedback we received during those meetings, we made appropriate revisions to our recommendations.

## Report and recommendations

1.11 This report details our finalised recommendations, the support they received, and the rationale for each of them. The report with recommendations was provided to the Attorney-General and Minister for WorkSafe and the TAC (Transport Accident Commission) prior to 31 December 2024, and was then published on our website in early 2025.

# Our approach to making recommendations

1.12 In developing the recommendations in this report, we have been guided by a number of principles, described below. These have emerged from our specific consultations for this project, as well as general principles that the Council applies in every project.

- **Evidence-based recommendations**: The recommendations in this report are the product of our analysis of data and case law on sentencing outcomes, appeal outcomes, payment rates, and available sentencing remarks, as well as the results of our consultation with the community and key stakeholders. Each conclusion drawn and recommendation for reform made is accompanied by supporting evidence. Where we heard anecdotal evidence of an issue, we sought other forms of evidence to corroborate. Where multiple reform options were available, we have preferred the option we believe was most supported by the evidence.
- **Stakeholder-driven**: The input of key stakeholders in this space has been crucial to this project's success. Through the iterative process of consultation outlined above, we have tried to focus on the issues of most significance to those who work in, or are affected by, the sentencing of OHS offences. The recommendations in this report have been tested with people directly and indirectly affected by the reforms that those recommendations will bring about, to ensure we have understood as much as possible how those reforms will play out in practice, and whether there could be any unintended consequences. For some issues, stakeholders were divided on the best course of action. In those instances, we have tried to authentically present the various perspectives raised, and explain the balancing exercise that led to our conclusion on the issue.
- **A focus on sentencing**: Our statutory functions, outlined in the *Sentencing Act 1991* (Vic), all relate to sentencing-related matters. In that context, we have limited our attention to issues that involve sentencing in some way. Topics such as charging decisions, investigations by WorkSafe, and whether there are processes that should occur after sentencing that are unrelated to criminal proceedings, are outside our scope and remit.

- **Awareness of sentencing in context**: While maintaining a focus on sentencing, we are aware that sentencing forms part of a broader regulatory system. Sentenced OHS cases represent a small fraction of instances of non-compliance with OHS laws in Victoria, and a very small fraction of workplaces in Victoria.
- **Promoting the objects of the *OHS Act***: In developing our recommendations, we have prioritised those that promote the objects of the *OHS Act*, in particular, to secure the health, safety and welfare of employees and other persons at work, and to eliminate risks to employees and others. We have sought to do this by crafting reforms that will result in safer workplaces.
- **A need for innovation**: As we noted in the *Consultation Paper*, this is not the first review of the sentencing of OHS offences. Over the last three decades, a number of such reviews have made very consistent recommendations for sentencing reform, including more imaginative use of alternative sentencing orders, and higher fines for OHS offences. In contrast to those recommendations, our *Statistical Report* found that over the last 20 years, there has been little use of sentencing orders other than fines, and fine amounts in Victoria have stagnated, if not declined, and become compressed within certain ranges. If there is a need for change, and we believe there is, we have considered it necessary to adopt an open mind, and develop innovative ideas that might be capable of changing sentencing practices to more closely align with the purposes of sentencing and community expectations. This approach is reflected in the substance of the recommendations, which in some cases involve novel innovations that are firsts in Australia, if not internationally.
- **Harmonisation with the model work health and safety laws**: Victoria is currently the only state or territory in the country not to have adopted the model work health and safety laws ('model laws') that were first created in 2008. Many stakeholders we spoke to advocated for Victoria to harmonise with the model laws, either entirely or in specific contexts. Such considerations are beyond the scope of our review, which is focused on sentencing. There are, however, a number of recommendations where we have chosen a particular path because it would harmonise Victoria's approach with that currently taken in the model laws, and there is an undeniable appeal to workplace health and safety laws being consistent across the country. But there are also areas where we have chosen to diverge from the model laws. Where we have done so, it is because the evidence and stakeholders suggested that this was the preferred approach.

## Structure of this report

1.13 This report is divided into five chapters. In addition to this introductory chapter:

- Chapter 2 presents the Council's recommendations for reform regarding the role of victims and affected persons (including injured workers and the families of deceased workers) in the sentencing of OHS offences.
- Chapter 3 discusses the results of the Council's examination of the appropriateness of current sentencing practices for OHS offences with respect to the purposes of sentencing, as well as the results of our consultation to gauge community expectations, and presents our recommendations to reform sentencing practices for OHS offences.
- Chapter 4 presents our recommendations relating to ensuring accountability for penalties imposed for OHS offences, in particular, improving payment rates for court fines.
- Chapter 5 discusses a number of reforms that we considered but chose *not* to pursue, and explains our rationale for each. In our view, it is just as important to explain the recommendations we are not making, as those that we have, especially when they relate to topics on which we expressly sought stakeholder and community views.

# 2. The role of victims and other affected persons in OHS cases

2.1 This chapter considers the role of injured workers and families of deceased workers in the sentencing of occupational health and safety (OHS) offences. This includes ways to improve the means by which people affected by workplace risks are able to communicate to the court how the offending has affected them, as well as introducing restorative justice processes that can run alongside the sentencing process.

## Victim impact statements

2.2 In Victoria, as in a number of other jurisdictions,[2] victims of crime can make a *victim impact statement* during sentencing proceedings.[3] These are typically written or verbal summaries of how the offending has affected them. Victim impact statements tend to serve two purposes: first, informing the court about the consequences of the crime, and second, offering victims a meaningful way to participate in the proceedings.[4]

2.3 In OHS cases, we heard that there are currently two major obstacles to people affected by OHS offences being able to make a victim impact statement:

- First, victim impact statements can only be made by a person who has suffered harm as a *direct result* of the offence,[5] but most OHS offences are risk-based offences that do not require the prosecution to prove the offence caused harm. As a result, there can be challenges in establishing the admissibility of victim impact statements in OHS cases (if they are even prepared in the first place).
- Second, where a victim impact statement is to be read aloud in court, only the admissible parts of the statement can be read aloud (requiring the court to first rule on the statement's admissibility).[6] Following legislative reforms in 2018,[7] if the victim impact statement is *not* read aloud in court, and just submitted in writing, the court does not have to specify which components

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30N; *Penalties and Sentences Act 1992* (Qld) ss 179I–179N; *Sentencing Act 2017* (SA) ss 14–16; *Sentencing Act 1997* (Tas) s 81A; *Sentencing Act 1995* (WA) ss 23A–26; *Crimes (Sentencing) Act 2005* (ACT) ss 47–53; *Sentencing Act 1995* (NT) ss 106A–106B.
3. *Sentencing Act 1991* (Vic) pt 3 div 1C.
4. Edna Erez, *Victim Impact Statements*, Trends & Issues in Crime and Criminal Justice 33 (1991).
5. *Sentencing Act 1991* (Vic) s 3(1) (definition of 'victim').
6. *Sentencing Act 1991* (Vic) s 8Q.
7. *Victims and Other Legislation Amendment Act 2018* (Vic) s 26.

are admissible or not. We heard from a number of people affected by workplace risks how distressing it was to have their statement redacted and edited if they wanted to avail themselves of the right to read it aloud.

## The importance of victim impact statements

2.4 Victim impact statements have an important practical and symbolic function in the criminal justice process. Victims and other people affected by criminal offending can be left feeling excluded from the process, in part because of the adversarial nature of criminal prosecutions by the state. For this reason (after lengthy advocacy by victims' rights groups[8]), several reforms have been introduced in Victoria over the last few decades to enhance the role of victims.[9] One of the most important reforms was the introduction of victim impact statements in 1994, as a mechanism to promote greater victim participation in the sentencing process.[10] Victim impact statements provide a formal platform for victims and their families and friends to communicate to the court the physical, psychological, financial and social impacts of a crime on their lives.[11] Both the process of writing a victim impact statement, and subsequently presenting it to the court, can contribute invaluably to a victim's healing process, by making them feel heard and validated.[12]

2.5 During consultation, WorkSafe Victoria ('WorkSafe') provided us with an illustrative example of an OHS case in which a victim made a victim impact statement to the court (Case Study 1, page 9).[13] It demonstrates the importance of victim impact statements in OHS cases specifically, their positive effects, and their role in facilitating the victim's participation in the criminal justice process.

8. Bree Cook et al., 'Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia' (1999) 19 *Australian Institute of Criminology Research and Public Policy Series* 81–85; Edna Erez, 'Victim Impact Statements' (1991) 33 *Trends & Issues in Crime and Criminal Justice* 2–3.
9. For instance, the introduction of the *Victims' Charter Act 2006* (Vic) resulted in the Office of Public Prosecutions establishing policies requiring practitioners to consult with victims of crime about decisions to discontinue prosecutions and informing them about plea negotiations: Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (2023) 12.
10. *Sentencing (Victim Impact Statement) Act 1994* (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 31 March 1994, 778–779 (Jan Wade, Attorney-General). In 2005, the *Sentencing Act 1991 (Vic)* was amended to require the sentencing court to take into account the impact of the offence on any victim: *Sentencing Act 1991* (Vic) s 5(2)(daa), inserted by *Sentencing (Further Amendment) Act 2005* (Vic) s 3. In 2011, significant amendments were made to the victim impact statement provisions, making changes to the contents, presentation and examination of victim impact statements, most significantly, allowing victims to read, or elect someone to read, their statement to the court: *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) s 7. And in 2018, reforms to the *Sentencing Act 1991* (Vic) were made that allow the court to take into account the entirety of a victim impact statement without specifying which parts are inadmissible: *Victims and Other Legislation Amendment Act 2018* (Vic) part 4.
11. Cook et al. (1999), above n 8, 61.
12. Ibid 61; Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 975.
13. Email from WorkSafe Victoria (15 November 2024).

### Case Study 1: Magistrates' Court case involving a victim impact statement

[The injured person] and his mother who accompanied him at court were happy with the result. [The injured person] chose to have the VIS read by the Magistrate as he wasn't comfortable with it being read aloud in an open court. During sentencing, [the Magistrate] addressed [the injured person] and commended him for his positive attitude towards recovery and noted that his VIS is one of the most genuine, succinct and to the point statements he has seen in his career. It looked like the whole process of the matter being heard and sentenced brought a sense of closure and relief to them given the trauma they have gone through and the personal relationship they share with the director. They visibly interacted with the director and his family outside the court room.

**Email from WorkSafe Victoria (15 November 2024)**

## Broadening the eligibility to make an impact statement

2.6 OHS prosecutions frequently occur because there has been a workplace incident in which someone has been injured, after which WorkSafe has investigated the incident and found a failing in health and safety practices. In many of these cases, the OHS offence (the risk) will have been the cause of the injured person's injuries. But for someone to qualify as a 'victim' who can make a victim impact statement, they must have been harmed as a *direct result* of the offence, and that causation must be established by the criminal standard of proof (beyond reasonable doubt). If, for whatever reason, it is not possible to establish beyond reasonable doubt that the injury (or illness or fatality) was a 'direct result' of the OHS offence, they will not qualify as a victim who can make a victim impact statement.[14]

2.7 In the *Consultation Paper*, we identified several OHS cases in Victoria where courts had refused to take victim impact statements into account because causation could not be established between the offender's breach of duty and any injury or fatality.[15] For example, in *DPP v Cool Dynamics Refrigeration Pty Ltd*, an employee was killed when his work van, which contained a number of flammable gases, exploded. However, because the exact mode of ignition and the specific gases

14. In a non-OHS context, see, for example, the recent case of *Varghese v The King* [2024] VSCA 115. In an OHS context, see *Arthur's Seat Scenic Chairlift Pty Ltd v The Queen* [2010] VSCA 269 [25] ('the question of the cause of the injuries … was an aggravating factor, in respect of which the Crown bore an onus of proof beyond reasonable doubt').

15. Sentencing Advisory Council, *Sentencing Occupational Health and Safety Offences in Victoria: Consultation Paper* (2024) 43–46 ('*Consultation Paper*'). The other cases cited in the *Consultation Paper* included *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278 [141]; *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021 [31]–[32], [131], [146]; *DPP v Ricegrowers Ltd* [2018] VCC 542 [22].

that exploded could not be determined, the company's breach of duty contrary to the *Occupational Health and Safety Act 2004* (Vic) (*'OHS Act'*) in that case was not considered a causative breach. As a result, the court ruled that friends and family of the deceased were not 'victims' for the purposes of the *Sentencing Act 1991* (Vic) ('the *Sentencing Act*') and could not tender victim impact statements.[16]

2.8 This remains a live and frequently encountered issue for courts sentencing OHS offences. In May 2024, the County Court found that it had to reject victim impact statements tendered by family and friends of a child who drowned while on a school excursion to a swimming pool.[17] The offender in the case was found to have failed to reduce the risk by failing to provide the swimming pool with details of the students' swimming abilities. The court found that it was bound to reject those statements because the parents of the deceased child could not be considered 'victims' of the OHS offence, as it was not established that the loss they suffered was a 'direct result' of the offence, which involved a failure to provide the management of a swimming pool with information about the competency of students sent to it. The court found that:[18]

> [t]his criterion clearly limits the use of victim impact statement material in sentencing for OHS offences when there is, as in this case, a concession that the death … was not 'caused' by the … breach. It was not alleged or proven that the breach of duty caused actual harm such as the death … or was an operative cause of it. I understand that there is a common practice that victim impact statement material is received without objection even though there is no causal connection in some OHS prosecutions. Perhaps this is reflective of the recognition of the value that the material has in the social rehabilitation of victims. However, as the term 'victim' is currently defined under the Act and with the objection taken as to the admissibility of the material, I regard the victim impact statement material in this case as inadmissible.

2.9 Even more recently in November 2024, the County Court was again in a position where it had to reject the prepared victim impact statements of surviving family members because they did not satisfy the legal test of having suffered harm 'as a direct result' of the offence. In doing so, the court acknowledged that, to the family of the deceased and others, 'this must seem to be a highly technical legal issue which ignores the human dimension of the family's grief', and commented that 'the existing definition of "victim" in the *Sentencing Act 1991* is not well suited to OHS offences given their risk-based character'.[19]

16. *DPP v Cool Dynamics Refrigeration Pty Ltd* [2015] VCC 1882.
17. *DPP v The Crown in Right of the State of Victoria* [2024] VCC 810.
18. *DPP v The Crown in Right of the State of Victoria* [2024] VCC 810 [50].
19. *DPP v Yarra Valley Park Lane Holiday Park Pty Ltd* [2024] VCC 1863 [107]–[114].

2.10 In our *Consultation Paper*[20] and survey,[21] we asked whether stakeholders and the community supported expanding or clarifying the circumstances in which victim impact statements can be made in OHS cases.

## Stakeholder views

2.11 There was strong support from stakeholders for broadening the eligibility criteria for making victim impact statements in OHS cases.

2.12 Of the 64 survey responses, 81% agreed that there is a need to broaden the circumstances in which a victim impact statement can be made.

2.13 Additionally, all but three[22] stakeholders who addressed the topic in their submissions supported expanding the circumstances in which a victim impact statement can be made in an OHS case.[23] For example, the Workplace Incidents Consultative Committee, the Victorian Trades Hall Council, and the Office of Public Prosecutions wrote:

> The current system severely undervalues the experience of victims and the impacts on them of both the initial incident and reliving it through court proceedings … families suffer enormously putting these statements together and then find that they have almost no impact on the proceedings or sentencing decisions. There needs to be much clearer guidance on the purpose of Victim Impact Statements, including what is in or out of scope for inclusion, so victims can make an informed decision about whether they want to submit a Victim Impact Statement.
>
> **Submission 17 (Workplace Incidents Consultative Committee)**

> The current definition of a victim is too limiting, it only considers 'victims' people who have suffered as a direct result of the offence. The definition must be expanded to include families, coworkers, union representatives and indirect victims, in order to provide … the justice system a better grasp of the severity of the breach and its impact on the worker, their family, the workplace and the community.
>
> **Submission 8 (Victorian Trades Hall Council)**

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20. *Consultation Paper* 46 (Question 8).
21. The question we asked in our survey on Engage Victoria was: 'Is there a need to broaden the circumstances in which victim impact statements can be made in OHS cases?'
22. Submission 1 (Housing Industry Association); Submission 11 (Victorian Congress of Employer Associations); Submission 15 (Victorian Automotive Chamber of Commerce). The Australian Industry Group ('Ai Group') did not express a view against broadening the circumstances in which a victim impact statement can be made. They did, however, caution against a 'strong victim impact detracting from the key evidence base regarding causation': Submission 4 (Australian Industry Group).
23. Submission 3 (Office of Public Prosecutions); Submission 6 (Australian Manufacturing Workers' Union); Submission 7 (Maurice Blackburn); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 12 (Law Institute of Victoria); Submission 13 (OHSIntros); Submission 17 (Workplace Incidents Consultative Committee); Submission 19 (Australian Institute of Health and Safety); Submission 21 (WorkSafe Victoria).

> From the OPP's perspective, it is very difficult to explain to family members of a deceased person that they are not, or may not be, classified as 'victims' under the legislation and that the prosecution cannot tender their Victim Impact Statements. More importantly though, it is extremely difficult for family members, in circumstances where they have suffered such a huge loss, to understand that they do not meet the legal definition of 'victim'.
>
> **Submission 3 (Office of Public Prosecutions)**

2.14 Conversely, there were a number of employer groups who were of the view that it is unnecessary to broaden the circumstances in which a victim impact statement can be made in OHS cases, primarily because it could risk spurious claims of harm and causation to be made:

> The nexus between the harm to the victim having to be a direct result of the offence should remain unchanged and remain at the discretion of the court to determine for individual circumstances … to ensure that other 'victims' with perhaps spurious claims cannot compromise the effective dealing of natural justice in sentencing. HIA considers that there is no need to broaden the sentencing factors to facilitate victim impact statements.
>
> **Submission 1 (Housing Industry Association)**

> VCEA acknowledges the role of VIS in informing the court about the impact of the crime on victims but cautions against any risk of their being used in pursuit of unfair or unjustified sentences. We wish to emphasize that the weight given to [a] VIS is, and should be, at the discretion of the sentencing judge, along with other relevant factors and used as part of the "instinctive analysis" in the sentencing process. VCEA argues that the existing jurisprudence relating to the use of Victim Impact Statements remains current and reflects community expectations.
>
> **Submission 11 (Victorian Congress of Employer Associations)**

> As OHS offences are generally risk-based and not outcome-based, victim impact statements are generally not appropriate (and do not assist) the court in determining whether an OHS offence has occurred. A sentencing court does however take into account the impact of the offending on victims, through victim impact statements, in circumstances where an offence has occurred and it is established that the person has been harmed as a direct result of the offending.
>
> **Submission 15 (Victorian Automotive Chamber of Commerce)**

2.15 Of those stakeholders who did support clarifying or broadening the admissibility of victim impact statements, some options proposed were:

- amending the definition of 'victim' in either the *Sentencing Act* or the *OHS Act* to remove the 'direct result' requirement in OHS cases;[24]
- including an avoidance-of-doubt provision in the *Sentencing Act* definition of 'victim' to ensure all affected persons in OHS cases are allowed to make a victim impact statement;[25]
- introducing a specific form of 'impact statement' in OHS cases;[26] and
- providing guidance and resources to people affected by OHS offences about the admissibility and use of victim impact statements by sentencing courts.[27]

2.16 Following a review of the various submissions, our preliminary view was that the introduction of a new *impact statement* in the *OHS Act* would be the most desirable option to resolve the barriers faced by people affected by workplace risks in being able to make impact statements in appropriate cases. We therefore took that draft proposal to stakeholders to seek their views, and they expressed strong support, including from the Workplace Incidents Consultative Committee.[28] For example:

> [t]his is probably the one opportunity in a very legalistic system where families actually [have] an opportunity to humanize the person who died, and to be able to tell a little story about that person's life. While it may not mean much in the actual court process, it means an awful lot to the family to be able to say that in court.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

> [w]e had this particular problem emerging in relation to [a] prosecution … We had 30 people who were seriously affected [and] … wanted, in the prosecution … to have their voices heard. And the … Court welcomed their making a statement, or 30 of them made a statement, but [the court] couldn't consider it as part of the evidence for the purposes of the fine. So, I think it gives a voice to people who are injured or who witness something, and I think it's an incredibly important step forward.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

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24. Submission 3 (Office of Public Prosecutions); Submission 7 (Maurice Blackburn); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 12 (Law Institute of Victoria); Submission 21 (WorkSafe Victoria).
25. Submission 3 (Office of Public Prosecutions).
26. Submission 7 (Maurice Blackburn).
27. Submission 7 (Maurice Blackburn); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 13 (OHSIntros); Submission 17 (Workplace Incidents Consultative Committee).
28. Meeting with Workplace Incidents Consultative Committee (21 August 2024).

> I completely agree about the need for further clarity here, and obviously … this has been a problem in a number of cases … I was involved in a case that concerned a really terrible fatality [and] [t]here [were] a whole lot of people at the workplace who were affected by that incident, not just people who knew the deceased, but people who were then concerned about their own safety moving forward, there was a union who was obviously affected as well, and arguably, I think a provision like this would allow all of those people to make a statement.
>
> **Participant at OHS Barrister Roundtable (16 August 2024)**

## The Council's view

2.17 Given the extensive stakeholder support for broadening the admissibility of victim impact statements in OHS cases, we recommend an entirely new form of impact statement be introduced into the *OHS Act*. The other options offered – such as introducing a bespoke definition of 'victim' in OHS contexts – would, in our view, create unnecessary confusion. And simply offering training and education would not address the barriers many affected persons would continue to face. Legislative reform is required.

2.18 The provisions in the *Environment Protection Act 2017* (Vic) ('the *Environment Protection Act*') provide a useful, recent example of a new form of 'impact statement' in a risk-based regulatory regime. In criminal proceedings for offences against that Act, a person or organisation may make a statement to the court for the purpose of assisting the court to determine the sentence that should be imposed for those offences, and if any other orders should be made.[29] That Act provides that such statements may include any information relevant to:

- the impact of the offence on the environment;
- the risk of harm to human health or the environment caused by the offence;
- any injury, loss or damage caused by the offence; or
- the impact of the offence on any person, organisation or community.

2.19 There are two important features of impact statements under the *Environment Protection Act* that we believe should be adopted in the OHS context. First, the class of persons that can make an impact statement is not limited to people harmed as a 'direct result' of the offence. Second, such statements can be made in instances where the offending posed a *risk* of harm, not just where harm eventuated.

29. *Environment Protection Act 2017* (Vic) s 335.

2.20 A new 'impact statement' provision in the *OHS Act* would, however, need to be supported by a more comprehensive framework. At the moment, there is very little specificity around the permissible use of the contents of impact statements made under the *Environment Protection Act*, and no detail about the mediums by which such statements can be made. For this reason, while we are of the view that there is a need to introduce similar impact statements in the *OHS Act*, we also believe there are various features of the victim impact statement provisions in the *Sentencing Act* that should be incorporated as well, including:

- clearly defining the permissible contents of impact statements;[30]
- allowing impact statements to be tendered or read aloud in court by the author or prosecution;[31]
- specifying how the contents of impact statements might be relevant to sentencing;[32]
- allowing impact statements to include and refer to medical reports;[33] and
- allowing the offender to cross-examine the author of an impact statement in appropriate instances.

2.21 The other point we would emphasise is that it will be critical to define the class of persons who can make these impact statements in OHS cases. Our view is that 'affected persons' should be allowed to make impact statements, which should be defined to incorporate a relatively broad range of people and scenarios affected by

30. The *Sentencing Act* provisions currently only permit victims to describe 'particulars of the impact of the offence on the victim and of any injury, loss or damage suffered by the victim as a direct result of the offence': *Sentencing Act 1991* (Vic) s 8L(1). Given the risk-based nature of these offences, it is important that impact statements in OHS cases allow affected persons to speak to the *potential* consequences as well.
31. Following reforms to the *Sentencing Act* in 2018, courts are now permitted to accept the whole of a victim impact statement without specifying which parts they considered inadmissible: *Victims and Other Legislation Amendment Act 2018* (Vic) pt 4. There is, however, an anomaly in these provisions. If a victim wishes to avail themselves of the right to read their victim impact statement aloud in court, the court must restrict them to only reading out the *admissible* parts of their statement, meaning the court must rule on the admissibility in those circumstances: *Sentencing Act 1991* (Vic) ss 8L(5)–(6), 8Q. We see no reason to undermine the therapeutic potential of victim impact statements in circumstances where the victim chooses to read aloud their victim impact statement (or have it read aloud by someone else). As we heard from people with lived experience of sentencing proceedings for OHS offences, such editing and redacting can be unnecessarily distressing for victims: Meeting with Workplace Incidents Consultative Committee (21 August 2024). See also Tracey Booth, 'Crime Victims and Sentencing: Reflections on Borthwick' (2011) 36(4) *Alternative Law Journal* 236.
32. Currently, victim impact statements submitted via the *Sentencing Act* provisions can help the court take into account 'the impact of the offence on any victim of the offence': *Sentencing Act 1991* (Vic) s 5(2)(daa). While impact statements in OHS cases should still be able to inform that consideration, the contents of impact statements where there has not been any harm, or where there is debate over the causative link between the offending and the harm suffered, should instead inform the court's assessment of 'the nature and gravity of the offence': *Sentencing Act 1991* (Vic) s 5(2)(c).
33. The *Sentencing Act* allows a victim to attach a medical expert's written statement to their victim impact statement (usually to support or substantiate physical or psychological harm suffered by the victim as a result of the offence): *Sentencing Act 1991* (Vic) s 8M.

OHS offending. It should, in particular, be capable of enabling the following people to make impact statements:

- employees or others who are harmed at (or by) a workplace, where there are multiple potential causes of their harm, but the prosecuted risk is one of them;
- family members of deceased workers who have been harmed at (or by) a workplace, where there are multiple potential causes of their harm, but the prosecuted risk is one of them; and
- employees and others who have been exposed to a risk at (or by) a workplace, even if harm did not eventuate.

2.22 With those categories of people in mind, our proposed definition of 'affected person', which we tested with stakeholders, is:

> An **affected person** includes any person who is a victim of the offence, anyone who has been exposed to a risk to health or safety as a result of the offence, and any other person the court is satisfied has been affected by the offence.

2.23 This definition of an affected person is clearly broader than that of 'victim' in the *Sentencing Act*. Take, for instance, the example provided by WorkSafe in its submission, in which an employee, while using a ladder, fell from a height and was killed. The offending company was charged with breaching its duty to reduce the risk of a fall from height by leaving the roof edge unsecured and unprotected. However, because no-one saw the employee fall, it could not be proven beyond reasonable doubt that the inadequate fall protection caused their death, rather than some other contributing factor, such as the ladder failing. In this case, there could be a number of bases upon which the person killed may not meet the definition of 'victim' which would therefore preclude their family and friends from making victim impact statements: (1) the offender may argue that they failed to *reduce* the risk of falls from height (as opposed to *eliminate* it), such that even if the offender had complied with their duty, the risk may still have eventuated, (2) the offender may argue that there were multiple potential causes of the fall, so it isn't clear that the employee's death was a 'direct result' of the prosecuted risk, and (3) the offender may argue that they have been prosecuted for having inadequate fall protection systems, rather than for causing the death of the employee.[34]

34. This is the difficulty in sentencing breaches of the *OHS Act* where harm has resulted from the breach, as the Court of Appeal has observed: 'proof of a breach of the Act does not require proof that the breach led to injury or death': *DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55 [196].

2.24 Under the narrow definition of 'victim' in the *Sentencing Act*, the family, friends and co-workers of the deceased employee would likely be prohibited from submitting a victim impact statement to the court due to the inability to establish a clear causative link between the breach of duty and the harm. Under our proposed definition of 'affected person', that would no longer be the case. The deceased was exposed to a risk to health and safety as a result of the offence (in particular, the risk of fall from height due to inadequate fall protection), and they are incapable of making the statement themselves because they are deceased,[35] so we would expect that their family and friends could submit impact statements in their stead.

2.25 We envisage this new form of impact statement operating alongside victim impact statements under the *Sentencing Act*. In many OHS cases, both types of statements may be relevant, depending on the circumstances and the persons affected in the matter. However, we are of the view that there should be no hierarchy of importance between the two, and therefore no implication that either type of statement should inherently be given greater weight by a sentencing court. For example, the fact that the new impact statements under the *OHS Act* will allow a wide range of persons to make a statement should not mean that such a statement should be given less weight than a victim impact statement made by someone who satisfies the eligibility criteria under the *Sentencing Act.* For the avoidance of doubt, it may need to be specified in legislation that courts must assess victim impact statements and impact statements purely on their content, and not by reference to the type of statement made.

2.26 In summary, we are of the view that there is a need to enable a broader range of people to make impact statements in OHS cases, beyond those who have been harmed as a 'direct result' of the OHS offence. These are risk-based offences, and the ability of affected persons to participate in the sentencing process should be premised on the risk-based nature of those offences. To achieve this, we believe there should be a bespoke set of legislative provisions in the *OHS Act* to guide the admissibility and content of those impact statements. To that end, we have proposed a definition of 'affected persons' that we believe would achieve that broader applicability, though that definition will likely benefit from the input of the Office of the Chief Parliamentary Counsel.

## Recommendation 1: Impact Statements in OHS Cases

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to create a framework that allows affected persons to make impact statements in sentencing proceedings involving OHS offences.

35. See *Sentencing Act 1991* (Vic) s 8K(3)(b).

## Restorative justice conferences in OHS cases

2.27 In our *Consultation Paper*, in response to significant interest in the topic from stakeholders during preliminary consultation, we asked whether restorative justice conferences would be appropriate and useful in OHS cases. Given the significant support we heard during preliminary consultation, in survey responses, in written submissions, and in subsequent consultation on our draft recommendations, we are firmly of the view that there is a need to enable restorative justice conferences to occur alongside OHS prosecutions. These conferences have the potential to address a number of unmet needs of injured workers and their families, enable offenders to better understand how to prevent similar risks occurring in the future, and begin to repair relationships that are too often fractured in the aftermath of a workplace health and safety breach.

### What are restorative justice conferences?

2.28 Restorative justice conferences are a subcategory of what have come to be known as 'restorative processes', which the United Nations has defined as:

> any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.[36]

2.29 In other words, restorative justice conferences involve gathering persons affected by offending to help 'in determining how best to repair the harm' caused.[37] In an OHS context, this includes not only when actual injuries, illnesses or fatalities arise from workplace incidents but also when people are exposed to risks to their health and safety.

2.30 The primary aim of a restorative justice conferencing process is to facilitate a meaningful dialogue between the offender, victim(s) and any other affected persons.[38] It is, however, also common for one of the outcomes of a restorative justice process to be the creation of a restorative justice agreement, which

36. UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, UN Doc E/RES/2002/12 (24 July 2002).
37. Paul McCold and Ted Wachtel, 'In Pursuit of Paradigm: A Theory of Restorative Justice' (Paper presented at XIII World Congress of Criminology, International Institute for Restorative Practices, Rio de Janeiro, 10–15 August 2003) 1; Jillian Furman, 'An Economic Analysis of Restorative Justice' (PhD Thesis, The University of Massachusetts, 2012) 10. See also Derek Brookes, *Restorative Justice and Work-Related Death: A Literature Review* (2008) 40.
38. RMIT Centre for Innovative Justice, *It's Healing to Hear Another Person's Story and Also to Tell Your Own Story: Report on the CIJ's Restorative Justice Conferencing Pilot Program* (2019) 8; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 176.

specifies actions that the offender has agreed to undertake. These actions can include, for example:

- agreements around changes and innovations in work health and safety systems and employment arrangements;[39]
- compensation and restitution agreements;[40] and/or
- agreements to provide ongoing support to families.

2.31 Even something as simple as an apology can be an incredibly meaningful outcome of restorative justice conferences.[41] The Law Institute of Victoria said that for many victims and affected persons, receiving an apology from the person or body that caused harm to them, or their loved one, can go a long way towards recovery and healing:

> The LIV also acknowledges the transformative power that apologies – if provided – may provide, which may potentially be of greater value to a victim or a victim's family than a fine.
>
> **Submission 12 (Law Institute of Victoria)**

2.32 In addition to offering both victims and offenders the opportunity to meaningfully heal from the consequences of the offending, the general consensus from research on restorative justice conferences for individuals (though none yet involving corporate offenders) is that they can also offer significant cost benefits due to their potential to reduce future offending by participating offenders.[42] Arguably, this could be especially pronounced in the context of OHS offences given that most offenders are companies,[43] which are more susceptible to rationality and behavioural change than individuals.[44]

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39. For example, in response to the Clarence Valley Council lopping a scar tree that was registered as an Aboriginal object under the *National Parks and Wildlife Act 1974* (NSW), a restorative justice conference was held with Clarence Valley Council (the offender) and affected members of the community. The conference resulted in an agreement containing, among other terms, a term requiring the Council to develop and implement cultural skills development training in response to the incident: *Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205 [12]–[22].
40. For example, during a restorative justice conference run by RMIT's Centre for Innovative Justice, a family violence offender agreed to compensate his victim and former partner by paying $5,500 to cover the fees of a university semester – which she was unable to attend due to the offending – and related psychology and psychiatry sessions: Rachael Dexter et al., 'I felt Lighter': Restorative Justice Gives Sex Crime Survivors a Different Way Forward', *The Age* (29 August 2021).
41. A University of Sheffield evaluation on three conferencing trials in the United Kingdom found that 90% of victims who participated in conferencing received an apology from the offender, compared to only 19% of those who participated only in the traditional sentencing process. Additionally, 91% of victims overall indicated that they had accepted the apology offered by the offender, even in conferencing trials for more serious offences such as robbery or burglary: United Kingdom Ministry of Justice, *Restorative Justice: The Views of Victims and Offenders, The Third Report from the Evaluation of Three Schemes*, Ministry of Justice Research Series 3/07 (2007) 23–25.
42. Lawrence W. Sherman et al., 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials in Restorative Justice Conferences' (2015) 11 *Journal of Experimental Criminology* 501; Heather Strang et al., 'Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review' (2013) 9(1) *Campbell Systemic Reviews* 1.
43. During our reference period, 83% of offenders sentenced for an OHS offence were companies: Sentencing Advisory Council, *Sentencing Occupational Health and Safety Offences in Victoria: A Statistical Report* (2024) ix ('*Statistical Report*').
44. Steve Tombs and David Whyte, 'The Myths and Realities of Deterrence in Workplace Safety Regulation' (2013) 53(5) *British Journal of Criminology* 746, 750–751.

2.33 To date, there have been relatively few attempts to formalise restorative justice conferences in criminal proceedings in Australia.[45] There are, however, some contexts in which they are available – several of which operate independently to the criminal justice system – such as:

- almost all criminal proceedings in the Australian Capital Territory;[46]
- environmental offences in Victoria[47] and New South Wales;[48]
- family violence offences in Victoria (not legislated);[49]
- sex offences in Victoria (not legislated);[50] and
- pre-sentence group conferences for children in Victoria.[51]

2.34 Given the growth of restorative justice conferences as an option alongside criminal proceedings in Australia, we were interested in stakeholder views on whether conferences should be made available in the specific context of OHS offences. We spoke to stakeholders about this in preliminary consultation, asked a question on the topic in our community survey, and posed a specific question in our *Consultation Paper*.[52]

## Stakeholder views

2.35 There was extremely strong support from stakeholders for making restorative justice conferences available in OHS cases. Where there was opposition, it was to the features of such conferences, not to the fundamental question of whether conferences should be available at all.

2.36 Of the 64 online survey responses, 77% supported the introduction of restorative justice conferences.[53]

45. In contrast, restorative justice conferences are available for almost all offences in England: see *Sentencing Act 2020* (UK) s 5; New Zealand: see *Sentencing Act 2002* (NZ) s 24A; and Canada: see *Criminal Code,* RSC 1985, c C-46, s 717(1) which, while not expressly stated, is used for the purposes of deferring sentencing for restorative justice conferencing to take place: Government of Canada, 'Restorative Justice: Legislation and Policy' (justice.gc.ca, 2021).
46. *Crimes (Restorative Justice) Act 2004* (ACT).
47. *Environment Protection Act 2017* (Vic) s 336.
48. *Protection of the Environment Operations Act 1997* (NSW) s 250(1A). See, for example, *Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205; *Garrett v Williams* [2007] NSWLEC 96.
49. Department of Justice and Community Safety, 'Restorative Justice for Victim Survivors of Family Violence' (justice.vic.gov.au, 2022).
50. See, for example, Dexter et al. (2021), above n 40.
51. *Youth Justice Act 2024* (Vic) ss 228–234.
52. *Consultation Paper* 49 (Question 9).
53. The question asked in our survey on Engage Victoria was: 'Should restorative justice conferences be made available in OHS cases?' (Survey Question 8).

2.37 Moreover, of the written submissions that addressed the topic, all but two[54] favoured the introduction of restorative justice conferences in OHS cases.[55] For example:

> VCEA welcomes opportunities for … potentially innovative options to correct breaches and encourage safer, more cooperative work practices, including through restorative justice initiatives … Restorative justice approaches can promote a culture where individuals and organisations take responsibility for their actions and address any potential harm caused to others[.]
>
> **Submission 11 (Victorian Congress of Employer Associations)**

> [t]he LIV considers that restorative justice conferences would be appropriate and useful in OHS cases, and … notes that the flexible nature of restorative justice conferences may offer therapeutic benefit, where a range of styles can be applied, tailored to individual needs.
>
> **Submission 12 (Law Institute of Victoria)**

> [i]n the wake of traumatic workplace deaths … the evidence suggests that the family members of the deceased often have a range of information and justice needs that are poorly met by existing legal responses. Delays, constraints on sharing information and the absence of a voice for families in relation to the death of their loved one are particular sources of difficulty in these cases, and where the parties are willing, restorative justice conferences are likely to be particularly valuable.
>
> **Submission 18 (Australian Centre for Justice Innovation, Monash University)**

> existing processes do not provide people with the opportunity to explain to employers the impact the incident has had on their lives, to receive apologies from employers, or to have input into prevention measures that might ensure no one else has to go through what they have endured.
>
> **Submission 16 (RMIT Centre for Innovative Justice)**

> [c]onferencing could also provide an offender with the ability to express remorse and have an open conversation with the family or worker by reflecting on the incident. Many employers are deeply impacted by deaths in their workplace and want an opportunity to express their sorrow about the incident, which conferencing could help facilitate.
>
> **Submission 21 (WorkSafe Victoria)**

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54. Submission 6 (Australian Manufacturing Workers' Union); Submission 15 (Victorian Automotive Chamber of Commerce).
55. Submission 1 (Housing Industry Association); Submission 2 (Australian Association for Restorative Justice); Submission 4 (Australian Industry Group); Submission 7 (Maurice Blackburn); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 11 (Victorian Congress of Employer Associations); Submission 12 (Law Institute of Victoria); Submission 13 (OHSIntros); Submission 16 (RMIT Centre for Innovative Justice); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 19 (Australian Institute of Health and Safety); Submission 21 (WorkSafe Victoria).

2.38 There was limited opposition to the introduction of restorative justice conferencing for OHS cases. The Australian Manufacturing Workers' Union was primarily concerned with the potential re-traumatisation of victims or affected persons if they were to meet with the offender or duty-holder.[56] And the Victorian Automotive Chamber of Commerce opposed the use of conferencing as adjunct to the enforcement of OHS offences, instead preferring its use as an *alternative* to prosecution.[57]

2.39 Some stakeholders also commented on what they saw as important features of restorative justice conferences, including that:

- participation would need to be voluntary;[58]
- genuine participation should be capable of constituting a mitigating factor in sentencing, but refusal to participate or not fully participating should not be considered an aggravating factor in sentencing;[59]
- an approach that is informed primarily by the needs of affected persons (often known as a victim-centred approach) would need to be taken both prior to and during conferencing;[60]
- communications between affected persons and offenders during conferencing should remain confidential (with limited exceptions);[61]
- courts could defer sentencing to allow conferencing to occur;[62] and
- appropriately skilled third-party convenors should facilitate conferences.[63]

2.40 The features of restorative justice conferencing raised by stakeholders in submissions are largely consistent with those recommended by the Victorian Law Reform Commission in 2016,[64] and again in 2021.[65]

56. Submission 6 (Australian Manufacturing Workers' Union).
57. Submission 15 (Victorian Automotive Chamber of Commerce).
58. Submission 1 (Housing Industry Association); Submission 7 (Maurice Blackburn); Submission 16 (RMIT Centre for Innovative Justice); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 21 (WorkSafe Victoria).
59. Submission 1 (Housing Industry Association); Submission 21 (WorkSafe Victoria).
60. Submission 2 (Australian Association for Restorative Justice); Submission 7 (Maurice Blackburn); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 12 (Law Institute of Victoria); Submission 16 (RMIT Centre for Innovative Justice).
61. Submission 16 (RMIT Centre for Innovative Justice).
62. Submission 21 (WorkSafe Victoria).
63. Submission 2 (Australian Association for Restorative Justice); Submission 16 (RMIT Centre for Innovative Justice).
64. In 2016, the Victorian Law Reform Commission (VLRC) recommended the Victorian Government introduce a restorative justice conferencing framework for all indictable offences in Victoria, and recommended a number of key features: Victorian Law Reform Commission (2016), above n 38, 174–194.
65. In its 2021 report on improving justice systems responses to victims of sexual offences, VLRC again recommended that a restorative justice conferencing framework be introduced for all indictable offences in Victoria, including sexual offences: Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 184–210.

## Centre for Innovative Justice Summary Report

2.41 In 2017, WorkSafe requested that the RMIT University Centre for Innovative Justice ('the CIJ') conduct in-depth research on the potential utility of restorative justice conferences in the context of WorkSafe's claims and enforcement processes. With permission from WorkSafe, the CIJ's submission to our review annexed a summary report from that research.[66] Given the research involved and the utility and applicability of the CIJ's findings, we summarise that report below.

2.42 The CIJ conducted interviews and workshops with numerous stakeholders, including injured workers, bereaved families, trade union members, employer groups, academics, and WorkSafe, to identify the justice needs of victims and families of injured or deceased workers that are often unable to be met by the traditional justice process. Some of these justice needs included:

- expressing the emotional impact of a workplace incident;
- receiving support and validation from the offender (where they are the victim's employer);
- hearing apologies or remorse from the offender;
- understanding why and how the incident occurred, and what actions will be taken to rectify the failure;
- seeing the offender held accountable for the incident;
- restoring or maintaining relationships with co-workers and the employer;
- ensuring that the incident will not occur again, and health and safety practices are improved in the workplace; and
- receiving closure and healing.

2.43 The CIJ sought to understand how restorative justice conferencing could address some of these unmet justice needs. The CIJ recommended, among other things, that WorkSafe establish a pilot restorative justice conferencing program and outlined a number of key features, many of which align with those we heard from stakeholders:

- the process must be flexible, in order to maintain a victim-centred focus, meaning flexibility in the timing of the conference, and in the number and format of conferences in each case;
- participation must be voluntary and premised on informed consent from all parties, meaning they are fully informed about the process and the potential outcomes of the process (because the positive benefits of conferences can be lost if there are unexpected consequences due to a lack of information), noting that restorative justice conferencing will not be appropriate in all cases;

66. Submission 16 (RMIT Centre for Innovative Justice).

- there should be legislative limitations on what information can be disclosed by the parties during and after the conferencing process, with the only exceptions being (a) to inform the court about the offender's participation for the purposes of informing the sentencing exercise, and (b) when the parties agree otherwise; and
- the process should be facilitated by a body other than WorkSafe, to limit any perceived conflicts of interest or barriers to participation.

## The Council's view

2.44 We strongly agree with the overwhelming view expressed by stakeholders – during consultation, in survey responses and in written submissions – that a restorative justice conferencing framework should be made available for affected persons and offenders in OHS cases. These conferences have the potential to meet the unmet justice needs of victims,[67] repair broken relationships, and improve safety outcomes in the future.[68] We don't anticipate a conference occurring in the majority of cases. Given there are only about 100 prosecutions involving OHS offences each year, the resource implications of introducing restorative justice conferences for these types of cases should be relatively limited.

### *Key features of restorative justice conferences in OHS cases*

2.45 Drawing from stakeholder submissions and consultation,[69] legislated conferencing frameworks both in Australia and internationally,[70] and recommendations made by the Victorian Law Reform Commission[71] and the CIJ,[72] we are of the view that there are a number of key features to restorative justice conferences that should be included in the legislative provisions establishing those conferences (see Table 1, pages 25–26).

67. Strang et al. (2013), above n 42, 33–44.
68. RMIT Centre for Innovative Justice (2019), above n 38, 17–19.
69. Submission 2 (Australian Association for Restorative Justice); Submission 16 (RMIT Centre for Innovative Justice); Meeting with Australian Association for Restorative Justice (6 August 2024); Meeting with RMIT Centre for Innovative Justice (8 August 2024); Stakeholder Roundtable (12 August 2024); Meeting with Australian Centre for Justice Innovation, Monash University (15 August 2024); OHS Barrister Roundtable (16 August 2024).
70. In Australia, see *Crimes (Restorative Justice) Act 2004* (ACT). Internationally, see *Sentencing Act 2020* (UK) s 5; *Sentencing Act 2002* (NZ) s 24A.
71. Victorian Law Reform Commission (2016), above n 38; Victorian Law Reform Commission (2021), above n 65.
72. RMIT Centre for Innovative Justice (2019), above n 38.

**Table 1**: Key features of restorative justice conferences

| Feature | Description |
|---|---|
| **Who should be eligible to participate in conferencing?** | Conferencing should include persons affected by an OHS offence (see our proposed definition of 'affected person' above at [2.22]), the offender (or, in the case of a corporate offender, an appropriate representative) and any support persons for the affected persons and/or offender.[a] It may also be useful to have the WorkSafe inspector involved in the matter attend.[b] |
| **All participants must provide (ongoing) informed consent** | There would need to be informed consent from the outset, and ongoing discussions with all parties about continued consent. First, a suitably qualified person would need to explain the process to affected persons so that they can make an informed choice whether to participate in the process at all.[c] This initial preparatory work could potentially be undertaken by one of WorkSafe's family liaison officers, who have undertaken training in restorative practices. Then, once the process begins, the skilled convenor – someone independent of WorkSafe – would need to engage in regular discussions with both affected persons and the offender about the process, the potential outcomes and their right to stop participating at any stage.[d] This should operate as a safeguard against any potential disingenuous participation by offenders, while also ensuring affected persons feel comfortable withdrawing from the process if it is not suitable for them. |
| **There should be limits on the information that can be disclosed by participants** | To ensure frank and free participation by all persons involved, conferences must be undertaken on the basis that nothing discussed during the process can be used as evidence in any associated legal proceedings, and that discussions also cannot be disclosed to any third parties (including the media) unless the parties agree otherwise. The one exception would be – if the process occurred as a pre-sentencing exercise – that the convenor would prepare a report for the sentencing court about the parties' participation, as well as any possible restorative justice agreements that were settled upon. |
| **Participation in restorative justice conferencing can be relevant to sentencing** | If an offender genuinely participates in restorative justice conferencing, their participation should be relevant to the sentencing court in assessing their level of remorse and prospects of rehabilitation,[e] and could potentially also inform the court's determination of conditions attached to a health and safety undertaking.[f] The court would be informed about their participation and any agreement via a report (similar to a pre-sentence report) prepared by the convenor. Importantly though, where an offender elects not to participate, this should not be considered an aggravating factor at sentencing.[g] |

| Feature | Description |
|---|---|
| **Conferences should be facilitated by expert convenors, and the administrator of the program should be independent** | There is a particular skillset required to convene and facilitate restorative justice conferences. This work should be undertaken by people who are trained in those skills, and who are entirely independent of the participants.<br><br>The work of administering restorative justice conferencing – receiving referrals, identifying appropriate convenors, administering the scheme, etc. – should be undertaken by a government agency other than the courts and WorkSafe, or by a government-funded non-government organisation to ensure there are no perceived conflicts of interest. The administrator should also be an agency with experience in restorative justice processes, and with the ability and resources to offer conferences in both regional and metropolitan areas.[h] One potential option would be the Victim Services, Support and Reform team at the Department of Justice and Community Safety (DJCS).[i] |

a. The Australian Association for Restorative Justice described this broad level of participation by 'communities of care' as the strongest factor in predicting successful restorative justice conferences that provide healing for affected persons and promote tangible change post-conferencing. In OHS cases, this would focus on creating safer and healthier workplaces: Meeting with Australian Association for Restorative Justice (6 August 2024); Submission 2 (Australian Association for Restorative Justice).
b. A Swinburne University study on restorative justice conferencing, prepared for the Children's Court of Victoria, found that a strong factor linked to reduced recidivism existed where the investigating police informant involved with the offence, as well as primary and secondary victims, attended conferencing: Robert Bonett et al., 'Group Conferencing Is Associated with Lower Rates of Repeated Recidivism Among Higher-Risk Youth and There Are Enhanced Effects Based on Who Attended the Conference' (2024) 23(1) *Youth Violence and Juvenile Justice* 72.
c. The Australian Association for Restorative Justice told us that the first conversation a victim or affected person has informing them of their right to participate in conferencing is a pivotal moment in their understanding of the purposes, potential outcomes (including on sentencing, if conferencing is to occur pre-sentencing) and process. Without a clear understanding of these features, a victim or affected person cannot provide *informed* consent to participate in conferencing: Meeting with Australian Association for Restorative Justice (6 August 2024).
d. Meeting with Australian Association for Restorative Justice (6 August 2024); Meeting with RMIT Centre for Innovative Justice (8 August 2024); Stakeholder Roundtable (12 August 2024); OHS Barrister Roundtable (16 August 2024); Meeting with Workplace Incidents Consultative Committee (21 August 2024).
e. It is well established that courts will consider an offender's genuine remorse as a mitigating factor: *Phillips v The Queen* [2012] VSCA 140.
f. For example, in both the ACT and New Zealand, the conference convenor can provide a copy of a restorative justice agreement to the sentencing court: *Crimes (Restorative Justice) Act 2004* (ACT) ss 48, 54; *Sentencing Act 2002* (NZ) ss 8(j), 10.
g. This is important to ensure that offenders participate in a conference voluntarily and with informed consent. See, for example, *Crimes (Restorative Justice) Act 2004* (ACT) ss 25(f)(ii), 53(e)(ii); *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(h).
h. Submission 2 (Australian Association for Restorative Justice); Meeting with Australian Association for Restorative Justice (6 August 2024).
i. On their approach to restorative justice, see Department of Justice and Community Safety, 'About Victim-centred Restorative Justice' (justice.vic.gov.au, 2024).

### *Should restorative justice conferences be available prior to sentencing?*

2.46 When we took our proposed features of a restorative justice conferencing framework in OHS cases to stakeholders, there was overwhelming support for most of the features. However, the feature on which views were most divided was the timing of such conferences: should they be able to occur *prior* to sentencing, or should they only be available after the sentencing process has finished? The concern some stakeholders raised with pre-sentencing conferences was the potential for offenders to view participation as a mechanism to reduce their sentence, and engage in the process for disingenuous reasons.[73] For example, a member of the Workplace Incidents Consultative Committee commented:

> the only concern I would have [with pre-sentence conferencing] is that a lawyer might say to the company, if you go in, tell them [you're] really sorry, we might be able to reduce this sentence by 25%. That's just my only concern … that people may see, the minority may do that to say there's a reduction in their sentence, to try and save money.
>
> **Meeting with Workplace Incidents Consultative Committee (21 August 2024)**

2.47 While we acknowledge these concerns, it is our view that restorative justice conferences should nonetheless be available as a pre-sentencing option in OHS cases. Pre-sentence restorative justice conferencing offers a number of distinct benefits for affected persons and offenders, including:

- giving victims a greater voice and role in the sentencing process;
- reducing delay in relationship reparation for affected persons and offenders;
- allowing the court to make a more informed assessment of remorse;
- providing a level of oversight of the restorative justice process if it occurs during a period of sentence deferral;[74] and
- in appropriate cases, enabling restorative justice agreements to inform the conditions of potential sentencing orders.[75]

2.48 We are mindful of the concerns raised by some stakeholders about the potential for insincere participation in conferencing by offenders who try and participate solely to reduce the severity of their sentence. However, we are of the view that the safeguards built into the conferencing framework, particularly the requirements

73. Stakeholder Roundtable (12 August 2024); Meeting with Workplace Incidents Consultative Committee (21 August 2024).
74. Section 83A of the *Sentencing Act 1991* (Vic) allows the Magistrates' Court and County Court to defer sentencing for a number of reasons, including 'to allow the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim'. Deferral is utilised to allow restorative justice to occur in the Australian Capital Territory: *Crimes (Restorative Justice) Act 2004* (ACT) s 27(2), New Zealand: *Sentencing Act 2002* (NZ) s 24A, and the United Kingdom: *Sentencing Act 2020* (UK) ss 3, 5(1)–(3).
75. Given our recommendation to increase the use of health and safety undertakings, with conditions other than charitable donations, we see an opportunity for components of restorative justice agreements to be included as conditions of health and safety undertakings, which would make those components enforceable: see [3.58]–[3.72].

for rigorous preparation and informed (and ongoing) consent from both parties, adequately address those risks.[76] To be clear, we are not suggesting that restorative justice conferences should not *also* be available after sentencing has concluded. It may well be that they should also be available outside the criminal process, and there was considerable stakeholder support for such an option. However, such a recommendation would be beyond the sentencing-focused remit of this review.

### *What would a restorative justice process look like?*

2.49 It is useful to consider an illustration of what a restorative justice process would look like in practice, having regard to the key features discussed above. Case Study 2 (page 29) is a representative example from New Zealand, where restorative justice conferencing regularly occurs as part of OHS prosecutions, and courts sentencing OHS offenders refer to those processes in sentencing. The case study highlights the potential value of restorative justice conferencing in cases involving continuing relationships between offenders and those harmed by offending. It also demonstrates many of the key features discussed above, including pre-sentence conferencing, ongoing informed and mutual consent from both parties to participate in the process, the reaching of agreements during conferencing, and the nature of participation being taken into account in sentencing.

### *Who would enforce restorative justice agreements?*

2.50 Some stakeholders raised questions about whether restorative justice agreements would be monitored and enforced, and if so, how.[77] In the Australian Capital Territory, the Director-General has the power to monitor, and follow up on, an offender's compliance with any agreement that emerges from restorative justice conferencing, but there are no enforcement mechanisms or additional penalties for non-compliance.[78] Given the primary aim of conferencing is to create an environment for a healing dialogue, and given that if there is an agreement it should be one entered into voluntarily, we do not propose that there be specific enforcement or penalty provisions for non-compliance. If, however, aspects of a

76. The RMIT Centre for Innovative Justice has previously commented on the safeguards in place to address this risk, saying that the extensive preparation that takes place between the facilitator and each party, individually, ensures that affected persons and offenders are aware of the potential impact of conferencing on sentencing before providing informed consent about whether or not to participate: RMIT Centre for Innovative Justice (2019), above n 38, 29–30. See also Richelle Hunt and Nic Healey, 'Would You Meet with Someone Who Has Caused You or Your Family Harm?', ABC Radio Melbourne (1 March 2023). The Victorian Law Reform Commission made similar comments when recommending a pre-sentence conferencing scheme for all indictable offences in Victoria: Victorian Law Reform Commission (2016), above n 38, 186.
77. Stakeholder Roundtable (12 August 2024); Meeting with Workplace Incidents Consultative Committee (21 August 2024).
78. *Crimes (Restorative Justice) Act 2004* (ACT) ss 57–58.

## Case Study 2: An example of restorative justice conferencing in New Zealand

In New Zealand, restorative justice conferencing regularly occurs as part of OHS prosecutions, and courts sentencing OHS offenders often refer to those processes in sentencing. One case involved a meat-packing plant operator. Employees were tasked with, among other things, operating and cleaning a meat grinding machine at the plant. The company pleaded guilty to allowing a dangerous work practice involving staff cleaning moving parts in the machine without using an interlock guard. On one occasion, an employee placed his hand inside the machine while it was still on and got his fingers caught, amputating four of his fingers.

The employee and a representative of the company agreed to participate in a restorative justice conference prior to sentencing. In the sentencing judgment, the court didn't mention the process leading up to the conference, but it can be assumed that an expert facilitator liaised with the participants over a period of time prior to conferencing to describe the process and set expectations.

During the conference, the employee described the pain, loss of independence, social isolation and embarrassment he experienced as a result of the injury, and subsequent difficulties in caring for his young son and elderly parents. The company then extended an apology to the victim, and agreed to pay $60,000 in reparation for emotional harm and to cover the cost of a prosthetic hand. The company also committed to provide whatever support he needed to remain employed with the company in an alternative role.

During sentencing, the court took into account the company's participation in the restorative justice conference and noted that the company had done everything it said it would during the conference. The court acknowledged the company's 'high level of remorse and reparation', in part evidenced by their genuine participation in a restorative justice conference and fulfilment of the restorative justice agreement. The company ultimately received a fine of almost $200,000 out of a possible maximum fine of $1.5 million.

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restorative justice agreement were incorporated as conditions of a health and safety undertaking, those conditions would become binding as conditions of the sentencing order. Breaches of the order would then render the offender liable to contravention proceedings, which may result in both a separate penalty for contravention and being resentenced for the original charges. In any event, keeping affected persons appraised of the enforceability of any agreement reached will be important to ensuring their ongoing informed consent to participate.

## Recommendation 2: A framework for restorative justice conferences

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to provide a framework for restorative justice conferences to occur in cases involving offences contrary to that Act.

### *Establishing and monitoring a restorative justice conferencing trial*

2.51 For completeness, we recommend that the government establish a pilot program of restorative justice conferences in OHS cases. In addition, given the potential utility for restorative justice processes in cases involving other types of offending (not just OHS offences), and the importance of ensuring the intended framework is actually fit for purpose, we believe it is necessary that a system to collect data and feedback on that pilot program be in place from the outset. This will enable continuous improvements to occur, as well as interim and final evaluations – which we propose be finalised within two and four years – to be conducted. In consultation, all stakeholders were supportive of ensuring that any pilot of restorative justice conferences in OHS cases be monitored and evaluated.[79]

## Recommendation 3: Pilot and evaluate restorative justice conferences

The Victorian Government should establish a program trialling the use of restorative justice conferences in cases involving offences contrary to the *Occupational Health and Safety Act 2004* (Vic), and ensure a system is in place for continuous feedback that results in interim and final evaluations being completed within two and four years, respectively.

79. Meeting with Australian Association for Restorative Justice (6 August 2024); Meeting with RMIT Centre for Innovative Justice (8 August 2024); Stakeholder Roundtable (12 August 2024); Meeting with Australian Centre for Justice Innovation, Monash University (15 August 2024); OHS Barrister Roundtable (16 August 2024); Meeting with Workplace Incidents Consultative Committee (21 August 2024); Meeting with Herbert Smith Freehills (27 August 2024); Meeting with Environment Protection Authority (29 August 2024).

# 3. Changing sentencing practices for OHS offences

3.1 The focus of this chapter is on sentencing outcomes for OHS offences: given what we know about current sentencing practices, do sentencing outcomes need to change, and if so, what reforms are necessary to achieve that change? In addition to summarising what stakeholders told us in consultation and in written submissions, this chapter reports on the results of our community consultation process, which aimed to gauge the community's expectations about sentencing practices for OHS offences. As a result of our statistical analysis and consultation, we are of the view that there is a need for a number of reforms to the sentencing of OHS offences. These reforms are necessary to ensure that sentencing practices more closely align with community expectations and are better able to achieve the purposes of sentencing specified in the *Sentencing Act 1991* (Vic) ('the *Sentencing Act*').

## Contextualising sentenced OHS offences

3.2 Before examining sentencing practices, it is important to first contextualise the nature of sentenced OHS offences. There are hundreds of thousands of workplaces operating in Victoria at any given time. WorkSafe Victoria ('WorkSafe') conducts over 40,000 inspections every year. From those inspections, WorkSafe issues almost 10,000 improvement and prohibition notices each year. And WorkSafe prosecutes just over 100 companies and individuals annually for OHS offences.[80] This suggests that the vast majority of workplaces are reasonably safe, and for those that have apparent deficits, WorkSafe more frequently takes action other than prosecution (such as issuing an improvement or prohibition notice). In turn, it's important to emphasise that the cases involving OHS offences that are sentenced are not representative of Victorian workplaces. Instead, either they represent the worst instances of poor OHS practices, especially where someone has been injured or killed, or alternatively they represent key areas of focus for WorkSafe, such as the recent emphasis on the risks of falls from height.

3.3 We also note that the majority of businesses are small and medium-sized enterprises. According to data published by the Australian Bureau of Statistics,[81]

80. *Statistical Report* 10–11.

81. Australian Bureau of Statistics, 'Counts of Australian Businesses, Including Entries and Exits, July 2020–June 2024' (abs.gov.au, 2024).

as at June 2024 there were 2,662,211 businesses operating across Australia. Just 0.2% of those businesses employed 200 staff or more, and just 2.6% employed 20 staff or more. Conversely, 97% of businesses across Australia employed fewer than 20 staff. Indeed, 62% of businesses do not employ anyone at all. This is important contextual information because, while some of our proposed reforms are designed to ensure sentencing outcomes are better calibrated to the size of the company for larger entities, most companies are not large companies.

## What are current sentencing practices for OHS offences?

3.4 The term 'current sentencing practices' in the *Sentencing Act* refers to how a particular type of offence, offending or offender is currently being sentenced. Are prison sentences becoming longer, as we have seen for offences such as incest and murder?[82] Or are, perhaps, court outcomes for children increasingly prioritising rehabilitation, as can be seen through the increased use of diversion in the Children's Court?[83] In theory, courts should strive to achieve a measure of consistency between cases by referring to current sentencing practices when deciding an appropriate sentence in any given case.[84] As the Court of Appeal has observed, this will usually require courts to consider 'both … relevant sentencing statistics' and 'sentencing decisions in comparable cases'.[85]

3.5 Our terms of reference asked us to examine whether current sentencing practices for OHS offences align with community expectations. Before seeking the community's views, our first task was to understand what sentencing practices for OHS offences currently are in Victoria. Using court data on sentencing outcomes, prosecution result summaries published on WorkSafe's website (especially cases sentenced in the Magistrates' Court), sentencing remarks published by the higher courts (especially the County Court), and appeal judgments published by the Court of Appeal, we sought to present a comprehensive picture of current sentencing practices in our *Consultation Paper* and *Statistical Report*. The court data, higher courts sentencing remarks and appeal judgments covered the 16-year period from 1 July 2005 to 30 June 2021 (the most recent data we had available at the time). The prosecution result summaries have been available since January 2012.

82. Sentencing Advisory Council, *Long-Term Sentencing Trends in Victoria* (2022) 6–7, 18–19.
83. Sentencing Advisory Council, 'Sentencing Outcomes in the Children's Court' (sentencingcouncil.vic.gov.au, 2024).
84. *Sentencing Act 1991* (Vic) s 5(2)(b).
85. *DPP v CPD* [2009] VSCA 114 [78].

3.6 Some of our key findings about current sentencing practices included:

- most OHS cases are sentenced in the Magistrates' Court (88%), in part because fine amounts currently imposed for OHS offences are typically well within the jurisdictional limit of the Magistrates' Court (in 2024–25, that was about $99,000 for individuals and $494,000 for companies);
- most offenders sentenced for OHS offences were corporations (83%) (maximum penalties are higher for companies than for individuals);
- the most common OHS offences sentenced are breaches of health and safety duties by *employers* (67%), which currently carry a maximum penalty of 9,000 penalty units for corporations (about $1.78 million) and 1,800 penalty units for individuals (about $356,000);
- the most common sentence imposed in OHS cases is a fine (90% of cases involving companies, and 72% of cases involving individuals);[86]
- the next most common sentence was an undertaking,[87] and most undertakings required the offender to make a charitable donation;
- in the 58 cases in which an individual received a penalty other than a fine, 40 undertakings,[88] 10 diversion plans, four community orders, three wholly suspended sentences of imprisonment, and just one immediate term of imprisonment were imposed;
- most cases sentenced in the higher courts involved a fatality (82%), compared to just 4% of cases in the Magistrates' Court, and companies typically received much higher fine amounts where there was a fatality in the case (for example, 45% of fines in cases involving fatalities were $200,000 or more, compared to less than 1% of fines in cases that did *not* involve a fatality);
- fine amounts in the higher courts tended to *increase* over time, from a median fine of $135,000 for companies during the first half of our reference period to $250,000 during the second half;[89]
- fine amounts in the Magistrates' Court tended to *decrease* over time, from a median fine of $40,000 for companies during the first half of our reference period to $20,000 during the second half – given the increasing value of

86. In the *Statistical Report*, we also note that 86.7% of all OHS *charges* received a fine: *Statistical Report* 18.
87. Court data did not always delineate whether these were adjourned undertakings pursuant to sections 72 and 75 of the *Sentencing Act 1991* (Vic), or health and safety undertakings pursuant to section 137 of the *Occupational Health and Safety Act 2004* (Vic). Those two orders are, however, largely similar in nature.
88. Court data did not always delineate whether these were adjourned undertakings pursuant to sections 72 and 75 of the *Sentencing Act 1991* (Vic), or health and safety undertakings pursuant to section 137 of the *Occupational Health and Safety Act 2004* (Vic). Those two orders are, however, largely similar in nature.
89. *Statistical Report* 36–37 (Table 5).

penalty units in that timeframe, this represents a 70% decline in fine values in the decade to 30 June 2021;[90]

- in 2019–20 the median fine for an employer company breaching a health and safety duty in the Magistrates' Court (125 penalty units, or $20,653) represented 5% of the court's jurisdictional limit and 1.4% of the maximum penalty;[91]
- the majority of sentence appeals from the Magistrates' Court and the County Court were initiated by the Director of Public Prosecutions, who was successful in 21 of 24 *de novo* appeals in the County Court (with an average 260% increase in the fine amount), and five of nine Court of Appeal cases; and
- there has only been one adverse publicity order made since the *OHS Act* came into effect in 2004, and it was in early 2023.

3.7 At the time we published our *Consultation Paper*, there had not been any cases sentenced involving Victoria's new workplace manslaughter offence (which came into effect in July 2020). The maximum penalty for that offence is 25 years' imprisonment for an individual, or 100,000 penalty units for a corporation (which, in 2024–25, amounts to about $19.8 million).[92] A few weeks after we published our *Consultation Paper*, the Supreme Court sentenced Victoria's first workplace manslaughter offence in a case involving a forklift incident.[93] The director of the offending company received a two-year community correction order with 200 hours of unpaid community work, and the company received a $1.3 million fine (which was about 7% of the maximum penalty for the offence).

## Current sentencing practices in psychosocial risk cases

3.8 There is a further topic relating to current sentencing practices that we did not address in our *Consultation Paper* but should be mentioned here: in particular, sentencing practices for *psychosocial risks* in the workplace, being those risks that primarily place employees in danger of psychological harm. These can range from employers failing to provide adequate emotional support systems in a workplace, to engaging in (or at least failing to prevent) sexual harassment or prolonged workplace bullying.[94]

90. *Statistical Report* 33 (Table 4).
91. *Statistical Report* 34.
92. *Occupational Health and Safety Act 2004* (Vic) s 39G.
93. *R v LH Holding & Hanna* [2024] VSC 90.
94. WorkSafe Victoria, 'Psychosocial Hazards Contributing to Work-Related Stress' (worksafe.vic.gov.au, 2024).

3.9 In 2011, in response to the *Café Vamp* case,[95] the Victorian Government introduced legislation expressly designed to criminalise workplace bullying.[96] More recently, the government consulted on the proposed introduction of new *Occupational Health and Safety (Psychological Health) Regulations*.[97] There does, though, appear to have been few OHS prosecutions against employers or others for workplace bullying, or for generally failing to reasonably protect against psychosocial risks.

3.10 Such prosecutions are, however, beginning to occur more frequently:[98]

- In October 2023, Court Services Victoria was fined $380,000 (the maximum fine available in the Magistrates' Court at the time) with conviction for allowing risks to the psychological health of employees in the Coroners Court. These risks were due to 'exposure to traumatic materials, role conflict, workloads, work demands, poor workplace relationships and inappropriate workplace behaviours … including allegations of bullying, favouritism and cronyism, verbal abuse, derogatory comments, intimidation, invasions of privacy and perceived threats to future progression', which resulted in a staff member being 'diagnosed with [a] work related major depressive disorder' and being 'found deceased in her home as a result of suicide'.[99]
- In November 2023, a number of café franchisee organisations received fines of $40,000 and $110,000 for failing to provide an avenue for reporting sexual harassment (which had been occurring at those locations for seven years),[100] and the manager responsible for the behaviour received a $40,000 fine with conviction.[101]
- In December 2023, the sole director of a glass manufacturing company received a $60,000 fine for workplace bullying behaviour that included, among other things, taping an apprentice 'to a crane topless and suspended above the ground', slapping him, and filming the incident, which was then circulated on social media.[102]

95. See Steve Butcher, 'Workers Fined $115,000 over Bullying of Café Waitress', *The Sydney Morning Herald* (8 February 2010).
96. *Crimes Amendment (Bullying) Act 2011* (Vic).
97. Victorian Government Solicitor's Office, 'Proposed Psychological Health Regulations for Victorian Employers Are Under Consideration' (vgso.vic.gov.au, 2024).
98. According to WorkSafe's prosecution result summaries published on its website, there have only been eight workplace bullying prosecutions in the nine years from 2012 to 2020 (less than one per year), but there have been 10 workplace bullying prosecutions in the 3.5 years from 2021 to July 2024 (three per year): WorkSafe Victoria, 'Prosecution Result Summaries' (worksafe.vic.gov.au, 2024).
99. WorkSafe Victoria, 'Court Services Victoria' (19 October 2023), *Prosecution Result Summaries and Enforceable Undertakings: A Directory of the Most Recent Prosecution and Enforceable Undertaking Outcomes* (2024) ('*Prosecution Result Summaries*').
100. WorkSafe Victoria, 'Whitelom Pty Ltd (in liquidation)' (26 October 2023), *Prosecution Result Summaries*; WorkSafe Victoria, 'Whitelom Investments Pty Ltd (in liquidation)' (26 October 2023), *Prosecution Result Summaries*.
101. WorkSafe Victoria, 'Mark Whitelock' (26 October 2023) *Prosecution Result Summaries*.
102. WorkSafe Victoria, 'Steven Yousif' (11 December 2023), *Prosecution Result Summaries*.

- Also in December 2023, a catering company was fined $10,000 after its head chef was found to have bullied two 17-year-old apprentices, including telling one of them 'to slit his own wrists and to drink boiling oil' and 'tap[ing] cabbage leaves to [his] head during work shifts'. The head chef received a separate $4,000 fine.[103]
- In July 2024, a heating and cooling installation company received a $10,000 fine without conviction for having no policies, procedures, reporting processes or risk control measures related to workplace bullying. Over a period of time, an apprentice had been subjected to, among other things, physical assaults ('being spat on … placed in headlocks … shot at with a nail gun … [and] hung from a noose'), 'sexually harassing comments and actions', taunts that his biological father was not alive, and 'having a bucket of water mixed with paint thrown over [him] during a cold day'.[104] Despite the court considering the company's departure from its duty to provide a safe workplace to be 'mid-range' and the apprentice being 'vulnerable due to age and lack of experience', the $10,000 fine imposed represented just 0.6% of the maximum penalty (almost $1.7 million) and 2.2% of the Magistrates' Court's jurisdictional limit (about $462,000).

3.11 It's fair to say that sentencing practices in cases involving psychosocial risks already seem to have fallen into step with those in more traditional OHS cases involving risks to physical safety. The fine amounts are typically well below $100,000, are somewhat inconsistent, and are only higher in cases with a fatality. If sentencing practices in OHS cases more generally are to be changed – and as discussed below, we believe they should be – it will be important to ensure that sentencing practices in cases involving psychosocial risks are changed as well, commensurate with the seriousness of the behaviour.

## Current sentencing practices in other regulatory contexts

3.12 It is also helpful to consider sentencing practices and civil penalties in other regulatory contexts, in part because there seem to be rather disparate approaches to civil and criminal penalties for regulatory offending.

103. WorkSafe Victoria, 'Ideal Catering Services Pty Ltd' (14 December 2023), *Prosecution Result Summaries*; WorkSafe Victoria, 'SC14 of 2023' (14 December 2023), *Prosecution Result Summaries*.
104. WorkSafe Victoria, 'Celsius Ballarat Pty Ltd' (16 July 2024), *Prosecution Result Summaries*.

### *Criminal penalties in EPA and NHVR cases*

3.13 Several offences in the *Environment Protection Act 2017* (Vic) are designed to reduce or eliminate risks to health or the environment, and those offences are enforced by the Environment Protection Authority (EPA).[105] There are also offences in the *Heavy Vehicle National Law* designed to reduce or eliminate risks arising from the use of heavy vehicles. That law applies in most Australian jurisdictions, with the National Heavy Vehicle Regulator (NHVR) responsible for enforcement. Much like the model work health and safety laws ('model laws'), the *Heavy Vehicle National Law* has three 'categories' of general duty offences, for which the maximum fines are $500,000, $1.5 million and $3 million.[106]

3.14 Similar to WorkSafe publishing on its website prosecution result summaries of matters sentenced in the summary jurisdiction, the EPA maintains a set of prosecution summaries on its website,[107] and the NHVR maintains a comparative sentencing table on its website.[108] These summaries show that there are some similarities in sentencing practices across regulatory prosecutions, but also some important differences. The most prominent similarity among them all is that fines for breaches of duties that place others at risk tend to be less than $100,000. In one NVHR case, however, the offending company received a $1.2 million fine for 37 category 3 offences (the least serious offence category) for allowing drivers of heavy vehicles to continue driving despite knowing that those drivers had exceeded the maximum number of driving hours to avoid fatigue-related risks.

3.15 Notably in both the EPA and NHVR cases, there appears to be greater utilisation of non-fine penalties that place behavioural obligations on offenders. There are a number of EPA cases where, rather than being required to simply make a donation to the Court Fund, the offender has been required to fund a particular project. For example, in recent proceedings, the South Gippsland Region Water Corporation was ordered to fund $50,000 towards a project that would fence off waterways from stock to improve the conditions of a local creek, as well as provide weed

105. For instance, there is a general environmental duty that carries a maximum penalty of 10,000 penalty units for companies and 2,000 penalty units for individuals: *Environment Protection Act 2017* (Vic) s 25. There is also an aggravated version of that offence, for which the maximum fine is doubled if the offender engaged in the breaching conduct intentionally or recklessly, the conduct caused harm, and the offender should have known it was likely to cause harm: s 27. The most commonly prosecuted offences are breaches of license conditions and offences relating to industrial waste, which also carry maximum fines of 10,000 penalty units for companies and 2,000 penalty units for individuals: see, for example, *Environment Protection Act 2017* (Vic) ss 63, 133.

106. The fines for individuals are $50,000, $150,000 and $300,000 respectively: *Heavy Vehicle National Law 2012* (Qld) ss 26F–26H.

107. Environment Protection Authority Victoria, 'Register of Court Proceedings' (epa.vic.gov.au, 2024).

108. National Heavy Vehicle Regulator, *Primary Duty Matters – Comparative Sentencing Table* (2024).

control and revegetation of the surrounding areas.[109] In another case, building developers were required to spend half a million dollars undertaking an audit and remediation works on soil at a building site in Melbourne, with any remaining funds to be given to a charity of the EPA's choice.[110] There have also been a number of NHVR cases in which the offending company has received a 'supervisory intervention order', with conditions such as developing a speed management policy, requiring all drivers to use electronic work diaries, providing fatigue management training to all drivers and staff, improving various safety practices and appointing a consultant to monitor compliance with those improved practices for a period of time, carrying out scheduled vehicle servicing every six months by a qualified mechanic, and providing the NHVR with evidence of compliance with these conditions.

3.16 And in EPA cases, in particular, adverse publicity orders have become common in recent years, with various companies being required to publish the details of their offending in publications such as the *Geelong Advertiser*, *The Age*, the *Bellarine Times*, the *Surf Coast Times*, a local newspaper in Wangaratta, and the *South Gippsland Sentinel Times*.[111] We note that these are all newspapers, whereas we envisage use of a broader range of publication media if adverse publicity orders are to be made more frequently in OHS cases, particularly given the changing ways in which people consume information, largely online and via social media.[112]

3.17 In effect, in both EPA and NHVR cases, there seems to be greater use of a wider range of sentencing orders that have the potential to better achieve the various purposes of sentencing, especially deterrence.

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109. Environment Protection Authority Victoria, 'South Gippsland Region Water Corporation (ABN 40 349 066 713)' (epa.vic.gov.au, 2024).
110. Environment Protection Authority Victoria, 'Axcent Apartments Pty Ltd' (epa.vic.gov.au, 2024).
111. See, for example, Environment Protection Authority Victoria, 'Geelong Landfill Pty Ltd' (epa.vic.gov.au, 2024); Environment Protection Authority Victoria, 'I, C & J Santospirito Pty Ltd' (epa.vic.gov.au, 2024); Environment Protection Authority Victoria (2004), above n 109; Environment Protection Authority Victoria, 'Van Hessen Australia Pty Ltd' (epa.vic.gov.au, 2024).
112. In the recent Federal Court case of *ASIC v Commonwealth Bank of Australia [No 2]* [2021] FCA 966, the judge (at [17]) wrote about the unlikelihood of achieving the intended effects of adverse publicity orders if the only publications are in newspapers: 'It is a fairy tale to think that in 2021 dense legalistic public advertisements, published in the notices section of daily newspapers, often cheek by jowl with the results of things such as flower shows and greyhound races, amounts to an effective way of communicating information to a broad audience of consumers. The decline in literacy rates in Western societies, and the likelihood that the intended audience is made up of persons at every point of the continuum of sophistication in financial and legal matters, presents real challenges that cannot be simply ignored'.

## Community expectations of sentencing OHS offences

3.18 Having established what current sentencing practices are in the context of OHS offences, we next gauged community expectations, to better understand whether those expectations are aligned with those sentencing practices. We did this in a number of ways:

- we met with a number of individuals and organisations in preliminary consultation meetings to gauge initial views about sentencing practices;
- we posed specific questions in the *Consultation Paper* seeking respondents' views on sentencing practices – in particular, whether sentencing orders other than fines should be used more frequently in OHS cases (Question 13), and whether there is a need to increase fine amounts for OHS offences (Question 15);
- we conducted an online survey via Engage Victoria that asked respondents about their views on current sentencing practices – in particular, whether sentencing options other than fines should be used more often in OHS cases (Survey Question 5), and whether there is a need to change the values of fines imposed for OHS offences in Victoria (Survey Question 6); and
- we conducted eight community consultation events across Victoria, at which we provided participants with real-life case studies of OHS offences and asked them to decide what sentence they felt was appropriate, as well as what they thought about the appropriateness of the sentence actually imposed in the case.

### Community expectations: community consultation events

3.19 Appendix 2 provides a full description of our approach to these community consultation events. In brief, at each session we asked participants to sentence one of two real-life cases involving OHS offences: one involved a small company dealing in solar panel installation, which placed two of its workers at risk of falling from height by not having adequate fall protection measures ('Daylight Solar'); the other involved a large national construction company whose breaches contributed to the death of a subcontractor who fell from an elevated work platform ('Brick & Mortar').

3.20 At each session, we told participants about the circumstances of the offending and its consequences, the circumstances of the offender, the applicable maximum penalty, and the available sentence types. We then asked participants to sentence the case and share their views as to what constituted an appropriate sentence. We asked participants what sentence type they would impose and, if it was a fine, the amount they would impose, whether they would impose an adverse publicity order, and whether they would record a conviction. We then revealed the penalty that the court actually imposed in the case, and asked participants to comment on the

appropriateness of that penalty as well as the maximum penalty available. Importantly, we also asked participants how much weight they gave to certain factors in each case study, namely the level of the risk, the fact that no-one was harmed or that someone was killed, the criminal history of the offender, the size and financial circumstances of the offending company, the steps taken by the offender after their offending, and the fact that the offender pleaded guilty (which they did in both case studies).

3.21 While we note that the community consultation events represent 50 participants' responses, some important and consistent findings emerged from those events:

- across both case studies, 62% of participants would have imposed a health and safety undertaking (HSU), either on its own or in addition to a fine, frequently with conditions to undertake specific educational or improvement projects. By way of comparison, just 10% of actual OHS cases currently result in an undertaking of some sort, and the only condition is usually to make a charitable donation rather than engage in any behavioural conditions (Figures 1 and 2, page 41);
- for the 36 participants who sentenced the case involving a large company and a fatality, the average fine imposed was $2.8 million, almost six times more than the actual fine imposed ($475,000) – 58% imposed the maximum allowed ($3.5 million), and the lowest fine among all 36 participants was $600,000, which was still more than the actual fine imposed (Figure 4, page 41);
- for the 14 participants who sentenced the case involving a small company and no injuries, the average fine imposed was $113,000, which was partly attributable to two outliers at one event[113] – most participants (nine) imposed a sentence of $100,000 or less (Figure 3, page 41);
- upon hearing the sentence actually imposed in the relevant case, most of the 14 participants in the Daylight Solar case study thought the $35,000 fine was 'about right' (six) or 'a little too low' (five), and relatively few participants thought it was 'much too low' (three) (Figure 5, page 41);
- in contrast, the vast majority of the 36 participants in the Brick & Mortar case study felt the fine was 'much too low' (30), another five thought it was 'a little too low', and only one thought it was 'about right' (Figure 6, page 41);
- 84% of all participants[114] would have recorded a conviction, with a much higher rate in the case study involving the large company and a fatality (97%, or 34 out of 35), compared to just 50% of participants in the other case study (seven out of 14); and
- 70% of all participants would have imposed an adverse publicity order, whereas only two such orders have been imposed in Victoria in the last 20 years.

113. At the Lilydale event, one participant imposed $480,000 (which we said was the maximum due to the Magistrates' Court's jurisdiction in the case) and another imposed $250,000, both well above any other fines imposed.

114. One person did not respond to this question, so this percentage represents 41 of 49 participants.

**Figure 1:** Community consultation responses (sentence type, Daylight Solar)

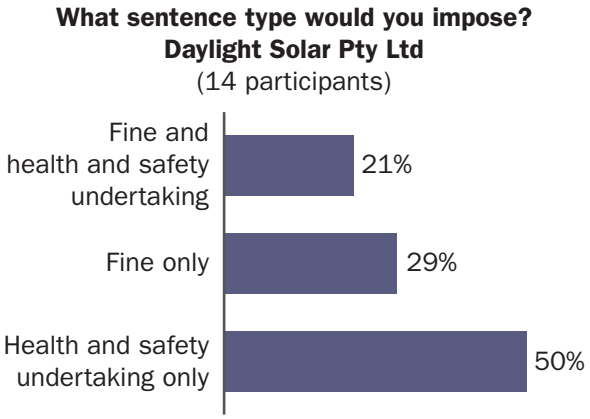



**Figure 2:** Community consultation responses (sentence type, Brick & Mortar)

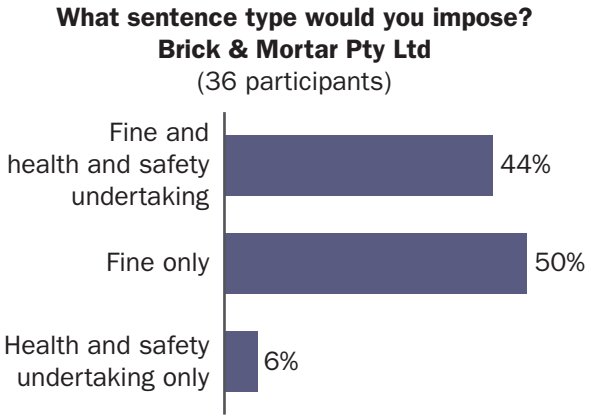



**Figure 3:** Community consultation responses (fine amount, Daylight Solar)

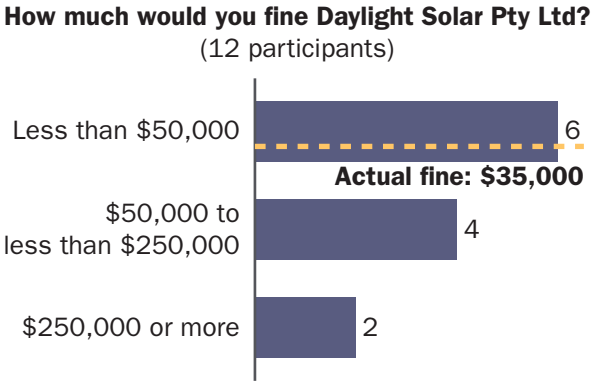



**Figure 4:** Community consultation responses (fine amount, Brick & Mortar)

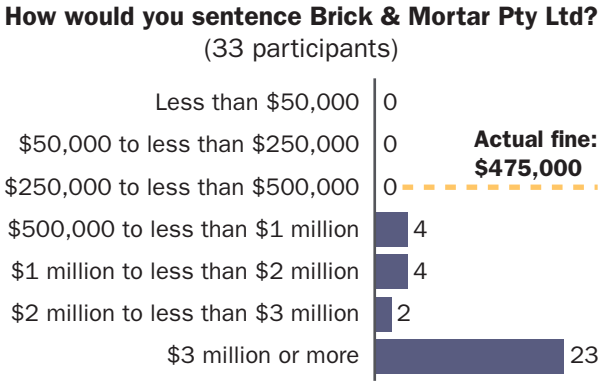



**Figure 5:** Community consultation responses (appropriateness of sentence, Daylight Solar)

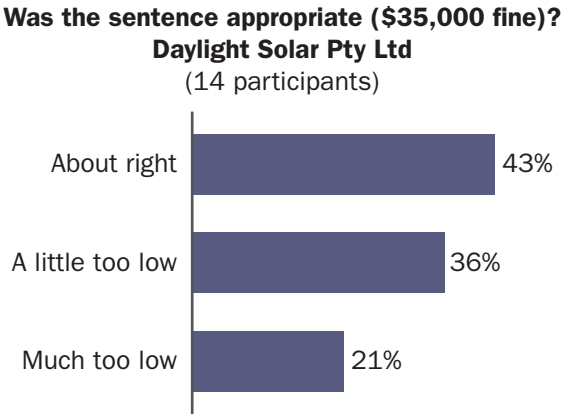
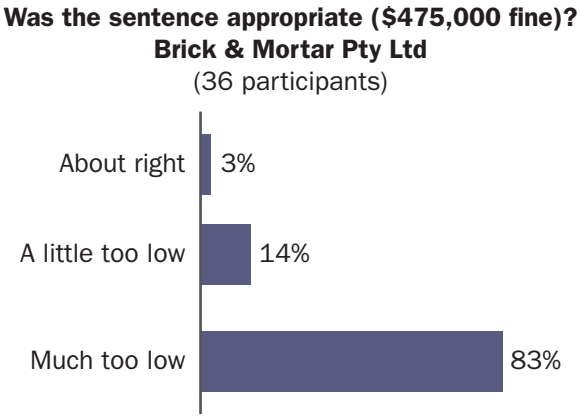



**Figure 6:** Community consultation responses (appropriateness of sentence, Brick & Mortar)



### *Daylight Solar Pty Ltd*

3.22 We chose the case of Daylight Solar Pty Ltd ('Daylight Solar') for a case study because the fine was larger than most penalties imposed in the Magistrates' Court for risk-only breaches of health and safety duties. That choice was designed to test whether even a relatively high fine by current standards met with community expectations. As we found in the *Statistical Report*, fine amounts in the Magistrates' Court declined over time to a median of $20,000 by 2019–20, and fines of $10,000 or less are common.[115]

3.23 The median fine imposed by participants sentencing Daylight Solar was $52,500, which is 50% higher than the $35,000 actually imposed, and well above most fine amounts in the summary jurisdiction. These results suggest that fine amounts for smaller entities whose behaviour does not result in an injury do not accord with community expectations. That said, participants also seemed to see more value in health and safety undertakings for the small company, with most telling us that they saw more benefit in requiring some 'above-and-beyond' safety improvements rather than simply imposing a fine as punishment. For instance:

> I just think that the fine isn't effective when they're already in a loss, the undertaking to me is something that we don't do anywhere near enough in Victoria.
>
> **Community Consultation Participant, Ballarat (19 February 2024)**

> I would prefer … [if] the employees of that company were put through the appropriate … training … [t]he other thing is, with the fine, if you fine them too heavily, they'll … just [p]hoenix, which is a sad reality. And I'm not sure … whether the fine is going to change the behaviour.
>
> **Community Consultation Participant, Morwell (21 February 2024)**

> I feel that I have seen companies put a lot of additional effort into compliance with their … undertakings, I feel that it can create an industry uplift in terms of… training or some sort of program or awareness. And I'd rather see the money go to something like that[.]
>
> **Community Consultation Participant, Geelong (28 February 2024)**

> [Y]ou don't want to have an extraordinarily huge fine because you got … other people that are relying on employment. So there's a social utility cost associated. If you go and fine them, all of a sudden … people … are out of a job because the employer can't afford the fine. There's got to be a bit of balance there. And an undertaking – everything in the OHS Act, it's about prevention … An undertaking in terms of educating people that are in the industry is huge. Because that education piece goes towards the prevention piece.

115. *Statistical Report* 32–36.

> So, 'look at me, I've been made an example, I got fined'. That's the education … that's important to get out there to prevent those breaches happening in the first place.
>
> **Community Consultation Participant, Ballarat (19 February 2024)**

> It actually takes more effort to do an [undertaking] than it does to just pay a $35,000 fine.
>
> **Community Consultation Participant, Ballarat (19 February 2024)**

### *Brick & Mortar Pty Ltd*

3.24 Participants sentencing Brick & Mortar Pty Ltd ('Brick & Mortar') saw more value in imposing a fine on the company, either on its own or in combination with a health and safety undertaking, which some participants referred to as a 'shandy'.[116] Participants told us that the fine was necessary to express condemnation and achieve just punishment, while the undertaking was geared towards rehabilitative and deterrent objectives. Indeed, 68% of participants across both case studies imposed *both* a fine and an undertaking. Participants explained why they believed an undertaking would be appropriate in this case:

> The undertaking could cost a lot more time. Hopefully that might make them sit up and think.
>
> **Community Consultation Participant, Geelong (28 February 2024)**

> That would improve the safety of the site by enforcing the undertaking. For businesses like this, the amount you're talking about is back-pocket money. They can budget for that … [t]he undertaking would be a better option because you can actually force them to spend a considerable amount more … in enforcing better safety procedures.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

> Fines in companies that size tend to be absorbed quite quickly. I think you could have more controls when putting in place an undertaking, and probably achieve … greater deterrence to an organisation.
>
> **Community Consultation Participant, Geelong (28 February 2024)**

3.25 As to the types of conditions that participants would have imposed in a health and safety undertaking, some of the conditions shared with us included being of good behaviour, having OHS practices audited, apologising to the injured worker or their family, publishing an announcement in the newspaper, participating in restorative justice, compensating the family of the deceased worker, delivering presentations to other organisations, and requiring staff and management to participate in OHS training.

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116. Named after the popular beverage constituted by a beer and a non-alcohol drink, such as lemonade.

3.26 Remarkably, not one participant imposed a fine as low as the actual fine imposed on Brick & Mortar in that case ($475,000), with the lowest fine imposed by a participant being $600,000. These results strongly suggest that sentencing practices in cases involving larger companies, and in cases where someone has been seriously injured as a result of the breach of duty, are significantly out of alignment with community expectations:

> The whole point of sentencing is to deter it from happening again. [The maximum penalty] is too low for a company that size.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

## Community expectations: survey results

3.27 As can be seen in Figures 7 and 8, the majority of survey participants felt that sentencing options other than fines should be used more often in OHS cases (82%) and that the values of fines currently being imposed are too low (73%).

**Figure 7:** Survey responses (sentencing options)

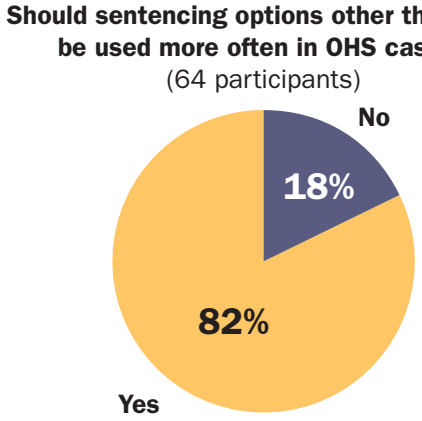
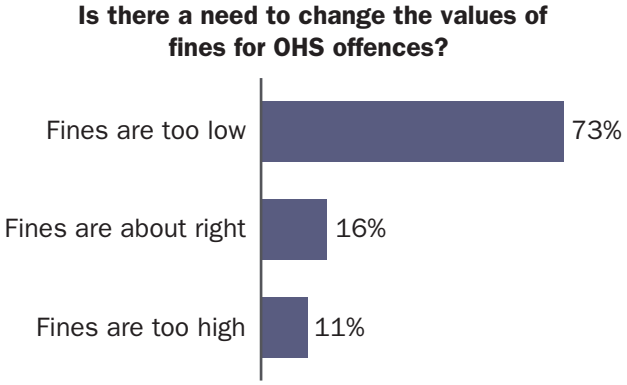



**Figure 8:** Survey responses (fine amounts)




### *Use of types of sentencing orders*

3.28 In comments, survey participants explained that they would advocate for greater use of alternative sentencing orders (other than fines) because of a perception that fines either were ineffective in deterring OHS breaches or were counterproductive to positive OHS outcomes:

> Fines are meaningless to so many businesses. They just factor them in as part of the risk. There need to be actual impactful consequences.
>
> **Survey Participant (female, 35–44)**

> Fines are clearly not working (and that's when they're actually paid). If there was more fear around the consequences of OHS breaches, then they might be taken more seriously by those in charge.
>
> **Survey Participant (female, 25–34)**

> Fining a small or medium sized company for a safety breach is completely counterproductive and makes it even harder for them to meet safety requirements. Improving safety is costly, even if it is just downtime required for training staff. Instead of paying fines, companies should be allowed to direct this money into improving safety.
>
> **Survey Participant (gender unspecified, 45–54)**

> Financial penalties are not enough, we should look at all options available … to ensure that the offence does not happen again. I believe that other sentencing options should be the priority with the addition of a financial penalty added as an additional penalty.
>
> **Survey Participant (male, 55–64)**

3.29 One survey participant appeared to have first-hand experience of their employer receiving an undertaking:

> It positively affected many people, whilst placing an appropriate burden on the organisation. Undertakings can be a creative way to build capacity within an organisation or community, whilst fines may further restrict, or even bankrupt a company, with [a] potentially larger impact on the community.
>
> **Survey Participant (male, 45–54)**

3.30 Some survey participants also offered their views about the potential conditions of health and safety undertakings. These included mandatory education, engagement of an OHS consultant, and mandatory employment of particular staff (such as in-house safety managers). A number of participants said they would expressly advocate against charitable donations as conditions of sentencing orders in OHS cases, in part because 'they can use it as PR to make themselves look good'.[117]

3.31 Some of the other sanctions mentioned by survey participants included imprisonment, adverse publicity orders, special project orders and personal liability of some form for directors and other individuals:

> The mere fact that an OHS offender is imprisoned will serve as a huge deterrent to others engaging in the same conduct.
>
> **Survey Participant (male, 65–74)**

> For many companies and directors a financial penalty is not as punitive as damage to a reputation. I would like the courts to consider other options and combine these with a fine.
>
> **Survey Participant (male, 55–64)**

> The alternative sentencing options in the OHS Act are underused … special project orders under the alternative sentencing options should be considered.
>
> **Survey Participant (female, 45–54)**

117. Survey Participant (male, 65–74).

> Fines and good behaviour orders aren't going far enough. [There is a n]eed to force improvements, and where there are very serious issues and/or persistent conduct, consider imprisonment and disqualifying personnel or the business from being able to work/operate.
>
> **Survey Participant (female, 25–34)**

> A fine could be a miniscule sentence for a large/ASX organisation. Personal accountability for the responsible offenders may create more of a commitment to employee and community safety.
>
> **Survey Participant (female, 25–34)**

3.32 In contrast, respondents who felt that a greater use of other sentencing options was not needed considered that the threat of fines was the most effective means of incentivising compliance with OHS laws:

> The 'hip pocket' nerve speaks all languages. If employers know they need to pay a substantial fine for their actions they will usually 'lift their game'.
>
> **Survey Participant (gender unspecified, 55–64)**

> [F]ines should be heavier in certain circumstances to really hit offenders' hip pockets when they deliberately ignore the safety and wellbeing of their workers.
>
> **Survey Participant (gender unspecified, 25–34)**

## *Values of fines for OHS offences*

3.33 Many respondents who were of the view that fines were too low were especially concerned about fines imposed on companies:

> The fines appear to be severe enough for individuals, less so for companies.
>
> **Survey Participant (male, 35–44)**

> The max is high but usually doesn't go near that. There should be more use of the higher penalties, especially for companies.
>
> **Survey Participant (male, 35–44)**

> If it is a company or corporation … they need much larger fines. For individuals the fines seem okay. But if you think about … the difference between individual fines and company fines the compan[ies] are getting off way too easy.
>
> **Survey Participant (female, 25–34)**

3.34 The most common explanation for why respondents felt fines were too low was a perception that fine amounts did not correspond to the financial circumstances of offenders (specifically companies):

> Fines should be respective to the size of the business.
>
> **Survey Participant (male, 35–44)**

Fines should take into account the resources available to the company and the efforts they typically make to ensure safety in the workplace.

**Survey Participant (gender unspecified, 45–54)**

Fines can be detrimental for small companies and rightfully so, but for larger companies they are a slap on the wrist.

**Survey Participant (male, 18–24)**

When I see in the media a company that has a multi-million-dollar turnover slapped with a small fine I wonder if it is really a sentence? My understanding is that a sentence is to punish for a safety breach. Small fines to companies that are quite financially strong don't really appear to punish or deter.

**Survey Participant (male, 55–64)**

If the penalty needs to be financial, it should be a percentage of a company's income.

**Survey Participant (male, 55–64)**

When I see the amount that some companies are fined I shake my head at the amount imposed, in many cases it is a week or month's earnings for the business, this is not enough. Employers need to understand that if they hurt someone or kill someone they could possibly lose their business due to the fine imposed, this would make them put more effort into keeping their people safe.

**Survey Participant (male, 55–64)**

3.35 Others felt that values of fines were not proportionate to the severity of the offending, and could not achieve any meaningful level of deterrence or punishment, particularly in light of the available maximum penalty:

[F]or certain situations fines are not high enough and people just pay them and move on.

**Survey Participant (gender unspecified, 25–34)**

The fines are far too low, especially when illegal workplace conduct leads to the death or work ceasing injury of an employee.

**Survey Participant (male, 65–74)**

They are not enough of a punishment or deterrent.

**Survey Participant (male, 35–44)**

The victims of life altering injuries will never feel they are vindicated or heard if the fines aren't prohibitive.

**Survey Participant (female, 45–54)**

Why is the average for a fatality so low when the maximum could be $1.7 million?!

**Survey Participant (female, 35–44)**

> Although the range of the fines seems fair, the maximum fine is rarely imposed. In particular when there are injuries, sometimes [this] could be insulting [considering] the fine imposed in cases when workers have lost limbs or would live with a permanent disability.
>
> **Survey Participant (female, 45–54)**

3.36 There were a handful of respondents who thought fine values were either set at appropriate levels or set too high. One said that the high rate at which fines aren't paid is indicative that they are too high;[118] another pointed to the current challenging economic conditions as a reason to avoid higher fines.[119]

## Stakeholder views: written submissions

3.37 The majority of written submissions expressed a view that fine amounts for OHS offences are too low.[120] The primary motivations for advocating an increase in the values of fines imposed for OHS offences were a perception that doing so would increase the deterrent value of those fines and to better ensure the punishment was proportionate to the offending. For instance:

> [f]ines in OHS sentencing are so low that employers who fail in their duties to protect their workers can afford to kill, injure, or maim their employees without real deterrent. Fines have not only stagnated in the past decade, but they have gone backwards. From 2005–2013, the average fine for companies in the Magistrates' Court was $40,000, compared to the average fine in the period of 2013–2021 of only $20,000. This drop is further intensified when considering the rate of inflation during this period … Fines for OHS offences must be increased across the board, to ensure appropriate punishment, deter would-be offenders, and meet community expectations. Countless reviews into OHS sentencing have found that the level of fines historically handed down for breaches of the OHS Act do not act as an adequate deterrent.
>
> **Submission 8 (Victorian Trades Hall Council)**

> In our experience, client families often do not agree with the level of fines and are confused as to why courts hand down 'lenient' sentences in their situation … Uniting is in agreement with the widely accepted view that: "Fines for OHS offences are too low to change companies' behaviour" and, as a consequence, does little to deter the same offender or others from engaging in similar conduct. Our position is based on Uniting's

118. Survey Participant (female, 35–44) ('Obviously if they're not getting paid - they're too high').
119. Survey Participant (female, 35–44) ('The fines are already high … [w]e're in an economic crisis').
120. Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 13 (OHSIntros); Submission 16 (RMIT Centre for Innovative Justice); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 19 (Australian Institute of Health and Safety).

> experience delivering the GriefWork program and the concerns raised by the many bereaved families we assist in their recovery from grief and loss … When sentencing for OHS offences are too low and families do not see their expectation for justice being served, they are at risk of being re-traumatised by what they see as offenders getting off lightly.
>
> **Submission 9 (Uniting Vic.Tas)**

> The AMWU identifies a need to increase fine amounts for OHS … offences in certain cases. This could be particularly important in cases where the violations have resulted in serious injuries or fatalities. Increasing fines in these situations may serve as a stronger deterrent and emphasize the significance of maintaining a safe work environment.
>
> **Submission 6 (Australian Manufacturing Workers' Union)**

3.38 The Law Institute of Victoria also suggested that fines would seem to need to increase, particularly in specific cases, 'such as severe breaches … [and] for larger scale organisations (to achieve a deterrent effect)'.[121]

3.39 Not all organisations, however, shared the view that there was a need to increase fine amounts. The Victorian Automotive Chamber of Commerce wrote that 'the courts already have a broad discretion in determining appropriate sentencing outcomes, consistent with overarching sentencing principles – and in VACC's view, generally get it right'.[122] Similarly, the Housing Industry Association said that increasing fine amounts for OHS offences was 'not justified' because current fine amounts, which are routinely only a fraction of the available maximum, show that 'there is already wide scope for the courts to impose higher fines if they consider it appropriate to do so'.[123] The Victorian Congress of Employer Associations wrote that '[t]here is no basis to conclude that even higher penalties … [are] merited or necessary'.[124]

3.40 There was an even stronger majority of views, including from both unions and employer representatives, that there should be greater use of sentencing orders other than fines.[125] The motivation for advocating increased use of other sentencing orders, especially health and safety undertakings with behavioural-type conditions,

121. Submission 12 (Law Institute of Victoria).
122. Submission 15 (Victorian Automotive Chamber of Commerce). See also Submission 11 (Victorian Congress of Employer Associations).
123. Submission 1 (Housing Industry Association), citing *Statistical Report* 39–40.
124. Submission 11 (Victorian Congress of Employer Associations).
125. Submission 1 (Housing Industry Association); Submission 4 (Australian Industry Group); Submission 5 (Construction, Forestry and Maritime Employees Union); Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 19 (Australian Institute of Health and Safety).

was that these sentencing orders would have tangible benefits to health and safety outcomes, either for an organisation or for a broader industry. For example:

> we believe other orders should be used more frequently, particularly OHS undertakings … We think other types of orders are a key component of supporting industry to break the plateau, and indeed in Victoria the increase, in negative OHS outcomes seen in recent years.
>
> **Submission 19 (Australian Institute of Health and Safety)**

> options for better outcomes could be courts having the power to issue a mix of sentencing orders. This could be a combination of orders that, together with a fine, amount to a more substantial sentence. An example might be verified investments in rectifications necessary to make the workplace safe, plus repairing the social harm through compensation or relevant good works in their industry or in the community in which they have a presence.
>
> **Submission 9 (Uniting Vic.Tas)**

> Ai Group is of the view that these alternatives to sentencing provide much greater opportunities to improve health and safety outcomes[.]
>
> **Submission 4 (Australian Industry Group)**

> HIA is supportive of rehabilitation of the offender, rather than a fine, and that … should take precedence over other sentencing options. HIA considers that rehabilitation through adjourned undertakings and health and safety undertakings in lieu of other sentencing options should be used more frequently.
>
> **Submission 1 (Housing Industry Association)**

> it is arguable that our apparent and heavy reliance on what appears to be a "financial only" penalty punishment regime, under our OHS legislative framework, is not only inadequate, but it miserably fails … the primary purpose of OHS prosecution … [which is] deterrence.
>
> **Submission 5 (Construction, Forestry and Maritime Employees Union)**

> [injured workers and the families of deceased workers] believed the sentences imposed by the court, usually fines, were an inadequate response, and not sufficient to send a strong enough message to industry, or to ensure the necessary changes would be made in the workplace. They felt that fines could be readily absorbed by a business, and did not necessarily lead to any genuine insight on the employer's part about the full impact of the incident or the importance of maintaining safe work practices.
>
> **Submission 16 (RMIT Centre for Innovative Justice)**

3.41 There was no opposition to the increased use of alternative sentencing orders in OHS cases (that is, orders other than fines). The Victorian Automotive Chamber of Commerce and Victorian Congress of Employer Associations did, however, note that '[j]udicial officers already have the discretion to apply various sentencing options' under the *OHS Act*.[126] Their view suggests that there is no need for legislative reform to the available orders, but no comment was made on their current use.

## The Council's view: there is a need to change sentencing practices

3.42 The balance of feedback presented above shows that there is substantial community dissatisfaction with current sentencing practices for OHS offences, with respect to both the range of orders being utilised to deal with offending and the severity of fine amounts when fines are imposed.

3.43 Based on this feedback, we have reached the view that sentencing practices for OHS offences, in particular, breach of duty offences involving companies (especially larger companies), are inadequate, in that current sentencing practices fail to consider the potential to achieve more positive OHS outcomes with non-fine sentencing orders, fail to appropriately punish offending in a proportionate manner, and are not capable of achieving meaningful deterrence.

3.44 These conclusions, we note, are not new. As we said in our *Consultation Paper*, sentencing practices for OHS offences have been the subject of a number of reviews over the past 30 years.[127] Those past reviews have consistently found that:

- fine amounts have stubbornly remained at levels that are unlikely to deter unsafe work practices;[128]
- courts should make greater use of sentencing options other than fines;[129] and
- maximum penalties for OHS offences are too low.[130]

126. Submission 11 (Victorian Congress of Employer Associations); Submission 15 (Victorian Automotive Chamber of Commerce).
127. *Consultation Paper* 5–6.
128. *Consultation Paper* 5–6, citing Industry Commission, *Work, Health and Safety: An Inquiry into Occupational Health and Safety, Volume 1: Report* (1995) 103–104; Chris Maxwell, *Occupational Health and Safety Act Review* (2004) 14; Australian Senate, Education and Employment References Committee, *They Never Came Home – The Framework Surrounding the Prevention, Investigation and Prosecution of Industrial Deaths in Australia* (2018) 70; Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (2018) 127–128.
129. *Consultation Paper* 5–6, citing Industry Commission (1995), above n 128, 124–126; Maxwell (2004), above n 128, 376–381; Bob Stensholt, *A Report on the Occupational Health and Safety Act 2004: Administrative Review* (2007) 81, 85; Australian Government, *National Review into Model Occupational Health and Safety Laws: First Report* (2008) 148–149.
130. *Consultation Paper* 5–6, citing Industry Commission (1995), above n 128, 116–118; Maxwell (2004), above n 128, 367–369; Australian Government (2008), above n 129, 139; Australian Senate, Education and Employment References Committee (2018), above n 128, 70.

3.45 Our review has shown that these views remain prevalent among the community and key stakeholders. We approached our recommendations about how sentencing practices can be appropriately reformed mindful that past recommendations have not significantly changed sentencing practices, suggesting that there is a need for innovative reform ideas. The changes that we believe are necessary include:

- increased use of sentencing orders other than fines;
- a higher maximum penalty for breach of duty offences to accommodate worst-case instances of those offences;
- clearer guidance about the relevance of a person being injured or killed in a workplace incident to sentencing OHS offending;
- clearer guidance about the relevance of the size of a company to sentencing OHS offending;
- clearer guidance about the relevance of a company's 'prior character' to sentencing OHS offending;
- an increase in fine amounts in OHS cases generally, but especially in cases involving more serious offending by larger companies; and
- mechanisms that ensure courts are informed about the financial circumstances of companies so that they can calibrate the penalty imposed to the company's size.

3.46 In the *Consultation Paper*, we proposed a number of possible mechanisms for changing sentencing practices, including:

- increasing the maximum penalties for OHS offences;
- introducing mandatory or presumptive sentences for OHS offences;
- introducing standard sentences for OHS offences;
- the Director of Public Prosecutions or Attorney-General seeking a guideline judgment from the Court of Appeal;
- the Court of Appeal issuing an 'uplift' judgment;
- establishing a sentencing guidelines council that could develop sentencing guidelines that courts would take into account; and
- introducing a legislated sentencing guideline into the *OHS Act*.[131]

3.47 We further noted that a number of these potential reforms were likely to be ineffective, not practically workable, or lacking stakeholder support. Those included mandatory sentences, the introduction of standard sentences for OHS offences, a guideline or uplift judgment from the Court of Appeal, and the establishment of a sentencing guidelines council.[132] The stakeholder feedback we received supported our preliminary views on these proposals.

131. *Consultation Paper* 81–90.
132. *Consultation Paper* 84–87, 89–90.

3.48 Ultimately, we have come to the view that the package of reforms required to change sentencing practices for OHS offences includes:

- making some legislative revisions to the health and safety undertaking provisions of the *OHS Act*;
- WorkSafe introducing policies that provide guidance around, and encourage (via sentencing submissions) increased use of, health and safety undertakings as well as adverse publicity orders;
- increasing the maximum penalties for breach of duty offences, in part to reflect community views on the seriousness of these offences, and also to ensure that courts have wider discretion;
- revising the section 32 reckless endangerment offence to ensure consistency and clarity in the offence and penalty hierarchy; and
- introducing an Australian-first legislated sentencing guideline to transform how Victorian courts sentence OHS offences.

3.49 We address each of these in turn below.

## Rethinking health and safety undertakings

3.50 A health and safety undertaking is a type of sentencing order available under section 137 of the *OHS Act*. It allows a court sentencing an offender for an OHS offence to adjourn the case for up to two years in return for the offender giving an undertaking to fulfil certain conditions. Health and safety undertakings require the offender not to commit further OHS offences, and to fulfil any special conditions set by the court.[133]

3.51 Health and safety undertakings were introduced as part of the *OHS Act* as a result of the 2004 *Occupational Health and Safety Act Review* ('*Maxwell Review*'), in which Maxwell wrote that:

> [T]he availability of undertakings as a sentencing option in OHS prosecutions should not be confined to "lower order" breaches. The conditions imposed in undertakings have the potential to significantly improve standards by requiring dutyholders to adopt a systematic approach to health and safety. The main advantage of health and safety undertakings is that the terms of the undertaking can be tailored to suit the particular circumstances and can bring about internal change in the offender's business to secure or at least encourage future compliance with the Act.[134]

3.52 Before proceeding, we note that health and safety undertakings share significant similarities with two other kinds of 'undertakings': adjourned undertakings and

133. *Occupational Health and Safety Act 2004* (Vic) s 137(2).
134. Maxwell (2004), above n 128, 378.

enforceable undertakings. It's important to mention both because they offer useful points of comparison, and because health and safety undertakings are a distinct sentencing order.

3.53 Adjourned undertakings are a sentencing order available under the *Sentencing Act*.[135] They require the offender to be of good behaviour for the duration of the order, and may also require the offender to comply with certain additional conditions, such as making a charitable donation or participating in a rehabilitation program. The differences between adjourned undertakings and health and safety undertakings are (1) health and safety undertakings are only available for OHS offences, whereas adjourned undertakings are available for all offences, (2) health and safety undertakings have a maximum adjournment period of two years, whereas for adjourned undertakings it is five years, and (3) the maximum penalty for companies contravening health and safety undertakings is 50 penalty units (currently just under $10,000), compared to 10 penalty units for contraventions of adjourned undertakings (currently just under $2,000).[136]

3.54 Enforceable undertakings are agreements entered into between WorkSafe and those who are alleged to have contravened the *OHS Act* or the regulations.[137] They involve the person or company giving an undertaking to comply with certain conditions over a specified period of time. Enforceable undertakings can be entered into either before or during criminal proceedings. If they are entered into during criminal proceedings, those proceedings are discontinued, and can only be reinstated if the person fails to comply with the undertaking.[138] The differences between enforceable undertakings and health and safety undertakings include (1) there is no specified maximum duration for enforceable undertakings, whereas it is two years for health and safety undertakings, (2) health and safety undertakings are sentencing orders of the court, whereas enforceable undertakings are effectively a diversionary initiative outside the court process, meaning there is no finding of guilt, and (3) the maximum penalty for companies contravening an enforceable undertaking is 2,500 penalty units (currently just under $500,000), which is 50 times higher than the maximum penalty for contravening a health and safety undertaking (50 penalty units, or currently just under $10,000).[139]

135. *Sentencing Act 1991* (Vic) ss 72, 75. For a detailed overview of adjourned undertakings, see our recent consultation paper and final report with recommendations for reform: Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria: Consultation Paper* (2022); Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria: Final Report* (2023).
136. *Occupational Health and Safety Act 2004* (Vic) ss 137–138; *Sentencing Act 1991* (Vic) ss 72, 75, 83AC.
137. *Occupational Health and Safety Act 2004* (Vic) s 16(1).
138. *Occupational Health and Safety Act 2004* (Vic) s 16(4).
139. *Occupational Health and Safety Act 2004* (Vic) s 16(3).

## Prevalence of undertakings in OHS cases

3.55 In our *Statistical Report*, we found that undertakings[140] were imposed in 11% of all OHS cases.[141] They were especially prevalent in the Magistrates' Court, where they were imposed in 7% of cases involving companies, and 16% of cases involving individuals.[142] They were less prevalent in the higher courts (just 1% of cases).[143]

3.56 While it is possible to impose a fine *in addition to* an undertaking, there were no cases in the 16-year period to 30 June 2021 in which a court sentenced an OHS offender to both an undertaking and a fine.

## Conditions of undertakings in OHS cases

3.57 There is no exhaustive list of conditions that a court can attach to a health and safety undertaking; however, some examples in the *OHS Act* include engaging a consultant to assist with OHS matters, developing and implementing a systematic approach to managing risks to health or safety, and arranging an audit of the offender's compliance with the health and safety undertaking.[144] While there is broad discretion to impose these sorts of behavioural conditions on OHS offenders, we found in our *Consultation Paper* that undertakings in OHS cases almost exclusively involve a single additional condition of making a donation to a charity or to the Court Fund, which is used for charitable purposes.[145]

### *Comparing with enforceable undertakings*

3.58 By way of comparison with health and safety undertakings, enforceable undertakings entered into with WorkSafe involve far more imaginative conditions that are driven towards improving safety outcomes in an organisation or industry. Some common conditions in the 62 available enforceable undertakings that have been entered into since the *OHS Act* came into effect include:

- employing an OHS manager (usually on a full-time basis);[146]
- engaging a third party for a specified period to conduct OHS audits, and to review and develop policies and procedures;[147]

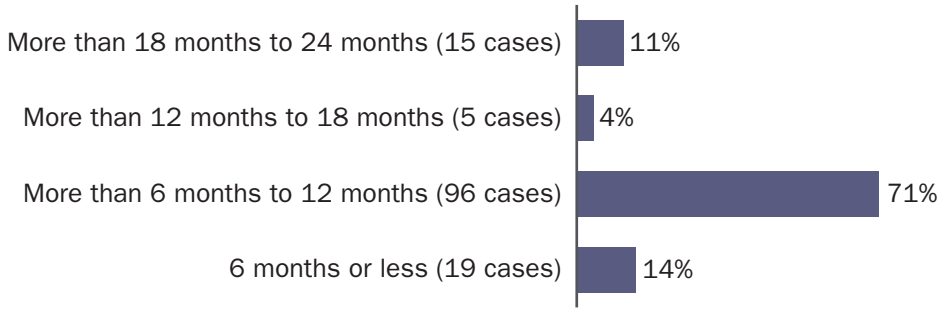
140. Court data did not reliably distinguish whether these undertakings were health and safety undertakings or adjourned undertakings.
141. *Statistical Report* 18.
142. Ibid 30.
143. Ibid.
144. *Occupational Health and Safety Act 2004* (Vic) s 137(3).
145. *Consultation Paper* 64–65.
146. WorkSafe Victoria, 'Plaster Company to Spend $480,000 after Forklift Injury' (worksafe.vic.gov.au, 2024).
147. See, for example, WorkSafe Victoria, 'Bluescope Steel Limited' (21 November 2019), *Prosecution Result Summaries*; WorkSafe Victoria, 'T.S. Constructions Pty Ltd' (9 May 2019), *Prosecution Result Summaries*.

- making donations to OHS peak bodies;[148]
- commencing a safety campaign, such as one involving distribution of brochures to business and residential premises within a five-kilometre radius of the person's workplace;[149]
- entering into a sponsorship agreement with a charity or not-for-profit organisation to organise pre-workforce seminars that educate youth about safe work practices;[150] and
- installing context-specific safety devices, such as industrial lifts.[151]

## Durations of undertakings in OHS cases

3.59 Most of the undertakings imposed in OHS cases had a specified duration of between more than six months and 12 months (71%) (Figure 9). The vast majority of these undertakings had a duration of precisely 12 months.[152] All of the 15 cases in which the undertaking spanned 18–24 months involved corporate offenders. We note, however, that the durations of these orders are likely to have been driven by the conditions of the undertaking. Given that the only conditions of undertakings in OHS cases tend to require the offender to be of good behaviour and make a charitable donation, there would likely be no need for longer undertakings. If, however, there is a shift towards more behavioural conditions in undertakings, it may be necessary to allow longer periods for offenders to fully comply with those conditions.

**Figure 9: Durations of undertakings imposed in OHS cases, July 2005–June 2021 (135 cases)**




148. WorkSafe Victoria, 'Mornington Peninsula Shire Council' (13 April 2017), *Prosecution Result Summaries*.
149. WorkSafe Victoria (2024), above n 146.
150. See, for example, WorkSafe Victoria, 'E.J. Lyons & Sons Pty Ltd' (13 December 2018), *Prosecution Result Summaries*.
151. See, for example, WorkSafe Victoria, 'George Weston Foods Limited' (15 July 2020), *Prosecution Result Summaries*.
152. In our consultation paper on adjourned undertakings, we found that 63% of 127,000 adjourned undertakings were precisely 12 months: Sentencing Advisory Council (2022), above n 135, 30.

## Orders to undertake improvement projects

3.60 Another form of sentencing order currently available in OHS cases is an order under section 136 of the *OHS Act* to undertake improvement projects. This section allows a court to 'make an order requiring the offender to undertake a specified project for the general improvement of occupational health, safety and welfare within the period specified in the order'.[153] The court may not make an order under this section unless it is satisfied that the costs of complying would not exceed the maximum penalty that the court could otherwise impose.[154] Since the *OHS Act* came into effect, orders to undertake improvement projects have almost never been utilised in sentencing OHS offenders in Victoria.

3.61 Earlier this year, the County Court, on its own motion, considered imposing an order to undertake an improvement project.[155] The offender, a self-employed plasterer, had failed to ensure that a Safe Work Method Statement was in place for high-risk construction work being undertaken by a labourer. The labourer in that case fell from a height and died from their injuries. The proposed order involved the offender attending TAFE colleges to share the story of the offending and his subsequent prosecution. The intent of such a project would have been to 'contribute to general deterrence by spreading the message about the importance of workplace safety'.[156] The offender's 'real life experience' was considered to be 'invaluable' in shaping the minds of other young people who were themselves about to form part of the industry, and therefore able to influence work safety.[157] However, while the offender was willing to undertake such a project, the prosecution opposed it, advocating instead for a community correction order or a substantial fine with conviction.[158] The court concluded that, in the absence of support from WorkSafe, the state's OHS regulator, such an improvement project would not be feasible.[159]

153. *Occupational Health and Safety Act 2004* (Vic) s 136(1).
154. *Occupational Health and Safety Act 2004* (Vic) s 136(3).
155. *DPP v Oriana* [2024] VCC 535.
156. *DPP v Oriana* [2024] VCC 535 [57].
157. *DPP v Oriana* [2024] VCC 535 [57].
158. *DPP v Oriana* [2024] VCC 535 [61].
159. *DPP v Oriana* [2024] VCC 535 [62].

## The Council's view

3.62 There was strong stakeholder support for increased use of health and safety undertakings in OHS cases, including from legal professionals, unions and employer representatives. There was also substantial use of such orders in our community consultation events, with participants clarifying that they would impose behavioural conditions on such orders, not simply charitable donation conditions. We agree with the resounding feedback from experts and the community. Health and safety undertakings have an untapped potential to contribute to more positive OHS outcomes in the future, and fundamentally align with the underlying objectives of the *OHS Act*.[160] In addition, the wide range of possible conditions of a health and safety undertaking means that a health and safety undertaking can achieve various sentencing purposes, including just punishment, deterrence, rehabilitation and/or community protection. Moreover, the imposition of a health and safety undertaking does not prevent the court from imposing a combination sentence, involving both a health and safety undertaking and a fine.

3.63 Why, then, are health and safety undertakings so underutilised? We believe there are a number of reasons:

- First, in the community consultation sessions we heard consistent concerns that undertakings simply put the offender in the position that they should have been in prior to the OHS offence. As a result, there is a perception that health and safety undertakings are a *lesser* penalty than a fine is. This is a valid concern, which is why the prosecution and courts should be mindful to ensure that any conditions of a health and safety undertaking imposed in an OHS case are 'above and beyond' whatever steps the offender should have taken so as to not contravene the *OHS Act*.
- Second, none of the parties involved in criminal proceedings for OHS offences have been advocating for the use of such orders. Given the potential costs of implementing special conditions of health and safety undertakings, and noting the current values of fines imposed for OHS offences, there is currently very little incentive for an OHS offender to suggest an undertaking to the court as a viable sentencing order. An undertaking would almost certainly be more expensive and onerous for the offender than whatever fine might be imposed. Further, the courts should not be expected to develop and craft conditions that will improve safety practices in an organisation or industry; it would be unreasonable to expect judicial officers to have the expertise to do so. Instead, the responsibility for defining the nature of a health and safety

160. *Occupational Health and Safety Act 2004* (Vic) s 2.

undertaking and its conditions, as well as discussing the draft undertaking with the defendant and the court, should rest with WorkSafe, as Victoria's expert safety regulator and prosecutor. It is possible that some of the barriers to WorkSafe advocating for such orders are the relatively short maximum duration (two years) to carry out more complex activities and the relatively minor penalty for contravention (50 penalty units – although the offender is also liable to be resentenced for their original offending).

- Third, and significantly, health and safety undertakings cannot be imposed without the offender's consent. This is because it can only be imposed if the offender 'giv[es] an undertaking'. While the term *undertaking* is not defined in the *OHS Act*, section 137 was intentionally designed to mirror[161] (and often cross-references[162]) the adjourned undertaking provisions of the *Sentencing Act*, which defines *undertaking* as 'a written undertaking by the offender'.[163]

3.64 We believe there are a number of reforms that could overcome these barriers and better incentivise the use of health and safety undertakings in a wider range of OHS cases. In part, this would require fine amounts in OHS cases to increase substantially to ensure that fines do not continue to be far less expensive and onerous sentencing outcomes than undertakings in OHS cases. Our proposals for addressing this, namely through increases in maximum penalties and the introduction of a legislated sentencing guideline, are discussed below. More specifically though, there are a number of legislative revisions that we believe would be necessary to better enable the use of health and safety undertakings. Just as importantly, we believe WorkSafe should develop a policy that ensures that prosecutors actively advocate for health and safety undertakings with behavioural conditions in OHS cases.

### *Removing the requirement of offender consent*

3.65 In a number of other contexts, there is no precondition for offender consent prior to courts imposing sentencing orders with behavioural conditions for regulatory offending. These include various orders under the *Environment Protection Act 2017* (Vic),[164] various orders under the model laws adopted in other Australian jurisdictions,[165] and even orders to undertake improvement projects under section 136 of the *OHS Act*.

161. Maxwell (2004), above n 128, 377–379.
162. *Occupational Health and Safety Act 2004* (Vic) ss 137(4)(b), 138.
163. *Sentencing Act 1991* (Vic) s 3(1) (definition of 'undertaking').
164. *Environment Protection Act 2017* (Vic) ss 331–333 (general restoration and prevention orders, restorative project orders and environmental audit orders).
165. Model Work Health and Safety Bill 2023 (Cth) ss 237–238 (orders for restoration, and work health and safety project orders).

3.66 We see no reason why health and safety undertakings in Victoria uniquely allow companies to simply refuse to be subject to such an order. We are of the view that the requirement for an offender to give consent should be removed from health and safety undertakings. Removing this significant barrier to their imposition would likely lead to an increase in their use. It may also lead to greater sophistication in their conditions, by incentivising prosecutors to make submissions to sentencing courts about the potential conditions of such orders. The conditions would, of course, still need to be considered feasible. Given this proposed change, we also suggest that health and safety *undertakings* be renamed as health and safety *orders*.

### *The maximum duration of a health and safety undertaking*

3.67 As noted above, health and safety undertakings have a maximum duration of two years. This is much shorter than the five-year duration recommended in the *Maxwell Review*.[166] It is also much shorter than the five-year duration allowed for adjourned undertakings under the *Sentencing Act*.[167] It is not clear why the maximum term is just two years. Given that we envisage a wider use of health and safety undertakings, with conditions that may take time to implement, we believe it is appropriate to align the maximum duration of these orders with the maximum duration of adjourned undertakings (and community correction orders[168]) in the *Sentencing Act*, consistent with the recommendation in the *Maxwell Review*.

### *Special conditions of health and safety undertakings*

3.68 As noted above (at [3.60]–[3.61]), in addition to allowing courts to impose health and safety undertakings as sentencing outcomes in OHS cases, the *OHS Act* allows courts to make orders to undertake improvement projects. There is significant overlap between orders to undertake improvement projects and health and safety undertakings, especially given that the special conditions of undertakings can include any conditions the court deems appropriate, including orders to undertake improvement projects. We see no reason to maintain two distinct sentencing orders, and would instead recommend that specific orders to undertake improvement projects be removed as an option, and that those projects should instead be treated as special conditions of health and safety undertakings in appropriate cases. In particular, we recommend repealing section 136 of the *OHS*

166. Maxwell (2004), above n 128, 378.
167. *Sentencing Act 1991* (Vic) ss 72, 75.
168. *Sentencing Act 1991* (Vic) ss 38(1)(a)(iii), 38(1)(b).

*Act* and revising section 137(3) to specify that health and safety undertakings can include a condition to undertake a specified project for the general improvement of occupational health, safety and welfare (using the same language that currently appears in section 136).

3.69 We also believe the non-exhaustive list of special conditions in section 137(3) needs a further minor revision; it is curiously limited to 'an offender who is an *employer*' (emphasis added). We see no reason why the potential conditions listed could not also apply to other offenders sentenced for OHS offences, such as managers or controllers of a workplace, self-employed persons, or designers of plant or equipment. This change would be consistent with the original draft of this provision in the *Maxwell Review* (which only specified 'the offender', not 'the employer')[169] and more importantly would provide clarity about the intended application of those potential conditions.

## *Revising penalties for contravention of health and safety undertakings*

3.70 Section 138(c) of the *OHS Act* sets a maximum penalty of 50 penalty units (less than $10,000) for companies that contravene a health and safety undertaking, and 10 penalty units (just under $2,000) for individuals.[170] The *OHS Act* also adopts various provisions in the *Sentencing Act* relating to contraventions,[171] including section 83AT of the *Sentencing Act*, which specifies that if a person is found guilty of contravening an undertaking, the court can cancel the original sentence and resentence them accordingly.[172] In effect, companies and individuals who do not comply with a health and safety undertaking risk being resentenced to a more severe sentence, in addition to whatever penalty might be imposed for the contravention offence.

3.71 The maximum penalty for a contravention offence should be capable of ensuring compliance with the original order. For large companies, the potential threat of resentencing is significant, but it is difficult to see how they would view the maximum fine of less than $10,000 for a contravention offence as any real deterrent.

169. Maxwell (2004), above n 128, 378–379.
170. *Occupational Health and Safety Act 2004* (Vic) s 138(c). By way of comparison, the maximum penalty for contravening an adjourned undertaking is a Level 10 fine, which equates to 10 penalty units or currently $1,957.90: *Sentencing Act 1991* (Vic) ss 83AC, 109.
171. *Occupational Health and Safety Act 2004* (Vic) s 138.
172. *Sentencing Act 1991* (Vic) s 83AT.

3.72 By way of contrast, the maximum penalty for contravening an enforceable undertaking is much higher than that for contravening a health and safety undertaking, at 2,500 penalty units (almost $500,000) for companies and 500 penalty units (almost $100,000) for individuals. We see no reason why contraventions of enforceable undertakings – which can also result in criminal proceedings being reinstituted – should carry potential penalties that are so much more severe than the penalties for contraventions of health and safety undertakings, particularly given the latter are court orders. We therefore recommend revising section 138 to align the maximum penalty for contraventions of health and safety undertakings with the maximum fine for contravening an enforceable undertaking.

### Recommendation 4: Reforming health and safety undertakings

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to:

- **a.** repeal section 136 (orders to undertake improvement projects);
- **b.** revise section 137 to remove the need for offenders to give an undertaking, and rename these as 'health and safety orders';
- **c.** revise section 137(1) to allow health and safety orders to run for a period of up to five years;
- **d.** revise section 137(3) to clarify that the special conditions listed can be imposed on any offender, not just employers;
- **e.** revise section 137(3) to include a further special condition 'to undertake a specified project for the general improvement of occupational health, safety and welfare within the period specified in the order'; and
- **f.** revise section 138(c) to specify that the maximum penalty for contravening a health and safety order is 2,500 penalty units for a body corporate, and 500 penalty units for an individual.

## Increased use of health and safety undertakings

3.73 As discussed above (at [3.44]–[3.45]), there was widespread support for health and safety undertakings being used more often in OHS cases, both as an alternative to fines, and as an order imposed in addition to a fine. This was apparent in survey responses, community consultation results, and written submissions from stakeholders. Having canvassed the legislative reforms to the health and safety undertaking provisions, we now consider how to bring about increased use of undertakings in appropriate cases.

3.74 Given the roles of the various parties in court, we believe WorkSafe is in the best position to advocate for undertakings in appropriate cases, including the recommended conditions of those undertakings. WorkSafe is a seasoned prosecuting agency, with expertise in workplace health and safety, the ability to make sentencing submissions to the court, and experience in negotiating conditions of enforceable undertakings. Indeed, in its submission, WorkSafe noted that its knowledge of conditions of enforceable undertakings, which it routinely negotiates, would likely 'be beneficial … when considering … health and safety undertaking conditions'.[173]

3.75 WorkSafe currently has a number of policies relating to its role as an enforcement agency. These include policies on enforceable undertakings,[174] diversion,[175] and OHS compliance and enforcement more generally.[176] There is, however, currently no dedicated policy on health and safety undertakings. We believe a policy on this topic would have the potential to (a) encourage prosecutors to make submissions, in appropriate cases, that an undertaking would be appropriate, (b) provide defendants and others with transparency about the criteria that WorkSafe will apply when considering whether to seek an undertaking, and even (c) include guidance about the potential conditions of undertakings. We therefore recommend such a policy be developed, and published on WorkSafe's website.

## Recommendation 5: Increased use of health and safety undertakings

WorkSafe Victoria should develop a policy relating to health and safety undertakings pursuant to section 137 of the *Occupational Health and Safety Act 2004* (Vic) that (a) specifies criteria for deciding whether to recommend that a sentencing court consider imposing an undertaking, including potential conditions of such an undertaking, and (b) encourages the increased use of undertakings in appropriate cases.

173. Submission 21 (WorkSafe Victoria).
174. WorkSafe Victoria, Enforcement Group, *Policy on Enforceable Undertakings Pursuant to Section 16 of the Occupational Health and Safety Act 2004* (2018).
175. WorkSafe Victoria, Enforcement Group, *Policy on the Criminal Justice Diversion Program* (2016).
176. WorkSafe Victoria, *Occupational Health and Safety Compliance and Enforcement Policy: A Guide for Employers* (2021).

### Resourcing implications for monitoring health and safety undertakings

3.76 WorkSafe's legislative functions include monitoring compliance with sentencing orders such as health and safety undertakings.[177] We are mindful that a greater use of health and safety undertakings would translate to an increased workload for WorkSafe, which would have resourcing implications. Equally though, the package of reforms proposed in this report will result in larger fines, and higher payment rates for fines, which, consistent with our recommendation below (and consistent with the vast majority of cases presently), would all go into the WorkCover Authority Fund. As a whole, we would expect the resource implications of this monitoring to be outweighed by the increased revenue we anticipate from our package of reforms.

## Increased use of adverse publicity orders

3.77 Adverse publicity orders are a sentencing order available under section 135 of the *OHS Act*. An adverse publicity order requires an offender to publicise the offence, its consequences, the penalty imposed and any other relevant matter, to the general public and/or to a specified person or class of persons. In addition to the content of the publicity, the order can specify *how* that publicity is to be achieved, in particular, the medium through which that information is to be disseminated. Adverse publicity orders can be made on the court's own initiative, or on the application of the prosecutor.[178]

3.78 Adverse publicity orders were introduced following a recommendation in the 2004 *Maxwell Review*, and they were modelled on the New South Wales legislation in effect at the time.[179] In turn, the 2008 National Review into OHS laws (which led to the model laws currently adopted in every jurisdiction other than Victoria) recommended that adverse publicity orders be one of the sentencing options available to courts sentencing OHS offences across Australia.[180]

3.79 Today, it is relatively common for adverse publicity orders to be available in a range of jurisdictions and legal contexts, particularly in respect of offences committed by companies. Adverse publicity orders for OHS offences are available not only in all Australian jurisdictions but also under the equivalent laws of other nations,

177. *Occupational Health and Safety Act 2004* (Vic) ss 7(1)(c), (l) ('to monitor and enforce compliance with this Act and the regulations … to monitor the operation of measures taken and arrangements put in place to ensure occupational health, safety and welfare').
178. *Occupational Health and Safety Act 2004* (Vic) s 135(2).
179. Maxwell (2004), above n 128, 380, citing *Occupational Health and Safety Act 2000* (NSW) s 115.
180. Australian Government (2008), above n 129 (Recommendation 61).

including New Zealand[181] and Canada.[182] They are also available in areas such as consumer protection,[183] essential services,[184] environmental protection,[185] maritime law,[186] social welfare,[187] and trade and commerce.[188]

## Research on the effectiveness of adverse publicity

3.80 Court-ordered publicity dates back to at least the nineteenth century.[189] Academic research has identified a number of possible uses of adverse publicity as a form of criminal sanction against companies. First, adverse publicity orders broaden available sentencing options to promote flexibility in sentencing. Second, adverse publicity orders may be a means of inflicting financial damage through reputational damage that impacts on economic activity.[190] Third and perhaps most significantly, adverse publicity bears on corporate prestige in a way that monetary penalties cannot, potentially achieving an enhanced form of deterrence and punishment.[191] Fourth, adverse publicity may be another tool for educating industry and the wider community about OHS-related risk, the requirements of the law, and the criminal justice response to offending,[192] particularly in growing industries and for newly emerging risks to health and safety.[193]

3.81 The *Maxwell Review* noted that 'employers – particularly medium-sized and large employers – are placing increasing importance on establishing a reputation as ''a safe employer''".[194] The Review referred to research findings that, 'for larger organisations, corporate image and credibility ranked second as a motivator behind regulation-related motivators'.[195] It noted a 2001 KPMG survey of 400 managers, which found that, while other factors – such as moral responsibility, regulatory requirements and

181. *Health and Safety at Work Act 2015* (NZ) s 153.
182. *Occupational Health and Safety Act,* RSO 1990, c C-0.1, s 68.1.
183. *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 211.
184. *Essential Services Commission Act 2001* (Vic) s 54F.
185. *Environment Protection Act 2017* (Vic) s 330.
186. *Marine Safety (Domestic Commercial Vessel) National Law (Application) Act 2013* (SA) sch 1 cl 158(2).
187. *Social Services Regulation Act 2021* (Vic) ss 163–164.
188. *Competition and Consumer Act 2010* (Cth) s 86D, sch 2 cl 2(1), cl 247(2).
189. Lloyd Freeburn and Ian Ramsay, 'An Analysis of Publicity Orders Under the Australian Securities and Investments Commission Act 2001' (2022) 30(4) *Australian Journal of Competition and Consumer Law* 287, 288; Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (1984) 285–286.
190. Freeburn and Ramsay (2022), above n 189, 302–303.
191. Freeburn and Ramsay (2022), above n 189; Fisse and Braithwaite (1984), above n 189, 303.
192. Brent Fisse, 'The Use of Publicity as a Criminal Sanction Against Business Corporations' (1971) 8(1) *Melbourne University Law Review* 107, 117–119.
193. For example, emergent risks in work on digital labour platforms: Elizabeth Bluff et al., 'Regulating Health and Safety in Work for Digital Labor Platforms in Australia: The Example of Food Deliverers' (2023) 1(1) *Journal of Work Health and Safety Regulation* 92.
194. Maxwell (2004), above n 128, 247.
195. Ibid 248.

commercial factors – carried greater weight in their decision-making, 86% of managers nevertheless agreed that their safety record affected their personal reputation.

3.82 A 2020 study considered the effect of adverse publicity within a particular industry.[196] The study found that the publication of violations of health and safety laws had measurable positive effects on specific deterrence. Publication of violations also improved general deterrence, in that publication led to other facilities improving their levels of compliance, especially those in the same *geographic location*. This effect was amplified in workplaces that had strong worker representation and bargaining power, which enabled workers to leverage that adverse publicity. Adverse publicity was also found to be an important and strong complement to the deterrent effect of inspections by the regulator, especially within a defined geographic location.[197]

## Current use of adverse publicity orders

3.83 We noted in our *Consultation Paper* that adverse publicity orders were extremely rare in OHS cases in Victoria, with just a single case resulting in an adverse publicity order between the commencement of the *OHS Act* in 2005 and the publication of the *Consultation Paper* in early 2024.[198] That case involved a fatality and serious injury during training at a horse-racing club. The court made an adverse publicity order on its own motion, and specified content that needed to be published in an edition of an industry-specific horse-racing magazine.[199]

3.84 Since then, there has been one other adverse publicity order imposed in the County Court, in the case of *DPP v Yarra Valley Park Lane Holiday Park Pty Ltd*, in November 2024.[200] The case involved a commercial caravan park at which a falling tree branch struck and killed a patron sleeping in one of the park's campsites. The County Court commented that courts, in appropriate cases, 'should play an active role in ensuring that the results of cases are generally known to promote general deterrence by requiring offenders themselves to publicise the outcomes'.[201]

3.85 The order required the offending company to publish a notice in an online newsletter administered by the peak body for the Victorian camping industry. Figure 10 (page 67) contains the full wording of the notice.

196. Matthew S. Johnson, 'Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws' (2020) 110(6) *American Economic Review* 1866.
197. Ibid 1888.
198. *DPP v Cranbourne Turf Club Inc* [2023] VCC 506.
199. *DPP v Cranbourne Turf Club Inc* [2023] VCC 506, [127]. A copy of the publication is available in our *Consultation Paper* (at 70, Figure 1).
200. *DPP v Yarra Valley Park Lane Holiday Park Pty Ltd* [2024] VCC 1863.
201. *DPP v Yarra Valley Park Lane Holiday Park Pty Ltd* [2024] VCC 1863 [127].

**Figure 10:** Adverse publicity order imposed in *DPP v Yarra Valley Park Lane Holiday Park Pty Ltd* [2024] VCC 1863

ADVERSE PUBLICITY ORDER PURSUANT TO S 135 OF THE OCCUPATIONAL HEALTH AND SAFETY ACT 2004 (VIC.)

DPP v Yarra Valley PARK LANE HOLIDAY PARK PTY LTD

On 13 March 2021, Benjamin Murphy was camping in a tent at the Big 4 Yarra Valley Holiday Park in Healesville (**the Park**). The Park, which was a workplace under the Occupational Health and Safety Act 2004 (Vic.) (**OHS Act**), was operated by Yarra Valley Park Lane Holiday Park Pty Ltd (**Yarra Valley**). Mr Murphy's campsite was surrounded by large trees. During the night, a tree branch broke off one of those trees and fell to the ground landing on the tent. Mr Murphy, who was asleep, sustained fatal injuries in the accident.

The circumstances of the accident were investigated by WorkSafe Victoria. As a result of that investigation, on 28 April 2022 Yarra Valley was charged with an offence against s 26 of the OHS Act. Section 26 of the OHS Act requires a person in control of a workplace to ensure, so far as reasonably practicable, that the workplace is safe and without risks to health.

The charge brought against Yarra Valley alleged that there was a risk at the Park that a large tree branch or tree limb (or both) could break from a tree, fall to the ground and seriously injure or kill a person below. In order to control the risk, Yarra Valley was charged that it (a) should have engaged an arborist to undertake an annual assessment of the trees at the Park and (b) should have followed any recommendations made by the arborist.

Yarra Valley contested the charge. Following a three week trial in August 2024, Yarra Valley was found guilty of the charge by a County Court of Victoria jury. The jury concluded that Yarra Valley had failed to comply with its duty under s 26 of the OHS Act as the manager of the Park to take all reasonably practicable steps to ensure that the Park was safe and without risks to health.

On 22 November 2024, the County Court of Victoria fined Yarra Valley $475,000 with conviction and ordered it to publicise the offence and the penalty imposed in the form of this Notice.

The Court was not satisfied that Yarra Valley's breach of the OHS Act caused the death of Mr Murphy.

3.86 While the parties did not oppose the making of an order, they disputed its wording. The prosecution argued that the order should refer to (a) the incident that led to the fatality and the subsequent investigation and prosecution, (b) the remorse on the part of the offender and (c) the financial and reputational damage to the offender resulting from the trial and penalty. The defence, in turn, argued that any reference to the incident would suggest that the offender was responsible for *causing* the death (which the evidence did not establish beyond reasonable doubt), and that any expression of remorse would be inappropriate, given the offender pleaded not guilty and went to trial.

3.87 The court ultimately concluded that it was necessary for the notice to refer to the incident (in the beginning paragraph of the notice) to provide essential context for readers, while separately clarifying that the court found that the offender's breach did not, at law, cause the death of the camper. The court also accepted that any expression of remorse would, in the circumstances, 'lack any genuineness'. Finally, the notice did not refer to financial or reputational damage, as the court did not receive any evidence on the topic.

### *Terms of enforceable undertakings*

3.88 While adverse publicity orders seem to be extremely rare as a sentencing order in OHS cases, there have been some enforceable undertakings that have contained conditions akin to adverse publicity orders. For example:

- publishing an advertisement regarding the company's contravention in local newspapers as well as in an industry-specific newsletter;[202]
- developing and publishing articles in industry association newsletters and regional newspapers regarding specific risk scenarios, including the dangers associated with working at height[203] or working with plant;[204]
- developing content regarding the importance of water safety, and disseminating it to schools and other public bodies via online/digital publications and email;[205]
- developing and delivering a scalable presentation to secondary-school students, on the cusp of entering the workforce, about the nature of workplace risks; and[206]
- requiring the terms of the enforceable undertaking to be disseminated among, and read by, all employees of the defendant company.[207]

202. WorkSafe Victoria, 'Yering Farm Wines Pty Ltd' (13 December 2012), *Prosecution Result Summaries*.
203. WorkSafe Victoria, 'Stowe Australia Pty Ltd' (29 April 2021), *Prosecution Result Summaries;* WorkSafe Victoria, 'T.S. Constructions Pty Ltd' (9 May 2019), *Prosecution Result Summaries*.
204. WorkSafe Victoria, 'Wagstaff Cranbourne Pty Ltd' (27 March 2014), *Prosecution Result Summaries*.
205. WorkSafe, 'Belgravia Health and Leisure Group Pty Ltd' (8 June 2017), *Prosecution Result Summaries*.
206. WorkSafe Victoria, 'Mettle Pty Ltd' (3 October 2024), *Prosecution Result Summaries*.
207. WorkSafe Victoria, 'Retpro Management Pty Ltd' (16 January 2020), *Prosecution Result Summaries*.

### *Adverse publicity orders in New South Wales OHS cases*

3.89 While adverse publicity orders are still not common, there have been a number of recent examples of these orders in OHS cases in New South Wales.[208] In those cases, the prosecution applied for the order and proposed the content for publication. This content typically includes the offender's name, the offences in the case, the circumstances of the offending, and the penalty imposed. Just as importantly, the prosecution also specified the intended medium of the publication, including in newspapers[209] and in industry-specific publications.[210] The prosecution also explained to the court why they considered that an adverse publicity order would be appropriate,[211] and why they chose the particular medium for publication.

3.90 Courts in New South Wales have indicated that adverse publicity orders can be made on two main grounds: either promotion of the objects of the *Work Health and Safety Act 2011* (NSW) or promotion of the purposes of sentencing, in particular, deterrence and denunciation. For example, in *SafeWork NSW v Investa Asset Management Pty Ltd*, the court wrote that:

> I am satisfied that the adverse publicity order is warranted in this case for the following reasons. First, the objects of the Act include protecting workers through the elimination or minimisation of risks arising from work … and securing compliance with the Act through effective and appropriate compliance and enforcement measures. One way of promoting those objects is to publicise how risks can be eliminated and where a risk exists, how the enforcement measures in the Act operate to deal with [an offender].
>
> Second, the purposes of sentencing include deterrence and denunciation of the conduct of the offender. General deterrence cannot be achieved without some publication of the sentencing outcomes for similar offences. The proposed adverse publicity order is specifically targeted [at] a class of persons who are in a position to commit similar offences, by failing to ensure that plant such as [a building maintenance unit] is maintained in accordance with the Australian Standard. Further, the adverse publicity order will denounce conduct of the offender. This is important in the ordinary way and also to indicate that in a strict liability offence even a comprehensive system needs to be reviewed to ensure that important safety measures do not slip through the cracks.[212]

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208. *SafeWork NSW v Investa Asset Management Pty Ltd* [2019] NSWDC 472; *Linnane (NSW Department of Planning and Environment) v Cummings* [2020] NSWDC 755; *SafeWork NSW v Saunders Civilbuild Pty Ltd [No 2]* [2022] NSWDC 163.
209. *Linnane (NSW Department of Planning and Environment) v Cummings* [2020] NSWDC 755 [86]–[97].
210. *SafeWork NSW v Investa Asset Management Pty Ltd* [2019] NSWDC 472 [114]–[116].
211. See, for example, *SafeWork NSW v Investa Asset Management Pty Ltd* [2019] NSWDC 472 [117]–[125]. In support of its application, the regulator referred to its various policies identifying the need to reduce serious injuries and fatalities in the context of certain high-impact harms, including falls from height. Noting the frequency of these kinds of incidents, the regulator contended that an adverse publicity order would increase awareness among owners and users of building maintenance units of the need to conduct major inspections.
212. *SafeWork NSW v Investa Asset Management Pty Ltd* [2019] NSWDC 472 [134]–[135].

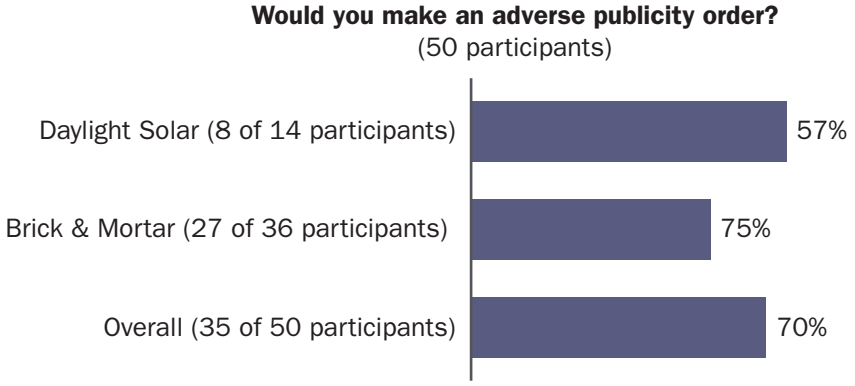
3.91 Similarly in *SafeWork NSW v Saunders Civilbuild Pty Ltd [No 2]*, the court said that an adverse publicity order was warranted because it furthered the objectives of both sentencing and OHS legislation in New South Wales, the cost involved was relatively modest, and it would be helpful for details of the company's offending 'to reach a wider audience'.[213]

3.92 There is also at least one example from New South Wales in which a court refused to impose an adverse publicity order.[214] The court in that case considered that the wording of the notice, while consistent with previous adverse publicity orders, was 'too formal and may not be readily understood by its target audience', which was readers of two local regional newspapers.[215] The court also said that publishing a notice in the local newspapers was 'unlikely to reach the target audience in a way sufficient to further the objectives of the Act or the purposes of sentencing'.[216]

## Community consultation responses

3.93 In our community consultation events, we asked participants whether, in sentencing their case, they would impose an adverse publicity order. Overall, 70% of participants chose to impose an adverse publicity order in the case they were asked to sentence (Figure 11). All of these participants imposed the order *in addition* to another penalty (such as a fine or an undertaking), as they did not believe that the adverse publicity order by itself could wholly replace their primary penalty.

**Figure 11: Community consultation responses (adverse publicity orders)**




213. *SafeWork NSW v Saunders Civilbuild Pty Ltd [No 2]* [2022] NSWDC 163 [125].
214. *Linnane (NSW Department of Planning and Environment) v Cummings* [2020] NSWDC 755.
215. *Linnane (NSW Department of Planning and Environment) v Cummings* [2020] NSWDC 755 [93].
216. *Linnane (NSW Department of Planning and Environment) v Cummings* [2020] NSWDC 755 [94]–[97].

3.94 Interestingly, the rate of use of adverse publicity orders by participants was higher in the case involving the large national company (75%), compared to the small company (57%). The size of the company and the scale of its operations were cited as particularly relevant factors in participants' decision-making process in both cases, with the implication being that larger entities have a more prominent reputation that may be meaningfully penalised through an adverse publicity order:

> I think for a big company, the fine is barely a drop in the bucket, but what they will care about is the publicity, and having to put something in the newspaper, saying we killed a worker, we did the wrong thing. I think that's going to be much more concerning to their management, directors and shareholders than anything else a court can impose.
>
> **Community Consultation Participant, Shepparton (23 February 2024)**

> I'd just stick with the undertaking and get more social utility out of that in this instance than an [adverse publicity order] ... An [adverse publicity order] is more for the reputational risk, for big companies.
>
> **Community Consultation Participant, Ballarat (19 February 2024)**

3.95 When asked what the primary purpose of sentencing should be in OHS cases, 43% of participants nominated general deterrence, 27% nominated specific deterrence, 12% nominated denunciation and 18% nominated one of punishment, community protection, or rehabilitation of the offender (6% each).[217]

3.96 Many participants viewed adverse publicity orders as aimed at achieving the purposes of just punishment and community protection:

> A fine's a blunt instrument, and in large part comes down to capacity to pay. But if it comes down to reputational damage, adverse publicity orders can address that. It can also be a restorative justice opportunity to educate [and] give back if properly targeted. It can be an opportunity to creatively make workplaces safer.
>
> **Community Consultation Participant, Melbourne (22 March 2024)**

> For me … the reason I [chose an] adverse [publicity order] is purely that I would actually be encouraging anyone not to work there ever, because it's quite obvious that they don't care about safety and their people. If they've done it before … I just think that I'd be saying, well, do you really want to work for this company?
>
> **Community Consultation Participant, Shepparton (23 February 2024)**

217. One of the 50 participants did not respond to this question.

> I think something where they can actually find out something about this company quite easily would be a good way for other companies to engage companies with … better ethics.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

> In the case of somebody looking for a subcontractor to perform tasks - put the notice wherever they would find an advertised contractor.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

3.97 However, others focused on other potential outcomes, particularly in respect of achieving positive awareness about OHS-related issues, and the rehabilitation of offenders:

> It can be a positive message.
>
> **Community Consultation Participant, Ballarat (19 February 2024)**

> It has the potential to be really educational. What would [the offender] want to say if you were trying to convince others to be [safer] … so, someone who would work with the company in writing that, and probably someone with some counselling experience, because once it goes out there – family, friends, and everybody sees it, and people deal with it differently, and you don't want it to cause more harm. You want it to be a good experience and a positive experience. So I really think that it has potential.
>
> **Community Consultation Participant, Shepparton (23 February 2024)**

> [M]ake [the offender] take out a half-page ad in the relevant paper and show that they were in the wrong … not a 'name and shame' as such. Just, this happened and here it is.
>
> **Community Consultation Participant, Morwell (21 February 2024)**

> I'd like the idea of putting an ad in the paper or just, you know, putting something out there, what they've done to improve, like we've been caught doing this, and this is what we've done to improve, [it] doesn't have to be a negative sign[.]
>
> **Community Consultation Participant, Morwell (21 February 2024)**

> If it's available you may as well use it. I think it's got to be a combination of both 'we screwed up' and 'here's how to do better' … I'm mindful of the fact that what this process … we are engaged in, is leading to, and if you want something to change, you've got to do something differently. And so the fact that something has never happened before, or very rarely happened before, we've got to ask, well, what is the result that we're getting with that situation? And, you know, I very strongly believe that we need the system to change and change radically. And that means we've got to do things differently.
>
> **Community Consultation Participant, Geelong (28 February 2024)**

3.98 Participants also considered different ways in which the relevant information could be publicised:

> [You could] require the company to print 1,000 leaflets about how to safely do roofing and solar and give it to a TAFE … for their training.
>
> **Community Consultation Participant, Morwell (21 February 2024)**

> I'm thinking like universities, training the younger generation.
>
> **Community Consultation Participant, Shepparton (23 February 2024)**

> Put [adverse publicity orders] underneath every employee's signature block, and on physical hoarding on worksites. Also to put in on their quotes when they quote for [a] job. 'Here's what we did'.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

3.99 Participants declined to impose an adverse publicity order for a variety of reasons, including that they might be mischaracterised by the offender, with the effect of it actually boosting their reputation; they were redundant or ineffective; and the offending was not sufficiently egregious to warrant such a punishment. Participants stated:

> There's a risk of it potentially improving their reputation.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

> My understanding is that most industries … do share a lot of information. If there is a construction company for instance that has a conviction, it's pretty widely [and] pretty quickly spread throughout the industry. So, you know, [it's] sort of double dipping really. I don't know in today's day and age, that publicity orders work. Even if you stuck it in the *Herald Sun*, people aren't looking at it.
>
> **Community Consultation Participant, Lilydale (18 March 2024)**

> Because how far does it go, and once it's out there and stays [then] one day, it's gone, it's disappeared, and it has no impact on the big picture.
>
> **Community Consultation Participant, Dandenong (20 March 2024)**

> It'd have to be a pretty significant gross negligent act that justifies [making an adverse publicity order].
>
> **Community Consultation Participant, Geelong (28 February 2024)**

## Survey responses

3.100 Some of the survey respondents that wanted to see an increased use of sentencing orders other than fines referred to adverse publicity orders as an effective mechanism of achieving punishment and deterrence in certain cases, including those involving large entities:

> If the company is large or is a big corporation this should definitely be used and *should be available for public viewing* [emphasis added].
>
> **Survey Participant (female, 25–34)**

> Unfortunately, prevention measures are often not taken up [un]til the real fear of the potential punishment is put under their nose *coupled with the fear of public exposure and accountability* [emphasis added].
>
> **Survey Participant (female, 25–34)**

> [S]howing the general public that offences will be dealt with properly may deter them from doing it, and also organizations/businesses may also take greater steps to ensuring that they or their staff don't end up in a position to be prosecuted.
>
> **Survey Participant (female, 35–44)**

> Absolutely there should be options other than fines. [Undertakings] are somewhat effective but they should be forced to *advertise guilt* [emphasis added].
>
> **Survey Participant (male, 35–44)**

> For many companies and directors a financial penalty is not as punitive as damage to a reputation. I would like the courts to consider other options and combine these with a fine.
>
> **Survey Participant (male, 55–64)**

> Publish the [incident] to the public. This could be a better corrective action, so the [offender] has greater incentive to maintain OHS. Public knowledge of the offender, event, and result. I believe this is the best corrective order.
>
> **Survey Participant (male, 35–44)**

3.101 Respondents also engaged with the issue of effectively communicating the circumstances of the offending and the sentencing outcome in the modern media environment:

> How are these orders *effectively* communicated? How do they reach the intended audience – those employers who are dismissive of their OHS obligations? How do they *work* if no one sees them? It is worth considering the use of adverse publicity orders in the context of an employer's or company's Social Licence to Operate. A serious breach of OHS duties should result in the removal of their Social Licence to Operate *safely*, as they have proven that they cannot do this or are unwilling to [emphasis added].
>
> **Survey Participant (male, 55–64)**

> I would be happy to see some Adverse Publicity Orders though, but it would need to be meaningful in today's media, not just one off, not a substitute for a fine.
>
> **Survey Participant (female, 55–64)**

## Stakeholder views

3.102 The Australian Manufacturing Workers' Union submitted that adverse publicity orders should be a mandatory sentencing order in all OHS cases where a conviction is recorded (as an order imposed in addition to another penalty).[218] It also noted that, as part of considering alternative sentencing options, community service in promoting awareness and preventing future violations had an important role to play. While such initiatives could form part of a health and safety undertaking (discussed above), they could also viably be part of an adverse publicity order with bespoke conditions.[219]

3.103 The Victorian Trades Hall Council (VTHC) said that adverse publicity orders should play a 'complementary role within the current sentencing framework'. VTHC considered requiring the publication of a company's or director's contraventions of OHS laws to be a 'real deterrent', especially in cases where offenders are sensitive to reputational damage (over and above the financial loss inflicted by a monetary penalty). It submitted that adverse publicity orders 'should be dynamic, industry and employer specific', and should be imposed for the purposes of deterring, denouncing and punishing offending. In VTHC's view, adverse publicity orders could take the form of statements in notable newspapers, on social media or on the offender's website, as well as declarations to industry bodies, financial institutions or (where relevant) stock exchanges.[220]

3.104 The Victorian Congress of Employer Associations submitted that the consequences of adverse publicity can be significant in some cases, and that it was important to have regard to those broader consequences in considering the true punishment imposed on offenders in sentencing:[221]

> The consequences of an adverse publicity order on named businesses and individuals can be severe, and the court should consider these potential repercussions when deciding whether to issue such an order. This can include a significant drop in company value due

218. Submission 6 (Australian Manufacturing Workers' Union).
219. Submission 6 (Australian Manufacturing Workers' Union).
220. Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union).
221. Submission 11 (Victorian Congress of Employer Associations).

> to a lower share price caused by a loss of shareholder confidence, a loss of significant contracts stemming from diminished customer confidence, or substantial industrial relations disruptions spurred by a perceived decrease in public and employee support for the offender. Again, this can lead to job losses, or failures to hire, as businesses try to manage through a more adverse operating environment. While sub-section 135(6) of the Occupational Health and Safety Act … stipulates that the court must not issue an adverse publicity order unless it is satisfied that the costs of compliance do not exceed the maximum penalty, this reference pertains only to the direct costs of complying with the order, not its broader consequences.
>
> **Submission 11 (Victorian Congress of Employer Associations)**

3.105 Similar concerns were raised in roundtable consultation:[222]

> [The issue] is what is appropriate. Do you know what cases have been targeted … and why? Is it to do with the degree of culpability of the defendant? … Or is it more a case of … we're wanting to send a message to a particular industry … not any particular employer who might have breached their duty via the nature of the strict liability [offence], rather than there being clear culpability [on their part]?
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

3.106 However, there was broad support for the increased use of adverse publicity orders in appropriate cases, particularly to promote an informed worker and consumer base:[223]

> We'd like to see health and safety more embedded into the mainstream [of how] businesses think and work. And let the healthier and safer businesses thrive, and do really well, and go make profits and have lots of customers buy their products, and have the not-so-healthy ones not do as well. *But the key differentiator in that is customers have to get the information* [emphasis added].
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

> I would be in favour of it, but [as orders] in addition [to a penalty]. In our industry we have a lot of transient workers who are looking for employment with another employer in the industry once a project finishes, and they have the right to know if they're applying for a certain position with a certain company – they can find out the full disclosure of any OHS offences to make an informed decision whether they want to work with that company.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

222. Stakeholder Roundtable (12 August 2024).
223. Stakeholder Roundtable (12 August 2024).

3.107 Participants expected that adverse publicity orders would regularly be contested by offenders, and it was important for a court to turn their mind to the extent of reputational damage that would result from the order, and whether that required a corresponding reduction of the penalty to be imposed alongside the order.[224]

3.108 Specialist OHS barristers, with whom we consulted on the draft recommendations, expressed general support for the increased use of adverse publicity orders, noting that in some cases they may generate an enhanced deterrent effect when compared to purely monetary penalties like fines. Participants also acknowledged that the question of whether to impose an adverse publicity order was related to that of whether to record a conviction. Finally, participants noted that courts should consider whether adverse publicity orders should have a set duration for which a publication was to exist, especially where the order involves the publication of notices on the internet.[225]

## The Council's view

3.109 We are of the view that adverse publicity orders in OHS cases have the potential to be effectively harnessed to give effect to the purposes of sentencing, including:

- **specific deterrence and just punishment**, by damaging the offender's prestige and reputation within their industry, their client/consumer base, and their public standing, while exacting additional costs involved in complying with the order;
- **general deterrence**, by publicising the circumstances of the offending, the nature of the risks involved and their consequences, the offender's experience of being prosecuted and sentenced, the penalty imposed, and steps taken by the offender to rehabilitate, including insights gained as a result of the process;
- **denunciation**, by further communicating the court's condemnation of the offending more broadly within the community;
- **community protection**, by raising awareness within specific industries or the community more broadly about workplace risks, and the responses of the regulatory framework and criminal justice system to breaches of the law, which can lead to improvements in OHS outcomes within industries, and better inform potential customers and clients about the entities with which they do business; and
- **rehabilitation**, by allowing offenders to communicate how they have made positive changes after having been prosecuted and sentenced, and the insights gained from the experience.

224. Stakeholder Roundtable (12 August 2024).
225. OHS Barrister Roundtable (16 August 2024).

3.110 In this sense, we agree with community feedback that adverse publicity need not always be a negative story. We heard in consultation that one of the most important aspects to be communicated to industries from a prosecution is the need to be *proactive* in identifying OHS risks. In this sense, any such complacency might be best addressed via messages from peers in the same field or industry who, while not intentionally breaching their duties, nevertheless failed to comply with the required standards. Communicating messages of learnings and insights gained can be just as valuable in furthering the objects of the *OHS Act*.

3.111 We are similarly of the view that there is strong evidence to show that, in some cases, in particular, those involving very large entities with national/international operations and reputation, a reliance on fines alone may fail to achieve an effective level of punishment and deterrence. It is also in those cases that adverse publicity offers the greatest potential for a substantial effect, as a penalty in addition to a fine or another sentencing order. Given that potential, courts should continue to view the sentence holistically, and consider the longer-term effects of an adverse publicity order on the financial circumstances of the offender.

3.112 Further, we see adverse publicity orders as providing an added dimension to sentencing practices, in that they allow courts to directly address the *reputation* of offenders, something which fines alone cannot do. Concerns about the effectiveness of such reliance on fines in sentencing are clearly not limited to the OHS context. In January 2024, reporting of the Federal Court noted the view that a $1.8 million penalty to be paid by a national bank pursuant to a settlement with the Australian Securities and Investment Commission was 'risible' given the bank's size and conduct:[226]

> A lot of people would be interested in whether or not someone with whom they choose to have a commercial relationship is someone who is breaking the law or not. Where there's been breaches of statutory norms, why shouldn't the public be told about that [in] the most effective way possible, rather than going through the fiction that people are going to read Federal Court judgments?

3.113 The matter was then adjourned to allow for consideration of whether there should be additional terms requiring the bank to publish information about its unconscionable conduct. The court noted that there was 'an acute public interest in securing compliance with the law by large financial institutions', with that interest being best served by 'transparency as to how such institutions have conducted themselves'. However, ultimately no order to publicise the offending was made by

226. Millie Muroi, '"Risible": Federal Court Justice Slams $9.8m Westpac Settlement', *Sydney Morning Herald* (31 January 2024).

the court, given the parties had not had time to make submissions as to whether such an order should be made.[227]

3.114 We are of the view that adverse publicity orders are extremely underutilised as a sentencing order in OHS cases. This cannot be solely due to the fact that most prosecuted OHS offenders are smaller entities. Instead, it appears that their underuse results from entrenched prosecutorial and sentencing practices, which simply have not evolved to include adverse publicity orders as a key consideration (although we note that the recent case of *DPP v Yarra Valley Park Lane Holiday Park Pty Ltd*[228] might signal a potential shift in this approach). While courts are empowered to make adverse publicity orders on their own motion, realistically the impetus should come from prosecution submissions on sentence. These can assist the court by identifying the utility of an adverse publicity order, as well as proposing the content of the information to be publicised and the mode in which the publication should occur to ensure the order is effective.

3.115 Indeed, it is not enough to see an increased use of these orders. Their effectiveness is wholly dependent on their terms: both the content of the information to be publicised and the medium by which that information is to be communicated. If adverse publicity orders are to be used in more cases, there needs to be close consideration of the intended audience of the information, as well as the best avenues to target that audience, whether it be the offender's employees, members of the industry, the offender's clients or customers, or the broader community.

3.116 As is our view with health and safety undertakings, our view here is that the most effective way of achieving change in prosecutorial practice is by fostering structural changes in prosecutorial decision-making. These changes should lead practitioners to consider the option of adverse publicity orders, including the information to be disseminated, and the mode and medium to be used to communicate that information. For example, decisions should be made about what media platforms should be utilised and how, and whether the purposes of sentencing (and the objects of the *OHS Act*) would be best served by targeting a specific industry, or consumers and the broader community. These considerations lend themselves to guidance in the form of a policy relating to the use of adverse publicity orders. The policy would specify case-specific criteria for when such an order might be appropriate. It is intended that providing a structure for that decision-making will lead to practitioners increasingly raising these orders in plea hearings and submissions on sentence, for consideration by sentencing courts.

227. *ASIC v Westpac Banking Corporation (Penalty Hearing)* [2024] FCA 52 [34]–[36].
228. *DPP v Yarra Valley Park Lane Holiday Park Pty Ltd* [2024] VCC 1863.

3.117 As an example, the New South Wales Centre for Work Health and Safety's *Guide for Regulators in the Use of Non-Monetary Orders* provides a useful list of considerations to guide regulators when crafting a proposed adverse publicity order, including:[229]

- the nature of the offence;
- the prevalence of the offence in the industry;
- the level of compliance achieved since the offence was committed;
- the view of the offender on the importance of reputation, the likelihood of publicity reaching the intended audience, the likelihood that the intended audience will disapprove of the described circumstances, and the extent of latent impacts of that disapproval;
- the environment in which the notice will be released;
- the language and wording of the order, paying particular regard to ensuring it is noticeable, accessible, relevant and implementable;
- the characteristics of the intended audience, including who needs to be informed, warned or deterred by the relevant matters under the order, whether the audience is the public, industry, employees, investors, shareholders or creditors, distributors, providers, or customers, and whether the order is likely to achieve its intended outcome with that audience;
- the most effective way to reach the intended audience, whether it be, for example, via media releases, television, radio, print media (such as newspapers or industry magazines), online media (such as on websites or social media), the display of physical notices, or direct contact through email or post;
- the duration that the adverse publicity should be active for; and
- the proportional cost of implementing the intended form of publicity.

## Recommendation 6: Increased use of adverse publicity orders

WorkSafe Victoria should develop a policy relating to adverse publicity orders pursuant to section 135 of the *Occupational Health and Safety Act 2004* (Vic) that (a) specifies criteria for deciding whether to recommend that a sentencing court consider making an adverse publicity order, including the content and medium of the information to be publicised, and (b) encourages the increased use of adverse publicity orders in appropriate cases.

229. New South Wales Government, Centre for Work Health and Safety, *Responsive Sentencing: Non-Monetary Orders in Work Health and Safety: Guide for Regulators in the Use of Non-Monetary Orders* (2020) 2.

## Revising the offence and penalty hierarchy for breach of duty offences

3.118 In Victoria, there are three primary offences relating to a failure to provide a workplace that is reasonably safe and without risks to health. These offences, and their associated maximum penalties for companies, are:

- workplace manslaughter (breaching a duty in a negligent manner and causing another person's death) – 100,000 penalty units;[230]
- reckless conduct endangering serious injury in a workplace – 20,000 penalty units;[231] and
- a duty-holder breaching a health and safety duty – 9,000 penalty units.[232]

3.119 These are relatively similar to the four primary offences in the model laws, which separate breaches of duty that expose someone to a risk of death or serious injury or illness, from breaches that don't:

- industrial manslaughter – $18 million;
- category 1 offences (duty holders putting someone at risk of death or serious injury or illness with gross negligence or recklessness) – $10,425,000;
- category 2 offences (duty holders breaching their duty and exposing an individual to a risk of death or serious injury or illness) – $2,090,000; and
- category 3 offences (duty holders breaching their duty, but not necessarily exposing someone to a risk of death or serious injury or illness) – $700,000.[233]

3.120 In our view, for a number of reasons, there is a need to revise the maximum penalties for breach of duty offences in Victoria, and – in order to ensure a logical offence and penalty hierarchy – to revise the reckless conduct offence currently in section 32 of the *OHS Act*. We address both of these in turn.

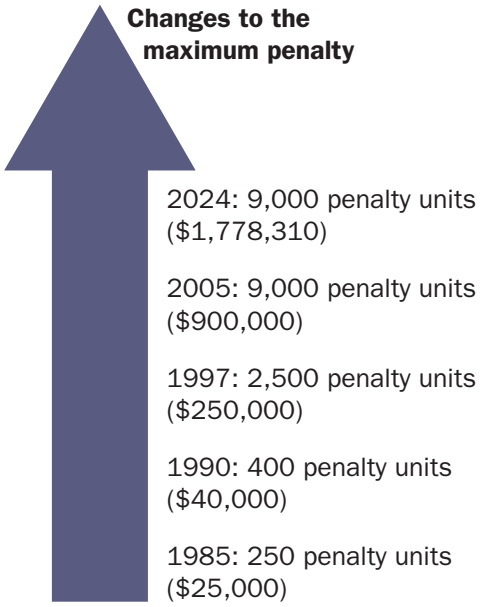
230. *Occupational Health and Safety Act 2004* (Vic) s 39G; the maximum fine for individuals is 3,000 penalty units.
231. *Occupational Health and Safety Act 2004* (Vic) s 32; the maximum fine for individuals is 1,800 penalty units.
232. *Occupational Health and Safety Act 2004* (Vic) ss 21, 23–27, 29–31; the maximum for individuals for these offences is 1,800 penalty units. Two health and safety duties have different maximum penalties for companies: section 22 (duties of employers to monitor health and conditions) has a maximum penalty of 1,200 penalty units, and section 28 (duties of designers of buildings or structures) has a maximum penalty of 2,500 penalty units.
233. Model Work Health and Safety Bill (2023) ss 30A–33, sch 4. Aside from the absence of an industrial manslaughter offence, this offence and penalty hierarchy is very similar to that in New Zealand, which includes $3 million for companies that recklessly place someone in danger of serious injury or illness, $1.5 million for companies that breach a duty and place someone in danger of serious injury or illness, and $500,000 in all other instances: *Health and Safety at Work Act 2015* (NZ) ss 47–49.

## Increasing the maximum penalties for breach of duty offences

3.121 The current maximum penalty for most breach of duty offences is 9,000 penalty units for body corporates, and 1,800 penalty units for individuals.[234]

3.122 When the *Occupational Health and Safety Act 1985* (Vic) came into effect, the maximum penalty for a corporate employer breaching their duty to their employees to provide a safe working environment was 250 penalty units (at the time, equivalent to $25,000) (Figure 12). As OHSIntros identified in their submission,[235] under that maximum penalty, in 1989, Simsmetal Ltd received a fine of $45,000 for three charges of that offence after an explosion killed four workers and injured seven others.[236] That fine represented 60% of the total maximum available at the time for three charges ($75,000).

**Figure 12: Changes to the maximum penalty for breach of duty offences by companies in Victoria**




3.123 In 1990, the maximum penalty for breach of duty offences was lifted to 400 penalty units (at the time, $40,000).[237] Then seven years later in 1997, the maximum was lifted again to 2,500 penalty units for body corporates (at the time, $250,000).[238] Finally, in 2005, when the *OHS Act* commenced, it was increased to 9,000 penalty units ($900,000) for body corporates. Since then, the value of a penalty unit has increased almost annually (indexed to account for inflation), so that it is nearly $1.8 million in 2024–25.

3.124 Since 1985, there has, in effect, been a 7,100% increase in the dollar value of a maximum fine for breach of duty offences by body corporates (this increase is about 29 times the cumulative rate of inflation, of 243%, since then).[239] In 2011, the

234. *Occupational Health and Safety Act 2004* (Vic) ss 21(1), 23(1), 24(1), 26(1), 27(1), 29(1), 30(1), 31(1). Sections 24 and 25 of that Act apply only to individuals. And the maximum penalty for the offence relating to designers of buildings or structures is lower, though the reason for the distinction is not immediately apparent: *Occupational Health and Safety Act 2004* (Vic) s 28(1) (2,500 penalty units for body corporates, and 500 for individuals).
235. Submission 13 (OHSIntros).
236. Fairfax Media, 'Investment Briefs', *Australian Financial Review* (10 March 1989).
237. *Occupational Health and Safety (Miscellaneous Amendment) Act 1990* (Vic) s 7(a).
238. *Accident Compensation (Miscellaneous Amendment) Act 1997* (Vic) s 73(a).
239. Reserve Bank of Australia, 'Inflation Calculator' (rba.gov.au, 2024).

Director of Public Prosecutions argued that the Court of Appeal should call for an uplift in sentencing practices for OHS offences to reflect the significant increases in the maximum over time. But the court dismissed the appeal, saying that the case was not an appropriate vehicle for such guidance because the Director was 'not seek[ing] any increase in the actual sentences imposed' on the offender in that case.[240] There do not appear to have been any subsequent attempts by the Director of Public Prosecutions to seek an uplift in sentencing practices for OHS offences.

3.125 As can be seen in Figure 13 (page 84), Victoria now has the second-highest maximum fine in the country for workplace manslaughter by a body corporate (almost $20 million in 2024–25, with only New South Wales having a higher maximum of precisely $20 million), the third-highest maximum fine for reckless endangerment or similar offences (after the Commonwealth and New South Wales), and a relatively comparable maximum fine for breach of duty offences (especially where someone has been exposed to a risk of death or serious injury).

3.126 Importantly, however, many of the maximum penalties in the various jurisdictions for companies that commit OHS offences have not yet accounted for significant changes that were made to the model laws in July 2023. At the instruction of officers of Safe Work Australia, the Australasian Parliamentary Counsel's Committee was asked to draft the *Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023*. In that amendment, released in July 2023, the maximum fines for category 1, 2 and 3 offences committed by body corporates were increased as follows:

- category 1 – from $3,000,000 to $10,425,000;
- category 2 – from $1,500,000 to $2,090,000; and
- category 3 – from $500,000 to $700,000.

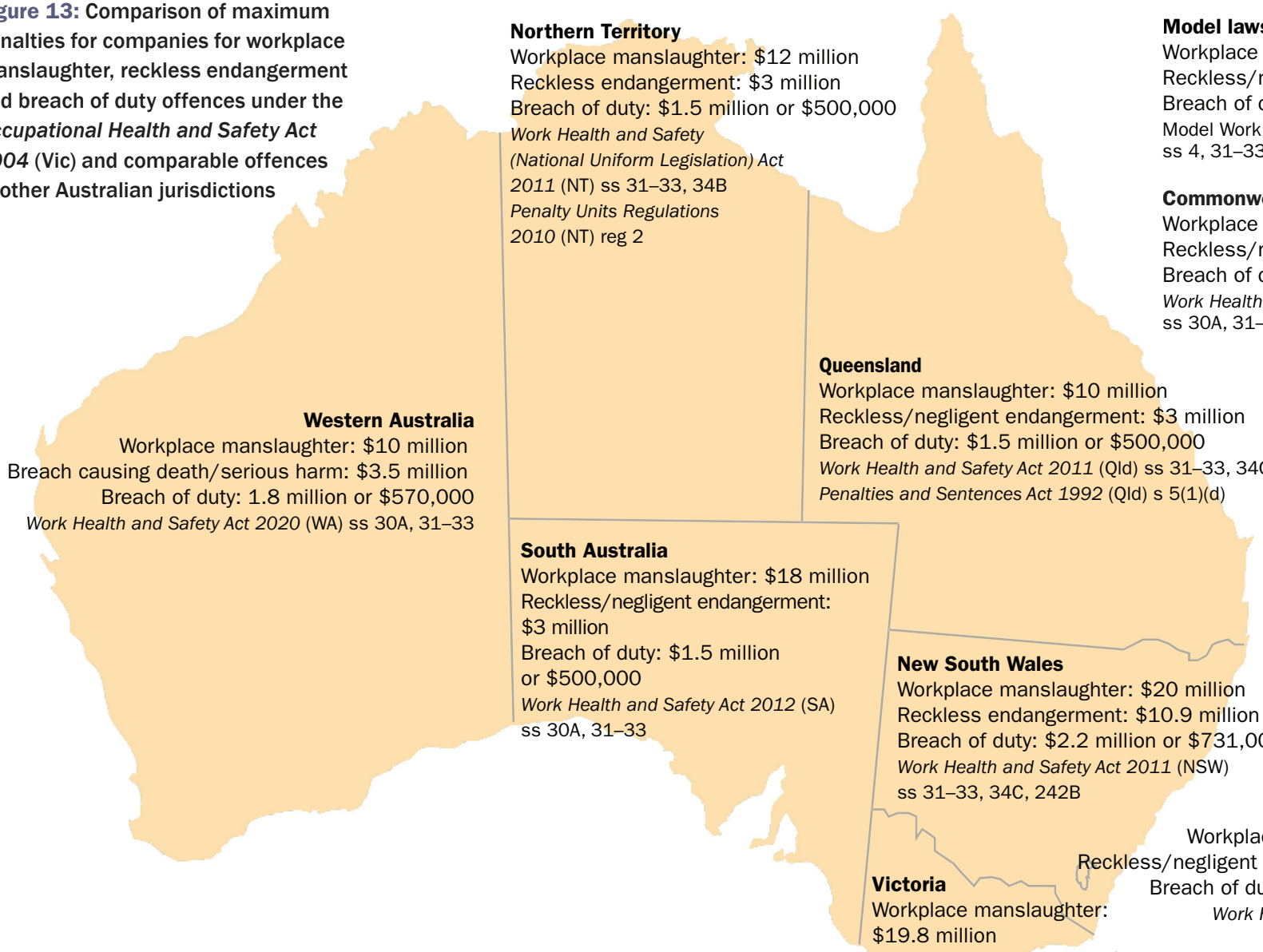
3.127 The 39% and 40% increases to the category 2 and 3 offences derived from a recommendation of the *Boland Review* to revise maximum penalties to account for inflation since the original model laws were developed.[241] This is because the model laws do not use penalty units (which can be indexed to account for inflation) but instead use specific dollar amounts, meaning that the real value of the maximum declines over time. There was also a decision to 'significantly increase the penalties for the Category 1 offence'.[242]

240. *DPP v Rapid Roller Co Pty Ltd* [2011] VSCA 17 [11].

241. Explanatory Memorandum, Model Work Health and Safety Legislation Amendment (Offences and Penalties) Bill 2023 (Cth) item 4, referencing Boland (2018), above n 128, 117 (Recommendation 22).

242. Explanatory Memorandum, *Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023* (Cth) item 4.

**Figure 13:** Comparison of maximum penalties for companies for workplace manslaughter, reckless endangerment and breach of duty offences under the *Occupational Health and Safety Act 2004* (Vic) and comparable offences in other Australian jurisdictions



**Northern Territory**
Workplace manslaughter: $12 million
Reckless endangerment: $3 million
Breach of duty: $1.5 million or $500,000
*Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ss 31–33, 34B
*Penalty Units Regulations 2010* (NT) reg 2

**Model laws**
Workplace manslaughter: $18 million
Reckless/negligent endangerment: $10.4 million
Breach of duty: $2 million or $700,000
Model Work Health and Safety Bill 2023 (Cth) ss 4, 31–33, sch 4 cl 1

**Commonwealth**
Workplace manslaughter: $18 million
Reckless/negligent endangerment: $15 million
Breach of duty: $2 million or $700,000
*Work Health and Safety Act 2011* (Cth) ss 30A, 31–33, sch 4 cl 1

**Queensland**
Workplace manslaughter: $10 million
Reckless/negligent endangerment: $3 million
Breach of duty: $1.5 million or $500,000
*Work Health and Safety Act 2011* (Qld) ss 31–33, 34C
*Penalties and Sentences Act 1992* (Qld) s 5(1)(d)

**Western Australia**
Workplace manslaughter: $10 million
Breach causing death/serious harm: $3.5 million
Breach of duty: 1.8 million or $570,000
*Work Health and Safety Act 2020* (WA) ss 30A, 31–33

**South Australia**
Workplace manslaughter: $18 million
Reckless/negligent endangerment: $3 million
Breach of duty: $1.5 million or $500,000
*Work Health and Safety Act 2012* (SA) ss 30A, 31–33

**New South Wales**
Workplace manslaughter: $20 million
Reckless endangerment: $10.9 million
Breach of duty: $2.2 million or $731,000
*Work Health and Safety Act 2011* (NSW) ss 31–33, 34C, 242B

**Australian Capital Territory**
Workplace manslaughter: $18 million
Reckless/negligent endangerment: $10.4 million
Breach of duty: $2.9 million or $700,000
*Work Health and Safety Act 2011* (ACT) ss 31–33, 34A, sch 4

**Victoria**
Workplace manslaughter: $19.8 million
Reckless endangerment: $4 million
Breach of duty: $1.8 million
*Occupational Health and Safety Act 2004* (Vic) ss 21, 23, 26–27, 29–32, 39G

**Tasmania**
Workplace manslaughter: $18 million
Reckless endangerment: $3 million
Breach of duty: $1.5 million or $500,000
*Work Health and Safety Act 2012* (Tas) ss 29C, 31–33

3.128 The Commonwealth, New South Wales and most recently the Australian Capital Territory are so far the only jurisdictions to have implemented these changes to maximum penalties.[243] The Commonwealth and New South Wales chose a higher maximum for category 1 offences – $15 million and $10.9 million respectively. The Tasmanian Parliament has recently passed an amendment to the *Work Health and Safety Act* introducing an industrial manslaughter offence with an $18 million maximum (though the Act does not change other penalties).[244] It is reasonable to assume that all of the jurisdictions with model laws will eventually increase their maximum penalties for breaches of duty offences in line with the amendments in the model laws. This would leave maximum penalties in Victoria well behind other jurisdictions, with even Victoria's section 32 reckless endangerment offence carrying a maximum (just under $4 million) of less than half the maximum for the comparable category 1 offence ($10 million).

### Stakeholder views

3.129 In our *Consultation Paper*, we asked whether fine amounts for OHS offences needed to increase, and if so, what the best way to achieve that increase would be.[245] At [3.42]–[3.49] above, we discussed the need to increase fine amounts for OHS offences in some cases. One of the options we offered for doing so was to increase the maximum penalty for breach of duty offences. Across our community consultation, and in our consultation on draft recommendations, there was clear support for increasing the maximum penalties for breach of duty offences. This was not because increasing the maximum penalty would be an effective lever for altering current sentencing practices as a whole, but instead because the current maximum does not allow courts adequate discretion, in particular, when sentencing serious breaches by large companies.

3.130 During our community consultation events, participants were asked to sentence one of two companies: a small solar panel installation company with four staff – the company created a risk of fall from height but no-one was injured; and a large national construction company with a turnover of $1.5 billion – the company's behaviour resulted in a fatality and it was being sentenced for two offences (with a combined maximum fine of $3.5 million). Of the 36 participants who sentenced the large company, 58% (21 participants) imposed the maximum available fine.

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243. *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 4 div 11 cl 72; *Work Health and Safety Act 2011* (NSW) ss 31–33, as amended by *Work Health and Safety Amendment Act 2023* (NSW) ss 4–6 (effective 1 July 2024); *Work Health and Safety Act 2011* (ACT) sch 4, as amended by *Workplace Legislation Amendment Act 2024* (ACT) s 26.
244. *Work Health and Safety Act 2012* (Tas) s 29C, as amended by *Work Health and Safety Amendment (Safer Workplaces) Act 2024* (Tas).
245. *Consultation Paper* 80–90 (Questions 15 and 16).

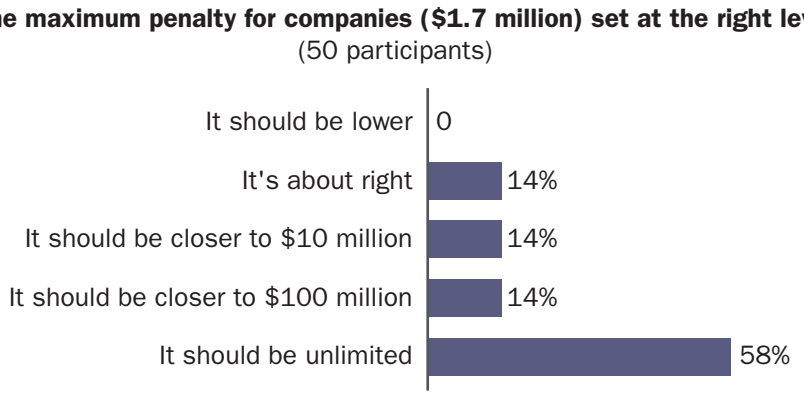
3.131 Two of the participants who sentenced the large company said:

> The whole point of sentencing is to deter it from happening again. [The maximum] is too low for a company that size.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

> [A] fine for this size company is probably small change even if you impose the maximum.
>
> **Community Consultation Participant, Geelong (28 February 2024)**

3.132 Near the end of each consultation session, we asked participants whether, having now experienced sentencing for themselves, they thought there was a need to change the maximum penalty (at that time $1.73 million) in Victoria for breach of duty offences. It was especially important for us to understand whether those who imposed the maximum thought that it was sufficient, or if they felt hamstrung to impose a less severe penalty than they otherwise would have. We gave participants five options: the maximum 'should be lower', 'it's about right', 'it should be closer to $10 million', 'it should be closer to $100 million', or 'it should be unlimited'. Only 14% of participants said the current maximum was adequate; no participants advocated a reduction in the current maximum; and the remaining 86% wanted to see a higher maximum penalty for companies that breach their health and safety duties, with most participants preferring an unlimited maximum fine (Figure 14).

**Figure 14: Community consultation responses (maximum penalty, both case studies)**




3.133 Similarly, Uniting Vic.Tas told us that they have supported families in some cases who have said the current maximum is too low:

> Several Uniting client families have been involved in cases against large companies. Their typical response to a question like this [about whether the size of the company should be relevant in sentencing] is that even the maximum penalty has minimal impact on financially viable organisations.[246]

246. Submission 9 (Uniting Vic.Tas).

3.134 Without advocating for any change, because 'the determination of maximum penalties is a matter for the legislature', the County Court also observed that:

> [T]he current penalties available and imposed for OHS offences are now inconsistent with other Australian jurisdictions and substantially out of step with the fines being imposed for other corporate regulatory frameworks, despite addressing arguably more serious concerns. This is particularly the case for larger companies[.][247]

3.135 There were, though, also a number of stakeholders – particularly employer groups – who opposed any increase in the maximum fines for OHS offences. They contended that the maximum penalties are already sufficiently high to achieve the purposes of sentencing, and that any problems with current sentencing practices are largely due to courts not exercising their full discretion within the existing maximums:

> The prescribed maximum fine amounts are [already] set at a sufficiently high level[.]
>
> **Submission 1 (Housing Industry Association)**

> [T]he courts are awarding fines significantly below the maximums available to them. Hence the quantum of fines could be increased by the courts without any need to increase the maximums … Ai Group does not believe that it would be appropriate to increase all the maximum penalties that are in the Act, particularly as they do increase every year with indexation of penalty units. However, we do note that the Victorian penalties for some offences are lower than those in the model laws. If a decision is made to increase the maximum penalties in Victoria, they should be aligned with those established in the model [Work Health and Safety] Act[.]
>
> **Submission 4 (Australian Industry Group)**

> The maximum financial penalties … for breaches of section 21 of the [*OHS Act*] … are massive potential penalties, set at levels clearly capable of delivering the intended signal and disincentive effects to employers. There is no basis to conclude that … the application of higher penalties to an expanded range of matters is merited or necessary.
>
> **Submission 11 (Victorian Congress of Employer Associations)**

> The current penalty regime is a far cry from the maximum penalties of $250,000 that were in place prior to the introduction of the OHS Act 2004 … VACC asserts that maximum penalties are in line with (genuine) community expectations when the risk-based and absolute liability nature of OHS offences is properly understood.
>
> **Submission 15 (Victorian Automative Chamber of Commerce)**

247. Submission 20 (County Court of Victoria).

3.136 Our preliminary view, following community consultation, was that maximum penalties for breach of duty offences are not currently sufficient to allow courts adequate discretion. This is because we were not trying to determine whether the current maximums were sufficient *in light of* current sentencing practices, but instead we were trying to determine whether current sentencing practices need to change and, if so, what to, and whether the current maximums will be adequate. In consultation on the draft recommendation, we heard support for increasing the maximum, so long as in doing so, we were clear that our intent was to better enable courts to sentence worst-case scenarios. For instance:

> It's such a nuanced issue … there's little to no utility increasing the maximum value without the … [s]entencing guideline. [B]ecause at the moment, we're seeing 1%, 2%, 3% of the maximum penalty … if you have something that really adds to it, being a guideline … that's when I feel you'll see change.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

> I think if it's made clear that that's the intention … that makes sense to me. But the point being … [so long as] it's really designed to capture potential worst sort of cases.
>
> **Participant at OHS Barrister Roundtable (16 August 2024)**

> I'm supportive of it … being able to appropriately sentence large companies and take into account worst-case scenarios … [I]n the case of [Redacted], that individual's life has been changed so completely that the penalty that was given was high, but if it had … these higher penalties, yeah, I would just say I support that recommendation.
>
> **Participant at OHS Barrister Roundtable (16 August 2024)**

### *The Council's view*

3.137 As the Court of Appeal has observed, there are usually two reasons to increase the maximum penalty for an offence: first, because sentencing practices as a whole are inadequate, and the legislature is attempting to provide the courts with a new yardstick to reflect the seriousness of the crime; and second, because there are 'worst-case scenarios' of the offence for which the current maximum penalty is not sufficient.[248]

3.138 We are of the view that there is a clear need to increase the maximum fines for breaches of OHS duties, in small part because there is a need to reform sentencing practices as a whole, but more so because the current maximums do not sufficiently allow for worst-case scenarios. It is otiose that the maximum

248. *R v Grossi* [2008] VSCA 51 [45]; *Hogarth v The Queen* [2012] VSCA 302 [50]; *DPP v Aydin & Anor* [2005] VSCA 86 [8]–[12].

penalty for an offence must be capable of enabling courts to impose penalties that are proportionate to the offending, and in the context of OHS offences, this includes serious offending by very large companies. The data we reviewed on current sentencing practices (where some courts have imposed penalties of up to 75% of the maximum), the responses to our community survey (which also supported change), our review of maximum penalties in other jurisdictions, particularly in the model laws (which are much higher), and especially the results of our community consultation exercise (where participants frequently felt constrained by the maximum fines available to them), all combine to suggest that the current maximum fines for breaches of OHS offences by companies in Victoria are inadequate. They do not allow courts sufficient discretion to impose appropriate penalties that are commensurate with the seriousness of the offending, the culpability of the offender and/or the size of the offender.

3.139 We do not expect an increase in the maximum fines for breach of duty offences, on its own, to result in any drastic change to sentencing practices. Past experience shows that simply increasing maximums, especially financial penalties, rarely drives significant change.[249] In England and Wales, where the maximum penalty for an OHS offence was amended to an unlimited fine in 2015,[250] most commentators attribute the recent decompression of (and increase in) fine amounts to the introduction of a sentencing guideline for health and safety offences, and not to the increase in the maximum penalty.[251]

3.140 While there was strong community support for an unlimited maximum fine, we are not convinced that this is necessary, given the experience in England and Wales. While for the last nine years, the maximum there has been an unlimited fine, the largest fines (in about half a dozen cases) have each been between £4 million and almost £7 million, all involving very large organisations, and almost all involving fatalities (see Case Study 3, page 90).[252] In Victoria, a five-fold increase in the maximum, to $10 million, is likely to be sufficient to capture the worst-case scenarios. For the same reason, we do not propose a maximum as high as $100 million.

249. See, for example, our recent report on the effect of inflation on court fines over time, finding that increases to the maximum financial penalty for failing to register a cat or dog, and for driving while suspended, appear to have had no discernible effect on sentencing practices: Sentencing Advisory Council, *Assessing the Impact of Inflation and Penalty Unit Indexation on Fine Amounts in Victoria* (2024) 27, 29, 34.

250. *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 85.

251. See, for example, Andrew O. Arewa et al., 'Analysis of Penalties Imposed on Organisations for Breaching Safety and Health Regulations in the United Kingdom' (2018) 9(4) *Safety and Health at Work* 388.

252. BBC, 'Northern Gas Networks Fined £5m over Mirfield House Explosion', *BBC* (10 February 2022); BBC, 'Kier Fined £4.4m for Power Cable Safety Breaches', *BBC* (14 January 2023); Gwyn Topham, 'Network Rail Fined £6.7m over Fatal Stonehaven Crash', *The Guardian* (8 September 2023); BBC, 'Chevron Fined for Pembroke Explosion that Killed Four People', *BBC* (7 June 2019).

## Case study 3: England and Wales Network Rail case

**Network Rail fined £6.7m over fatal Stonehaven crash**

Network Rail has been fined £6.7m at the high court in Aberdeen after admitting health and safety failings over a rail crash that claimed three lives.

…

The crash, the worst accident on Britain's railways in 18 years, came after debris had washed on to the track from a wrongly built drainage system after heavy rain. Despite the conditions, the driver was not warned to reduce speed.

…

Network Rail … admitted a series of failings that resulted in the deaths, pleading guilty to a charge covering the period from 1 May 2011 to 12 August 2020.

These included failing to inform the driver that it was unsafe to drive the train at a speed of 75mph or caution him to reduce his speed on the day of the derailment. There were also failings in construction, inspection and maintenance of drainage assets and in adverse and extreme weather planning.

Trish Ewen … the partner of the train conductor said the crash "turned her life upside down" … adding: "Donald and I should be thinking about retiring together and planning the rest of our lives – instead he was taken and I've been left to exist alone."

**Gwyn Topham, 'Network Rail Fined £6.7m over Fatal Stonehaven Crash', *The Guardian* (8 September 2023)**

3.141 Increasing the maximum fine as we recommend will also ensure Victoria remains relatively consistent with other jurisdictions, which will likely soon make revisions to implement recent changes to the model laws. The model laws' category 1 offences – behaviours that we would expect to be captured by the Victorian breach of duty offences – are intended to have maximums of approximately $10 million following changes to the model laws in July 2023. Further, in light of our recommended reforms to section 32 of the *OHS Act* (see [3.143]–[3.165] below), increasing the maximum for companies that breach their health and safety duties creates a logical offence and penalty hierarchy for companies: 50,000 penalty units for breaches of health and safety duties, and 100,000 penalty units for industrial manslaughter.

3.142 We note some ancillary matters: (1) we see no need for the *OHS Act* to continue to delineate a lower maximum penalty for those who design buildings and

structures; if those individuals or companies owe health and safety duties because failures in those duties may put people at risk, the potential penalties should be the same as the potential penalties for other duty holders; and (2) there is a consequential need to retain the 1:5 ratio in the maximum fine between individuals and companies, as is apparent throughout the Victorian statute book.

### Recommendation 7: Maximum penalties for breach of duty offences

The Victorian Government should increase the maximum penalties for breaches of health and safety duties under the *Occupational Health and Safety Act 2004* (Vic) to:

- 50,000 penalty units for body corporates for offences contrary to sections 21, 23, 26, 27, 28, 29, 30 and 31; and
- 10,000 penalty units for individuals for offences contrary to sections 21, 23, 24, 25(1), 25(2), 26, 27, 28, 29, 30 and 31.

## The recklessness offence

3.143 Under section 32 of the *OHS Act*, it is an offence to recklessly engage in conduct that places, or may place, another person who is at a workplace in danger of serious injury. The offence carries a maximum penalty of five years' imprisonment or a fine of 1,800 penalty units for an individual, and a maximum fine of 20,000 penalty units for companies.

3.144 In the *Statistical Report*, we noted that in the period from 2005 to 2021, there were exceptionally few sentenced offences of reckless endangerment (a total of seven charges, in five of the 1,197 OHS cases).[253]

3.145 The offence was introduced as part of the new *OHS Act* in 2004, pursuant to recommendations from the *Maxwell Review*[254] and modelled on the offence of recklessly endangering serious injury in section 23 of the *Crimes Act 1958* (Vic) ('the *Crimes Act*'):

> This provision applies the same standards, tests and penalty as section 23 of the Crimes Act 1958, but creates a high culpability offence applicable within workplaces. In such cases, a penalty of up to five years imprisonment may apply in addition to a fine.[255]

253. As flagged in our *Statistical Report*, this included five charges sentenced in the Magistrates' Court and two in the higher courts. One of those charges resulted in the only immediate custodial sentence for an OHS offence in the 16-year period from 1 July 2005 to 30 June 2021. One of the two higher courts cases was *DPP v Orbit Drilling Pty Ltd & Anor* [2010] VCC 417; the other judgment is not publicly available: *Statistical Report* 52–54.
254. Maxwell (2004), above n 128, 375–376.
255. Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 1764 (Rob Hulls, Attorney-General, Minister for Industrial Relations and Minister for WorkCover).

3.146 Relevant parliamentary debates indicate that, during that process of reform, there was also an impetus to introduce a workplace manslaughter offence, which was met with opposition. Those negotiations eventually resolved to an agreement to introduce a new 'recklessness' offence instead of a workplace manslaughter offence.[256] Some 16 years later, subsequent law reform initiatives have led to the enactment of a workplace manslaughter offence, with the recklessness offence still being retained.

3.147 Three issues arise in respect of the maximum penalties for individuals and companies for the recklessness offence.

3.148 First, we noted in the *Consultation Paper* the overlap between this offence and the offences of recklessly endangering serious injury and recklessly endangering life in the *Crimes Act*. The *Crimes Act* offences carry a maximum penalty of five and 10 years' imprisonment, respectively. We noted that the only difference between the *Crimes Act* offences and the *OHS Act* recklessness offence is that the *OHS Act* offence requires the prosecution to prove that the offence occurred 'at a workplace'. What's more, the *OHS Act* offence is limited to endangering serious injury. However, many of the cases sentenced in the last 20 years involved either risks to life or an actual fatality; therefore, the *OHS Act* offence is clearly intended to capture conduct that is analogous to the *Crimes Act* offence of recklessly endangering *life*. Despite this, the maximum penalty for the *Crimes Act* offence of endangering life is twice that for the *OHS Act* offence. It seems incongruous, given the additional duties placed on people in workplaces, that the maximum prison term is *lower* if that conduct occurs in a workplace.

3.149 Second, the maximum penalty of five years' imprisonment for individuals is now inconsistent with the maximum penalty for the equivalent offence in jurisdictions that have adopted the model laws (see Figure 15, page 96). The equivalent offence in the model laws is a category 1 breach of duty offence, being a breach of duty that is reckless or (grossly) negligent. Under the model laws (developed by Safe Work Australia), this category 1 designation attracts a maximum penalty of 10 years' imprisonment. New South Wales has already implemented this increase in the maximum penalty,[257] while the Commonwealth has increased its maximum penalty to 15 years' imprisonment.[258] We would expect the other states and territories to follow suit in the near future.

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256. Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 1767, 1769 (Rob Hulls, Attorney-General, Minister for Industrial Relations and Minister for WorkCover); Meeting with Australian Industry Group (19 August 2024). The *Maxwell Review* noted that 'the Victorian Government announced in early 2003 that it had decided not to introduce an offence of industrial manslaughter': Maxwell (2004), above n 128, 356.
257. *Work Health and Safety Amendment Act 2023* (NSW) sch 1, amending *Work Health and Safety Act 2011* (NSW) s 31.
258. *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 4 div 2 cl 21, amending *Work Health and Safety Act 2011* (Cth) s 31.

3.150 Third, if the maximum financial penalty for breach of duty offences is increased to 50,000 penalty units for companies consistent with our recommendation (see [3.121]–[3.142]), the penalty hierarchy between the breach of duty offences, the reckless endangerment offence and the workplace manslaughter offence would become incoherent.

3.151 In our *Consultation Paper*, we asked whether the maximum penalty of five years' imprisonment for reckless conduct endangering serious injury in a workplace should be increased and, if so, why and to what level (Question 12).

## Stakeholder views

3.152 Stakeholders' written submissions were divided on the appropriateness of the current maximum penalty for the recklessness offence.

3.153 The Housing Industry Association (HIA) noted the small number of sentenced reckless endangerment offences, the fact that a term of imprisonment was imposed in only one of those five cases, and the existence of the equivalent reckless endangerment offences in the *Crimes Act,* and advocated for the penalty of imprisonment to be removed, or at least reduced to a maximum of 12 months.[259] Australian Industry Group noted that consistency with the maximums in the model laws may be justifiable, but like HIA, pointed to the comparatively low sentencing practices for the offence, to argue that an increase in the maximum penalty was not necessary.[260] The Victorian Congress of Employer Associations and the Victorian Automotive Chamber of Commerce also were in favour of maintaining the current maximum, noting that the offence was most directly comparable to recklessly endangering serious injury under the *Crimes Act*, which, on its own, has the same five-year maximum penalty.[261]

3.154 Similarly, the Australian Institute of Health and Safety was not convinced that increasing the maximum penalty would result in improved OHS practices and outcomes, and was of the view that the prospect of imprisonment itself was of significance to industry, irrespective of the maximum possible term.[262]

3.155 In contrast, the Australian Manufacturing Workers' Union supported an increase in the maximum penalty to 'serve as a stronger deterrent against reckless behaviour that could lead to serious injury'.[263]

259. Submission 1 (Housing Industry Association).
260. Submission 4 (Australian Industry Group).
261. Submission 11 (Victorian Congress of Employer Associations); Submission 15 (Victorian Automotive Chamber of Commerce).
262. Submission 19 (Australian Institute of Health and Safety).
263. Submission 6 (Australian Manufacturing Workers' Union).

3.156 The Victorian Trades Hall Council also supported an increase to maximum penalties for egregious breaches of OHS duties, specifically nominating a maximum penalty of 10 years' imprisonment in such cases (involving offences against sections 21, 22, 23, or 26 of the *OHS Act*), while noting the low rate of prosecutions for the reckless endangerment offence.[264]

3.157 Uniting Vic.Tas submitted that there had been 'no call from client families to extend custodial sentencing to breaches under general "duty of care" provisions'. It did, however, support retaining a maximum penalty of imprisonment for breaches involving serious harm and culpability, and specifically referred to the section 26 duty applicable to managers and controllers of workplaces as a possible example.[265]

3.158 On the question of the maximum penalty for individuals, stakeholders participating in roundtable consultation generally supported an increase to the maximum term of imprisonment. They were divided, however, on whether consistency with the model OHS laws (which provide a single maximum penalty of 10 years' imprisonment) or the Victorian *Crimes Act* (which provides a two-tiered maximum of five and 10 years' imprisonment for conduct endangering serious injury and conduct endangering life, respectively) should be preferred. Others maintained that it was the threat of imprisonment itself that was the main force of deterrence, rather than the particular maximum term.[266]

### *Survey responses*

3.159 Survey responses expressed strong support for maintaining the possibility of imprisonment to ensure an appropriate level of deterrence, and to appropriately respond to especially serious breaches of OHS duties. For example, where the offender was on notice for the risks and nonetheless proceeded to cause the risk, and where the offence caused serious harm:

> [t]he mere fact that an OHS offender is imprisoned will serve as a huge deterrent to others engaging in the same conduct.
>
> **Survey Participant (male, 65–74)**

> If someone knowingly creates danger they should be treated very harshly – that should include "prison" especially where death or serious injury happens.
>
> **Survey Participant (male, 65–74)**

264. Submission 8 (Victorian Trades Hall Council).
265. Submission 9 (Uniting Vic.Tas).
266. Meeting with Australian Industry Group (19 August 2024).

> Prison should be considered if warnings in relation to safety breaches had been issued previously.
>
> **Survey Participant (female, 45–54)**

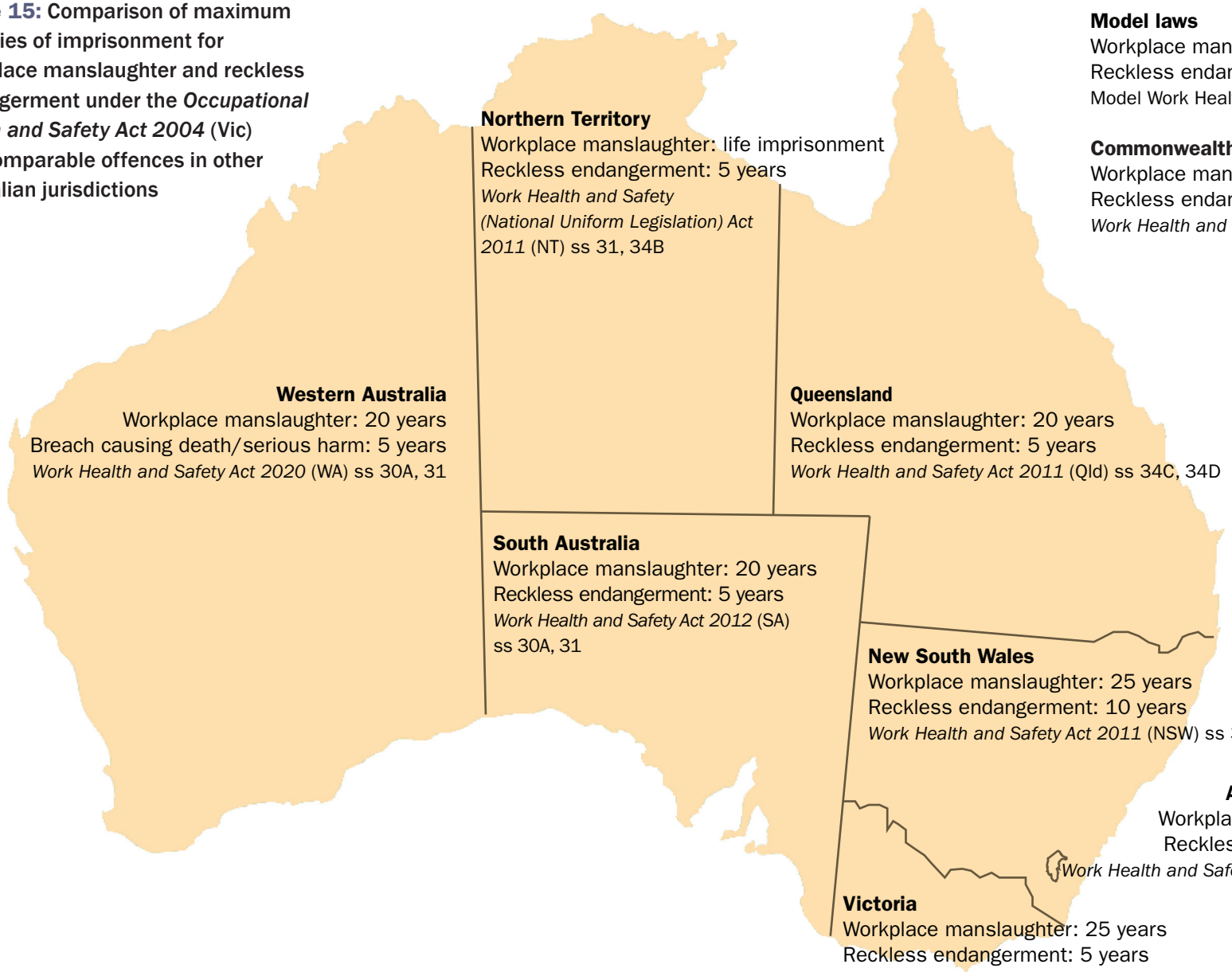
## *The Council's view*

3.160 Given that our proposed increases to the maximum penalties for breach of duty offences would place those maximums above the maximum penalty for the reckless endangerment offence, we considered whether it would be appropriate to recommend repealing that offence entirely. As it currently stands, the offence is rarely prosecuted, likely due to the high threshold required to prove recklessness,[267] making it in many cases potentially 'harder to prove than workplace manslaughter'.[268] However, our meetings with key stakeholders and the balance of community feedback regarding this offence indicated that there are distinct advantages to the *OHS Act* retaining a reckless endangerment offence that involves placing others at risk of serious injury (or death). It ensures the powers provided in that Act can be used to investigate alleged offences, and it maintains the threat of imprisonment for individuals who grossly fall short of their obligations (in cases not involving fatalities). Removing the offence would also introduce a further inconsistency between Victoria's OHS laws and the model laws implemented across Australia.

3.161 However, we believe the recklessness offence provision requires substantial reform to ensure a coherent offence and penalty hierarchy in the *OHS Act*. First, we are of the view that the maximum penalty for individuals should be increased to 10 years' imprisonment, for conduct recklessly endangering serious injury *or life*. We do not believe it is necessary to create a two-tiered maximum penalty, strictly in line with the equivalent *Crimes Act* offences. We heard in roundtable consultation that, in many cases, the distinction between risks of serious injury and risks of death is apparent (for example, inadequate guarding risking a limb in contrast to working at height without fall protection risking a fatal fall). In other cases, however, the level of the risk is much more dynamic (such as incidents involving mobile plant, such as forklifts) and therefore more difficult to classify as either risks endangering serious injury or risks endangering life. Our recommended approach would also be more consistent with the model OHS laws (Figure 15), while avoiding the added complexity posed by a two-tiered maximum.[269]

267. Victorian Law Reform Commission, *Recklessness: Report* (2024) 129.
268. Ibid, citing a submission to the VLRC from the Office of Public Prosecutions.
269. Model Work Health and Safety Bill 2023 (Cth) s 31.

**Figure 15:** Comparison of maximum penalties of imprisonment for workplace manslaughter and reckless endangerment under the *Occupational Health and Safety Act 2004* (Vic) and comparable offences in other Australian jurisdictions



**Model laws**
Workplace manslaughter: 25 years
Reckless endangerment: 10 years
Model Work Health and Safety Bill 2023 (Cth) ss 31, 30A

**Commonwealth**
Workplace manslaughter: 25 years
Reckless endangerment: 15 years
*Work Health and Safety Act 2011* (Cth) ss 31, 30A

**Northern Territory**
Workplace manslaughter: life imprisonment
Reckless endangerment: 5 years
*Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ss 31, 34B

**Western Australia**
Workplace manslaughter: 20 years
Breach causing death/serious harm: 5 years
*Work Health and Safety Act 2020* (WA) ss 30A, 31

**Queensland**
Workplace manslaughter: 20 years
Reckless endangerment: 5 years
*Work Health and Safety Act 2011* (Qld) ss 34C, 34D

**South Australia**
Workplace manslaughter: 20 years
Reckless endangerment: 5 years
*Work Health and Safety Act 2012* (SA) ss 30A, 31

**New South Wales**
Workplace manslaughter: 25 years
Reckless endangerment: 10 years
*Work Health and Safety Act 2011* (NSW) ss 31, 34C

**Australian Capital Territory**
Workplace manslaughter: 20 years
Reckless endangerment: 10 years
*Work Health and Safety Act 2011* (ACT) ss 31, 34A

**Victoria**
Workplace manslaughter: 25 years
Reckless endangerment: 5 years
*Occupational Health and Safety Act 2004* (Vic) ss 32, 39G

**Tasmania**
Workplace manslaughter: 21 years
Reckless endangerment: 5 years
*Work Health and Safety Act 2012* (Tas) ss 29C, 31

3.162 Further, we believe the proposed maximum penalty for individuals for breach of duty offences discussed above (10,000 penalty units) is adequate to cover particularly egregious breaches involving a degree of recklessness. The recklessness offence should therefore adopt that same maximum financial penalty for individuals.

3.163 We are of the view that the proposed increase in the maximum penalty for companies for breach of duty offences (50,000 penalty units, see above) also creates sufficient range to appropriately sentence companies for the most serious examples of breaches, including breaches where a degree of recklessness may be established. We are therefore of the view that the reformed recklessness provision should not apply in respect of companies. Instead, companies should be prosecuted and sentenced for breaching their relevant duties. This approach would effectively resolve the incoherent penalty hierarchy between breach of duty offences (which, after our reforms, would have a maximum penalty of 50,000 penalty units), reckless endangerment (a current maximum penalty of 20,000 penalty units) and workplace manslaughter (100,000 penalty units), by simplifying the hierarchy for companies down to two types of offences: a breach of duty offence and, in cases involving gross negligence causing a death, the workplace manslaughter offence.

3.164 We must stress here that the reforms discussed in this chapter are interrelated in multiple ways. For example, below we discuss a proposal to consult on the introduction of a legislated sentencing guideline to be applied by courts in sentencing OHS offences. One of the aims of that reform is to decompress fine amounts by providing greater guidance on, and structure around, certain factors in a case, and how those factors should bear on the appropriate sentencing range. Given that reform, we are then able to recommend the removal of the reckless endangerment offence for companies, as we believe the guideline would assist courts to appropriately sentence within the new maximum penalties for breach of duty offences.

3.165 In summary, the aim of the reform is to increase the maximum penalty of imprisonment for individuals for the most egregious breaches of health and safety duties (those involving recklessness and high risk), and simplify the penalty hierarchy for companies by removing the intermediate offence between a breach of duty offence and workplace manslaughter.

### Recommendation 8: Reckless endangerment offence

The Victorian Government should replace section 32 of the *Occupational Health and Safety Act 2004* (Vic) with a provision specifying a maximum penalty of 10 years' imprisonment, in addition to or instead of the (revised) maximum fine of 10,000 penalty units, for individuals who recklessly contravene a health and safety duty under the Act in a way that places, or may place, another person in danger of death, serious injury or serious illness.

## The relevance of harm in sentencing OHS offences

3.166 As breaches of duty offences under the *OHS Act* are risk-based offences, it is not an element of those offences that a breach has resulted in injury or death. The Court of Appeal has grappled with this issue when considering the extent to which an injury or fatality resulting from an OHS offence should affect the sentence imposed. In *DPP v Frewstal Pty Ltd*,[270] the court said that the fact that a breach resulted in serious injury or death 'is only relevant in the sense that it might manifest or demonstrate the degree of seriousness of the relevant threat to health or safety resulting from the breach'.[271] Therefore, where someone has been seriously injured or killed as a result of an OHS offence, this will not necessarily result in a more severe penalty. Instead, the nature of any harm will assist the court in determining the potential or likely consequences flowing from the breach. The Court of Appeal has reaffirmed this principle in subsequent cases, commenting in *DPP v Vibro-Pile (Aust) Pty Ltd* that 'the gravity of a breach of the [*OHS Act*] is not to be measured by the particular consequences of the breach'.[272]

3.167 Despite this, in our *Statistical Report* we found a significant difference between fine amounts in cases that involved a fatality and fine amounts in cases that did not. Cases in which a person had died were primarily sentenced in the higher courts and resulted in much more severe sentencing outcomes.[273] Over a 9.5-year period, the median case-level fine for companies in breach of duty cases involving a fatality was $140,000, whereas the median fine in cases *not* involving a fatality was $25,000. A similar trend was apparent in the higher courts, with a median

270. *DPP v Frewstal Pty Ltd* [2015] VSCA 266.
271. *DPP v Frewstal Pty Ltd* [2015] VSCA 266 [127].
272. *DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55 [11].
273. *Statistical Report* 38–40. Indeed, the occurrence (or absence) of an incident causing serious injury or death is also highly likely to determine the level of response from the regulator: see, for example, Richard Johnstone, 'Rethinking Responsive Regulation' (Public Lecture, National Research Centre for OHS Regulation, Australian National University, 28 June 2024).

fine of $275,000 in cases where there was a fatality, and $110,000 in cases without a fatality.[274] These findings demonstrate a clear inconsistency between the principles in case law and actual sentencing practices.

3.168 As points of comparison, OHS legislation in Canada specifies that, if an OHS offence 'result[s] in the death, serious injury or illness of one or more workers', that is an aggravating factor in sentencing.[275] So too does the sentencing guideline for health and safety offences in England and Wales, which specifies that the fact that an OHS offence 'was a significant cause of actual harm' – whether it be injury, illness or death – will justify the sentencing court imposing a more severe penalty.[276] Finally, New Zealand's equivalent legislation provides a list of factors that must be considered by sentencing courts, one factor being 'whether death, serious injury or serious illness *occurred* or could reasonably have been expected to have occurred'.[277] In interpreting this requirement, the High Court of New Zealand commented that:

> It is correct the level of actual harm can be a matter of chance, but this is a statement equally true of a lot of offending. The conduct and intent will often be the same, but the consequence very different. That different consequence has always led to significant differences in sentencing jeopardy. We remain of the view that what actual harm occurred is a relevant and important feature in fixing placement within the [sentencing] bands. That a defendant is "lucky" no-one was hurt does not absolve it of liability … but the actual harm caused is still a relevant sentencing factor in determining how serious the offence was.[278]

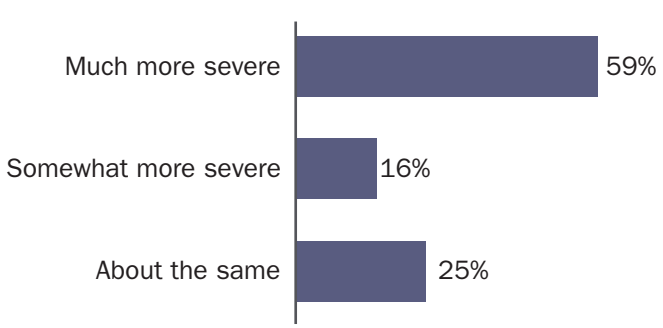
## *Stakeholder views*

3.169 During preliminary consultation, a number of stakeholders expressed a need for clarity around the relevance of harm in sentencing OHS offences. We asked participants in our online survey, attendees at our consultation events, and respondents to our *Consultation Paper*, the extent to which harm caused should be relevant to assessing the seriousness of an OHS offence.[279]

274. *Statistical Report* 38–40.
275. See, for example, *Occupational Health and Safety Act,* RSO 1990, c C-0.1, s 66(2.2).
276. Sentencing Council for England and Wales, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline* (2016) 5.
277. *Health and Safety at Work Act 2015* (NZ) s 151(2)(d).
278. *Stumpmaster v WorkSafe NZ* [2018] 3 NZLR 881, 893 [40].
279. *Consultation Paper* 24 (Question 3). The question we asked in the survey was: 'Should the fact that someone was killed or seriously injured be relevant in sentencing an OHS offence?'

3.170 Among the 64 participants who responded to our survey, there was strong support for harm being a relevant factor in sentencing OHS offences, with 75% of participants being of the view that the sentence imposed should be more severe where serious injury or death occurs as a result of the breach (Figure 16). Survey responses varied on the degree to which the sentence should be aggravated where someone is harmed, with the majority (59%) proposing that the sentence should be *much* more severe in cases resulting in harm, and a smaller proportion (16%) saying that the sentence should be *somewhat* more severe. The remaining respondents (25%) said that the sentence should be about the same, regardless of whether harm resulted from the offence.

**Figure 16: Survey responses (relevance of harm)**




3.171 In written submissions, there were competing views on this issue, with seven submissions suggesting that causing harm should result in a more severe sentence,[280] and another five saying that it shouldn't.[281]

3.172 Stakeholders advocating for actual harm to be an aggravating factor acknowledged the risk-based nature of OHS offences, but nevertheless said it was important to recognise that harm had occurred:

> We strongly believe that severity of the harm should be considered as relevant when sentencing. The effects of serious harm are devastating to families and this should be reflected in sentences … Cases resulting in fatality or injury should be escalated beyond the Magistrates' Court due to the limitation on fine amounts and to demonstrate the seriousness of these cases.
>
> **Submission 17 (Workplace Incidents Consultative Committee)**

280. Submission 6 (Australian Manufacturing Workers' Union); Submission 7 (Maurice Blackburn); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 12 (Law Institute of Victoria); Submission 13 (OHSIntros); Submission 17 (Workplace Incidents Consultative Committee).

281. Submission 1 (Housing Industry Association); Submission 4 (Australian Industry Group); Submission 11 (Victorian Congress of Employer Associations); Submission 15 (Victorian Automotive Chamber of Commerce); Submission 19 (Australian Institute of Health and Safety).

> The LIV acknowledges that breaches of duties under the OHS Act are 'risk-based' offences, which do not rely on the causing of actual harm as an element of the offence … Nonetheless, the LIV submits that courts … should more expressly be allowed to take into account the fact that a risk-based offence resulted in someone being injured or killed (so long as causation is established). That is, courts should be allowed to consider the fact that a risk did cause severe harm as a factor increasing the seriousness of the offence.
>
> **Submission 12 (Law Institute of Victoria)**

> It is a long-standing failure of our current OHS system that the outcome of a breach is not considered in sentencing. Assessing the severity of an OHS breach through a purely risk-based lens ignores one of the foundational principles of the justice system – that where someone is harmed, there should be a reasonable assumption of punishment of the offending party.
>
> **Submission 8 (Victorian Trades Hall Council)**

3.173 In contrast, those who advocated against taking actual harm into account were keen to preserve the risk-based nature of OHS offences:

> The law details that offenders are to be penalised based on the severity of their breach of duty, not the resulting consequences. Most [OHS] offences do not hinge on the occurrence of death or injury; rather, a breach occurs when an employer fails to reasonably eliminate or mitigate risks.
>
> **Submission 11 (Victorian Congress of Employer Associations)**

> We note … that sentencing practices make it patently clear that the fact of death is a very significant factor [in OHS cases], both in the choice of jurisdiction and in the fine amount imposed. It is our view that this is due to the community expectations to punish the offender for the outcome, rather than the seriousness of the breach. Ai Group has always held the view that the severity of harm should not be taken into account when determining the seriousness of the offence.
>
> **Submission 4 (Australian Industry Group)**

3.174 The Australian Institute of Health and Safety acknowledged that there is likely no right answer to this difficult issue, noting the legitimate arguments for taking harm into account, and for *not* taking harm into account:

> [I]n a very ideal and theoretical sense, the outcome, including its severity, should be entirely irrelevant to … assessing … the seriousness of the offence. This is because … when an incident occurs, it is often only luck that determines how severe the incident is … near misses should be treated equally as equivalent incidents where harm occurs. However, we know that when factors such as perceived justice and broader community expectations are considered, severity is often an important component that shapes sentencing considerations and decisions.
>
> **Submission 19 (Australian Institute of Health and Safety)**

3.175 We then, at our community consultation events, asked participants how they weighed certain factors when deciding what sentence to impose on the company. One of the factors we asked participants to consider was how relevant they treated the fact that someone was (a) killed in the Brick & Mortar case study (Figure 17) or (b) not harmed in the Daylight Solar case study (Figure 18).

**Figure 17:** Community consultation responses (relevance of harm)

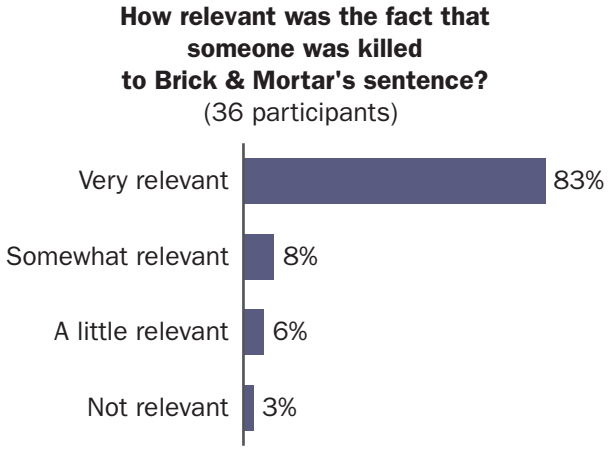
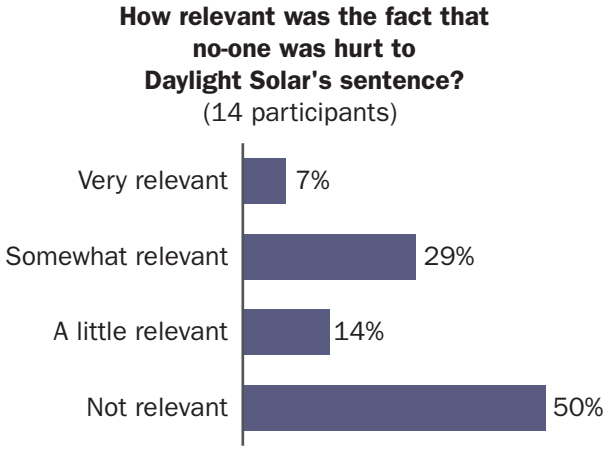


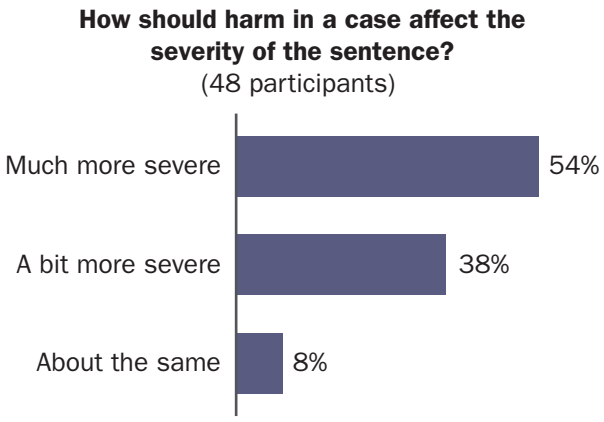

**Figure 18:** Community consultation responses (relevance of harm)




3.176 The majority of participants sentencing Brick & Mortar (83%) considered the fatality in that case to be 'very' or 'somewhat' relevant to sentencing, with most considering that it was 'very' relevant (Figure 17). In comparison, participants sentencing Daylight Solar said that the fact that no-one was harmed in the case was relevant (Figure 18), with most participants considering the fact that no-one was harmed in the Daylight Solar case as 'not relevant' (50%), and a smaller number considering the fact that no-one was harmed as 'somewhat' or 'a little' relevant (together, 43%) (Figure 18).

3.177 We then also asked participants whether the sentence should generally be 'much more severe', 'a bit more severe', or 'about the same' where someone is seriously injured or killed in an OHS case (Figure 19). The majority of participants (54%) across both case studies considered that the sentence should be much more severe where someone is seriously injured or killed. Very few

**Figure 19:** Community consultation responses (relevance of harm, both case studies)



participants (8%) felt that the sentence should be the same in cases with or without serious injury or death.

3.178 When asked to explain their responses, it became clear that members of the community were also having difficulty reconciling the policy intent of risk-based offences with the severity of harm that can and does occur as a result of OHS offences. For example, some participants commented:

> [l]egally, it should be about the same. But morally and ethically, it should be much more severe.
>
> **Community Consultation Participant, Ballarat (19 February 2024)**

> [m]y initial response is [that the sentence should be] … much more severe, absolutely. And then I switch back to, what defence does it create? If we say much more severe, then, the defence where a worker is seriously injured, or where a worker really easily could have been killed, the employer did all the wrong things, but because … they go, well no-one was killed, so we want that [smaller] fine instead.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

### On the relevance of harm in sentencing OHS offences

**'I look at it and go, theoretically, it shouldn't make a difference. But ethically, and morally, it makes a massive difference.'**

**Community Consultation Participant, Ballarat (19 February 2024)**

3.179 Regardless of whether stakeholders felt that serious injury or death should increase the severity of the sentencing outcome, there was strong support during consultation for *clarifying* the relevance of harm in sentencing OHS offences.[282] One participant at a roundtable commented on the difficulty in obtaining commensurate penalties for OHS offences where no injury or fatality has occurred:

> It's the same offence. It's … arguably … just as serious as [an offence involving injury or a fatality]. One just shows that the risk eventuating can cause death, but courts tell us over and over again, it's not about the outcome, and that's what makes this such a complicated matter … the fact that when we're a risk-based jurisdiction, and our matters are going through the courts[.] [W]e even see from the courts that if we push that risk-based matter as high as it should be as a risk-based jurisdiction … [where] there's no death, people look at us sideways to say, 'But no-one's died here. Why are you here? Why are you in the indictable jurisdiction? [You] should be back in the Magistrates' Court.' But the case law says otherwise.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

282. Stakeholder Roundtable (12 August 2024); OHS Barrister Roundtable (16 August 2024); Meeting with Workplace Incidents Consultative Committee (21 August 2024); Meeting with Herbert Smith Freehills (27 August 2024).

### *The Council's view*

3.180 The risk-based nature of OHS offences and the repeated decisions of the Victorian Court of Appeal suggest that the consequences of breaches of OHS duties should not be the driving factor in determining the severity of the penalty to be imposed in an OHS case. Conversely, our sentencing data analysis and consultation with stakeholders suggest that not only is the fact of harm informing both the jurisdiction in which a matter is sentenced and the actual penalty imposed, but also this is what the community expects. An OHS offence resulting in a fatality is more likely to be sentenced in the higher courts and to receive a much higher fine than similar offences where no fatality occurred.

3.181 As noted in our *Consultation Paper*, if nothing else, there is a need to reconcile the law and practice in this area, either to ensure that sentencing practices more clearly acknowledge the consequences of OHS offending or to achieve greater consistency with the principles enunciated in case law. In this report, we have not made any specific recommendations about how to resolve this conflict. That is because we believe the most effective vehicle for resolving this tension would be a new legislated sentencing guideline, which will need to be developed in consultation with legal experts, OHS experts, employee organisations, employer organisations and the broader community.

## The relevance of corporate offenders' good character

3.182 The *Sentencing Act* specifies that courts must take into account an offender's 'previous character' in determining an appropriate sentence.[283] It then provides a non-exhaustive list of considerations that may be relevant to determining 'the character of an offender', including their prior convictions, their general reputation, and any significant contributions they have made to the community.[284] This applies to both individuals and companies.

3.183 The relevance of an offender's character to sentencing has been a matter of considerable public debate in recent years. There have been a number of highly publicised cases in which character references were submitted on behalf of an individual offender.[285] The New South Wales Sentencing Council is currently undertaking a dedicated inquiry into the relevance of good character

283. *Sentencing Act 1991* (Vic) s 5(2)(f).

284. *Sentencing Act 1991* (Vic) s 6.

285. See, for example, Elizabeth Byrne, 'Greens Senator Sarah Hanson-Young Defends Character Reference for Man Charged over Family Violence', *ABC News* (6 March 2020); Phoebe Hosier and Elise Kinsella, 'Questions Arise over Character References Used to Help Sex Offender Jeffrey "Joffa" Corfe Escape Jail Time', *ABC News* (8 March 2023).

in sentencing.[286] And following a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse, Victoria's *Sentencing Act* was amended to prohibit courts from taking into account an offender's previous good character or lack of prior convictions if that 'was of assistance to the offender in the commission of the offence'.[287]

3.184 In the context of OHS offences, companies have successfully argued that they were of good character on the grounds of good corporate citizenship, undertaking certain charitable work (especially donations), and having a positive OHS record prior to, or after, the offence in question.[288] A positive OHS record has been especially weighty in cases involving companies that have been in operation for some time (e.g. more than one[289] or two[290] decades) compared to companies that have only recently come into operation.[291] Courts have also, however, described the relevance of a company's good character as 'subsidiary' in OHS cases, because 'general deterrence is the primary sentencing consideration'.[292]

3.185 In our *Consultation Paper*, we asked respondents whether 'good character' should be relevant to sentencing OHS offences and, if so, what matters should ordinarily be relevant in assessing a company's character (Question 7).[293] This question was motivated, in part, by some stakeholders in preliminary consultation expressing scepticism about some companies making contributions to the community (e.g. donations to local sporting clubs) in the wake of an OHS incident, and then using that as evidence of their good character.

## Stakeholder views

3.186 There was general support not only for continuing to allow the character of companies to inform the sentencing exercise but also for narrowing the ways in which courts assess the character of companies in OHS cases.

3.187 In particular, the majority of submissions suggested that the most relevant factor in assessing a company's character should be their approach to health and safety,

286. New South Wales Sentencing Council, 'Good Character in Sentencing' (sentencingcouncil.nsw.gov.au, 2024).
287. *Sentencing Act 1991* (Vic) s 5AA.
288. *DPP v YJ Auto Repairs Pty Ltd* [2023] VCC 1759 [65]; *DPP v De Kort* [2019] VCC 291 [16]; *DPP v St Vincent's Care Services Ltd* [2021] VCC 1035 [86]; *DPP v United Access Pty Ltd* [2020] VCC 1085 [26]; *DPP v L Arthur Pty Ltd* [2013] VCC 1051 [19].
289. *DPP v Rapid Perforating Pty Ltd* [2023] VCC 1167 [64].
290. *DPP v Prestige Truck Bodies (Aust)* [2023] VCC 747 [21].
291. *DPP v YJ Auto Repairs Pty Ltd* [2023] VCC 1759 [56].
292. See, for example, *DPP v The Elastomers Pty Ltd* [2024] VCC 482 [57]; *DPP v Seascape Constructions Pty Ltd* [2023] VCC 751 [34], [49].
293. *Consultation Paper* 33 (Question 7).

both before and after the incident or risk involved. Ai Group said that '[p]revious interactions with the regulator … responses to improvement notices … [and] their approach to risk management' should all be pertinent considerations.[294] The Australian Manufacturing Workers' Union said that good character should only be taken into account if the company has:

> a clean compliance record … [such as an] active commitment to improving OHS, with systems that ensure employee involvement, elected [health and safety representatives], positive safety culture, training programs and genuine efforts to rectify OHS deficiencies.[295]
>
> **Submission 6 (Australian Manufacturing Workers' Union)**

3.188 The Victorian Congress of Employer Associations said that courts should look at 'the employer's overall approach to managing OHS'.[296] The Victorian Trades Hall Council expressed a similar view, that:

> willingness to prioritise the safety and wellbeing of workers could be a sentencing consideration … [such as] consultation with the workforce, meaningful engagement with elected [health and safety representatives], union delegates and officials, collaboration with WorkSafe above what is expected, the presence and evidence of implementation of best practice policy and procedures and priority of worker wellbeing.[297]
>
> **Submission 8 (Victorian Trades Hall Council)**

3.189 Some, though, suggested that factors beyond the company's OHS record should also be relevant. The Victorian Congress of Employer Associations, for example, argued that:

> an offending company's involvement in charitable or community works that may be an indication of its character as a good corporate citizen, as well as other initiatives such as becoming carbon neutral, community advocacy or charitable initiatives … their success as employers of young people … [and] previous track records of safe and successful completion of apprenticeships should also be relevant.[298]
>
> **Submission 11 (Victorian Congress of Employer Associations)**

3.190 The Law Institute of Victoria agreed, but said that while 'a previous positive OHS record' should be an 'important factor' for sentencing courts, 'good corporate citizenship and charity work (i.e. donations) should be given less weight'.[299] So too did Uniting Vic.Tas, saying that bereaved families have often expressed 'suspicion

294. Submission 4 (Australian Industry Group).
295. Submission 6 (Australian Manufacturing Workers' Union).
296. Submission 11 (Victorian Congress of Employer Associations).
297. Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union).
298. Submission 11 (Victorian Congress of Employer Associations).
299. Submission 12 (Law Institute of Victoria).

and view [it] as another legal ploy to reduce the sentence' when companies submit that they have been 'a "good corporate citizen" by investing in good "social work" works', 'between the incident and the sentencing'.[300]

3.191 In their submission, the Office of Public Prosecutions said that there is a clear need for guidance on the notion of 'good character' in the context of sentencing OHS offending by companies:

> [T]here is insufficient guidance for courts as to how to assess a company's 'good character'. The principles commonly relevant to character are human factors that aren't easily applied to a company in any meaningful way. 'Good corporate citizenship' has been raised in several cases, but there is no case law providing guidance as to the components or pillars of good corporate citizenship in the context of OHS offending. In some cases, good corporate citizenship will be a hollow proposition because the company was created for a limited project or purpose. The OPP considers that it would be beneficial to have legislative guidance as to the offender-specific factors that courts should take into consideration when sentencing a company.
>
> **Submission 3 (Office of Public Prosecutions)**

3.192 Again, during our community consultation events, we asked participants how they weighed certain factors in deciding what sentence would be appropriate in their case. And one of the factors we asked them to consider was the relevance of the company's prior conviction (both companies had a relevant prior conviction). The large national construction company (Brick & Mortar) had been found guilty and sentenced for an OHS offence in another jurisdiction 11 years earlier at a different worksite. The small solar panel installation company (Daylight Solar) had been found guilty and sentenced for an almost identical offence three months previously. For both case studies, almost all participants considered the prior OHS conviction to have been very or somewhat relevant to sentencing (Figures 20 and 21).

**Figure 20: Community consultation responses (prior convictions, Brick & Mortar)**

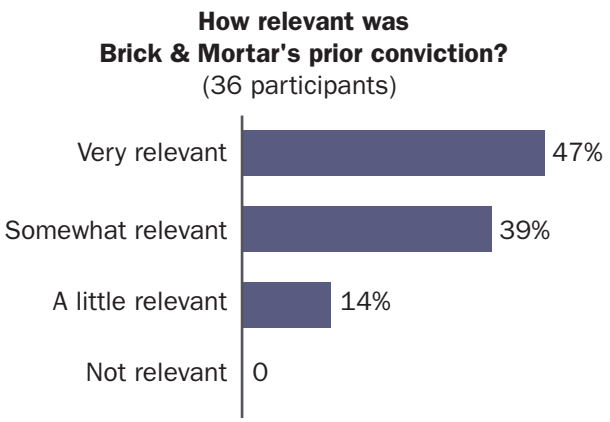
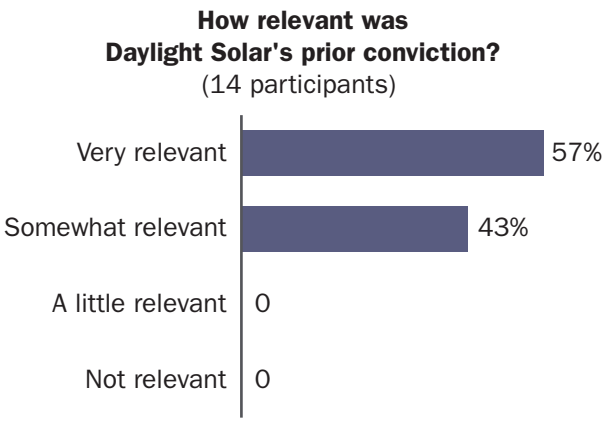



**Figure 21: Community consultation responses (prior convictions, Daylight Solar)**




300. Submission 9 (Uniting Vic.Tas).

3.193 Participants in both case studies explained that they applied a significant amount of weight to the companies' prior convictions in sentencing because being on notice about particular risks significantly increased the companies' culpability. Both of the companies' prior convictions involved a risk of falls from height. One participant said, 'they've been made aware of this previously'.[301] Another said, 'they've made changes before and couldn't even hold on to them for three months'.[302] For another participant, the large company's near miss three months earlier – the exact same risk at the same location – was even more important than the prior conviction, because it meant that the company should have been aware of the need to make relevant changes.[303]

3.194 A number of participants also observed that there are so few OHS offences prosecuted and sentenced that using prior convictions as a measurement of a company's previous safety record will never be an accurate account:

> To me, you could have really bad practices all the time and never be caught … I think the company's prior behaviour, if we had some crystal ball way to [see] that, yes, absolutely [it would be] relevant … I think … we've potentially set up a defence of 'We've got no prior convictions' and all the workers might be going 'Yeah, but we're all, you know, absolutely wrecked and in danger every day'.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

> [I] can't believe there's only one prior conviction. The biggest challenge I have is getting people to report [incidents].
>
> **Community Consultation Participant, Geelong (28 February 2024)**

3.195 We also asked participants to rate how relevant they considered the company's behaviour after the incident. In the Brick & Mortar case, the company undertook a national stop-work to audit their safety practices at all worksites, and paid the funeral expenses of the deceased worker. Half of the respondents considered this factor to be 'somewhat' or 'very' relevant, while the other half considered it either 'a little relevant' or 'not relevant' (Figure 22, page 109). And in the Daylight Solar case, the company had hired a full-time safety manager whose responsibility it was to monitor implementation of safety procedures at each worksite. The majority of respondents (11 of 14) considered Daylight Solar's post-offence conduct as 'somewhat' or 'very' relevant to sentencing (Figure 23, page 109).

301. Community Consultation Participant, Lilydale (18 March 2024).
302. Community Consultation Participant, Lilydale (18 March 2024).
303. Community Consultation Participant, Bendigo (26 February 2024).

**Figure 22:** Community consultation responses (post-offence conduct, Brick & Mortar)

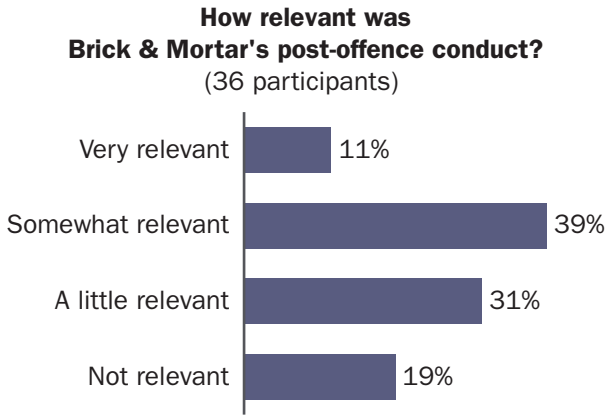
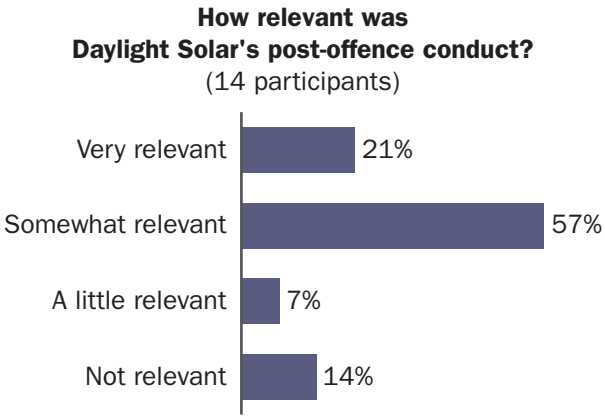



**Figure 23:** Community consultation responses (post-offence conduct, Daylight Solar)




3.196 Comments from participants illuminate why there were more divergent views on the relevance of post-offence conduct, especially in the Brick & Mortar case study, involving a large construction company. Some were pleased to see the companies were responsive to the risks once identified, others were sceptical about their motives, and one participant observed that the large company's stop-work was an automatic consequence of a policy:

> [B]ig company like that … [they'd have] advisors saying, 'Here's what you need to do. Immediately put out this press statement saying you're devastated. Send the family flowers and pay for the funeral'. In my view, for the most part, that sort of stuff isn't about being humble and recognising that they're in the wrong. It's just about good PR.
>
> **Community Consultation Participant, Bendigo (26 February 2024)**

> Where there's a death on a site, they close the site down for the next day, as a sign of respect for the deceased worker … the unions got together with the employer associations and made the 'death in the industry' policy, which has set parameters for when there's a death in the industry in Victoria. So it's not that the company wants to do it.
>
> **Community Consultation Participant, Geelong (28 February 2024)**

## The Council's view

3.197 There is, in our view, a clear need for greater guidance on the relevance of an offender's prior character in the sentencing of OHS offending, especially in cases involving companies. The most common view expressed by stakeholders was that character should remain a relevant sentencing consideration, even for companies, but that it should almost always be a subsidiary consideration to the

seriousness of the offending and the need for general deterrence.[304] Stakeholders also considered that there should be clearer guidance about what factors might contribute to a company's character in the context of OHS offending. Most prominently, stakeholders were keen to see the assessment of a company's good character limited primarily to its workplace health and safety history. This should include factors such as the number of prior prosecutions, notices issued, WorkCover claims, and evidence of investment in health and safety initiatives, rather than a company's contributions to the community, particularly contributions that occur after a workplace incident that results in a prosecution.

3.198 Ultimately, our view is that 'character' is a complex sentencing factor for courts sentencing companies for OHS offences, and that guidance is best achieved through the introduction of a legislated sentencing guideline.

## The relevance of the offender's financial circumstances

3.199 Most OHS offenders are companies (83%),[305] and most sentencing outcomes are fines (87%).[306] When sentencing a company (or individual) to a fine, courts are required to consider 'the financial circumstances of the offender and the nature of the burden that its payment will impose'.[307]

3.200 In reviewing sentencing remarks for OHS cases, we found that courts' consideration of financial circumstances varied widely. In some cases, there were detailed summaries of financial documentation provided by offending companies, while in other cases, the characterisation of an offender's financial circumstances was very brief, leaving the court to sentence in a vacuum of information about their financial status. For example:

- '[n]o submissions were made as to the financial capacity of the Company beyond submitting that the Company could pay a fine';[308]
- '[n]o issue arose as to whether [the offender] had the capacity to pay an appropriate penalty';[309] and
- 'I note the capacity to pay was not raised as an issue'.[310]

304. This is consistent with case law on the topic. See, for example, *CDPP v Gregory* [2011] VSCA 145 [53] ('general deterrence is a particularly significant sentencing consideration in white collar crime and … good character cannot be given undue significance as a mitigating factor … [it should play] a lesser part in the sentencing process').
305. *Statistical Report* 16.
306. Ibid 18.
307. *Sentencing Act 1991* (Vic) s 52.
308. *DPP v A & J Australia Pty Ltd* [2024] VCC 211 [57].
309. *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400 [49].
310. *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053 [38].

3.201 It appears that in these cases, the courts' limited engagement with the issue of financial circumstances is driven by two main factors:

- a lack of information, or at least no obvious mechanism for courts to require detailed information, about offenders' financial circumstances; and
- a focus on the issue of 'capacity' to pay a fine, as opposed to the consideration of what fine amount would achieve the purposes of sentencing, including the primary purpose of general deterrence.

3.202 Because there is no obligation on defendant companies to share information about their size, they will typically only do so when it serves their interests, that is, to demonstrate that they are experiencing, or would experience if fined, financial hardship. This state of affairs means that any consideration of financial circumstances tends to have a *mitigatory* effect on the fine amount to be imposed, with the court reducing the fine to acknowledge the limited financial means of the offender.[311] Evidence of financial circumstances is rarely used to calibrate a penalty *upwards* to achieve an appropriate level of punishment or effective deterrence.

3.203 Prior to the introduction of a sentencing guideline, the same issue occurred in England and Wales, leading to a *compression* of the range of fine outcomes. For example, when developing its guideline for health and safety offences, the Sentencing Council for England and Wales reviewed a sample of OHS offences that had resulted in death and were broadly comparable in terms of culpability. A 'micro' company, with a turnover of around £1 million, was fined £50,000 following an early guilty plea – the fine representing 5% of its turnover. And a very large company, with a turnover in the region of £900 million, was fined £300,000 after a trial for a similar offence – the fine representing just 0.03% of its turnover. The Sentencing Council considered that this demonstrated an unacceptable degree of compression of the sentencing range.[312]

3.204 Other research has also noted this phenomenon, with smaller entities receiving fines that are proportionately larger than the fines received by larger entities.[313] In one example from Queensland, the court imposed a $3.6 million fine for work health and safety breaches that resulted in four deaths. That penalty represented just 0.54% of the offending company's yearly revenue.[314]

311. *Sentencing Act 1991* (Vic) s 52.
312. Lord Justice Treacy, 'Keynote Address' (Speech delivered at the Criminal Law Review Conference, 3 December 2015).
313. Arewa et al. (2018), above n 251.
314. Thalia Anthony and Penny Crofts, 'The Dreamworld Deaths: Corporate Crime and the Slumber of the Law' (2024) 36(2) *Current Issues in Criminal Justice* 197, 212–213.

3.205 The same issues seem to exist in Victoria, with smaller companies often receiving proportionately larger fines compared to the fines received by larger companies. These disparate outcomes are particularly evident in two cases with similar levels of culpability sentenced in the County Court, where evidence of the offending companies' annual turnover was provided. Coates Hire Operations Pty Ltd ('Coates Hire') was a large national company employing over 2,000 people and, in the financial year prior to its sentencing, had a turnover of $160 million. The court found that Coates Hire's failure to ensure safe working practices when using elevated work platforms (resulting in the death of a contracted employee) placed its culpability between the 'mid and high range'. However, the company was fined a total of $250,000 (in respect of three charges), representing just 0.16% of its prior year's turnover.[315] Conversely, Redback Tree Services Pty Ltd ('Redback') was a small company with 11 employees and an annual turnover of approximately $1 million. In that case, the court found that Redback's failure to reduce the risk of electrocution when working close to live powerlines (resulting in the death of an employee) also placed its culpability in the 'upper middle level' of the range. The company was fined $150,000 (for one charge), representing 15% of its annual turnover.[316]

3.206 We reviewed a number of cases that the courts described as involving offending in the mid- to high range and resulted in a fatality, but involved vastly different financial circumstances of the offending companies. In all of these cases, there was at least some indication of the size of the company, either in the remarks or via publicly available sources. Despite substantial variation in the size of each company, the following five cases all received fines that fell between $350,000 and $475,000:

- a medium-sized recycling company with approximately 35 employees was fined $450,000 for two charges;[317]
- a large warehousing company with almost 400 employees was fined $380,000;[318]
- a very large national building company (with an annual turnover over $1 billion) was fined a total of $475,000 for two charges;[319]

315. The Director of Public Prosecutions successfully appealed the $250,000 fine imposed in the County Court. The Court of Appeal subsequently increased the fine to $500,000: *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131.
316. *DPP v Redback Tree Services* [2017] VCC 1602.
317. *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472.
318. *DPP v W.F. Montague Pty Ltd* [2018] VCC 1553.
319. *DPP v Hansen* [2013] VCC 1543. In 2015, two years after sentencing, Hansen Yuncken's annual revenue was approximately $1 billion: Michael Bleby, 'Big Data Boosts Construction', *Australian Financial Review* (11 January 2015). Based on a conservative estimate of at least $1 billion, at the time of sentencing, a $475,000 fine represented approximately 0.05% of Hansen Yuncken's annual turnover.

- a small family-owned earthmoving company with limited financial means was fined $350,000;[320] and
- a large construction and manufacturing company was fined $400,000.[321]

3.207 The County Court recently commented on the compression of the range of fine amounts in OHS cases. In *DPP v D&A Martin Transport Pty Ltd*, the court was provided with four comparable cases that concerned the same risk (fall from height) but differed considerably in terms of the sizes of the companies, their culpability, and mitigating and aggravating factors. Nevertheless, the court noted that 'despite the differences between the cases, the sentences fell within a reasonably narrow range (ranging from 21% to 30% of the applicable maximum penalty)'.[322] Similarly in *DPP v YJ Auto Repairs Pty Ltd*, the court drew comparisons of 'David and Goliath' between the offender that was to be sentenced in that case, and the offender referred to in a comparable case.[323] Similar sentiments can be found in media reporting of sentencing outcomes for OHS offences.[324]

3.208 In the context of pecuniary penalties arising under other regulatory regimes, a line of case law has emerged from the case of *Trades Practices Commission v CSR Ltd.* In that case, Justice French of the Federal Court stated that the principal aim of penalties imposed under the *Trade Practices Act 1974* (Cth), and similar regulatory regimes, was 'to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act'. Determining the appropriate deterrent value of a pecuniary penalty will involve considering the following factors (known as the 'French factors'):[325]

- the nature and extent of the contravening conduct;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- the size of the contravening company;
- the degree of power the contravening company has, as evidenced by its market share and ease of entry into the market;
- the deliberateness of the contravention and the period over which it extended;

320. *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394.
321. *DPP v SJ & TA Structural Pty Ltd* [2019] VCC 2016.
322. *DPP v D&A Martin Transport Pty Ltd* [2024] VCC 1355 [22]–[25].
323. *DPP v YJ Auto Repairs Pty Ltd* [2023] VCC 1759, [65].
324. Bec Symons, 'Sibelco Fined $400,000 after Workers Exposed to 'Plumes' of Silica Dust at Victorian Quarry' *ABC News* (14 June 2024) ('The fact is, they plead guilty but 400k is a day's income for them; it's a drop in the ocean for them really').
325. *Trade Practices Commission v CSR Ltd* [1990] FCA 521 [42].

- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and
- whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

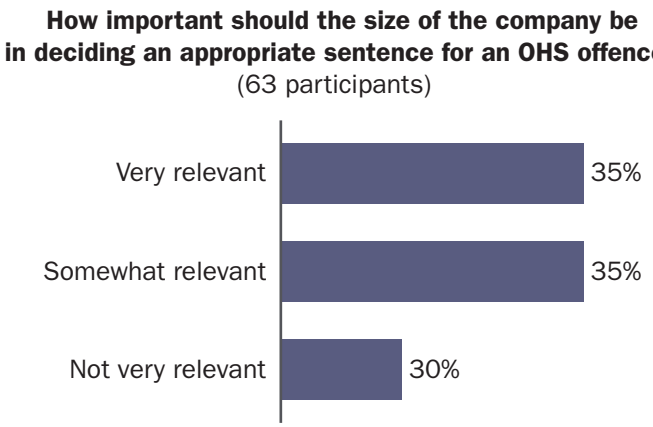
3.209 In other regulatory contexts, the size of the company is therefore a standard consideration when determining the amount of a penalty to impose.

## Stakeholder views

3.210 During preliminary consultation, a number of stakeholders raised concerns about the inconsistent approach to the assessment and relevance of a company's financial circumstances during sentencing. As a result, we asked participants in our *Consultation Paper* and survey whether the size of a company should be relevant when imposing a fine.[326]

3.211 There was strong support from stakeholders for a company's financial circumstances to be relevant to the sentence imposed. Of the 63 survey participants who responded to this question, 70% were of the view that the size of a company should be 'very' or 'somewhat' relevant in determining the appropriate sentence (Figure 24).

**Figure 24: Survey responses (size of company)**




326. *Consultation Paper* 32 (Question 5). The question we asked in our survey was: 'How important should the size of the company be in deciding an appropriate sentence for an OHS offence?'

3.212 Similarly in written submissions, all but one[327] of the stakeholders who responded to this question were of the view that the size of the company should be a relevant factor when sentencing OHS offences.[328] Most stakeholders were of the view that in order to effectively deter and punish OHS offenders, penalties should be calibrated to reflect the financial resources and size of a company. For example:

> [t]he financial position of the organisation should be a major contributing factor to the initial decision about the fine amount to be imposed … Failure to systematically and consistently take into account the financial position of the defendant fails on equity grounds. It does not ensure fines are experienced similarly by defendant companies of different sizes and wealth.
>
> **Submission 18 (Australian Centre for Justice Innovation, Monash University)**

> [t]he size of a company is … relevant to the extent to which a fine has the capacity to be punitive, or to act as a deterrent to companies of a similar size. The OPP … consider[s] that sentencing practices in Victoria (in terms of the range of fines imposed) have developed in such a way that they may not be aligned with the intention of the enforcement component of the OHS Act, particularly in relation to large and very large companies.
>
> **Submission 3 (Office of Public Prosecutions)**

> [t]he AMWU considers that when imposing a fine on a company in an OHS case, the size of the company should be relevant … Fines should be meaningful enough to serve as a deterrent, regardless of the company's size[.]
>
> **Submission 6 (Australian Manufacturing Workers' Union)**

> the size of the company is a relevant consideration in imposing a fine on a company in an OHS case, particularly in assessing general culpability and deterrence … In terms of deterrence, a lower-range fine applied to a small-sized business would be likely to have greater deterrent value than if applied to a medium to large-sized company. In this regard … a fine needs to have a 'real sting' to it, and arguably the only way to achieve that sting is for larger companies to receive larger fines.
>
> **Submission 12 (Law Institute of Victoria)**

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327. The Victorian Automotive Chamber of Commerce was of the view that the size of a company should not be relevant in determining the appropriate sentence: Submission 15 (Victorian Automotive Chamber of Commerce).

328. Submission 3 (Office of Public Prosecutions); Submission 4 (Australian Industry Group); Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 11 (Victorian Congress of Employer Associations); Submission 12 (Law Institute of Victoria); Submission 13 (OHSIntros); Submission 17 (Workplace Incidents Consultative Committee); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 19 (Australian Institute of Health and Safety); Submission 21 (WorkSafe Victoria).

3.213 The County Court, while acknowledging that matters such as this are matters of policy for government, was 'broadly supportive of changes to sentencing in OHS matters which ensure that the penalties imposed are consequential to the offenders'.[329]

3.214 In our *Consultation Paper*, we also asked participants to identify (if the size of the company was relevant to the fine amount) the most appropriate measure for determining the size of a company.[330] Factors that courts should examine, as suggested by some stakeholders, included:

- the company's annual revenue;[331]
- the number of employees of the company;[332]
- the number of operational locations of the company;[333]
- whether the company is part of a larger corporate structure (including any parent or subsidiary companies);[334] and
- whether the company is publicly listed.[335]

3.215 The Australian Institute of Health and Safety cautioned, though, against any prescriptive metric to assess a company's financial circumstances, noting that this 'may result in companies arranging their reporting, organisational, and potentially legal structures so as to minimise risk and potential exposure'.[336]

3.216 Additionally, several stakeholders suggested that for the court to be informed about a company's financial circumstances, the parties should present detailed evidence, including financial statements, annual reports and corporate structures, to the court,[337] potentially by way of affidavit.[338]

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329. Submission 20 (County Court of Victoria).
330. *Consultation Paper* 32 (Question 6).
331. Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 12 (Law Institute of Victoria); Submission 17 (Workplace Incidents Consultative Committee); Submission 21 (WorkSafe Victoria).
332. Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 12 (Law Institute of Victoria); Submission 19 (Australian Institute of Health and Safety); Submission 21 (WorkSafe Victoria).
333. Submission 19 (Australian Institute of Health and Safety); Submission 21 (WorkSafe Victoria).
334. Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 12 (Law Institute of Victoria).
335. Submission 12 (Law Institute of Victoria).
336. Submission 19 (Australian Institute of Health and Safety).
337. Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 12 (Law Institute of Victoria).
338. Submission 12 (Law Institute of Victoria). This is the practice used to assess a company's financial circumstances in New South Wales: District Court of New South Wales, *Practice Note 16 of 2021: Criminal Division: Work Health and Safety Act Prosecutions* (4 June 2021) 12, [45].

3.217 During our community consultation events, we also asked participants to indicate the relevance of certain factors when deciding the appropriate sentence for the company in their case study. One of those factors was the size of the company. In the case study involving the large national construction company (Brick & Mortar), the most common response from participants was that the size of the company was 'very relevant' to the sentence they imposed (Figure 25). Conversely, only 14% of participants sentencing the small solar panel installation company (Daylight Solar) viewed the company size as 'very relevant' to deciding the appropriate sentence (Figure 26). Based on these responses, it seems that members of the community are of the view that financial penalties imposed on companies should be commensurate to the company's size and resources, particularly in the case of large companies.

**Figure 25: Community consultation responses (size of company, Brick & Mortar)**

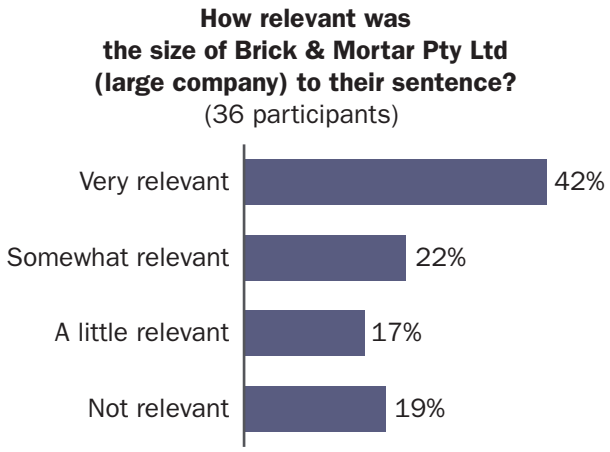
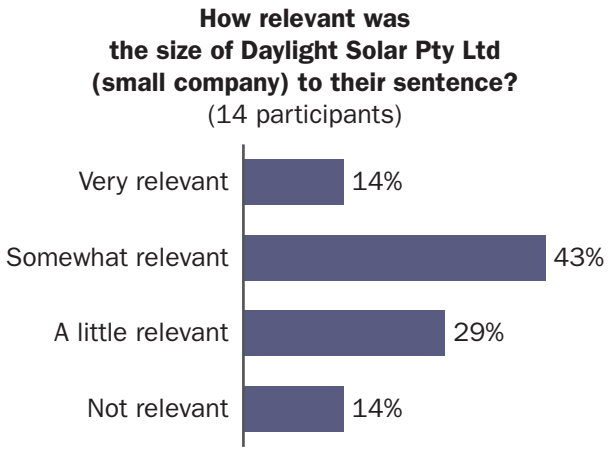



**Figure 26: Community consultation responses (size of company, Daylight Solar)**




3.218 As to why participants were of the view that a company's financial circumstances should be relevant to the penalty imposed, several participants told us that larger companies are better resourced and aware of their obligations under the *OHS Act*, and thus have little excuse for failing to meet those obligations. For example, one participant commented that 'a multinational, multi-million-dollar company, they've got the money, the employees and a lot more knowledge. That's certainly a consideration'.[339] Similarly, another participant commented that large companies should 'have a higher standard of safety in this country'.[340]

339. Community Consultation Participant, Ballarat (19 February 2024).
340. Community Consultation Participant, Shepparton (23 February 2024).

3.219 Other participants were of the view that penalties imposed for OHS offences should be calibrated to the size of the company in order to achieve the purposes of sentencing, namely deterrence and just punishment. For example:

> [i]f it's a small fine in relation to the size of the company, they'll just pay it as a cost of doing business. It doesn't have the full weight behind it with a large company if there isn't a significant fine … You couldn't hit a small company with [a] four-person team and [that] doesn't have a massive turnover with the same level of fine as the large one because that's the end of the business. They've learned something, but they don't have a business anymore. You'd have to look at the turnover, and perhaps you'd use a ratio.
>
> **Community Consultation Participant, Dandenong (20 March 2024)**

> [a] large fine to a large company is pocket change in many cases, and it won't be a deterrent.
>
> **Community Consultation Participant, Lilydale (18 March 2024)**

> as far as I'm concerned, I think it should be proportionate across different companies … I think it needs to be more proportional, if a company's profitable, etc., versus a small company … it's not even the budget line for a large company, whereas it would be significant for a small private company.
>
> **Community Consultation Participant, Morwell (21 February 2024)**

3.220 During consultation on our draft recommendations, there continued to be strong support from stakeholders for the size of a company to be a relevant factor at sentencing.[341] One participant at our Stakeholder Roundtable said that requiring companies to provide evidence of their financial circumstances to the court would help to alleviate some of the difficulties in determining not only the size of the company but also its capacity to pay any fine imposed:

> The benefit of having the affidavit as the default requirement is that you get around this sort of grey submission, you'll often get that, 'Oh, no, we have capacity to pay a moderate fine, but [we're] under some sort of financial impact'. The defence gives just enough so that the court doesn't probe further. They think they've got just enough information, whereas, if it's all [in] an affidavit, it's required process … I just feel that having that known as a guarantee, you're going to get a better outcome.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

341. Stakeholder Roundtable (12 August 2024); OHS Barrister Roundtable (16 August 2024); Meeting with Australian Centre for Justice Innovation, Monash University (15 August 2024); Meeting with Australian Industry Group (19 August 2024); Meeting with Workplace Incidents Consultative Committee (21 August 2024); Meeting with Herbert Smith Freehills (27 August 2024); Meeting with Environment Protection Authority (29 August 2024); Meeting with Emeritus Professor Arie Freiberg AM (19 September 2024).

3.221 A participant at our OHS Barrister Roundtable echoed the difficulty in determining a company's financial circumstances, indicating that defendant companies would only be expected to provide evidence if it benefitted their position (where the evidence shows that a company is in financial difficulty or has limited means to pay a fine):

> [I]n my view … defence … will only provide the court with financial information … if it helps [the] client's case. And I would have thought that's really what everybody does, and the courts probably know that that's the way that we approach these things[.]
>
> **Participant at OHS Barrister Roundtable (16 August 2024)**

### The Council's view

3.222 Current sentencing practices do not reflect an adequate and systematic consideration of the financial circumstances of offenders. We find this to be a particular issue in cases involving corporate offenders. There is a clear need to better calibrate the sizes of fines imposed to the financial circumstances of the companies being sentenced. In our view, the best mechanism for doing so is a *legislated sentencing guideline* (see [3.236]–[3.270]), one which builds on the tried, tested, and proven model of England and Wales' sentencing guidelines.

## Recording convictions against companies

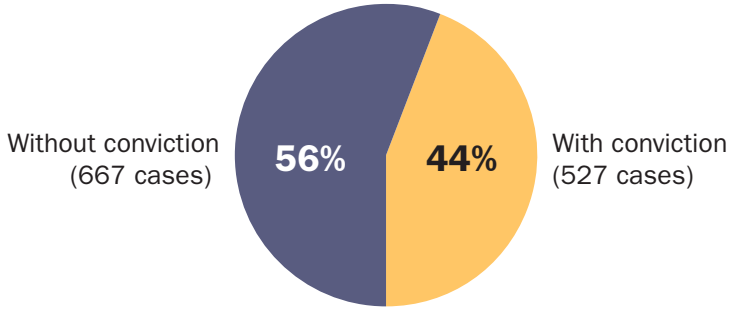
3.223 In Victoria, a finding of guilt is not synonymous with the recording of a conviction. A conviction is a separate order that can (but need not) be made by the court after a finding of guilt. When considering whether to record a conviction in a case, courts must have regard to all the circumstances of the case, including the nature of the offending, the character and past history of the offender, and the impact of a conviction on the offender's economic or social wellbeing, or employment prospects.[342]

3.224 With respect to corporate offenders, which make up 83% of OHS offenders, the consequences of recording a conviction are relatively minimal: it may affect their insurance premiums, but it may not; it may affect their ability to tender for government work (if they undertake such work), or it may not, especially in thin markets;[343] and most prominently, it may affect their reputation, with consumers, with staff or within their industry.[344]

342. *Sentencing Act 1991* (Vic) s 8(1).
343. A thin market is one in which there is limited competition among suppliers of goods and/or services.
344. Similar comments were recently made by the Supreme Court of Tasmania: *TT-Line Company Pty Ltd v Burrows* [2024] TASSC 46 [26].

3.225 From July 2005 to June 2021, 56% of all OHS offenders sentenced in the Magistrates' Court (where the vast majority of OHS cases are sentenced) did not have a conviction recorded (Figure 27).[345] In the higher courts, the rate was much higher, at 91%.[346]

**Figure 27: Proportion of OHS cases sentenced with and without the recording of a conviction, Magistrates' Court, June 2005–July 2021 (1,197 cases).**




3.226 In the *Consultation Paper*, we asked what factors should be the most significant for courts to consider when deciding whether to record a conviction for an OHS offence (Question 14).

**Figure 28: Community consultation responses (conviction, both case studies)**


3.227 In our community consultation events, we asked participants if, in sentencing the offender, they would have recorded a conviction. As shown in Figure 28, almost all participants recorded a conviction for Brick & Mortar, the case involving a fatality at the worksite of a large national company with a relevant criminal history. However, participants were evenly split on whether to record a conviction for Daylight Solar, the case involving no injury at the worksite of a small company: those who recorded a conviction justified it on the basis of the company's prior

345. Using a combination of WorkSafe and court data, we identified only three offenders (all companies) that were missing conviction data. These cases are not included in Figure 26.

346. Based on 107 cases for which sentencing remarks were available.

criminal history, which involved similar risks; however, those who didn't record a conviction pointed to the small scale of the company's operations, and a need to promote the rehabilitation of the offender:

> [I] was happy to go [with] the [undertaking] or a diversion type of thing that might not have a conviction. So, it's around trying to put the reinvestment back into … education [and] awareness, rather than a conviction.
>
> **Community Consultation Participant, Ballarat (19 February 2024)**

## Stakeholder views

3.228 The Office of Public Prosecutions, the Victorian Congress of Employer Associations, Ai Group and the Victorian Automotive Chamber of Commerce affirmed the current approach of exercising discretion, which involves weighing a complex range of circumstances:

> The sentencing court has the discretion to impose a conviction as part of the process of instinctive synthesis. The factors that are relevant in deciding whether or not to impose a conviction, and the relative weight of those factors, will turn on the facts of the case and the evidence upon which the submissions are based.
>
> **Submission 3 (Office of Public Prosecutions)**

> [W]hilst the seriousness of the offence … will ordinarily be the most significant factor in deciding whether to record a conviction, a sentencing judge must balance many different and conflicting features … [T]his requires a wide discretion, that in addition to the nature of the offence, includes consideration of the character and history of the offender, and the potential impact of recording a conviction on the offender's economic or social well-being, or employment prospects.
>
> **Submission 15 (Victorian Automotive Chamber of Commerce)**

> When deciding whether to record a conviction, a court must consider … the character and history of the offender, and the potential consequences of a conviction on the offender's economic or social wellbeing, or employment prospects. VCEA point to the authorities that detail that '…[t]he sentence cannot, and should not, be broken down into some set of component parts,' and that '…the duty of the judge [is] to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances.' VCEA argues that the factors to consider for recording a conviction are for an independent judicial officer to determine in accordance with established principles and precedent.
>
> **Submission 11 (Victorian Congress of Employer Associations)**

> Decisions about recording a conviction should be the same [as those] that are considered in relation to the quantum of the fine: good character; guilty pleas and remorse; and the offender's conduct after the offending. In relation to individuals (sole traders, officers and other people in the workplace, including employees) there does also need to be consideration of the impact of a conviction on their future ability to work and undertake normal activities of life.
>
> **Submission 4 (Australian Industry Group)**

3.229 The Law Institute of Victoria, in its submission, stated that recording a conviction on a company can carry significant consequences in the way of reputational damage within industry, with clients and partners, and with the public generally, as well as distinct economic consequences:

> A recorded conviction may also serve as a barrier for organisations to tender for and secure public sector work, and this could impact upon the financial viability of the organisation. The broader economic consequences of recording a conviction should be considered, including whether the business will face financial hardship or loss of market competitiveness due to the stigma associated with a conviction.
>
> **Submission 12 (Law Institute of Victoria)**

3.230 However, the Office of Public Prosecutions submitted that this should only become a consideration when a court is provided with specific evidence of those consequences, and not merely a 'hypothetical' assertion:

> For example, a submission that a conviction could hinder success in future government procurement processes ought not be considered relevant (or ought to carry little weight) if the prospect of that issue eventuating is purely hypothetical. There is a need to ensure that appropriate enquiries are made, and that evidence is adduced, to support submissions that may be relevant or determinative on the question of conviction.
>
> **Submission 3 (Office of Public Prosecutions)**

3.231 The Law Institute of Victoria and the Australian Institute of Health and Safety also submitted that courts should have regard to the offender's OHS record, both before and after the offending, and exercise a degree of 'leniency' where an otherwise positive commitment to occupational health and safety can be observed:

> [C]ourts should consider whether the organisation has adopted and implemented adequate risk control measures to mitigate OHS incidents. Depending on the circumstances of the case, it may be appropriate for courts to exercise a degree of leniency for workplaces who have maintained a proactive and robust approach towards addressing OHS risks and have a previous positive OHS record.
>
> **Submission 12 (Law Institute of Victoria)**

> We believe an effective OHS system, and indeed an effective OHS macro- ecosystem, is one that enables learning and improvement. The challenge here is the long-lasting 'damage', such as reputational or preclusion from government tendering requirements, that a conviction causes. The problem is that we see [that] individuals and companies involved in serious OHS incidents can (and often do) significantly improve their practices, attitude, and performance. A conviction therefore can have the unintended effect [of] harshly penalising strong future performers. Whilst not the purview of this work, we encourage government entities to take a broader approach in their procurement to not simplistically bar those who have received convictions from participating in tendering activities. Rather the focus should be on their reaction, their responses, and how they have dealt with the issues, both systemic and incidental, related to the conviction. Again repeatability is important here. Where there has been a demonstrated inability to learn and improve, penalties should be harsh. But where a company has managed risk appropriately and made preventative investments in expertise and control measures commensurate with their scale and risk profile, they should not be 'blacklisted' based on a moment of bad luck.
>
> **Submission 19 (Australian Institute of Health and Safety)**

3.232 OHSIntros and the Australian Manufacturing Workers' Union's submissions suggested that, given the current rate of convictions in OHS cases, convictions should be recorded in more cases. OHSIntros submitted that a conviction should be recorded for 'all serious offenders, especially those who cause harm', but only if it can be shown to have a punitive effect in the sense of a loss of reputation or a deterioration of prospects.[347] The Australian Manufacturing Workers' Union submitted that:

> [t]he court should be looking to record a conviction in the vast majority of cases. As mentioned previously, the court should only avoid recording convictions in cases of genuine unavoidable accidents or very low-level offending. The AMWU considers that the most significant factors for courts in deciding whether to record a conviction for an OHS offence should be the severity of the offence, the level of culpability, the impact on the safety and well-being of workers, the history of compliance, and the demonstrated commitment to remedial actions and ongoing improvements in workplace safety practices. These factors can help the courts make a fair and informed decision that takes account of the specific circumstances of each case.
>
> **Submission 6 (Australian Manufacturing Workers' Union)**

347. Submission 13 (OHSIntros).

3.233 However, the Victorian Trades Hall Council was of the view that convictions should be imposed in *all* sentenced OHS cases, to ensure transparency of court outcomes and the offenders' history, and achieving an appropriate level of deterrence:

> [T]his is particularly important as a company's OHS record is often a key consideration in government procurement with a threshold often set at whether OHS convictions exist. The value of recording convictions for companies is the threat of reputational harm and limiting their access to publicly funded projects. This is a significant and important deterrent factor. In addition, convictions for OHS offences should be publicly available and accessible. Every worker deserves to be able to make informed decisions about their employers, managers, workplace, and industry, and can only make informed decisions when they are provided all of the relevant information. These include a suitably accurate record of OHS breaches, especially those that are serious enough to result in sentencing. Workers deserve to know what they're signing up for. Currently workers are forced to rely on media attention, word of mouth, or undertake their own arduous research about the history of their employers – this is not ok. WorkSafe or a like authority must maintain an up-to-date register of all companies and directors convicted of OHS offences, it must be in plain language and easily accessible to all workers. Every single OHS offence with a conviction should be publicly accessible.
>
> **Submission 8 (Victorian Trades Hall Council)**

## The Council's view

3.234 The balance of stakeholder feedback regarding the court's discretion to impose a conviction on companies strongly suggests that, in the OHS context, the decision is one of significance, and the (reputational) consequences of a conviction for a company can be substantial. It must be noted that in particularly thin markets, the effect of a conviction on a company's prospects for securing government contracts becomes more difficult to determine.[348] Notwithstanding this, courts presented with evidence of the consequences of a conviction – for the company's reputation, financial standing, future growth and prospects for securing government contracts – can exercise their discretion so as to prioritise certain purposes of sentencing.

3.235 Given the complexities involved in deciding whether to record a conviction for an OHS offence, especially against a company, our view is that the most appropriate reform to achieve consistency, without interfering with judicial discretion, is to develop a legislated sentencing guideline that provides courts with guidance about considerations that might inform their decision.

348. See, for example, Rochelle Kirkham, 'Community Rallies after Ballarat Council Awards Tender to Company Convicted over Worker Deaths', *ABC News* (29 September 2022).

## A legislated sentencing guideline

3.236 There is one single policy solution, in our view, that is uniquely capable of addressing several of the issues described above, and it is one that would – as far as we are aware – be the first of its kind in Australia, if not globally: specifically, the introduction of a legislated sentencing guideline into the *Occupational Health and Safety Act 2004* (Vic). The legislated sentencing guideline would operate very similarly to the sentencing guidelines developed by bodies such as the Sentencing Council for England and Wales and the Scottish Sentencing Council, but it would only come into force if enacted as legislation. In very brief summary – and we will explore the various features in more detail below – this would involve amending the *OHS Act* to specify ranges of intended sentencing outcomes in OHS cases based on certain factors (e.g. seriousness of the offending), and requiring courts to have regard to those ranges, while still retaining full discretion to sentence anywhere within, or even outside, those ranges in appropriate cases.

3.237 Introducing a legislated sentencing guideline for OHS offences would:

- improve consistency in the sentencing of OHS offences, given evidence in the UK that the sentencing guideline for OHS offences shifted sentencing practices 'from an art to a science';[349]
- establish entirely new sentencing standards, allowing courts to be unmoored from current sentencing practices, which we have found to be inconsistent with community expectations and – in some cases – not capable of achieving the purposes of sentencing;
- encourage increased use of currently underutilised sentencing orders, such as health and safety undertakings and adverse publicity orders;
- specify the extent to which the fact that someone has been killed or injured in an OHS incident is relevant to sentencing;
- delineate sentencing ranges for companies based on the size of the company, and provide guidance about how courts should assess the size of a company; and
- provide guidance about how a company's 'prior character' can be relevant in sentencing an OHS offence.

349. Arewa et al. (2018), above n 251, 389.

## What are sentencing guidelines?

3.238 In our 2018 report on the establishment of a sentencing guidelines council for Victoria, we noted that there are two main types of sentencing guidelines: principle-based guidelines (e.g. guidance about how to approach certain sentencing considerations, such as the youth of an offender or any mental impairment they may have) and offence-based guidelines (e.g. guidance about how to sentence a certain type of offence).[350] The latter is where our focus lies here. Offence-based sentencing guidelines in England and Wales have three overarching features: a staged decision-making process, numerical guidance and principled guidance. In our 2018 report, we recommended that a sentencing guidelines council in Victoria should be able to create offence-based guidelines, which would include staged decision-making processes, and include sentencing ranges and starting points, so long as any guidance about the appropriate type or level of punishment would be supported by a comprehensive and non-exhaustive list of considerations for courts to take into account.[351] We also recommended that the purposes of a sentencing guidelines council should be to promote consistency and transparency of approach in sentencing (while preserving judicial discretion) and promote public confidence in sentencing, and the functions of a sentencing guidelines council should include (among other things) consulting with the community and key stakeholders about those guidelines.[352]

3.239 Sentencing guidelines in England and Wales provide a framework to assist courts in ensuring all relevant circumstances of an OHS case, as well as the effect those circumstances should have on the sentencing outcome, have been considered. They guide courts to consider the level of culpability, the level of harm risked by the offence (as well as any actual harm suffered), and the financial circumstances of the offender. The guideline then provides indicative sentencing ranges based on all of those factors. In the case of corporate offenders, those tables are arranged first by the size of the offender (as a 'micro', 'small', 'medium' or 'large entity'). The guideline also acknowledges that there may be 'very large organisations', whose turnover 'very greatly exceeds the threshold for large organisations', in which case 'it may be necessary to move outside the suggested range'.[353]

350. Sentencing Advisory Council, *A Sentencing Guidelines Council for Victoria: Report* (2018) 43–45.
351. Ibid 51.
352. Ibid 18 (Recommendation 1), 20 (Recommendation 2).
353. Sentencing Council for England and Wales (2016), above n 276, 7.

## How would a legislated sentencing guideline for OHS offences work?

3.240 There are a number of key features of a legislated sentencing guideline that would enable it to be effective in achieving changes to sentencing practices in OHS cases: it would include a staged approach to sentencing a particular offence, it would include sentencing ranges for that offence based on a non-exhaustive list of factors related to harm and culpability (and potentially even starting points), it would include a non-exhaustive list of mitigating and aggravating factors that a court may take into account, and it would include a non-exhaustive list of permissible reasons to depart from the sentencing guideline.[354]

### *Applicable offences*

3.241 There are a wide range of offences contained in the *OHS Act* and the associated regulations. A legislated guideline would be of most use in sentencing offences that involve breaches of health and safety duties, as these involve the most complex elements and evidentiary matters, as well as the highest maximum penalties and therefore the broadest available sentencing ranges. They are also the most common OHS offences sentenced. Offences that would be subject to the guideline should include breach of duty offences, the reckless endangerment offence and the workplace manslaughter offence.[355]

### *Binding while retaining judicial discretion*

3.242 The legislated sentencing guideline would be located in the *Occupational Health and Safety Act 2004* (Vic), with the content forming part of a schedule to the Act. An additional provision would also be inserted into the Act to the effect that courts sentencing applicable OHS offences must have regard to the guideline (see above [3.236]).

3.243 In 2018, we explained that 'it would be preferable to have no guidelines at all rather than non-binding guidelines', as non-binding guidelines would likely make

354. Sentencing Advisory Council (2018), above n 350, 51 (Recommendation 10).

355. Offences subject to the guideline should include Section 21 (Duties of employers to employees); Section 22 (Duties of employers to monitor health and conditions); Section 23 (Duties of employers to other persons); Section 24 (Duties of self-employed persons to other persons); Section 25 (Duties of employees); Section 26 (Duties of persons who manage or control workplaces); Section 27 (Duties of designers of plant); Section 28 (Duties of designers of buildings or structures); Section 29 (Duties of manufacturers of plant or substances); Section 30 (Duties of suppliers of plant or substances); Section 31 (Duties of persons installing, erecting or commissioning plant); Section 32 (Duty not to recklessly endanger persons at workplaces); Section 39G (Workplace manslaughter).

sentencing even more complex and could introduce additional inconsistencies, which would threaten the transparency of, and public confidence in, the sentencing process.[356]The same must be said of any proposed legislated sentencing guideline for OHS offences.

3.244 We also noted in 2018 that individualised justice is a fundamental principle of the justice system, and it was imperative that courts retain discretion to impose a just and proportionate sentence according to the circumstances of each case. The legislation enabling the OHS offences sentencing guideline should therefore allow courts to depart from the guideline 'where doing so would be in the interests of justice', provided that courts explain their reasons for doing so. This approach would maintain the integrity of the legislated guideline while further promoting transparency in the sentencing process in those cases where departure from the guideline is necessary.

### *Applicable to offences sentenced on or after commencement*

3.245 The legislated sentencing guideline would apply to all applicable offences *sentenced* after commencement of the guideline. As noted in our report on the establishment of a sentencing guidelines council, this approach promotes equal justice, helps to ensure that sentencing standards reflect current community expectations and is consistent with the approach already taken when other changes are made to sentencing practices, including the High Court's decision in *DPP v Dalgliesh*.[357]

3.246 However, the guideline should not apply during resentencing following a successful appeal of a sentence that was imposed *prior* to the commencement of the guideline, and any amendments made to a guideline should not constitute a permissible ground of appeal against a sentence previously imposed under the guideline.[358]

### *Sentencing practices for offences committed prior to guideline enactment no longer relevant*

3.247 The guideline should specify that current sentencing practices prior to the commencement of the guideline should no longer be relevant. This is to ensure that the guideline can have its intended effect of shifting sentencing practices in appropriate cases.[359] Sentencing practices that apply the guideline would then become a relevant

356. Sentencing Advisory Council (2018), above n 350, 59.
357. *DPP v Dalgliesh* [2017] HCA 41.
358. Sentencing Advisory Council (2018), above n 350, xx–xxi.
359. Ibid 62–63.

factor to which courts have regard when sentencing under the guideline. However, the predominant consideration for courts would still be the application of the guideline itself, with a consideration of similar cases becoming relevant if they assist a court in applying the guideline to the circumstances of the present case.

### *Non-exhaustive criteria guiding the assessment of offence seriousness*

3.248 The legislated guideline would provide a non-exhaustive list of criteria to guide the determination of the seriousness of the breach and the culpability of the offender. For example, the first step of the England and Wales sentencing guideline specifies a scale, with examples of circumstances indicating the level of culpability:[360]

- **Very high**: a deliberate breach of, or flagrant disregard for, the law.
- **High**: serious and/or systemic failures to address risks, or circumstances in which the offender *fell far short* of the appropriate standard, for example, by failing to put in place measures that are recognised standards in the industry, ignoring concerns raised by employees or others, failing to make appropriate changes following prior incidents exposing risks to health and safety, or allowing breaches to subsist over a long period of time.
- **Medium**: systems were in place but were not sufficiently adhered to or implemented, or the offender *fell short* of the appropriate standard that falls between descriptions in 'high' and 'low' culpability categories.
- **Low**: the offender did not fall far short of the appropriate standard, for example, because significant efforts were made to address the risk although they were inadequate on this occasion, or there was no warning/circumstance indicating a risk to health and safety, or failings were minor and occurred as an isolated incident.

3.249 Similar guidance is given regarding the level of harm, including by reference to the seriousness of the harm that was risked (death, physical or mental impairment, significantly reduced life expectancy, etc.) as well as the degree of likelihood of the harm materialising (ranked as high, medium or low likelihood).[361]

### *Approach to sentencing factors*

3.250 The guideline would address specific sentencing factors, including:

- the impact of the offence on any affected persons (including by reference to any victim impact statement under the *Sentencing Act* or impact statement under the *OHS Act*) (see Recommendation 1);

360. Sentencing Council for England and Wales (2016), above n 276, 4.
361. Ibid 5.

- any injury, loss or damage resulting directly from the offence;
- the offender's plea, and its timing;
- the conduct of the offender *after* the offending, including any steps taken to remediate breaches, or to provide support to affected persons such as injured workers; and
- the offender's previous character and any limitations on relevant matters informing character, in particular, for corporate offenders.

3.251 Importantly, the guideline would address the court's consideration of actual harm that is involved in a case, including reconciling the policy intent of the risk-based nature of breach of duty offences with the moral imperative to recognise harm that arises from criminal breaches of OHS laws, the latter of which was strongly identified in community consultation.

### *Size and/or financial circumstances of the offender*

3.252 The guideline would provide for a detailed consideration of the financial circumstances of the offender, which would allow the court to appropriately calibrate the sentence to the offender's size and financial means. This could be done by reference to financial measures, such as annual turnover or earnings, or by reference to scale, such as the number of employees engaged by the offender, the value of assets under management or the geographic extent of the offender's operations.

3.253 The guideline would then provide categories of financial size, to allow courts to better calibrate the penalty. For example, in the England and Wales Sentencing Guideline, four categories are provided – micro, small, medium and large – with provision for very large organisations where 'an offending organisations' turnover or equivalent very greatly exceeds the threshold for large organisations', in which case 'it may be necessary to move outside the suggested range to achieve a proportionate sentence'.[362]

### *Provision of sentencing ranges*

3.254 Ultimately, the guideline would specify sentencing ranges that courts should follow in OHS cases, by reference to the culpability of the offender, the seriousness of the offending, the financial circumstances of the offender and other relevant factors, including the previous character of the offender, their plea and the timing of their plea.

362. Ibid 7–8.

3.255 These ranges would also address the types of available sentencing orders and provide guidance on when orders such as health and safety undertakings (as an alternative to, or in addition to, a fine) and adverse publicity orders would be appropriate.

## Example application of a sentencing guideline: *Bupa Care Homes Ltd*

3.256 It is perhaps useful to provide a tangible example of how a sentencing guideline for OHS offences would work. Given we envisage the legislated guideline in Victoria being quite similar in content and approach to the health and safety offences sentencing guideline produced by the Sentencing Council in England and Wales, we have the benefit of looking to actual cases sentenced there to see how the guideline has worked. One of the more detailed cases to date involved the company Bupa Care Homes Ltd, offering services at over 120 nursing homes, residential homes, elderly care homes and other similar housing in the United Kingdom.

3.257 The case of *Bupa Care Homes Ltd v R*[363] involved a patient residing in an elderly care nursing home who had contracted a form of pneumonia and died, with the most likely cause being the care provider's 'failure to flush and disinfect pipes and fittings that had been installed during refurbishment works'. The Court of Criminal Appeal summarised how the sentencing guideline works, then applied the guideline to the facts of the case. In Case Study 4 (pages 132–133), the court:

- assessed the culpability of the offender as high because they were aware of the risk over a lengthy period and did not take action;
- assessed the potential consequences of the risk in question as death, but the risk of death occurring as low;
- found that a large number of people were exposed to the risk, but did not directly find the risk to have been causative of the deceased's death;
- noted that the company had a turnover of over £50 million, making it a 'large organisation';
- noted the company had a prior conviction, but also noted the rehabilitative steps the company had taken since the offending;
- accounted for the offender's plea of guilty; and
- using the ranges in the guideline for large organisations with high culpability whose offending is in harm category 2, determined an initial fine of £2,250,000 that was then reduced by one-third, to £1,500,000, to account for the plea of guilty.

363. *Bupa Care Homes Ltd v R* [2019] EWCA Crim 1691.

## Case study 4: Example application of sentencing guideline in the UK: Bupa Care Homes Ltd

| Step | Summary of guideline | Application of guideline |
|---|---|---|
| **Step 1(a): Culpability** | [21] The Guideline provides a structure within which to sentence for breaches of health and safety legislation. At Step One, the court is enjoined to determine the offence category. As part of that exercise it must first decide 'culpability'. There are four levels of culpability: very high, high, medium and low. The conduct described in the Guideline to inform the assessment of culpability ranges from 'deliberate breach of or flagrant disregard for the law', at one end, to 'offender did not fall far short of the appropriate standard' at the other. | [34] Step One required the judge to determine the level of culpability. The prosecution said that it was high, whereas the defence said it was only medium. The prosecution said that the Appellant had fallen far short of the appropriate standard by allowing serious breaches to subsist over a period of time, while the defence said that systems were in place, but these were not sufficiently adhered to.<br><br>[43] Overall, the judge's conclusion on culpability was as follows: 'In my view Bupa Care Homes fell far short of the appropriate standards by allowing problems of which they were aware and which had a direct bearing on the management of Legionella risk to persist over a lengthy period … I've concluded on the basis of the entirety of the evidence … that the culpability level is high'. |
| **Step 1(b): Seriousness and likelihood of risk** | [22] … The Guideline [then] requires the court to determine both the seriousness of the harm risked and the likelihood of that harm arising. Each of those factors may be ascribed to one of three categories. The seriousness of the harm ranges from Level A (death/physical or mental impairment resulting in lifelong dependency on third party care for basic need(s) significantly reduced life expectancy) to Level C … The likelihood of harm is to be categories as either High, Medium or Low … for seriousness of harm at Level A, with a medium likelihood of harm … the harm category is … 2. | [44] The judge then turned to her assessment of harm. She said the seriousness of the harm risked was death, and that that had not been disputed. She then turned to the question of the likelihood of that harm. Having considered the statistical evidence about mortality from Legionnaires' disease, she concluded that the risk was low, which meant that the harm category in the relevant table was Category 3. |
| **Step 1(c): Extent of exposure and actual harm** | [23] Having identified the appropriate level of harm, the Guideline then requires the court to consider whether the offence exposed a number of workers or members of the public to risk and whether the offence was a significant cause of actual harm. | [46] As to the first question, the judge said that she was in no doubt … that the offence exposed a number of employees and residents to the risk of harm.<br><br>[47] The judge then considered the second question, namely, the issue of causation in relation to [the deceased's] death … She found that the failures she had identified did not themselves contribute to the circumstances which led to the exposure of [the deceased] …<br><br>[48] Overall, the judge said that it was right to go up a category in terms of harm to Category 2 so that, overall, the case was one of high culpability, with the harm in Category 2. |

| Step | Summary of guideline | Application of guideline |
|---|---|---|
| **Step 2(a): Size of company** | [24] At Step Two a starting point and category range are determined by focussing on turnover, with aggravating and mitigating features influencing where in the range the starting point lies. The Guideline describes organisations as 'large' (turnover £50 million and over), 'medium' (turnover £10 to £50 million), 'small' (turnover £2 to £10 million) and 'micro' (turnover up to £2 million). The defendant is expected to provide the court with relevant financial information to enable this exercise to be carried out. In respect of each, there is a table bringing together the four possible levels of culpability and four possible harm categories. | [50] The Appellant's turnover in 2015 was £77 million. In 2016 its turnover was £89 million … Thus, under the Guideline, it ranked as a 'Large Organisation' which meant the starting point was a fine of £1.1 million with a range of £550,000 to £2,900,000. That starting point is based on an organisation with a turnover of £50 million. |
| **Step 2(b): Aggravating and mitigating factors** | [26] The Guideline includes a non-exhaustive list of factors both increasing seriousness and those reducing it or reflecting mitigation. It explains that recent relevant previous convictions should result in substantial upward adjustment. The impact of both aggravating and mitigating features may result in a move outside the category range identified in the Guideline. | [52] The judge then turned to aggravating and mitigating factors. She noted the Appellant had one previous conviction, but not related to Legionella, in 2011. She also noted that there had been an improvement notice in relation to Legionella risk management in 2009 in relation to another company within the Bupa group.<br><br>[53] In relation to mitigation she said there had been significant steps to address the cause of the offence and that better measures were now in place. She said there had been remorse within the company albeit it had not been well expressed. |
| **Step 3: Proportionality** | [29] Step Three requires the court to 'check whether the proposed fine based on turnover is proportionate to the overall means of the offender' … a fine [must] take account of the financial circumstances of the offender; … it must meet in a proportionate way the objectives of punishment, deterrence and removal of gain derived from the offending; and … it must be 'sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.' It then enjoins the court to consider the financial circumstances of the offender – the economic realities – with the result that in finalising the sentence the following factors are relevant: (a) profitability. Adjust downwards for a small profit margin and upwards for a larger profit margin; (b) any quantifiable benefit derived from the offence; (c) whether the fine will put the offender out of business. Such an outcome might be appropriate in some cases. | [54] The judge concluded: 'Taking account of all the relevant factors at this stage and my conclusions on culpability and harm, at the conclusion of Step Two I reach a fine of £2,250,000.'<br><br>…<br><br>[87] Applying a one third discount for the guilty plea produces a figure of £1,500,000. |

3.258 Figure 29 provides an extract of the applicable sentencing guideline and highlights the specific categorisations decided by the sentencing court.

**Figure 29: Extract of applicable sentencing guideline**

| **Large**<br>**Turnover or equivalent: £50 million and over** | | |
|---|---|---|
| | **Starting point** | **Category range** |
| **Very high culpability** | | |
| Harm category 1 | £4,000,000 | £2,600,000 – £10,000,000 |
| Harm category 2 | £2,000,000 | £1,000,000 – £5,250,000 |
| Harm category 3 | £1,000,000 | £500,000 – £2,700,000 |
| Harm category 4 | £500,000 | £240,000 – £1,300,000 |
| **High culpability** | | |
| Harm category 1 | £2,400,000 | £1,500,000 – £6,000,000 |
| Harm category 2 | £1,100,000 | £550,000 – £2,900,000 |
| Harm category 3 | £540,000 | £250,000 – £1,450,000 |
| Harm category 4 | £240,000 | £120,000 – £700,000 |
| **Medium culpability** | | |
| Harm category 1 | £1,300,000 | £800,000 – £3,250,000 |
| Harm category 2 | £600,000 | £300,000 – £1,500,000 |
| Harm category 3 | £300,000 | £130,000 – £750,000 |
| Harm category 4 | £130,000 | £50,000 – £350,000 |
| **Low culpability** | | |
| Harm category 1 | £300,000 | £180,000 – £700,000 |
| Harm category 2 | £100,000 | £35,000 – £250,000 |
| Harm category 3 | £35,000 | £10,000 – £140,000 |
| Harm category 4 | £10,000 | £3,000 – £60,000 |

## Stakeholder views

3.259 In our *Consultation Paper*, we asked stakeholders whether, in their view, there is a need to increase fine amounts in OHS cases and, if so, what the best mechanism to achieve that increase is.[364] Of the stakeholders who responded to this question, seven were of the view that a sentencing guideline (whether legislated or otherwise) was the most practical mechanism, or at least one of the most practical mechanisms, to achieve meaningful change to sentencing practices.[365] Several stakeholders commented on the success of the sentencing guideline in England and Wales in increasing sentencing practices in workplace health and safety breaches. Other stakeholders commented more generally on the need for legislative intervention in the form of sentencing guidance to assist courts in interpreting various factors, such as the relevance of harm (see [3.166]–[3.181]),

364. *Consultation Paper* 90 (Question 16).

365. Submission 3 (Office of Public Prosecutions); Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 20 (County Court of Victoria).

good character (see [3.182]–[3.198]) and a company's financial circumstances (see [3.199]–[3.222]). For example:

> [s]entencing reform can only be achieved in a meaningful, sustainable, and transparent way through the introduction of Sentencing Guidelines … OHS Sentencing Guidelines were introduced in the [United Kingdom] … in 2016. The following year … an impact review, assessing the effect of the reform ... proved that Sentencing Guidelines do increase fine amounts for OHS breaches. Whilst the intention for the Guidelines was to increase the quantum of fines for large and very large organizations, there was also a reflective increase in fines for smaller companies ... In the period post-introduction, fines increased by nearly 450%, and analysis of sentencing remarks … suggest that the Sentencing Guidelines are being applied in sentencing in the manner in which they were intended.
>
> **Submission 8 (Victorian Trades Hall Council)**

> [b]y revising OHS regulations and laws, authorities can explicitly outline the new fine amounts for different types of offences. Additionally, implementing a transparent and standardized fine structure based on the severity of the violation and the size of the organization could help ensure fairness and consistency in the application of increased fines.
>
> **Submission 6 (Australian Manufacturing Workers' Union)**

> the OPP considers that it would be highly beneficial for courts to be provided with clear guidance as to how to meaningfully conduct this assessment in relation to companies. The OPP considers that it would be beneficial to have legislative guidance as to the offender-specific factors that courts should take into consideration when sentencing a company.
>
> **Submission 3 (Office of Public Prosecutions)**

> [t]his Submission endorses … the adoption of the approach in England and Wales, encompassing the guideline … on sentencing for health and safety offences. The financial position of the organisation should be a major contributing factor to the initial decision about the fine amount to be imposed.
>
> **Submission 18 (Australian Centre for Justice Innovation, Monash University)**

3.260 The Victorian Automotive Chamber of Commerce was opposed to the introduction of a legislated sentencing guideline, concerned with its potential erosion of judicial discretion:

> VACC … does not support the introduction of legislated sentencing guidelines, as it views it [as] fundamentally at odds with the process of 'instinctive synthesis' affirmed by the High Court, necessary in the fixing of a just sentence.
>
> **Submission 15 (Victorian Automotive Chamber of Commerce)**

3.261 During consultation, we heard strong support from stakeholders for the introduction of a legislated sentencing guideline for offences contrary to the *OHS Act*.[366] For example, some participants commented:

> because [OHS offences are] so different to what [courts] normally see day to day … having some form of assistance to interpret legislation in the appropriate way would be helpful.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

> I do think … it could be a really helpful tool to provide guidance to the magistrates that don't ordinarily deal with OHS offences and where you get, often, the low fines[.]
>
> **Participant at OHS Barrister Roundtable (16 August 2024)**

> I believe there's little to no utility increasing the maximum value without [a] … [s]entencing guideline, because at the moment, we're seeing 1%, 2%, 3% [of the] maximum penalty, and it just gets lost … so if you have something that really adds to it, being a guideline, it goes with it. That's when I feel you'll see the change.
>
> **Participant at Stakeholder Roundtable (12 August 2024)**

3.262 Some stakeholders, particularly WorkSafe, were of the view that a guideline should also provide guidance for courts on the factors relevant to imposing a conviction in an OHS case.[367]

3.263 While there was no opposition to a legislated sentencing guideline from stakeholders during roundtable consultation, some expressed concern about the risk of a guideline increasing the complexity of the courts' sentencing exercise in OHS cases. For example:

> I could imagine that there'd be a lot of argument at plea hearings … about which level the harm is, which level the culpability is. So, I think it would add a layer of complexity to those hearings.
>
> **Participant at OHS Barrister Roundtable (16 August 2024)**

> I think there probably could be some utility to have guidance … in a statutory form, particularly if there is an intention to say that things like the fact that death or serious injury occurred is relevant to sentence, or how that's relevant … for example … the size of the company measured by these things, is relevant, but … we already see it in criminal matters, plea hearings do become more complicated because all the lawyers are arguing about statutory categories.
>
> **Participant at OHS Barrister Roundtable (16 August 2024)**

366. Stakeholder Roundtable (12 August 2024); Meeting with Australian Centre for Justice Innovation, Monash University (15 August 2024); Meeting with Workplace Incidents Consultative Committee (21 August 2024).
367. Stakeholder Roundtable (12 August 2024).

## The Council's view

3.264 The results of our statistical analysis and community and stakeholder consultation on sentencing practices for OHS offences have shown that, in certain cases, sentencing practices do not give proper effect to the purposes of sentencing and are in substantial misalignment with community expectations. This is particularly evident in cases involving larger corporate entities and where particularly egregious breaches result in fatalities and other serious harm. These issues undermine the effectiveness of criminal proceedings for OHS offences, as well as public confidence in the criminal justice system and the regulatory framework for occupational health and safety.

3.265 We are of the view that a decompression of sentencing practices (relating to fine amounts), as well as a greater use of other kinds of sentencing orders, including health and safety undertakings and adverse publicity orders, is best facilitated through the introduction of a legislated sentencing guideline, which would be included in the *OHS Act*. We note that, in order to be workable and constitutionally viable, the guideline would have to be in primary legislation as opposed to delegated legislation or regulations.

3.266 The Sentencing Council for England and Wales' assessment of the impact of the guideline, published three years after it came into effect, found that the guideline had been applied as intended by judicial officers, and had led to an increase in fine amounts imposed, in particular, in cases involving large/very large organisations. This suggests that the greatest effect of the guideline was in achieving a closer calibration of sentencing outcomes to the size and financial circumstances of the offender.[368]

3.267 We are not the first law reform body in Australia to identify a need for legislative guidance for courts in sentencing corporate offenders. In 2020, the Australian Law Reform Commission recommended that the *Crimes Act 1914* (Cth) be amended to require courts to consider the following factors when sentencing a corporation:[369]

- the type, size and financial circumstances of the corporation;
- whether the corporation had a corporate culture conducive to compliance at the time of the offence;
- the extent to which the offence or its consequences ought to have been foreseen by the corporation;
- the involvement in, or tolerance of, the criminal activity by management;

368. Sentencing Council for England and Wales, *Assessing the Impact and Implementation of the Sentencing Council's Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline* (2019) 6–7.

369. Australian Law Reform Commission, *Corporate Criminal Responsibility: Final Report,* Report 136 (2020) 16, 338–342.

- whether the unlawful conduct was voluntarily self-reported by the corporation;
- any advantage realised by the corporation as a result of the offence;
- the extent of any efforts by the corporation to compensate victims and repair harm;
- the effect of the sentence on third parties (such as employees); and
- any measures that the corporation has taken to reduce the likelihood of it committing a subsequent offence, including internal investigations into the causes of the offence, internal disciplinary action, and measures to implement or improve a compliance program.

3.268 These factors largely replicate the 'French factors' (discussed at [3.208] above), which are a list of considerations relevant to the imposition of pecuniary penalties, and frequently applied by the Federal Court in particular.[370]

3.269 In considering the option of introducing a legislated sentencing guideline as a means of changing sentencing practices, we have also considered alternative options. One such option was incorporating either the French factors or the factors described by the Australian Law Reform Commission, into the *OHS Act* as part of a new provision specifying factors relevant to sentencing offences under the Act. We have come to the conclusion that courts sentencing OHS offences in Victoria *are already* largely taking those factors into account. Moreover, given there would be a continuing obligation on courts to consider current sentencing practices – which in our view need to change – a legislated list of factors is unlikely to result in the necessary change to those practices. We are therefore of the view that the addition of a legislated provision specifying relevant factors would not achieve any material changes in sentencing practices, as the issue lies with the *weight* those factors are given and the extent to which they affect the sentencing outcome. Ultimately, a legislated sentencing guideline offers a far more promising opportunity to drive substantial and meaningful changes in sentencing outcomes in OHS cases.

3.270 In coming to the view that a legislated sentencing guideline is the most effective way of addressing the issues identified above, we note that the detail of such a guideline was not a dedicated component of our consultation with the community. Accordingly and given the novel nature of this reform, extensive further consultation is required to develop that guideline, and to calibrate the sentencing ranges contained within it, in close collaboration with all relevant stakeholders, including regulators, the courts, industry, and worker and victim representatives.

370. Named after Robert French who (as a then Judge of the Federal Court of Australia) provided the factors in the case of *Trade Practices Commission v CSR Ltd* [1990] FCA 762; see also *Australian Competition and Consumer Commission v Qantas Airways Limited* [2024] FCA 1219 [107]–[109].

## Recommendation 9: A legislated sentencing guideline

The Victorian Government should ask the Sentencing Advisory Council to develop and consult on a draft sentencing guideline for inclusion in the *Occupational Health and Safety Act 2004* (Vic) when sentencing offences contrary to that Act.

Key features of the guideline would include:

- the guideline would apply to all breach of duty offences (sections 21 to 31), as well as the reckless endangerment (section 32) and workplace manslaughter (section 39G) offences;
- the guideline would apply to all offences sentenced after enactment;
- the guideline would provide a range of sentencing outcomes based on various characteristics of the offending and the offender;
- for the purpose of section 5(2)(b) of the *Sentencing Act 1991* (Vic), courts applying the guideline would only be permitted to have regard to sentences imposed for an OHS offence pursuant to the guideline;
- courts would be required to follow the guideline but would be permitted to depart from the guideline if following it would be contrary to the interests of justice, and they explain their reasons for doing so;
- the guideline would include guidance about how courts should approach specific factors in sentencing OHS offences, such as the offender's culpability, the objective seriousness of the offence, the offender's financial circumstances, any injury, illness or harm caused by the offence, and the offender's character.

### *Providing courts with evidence of financial circumstances*

3.271 In order for courts to implement the above reforms aimed at changing sentencing practices, it is essential that courts are properly informed about the financial circumstances of offenders. Without that information, courts would not be able to apply the legislated sentencing guideline as proposed.

3.272 Our review of sentencing remarks in OHS cases shows that typically the discussion around the financial circumstances of the offender is limited in scope. As noted above, a court may even make a request for evidence about financial circumstances, only to have that request not be answered by the offender. We are of the view that this practice should not continue.

3.273 Recent cases illustrate the frustrating position sentencing courts are sometimes placed in. In *DPP v Oriana,* the County Court sentenced an individual, a

self-employed plasterer, for a breach of the *OHS Act* and regulations.[371] In imposing a fine, the court noted that it was required, as far as practicable, to take into account the offender's financial circumstances, in accordance with section 52 of the *Sentencing Act*. The court requested that the offender provide a tax return or other evidence of income; however, no such evidence was provided, and the court had to proceed to sentence the company and individual without that evidence.[372] In *DPP v Misz Pty Ltd,* the offending company had a limited capacity to pay a fine, because it was on the brink of entering liquidation or administration. The court considered the principle that where it that appears a company would not be able to pay any fine (because it is in the process of being wound up), a court should effectively ignore the company's financial circumstances and impose an otherwise appropriate fine. However, the court accepted an assurance – made in open court by legal counsel for the company, on instructions from one of the directors of the company, who was a practising solicitor – that the company would meet its legal obligations. This enabled the court to 'very significantly moderate' the amount of the fine to be imposed to ensure it was capable of being paid.[373]

3.274 The New South Wales District Court provides a useful example of a mechanism for how financial circumstances could be made more readily available in more cases. Its practice directions state that evidence about financial circumstances must be made by way of affidavit, within a set period of time prior to the plea hearing.[374] The Law Institute of Victoria, in its submission, supported the introduction of a similar requirement in Victoria.[375]

3.275 We considered two possible reforms aimed at ensuring that courts are provided with the necessary evidence of financial circumstances as a matter of course in OHS cases:

- introduction of a legislative requirement for companies being sentenced for OHS offences to provide courts, by way of affidavit, with evidence of financial circumstances; and/or

371. *DPP v Oriana* [2024] VCC 535.
372. *DPP v Oriana* [2024] VCC 535 [69]–[73].
373. *DPP v Misz Pty Ltd* [2024] VCC 1449 [33]–[34]; see also *Di Tonto & Anor v The Queen* [2018] VSCA 312 [29]–[30], where the Court of Appeal stated: '[the offender] proposes to meet whatever fines are imposed, and continue to run his business … in other words, he does not intend to wind up the company in insolvency … it is true that perhaps more could have been put before the sentencing judge to support the contention that fines of the order that Her Honour ultimately fixed would be ruinous … it is tolerably clear that, as a matter of common sense, this was a modestly sized business, and in our opinion, this fact should have weighed more heavily than it appears to have done in the overall sentencing synthesis'.
374. District Court of New South Wales, *Practice Note 16 of 2021: Criminal Division: Work Health and Safety Act Prosecutions* (4 June 2021) 12, [45].
375. Submission 12 (Law Institute of Victoria).

- a legislated presumption allowing courts to assume, in the absence of evidence to the contrary, that a company found guilty of an OHS offence will have the financial means to meet any penalty that the court considers appropriate to impose in the circumstances.

3.276 While stakeholders were generally supportive of additional assistance for courts in this context, they were divided on which approach was most appropriate. Some even supported having both measures in place, with the presumption taking effect if the offender fails to provide sufficient evidence regarding their financial circumstances.

3.277 We are of the view that a legislative *requirement* is the more appropriate reform option. If the aim is to ensure courts are adequately informed about the financial circumstances of an offender for the purposes of sentencing, there must be a positive obligation to provide that information. The alternative – a presumption that applies in the absence of that evidence – may often be inadequate because, without actual information regarding financial circumstances, in many cases courts would not be able to determine what is an 'appropriate penalty'. This is also an issue given the prominent role 'financial circumstances' would play in the structure of a legislated sentencing guideline. Accordingly, we believe this reform would have the greatest intended effect if it was introduced at the same time as the legislated sentencing guideline, making it clear that this evidentiary requirement is necessary for courts to correctly apply the guideline.

### *Access to sentencing remarks*

3.278 While 90% of OHS cases are sentenced in the Magistrates' Court, very few sentencing decisions of that court are publicly available. This gap is filled by WorkSafe's prosecution result summaries published on its website. These are brief summaries of the offending involved in the case, the sentencing outcomes and, in many cases, the sentencing factors considered by the court, both aggravating and mitigating.

3.279 However, several stakeholders suggested that sentencing remarks in OHS cases sentenced in the Magistrates' Court should be more widely available for two reasons: ensuring accuracy in reporting sentencing outcomes, and demonstrating more accurately current sentencing practices with respect to certain sentencing factors, thereby assisting courts with sentencing future cases.[376]

376. Submission 8 (Victorian Trades Hall Council). See also Safety at Work Blog, 'Sentencing and OHS Prosecutions but Few Solutions' (safetyatworkblog.com, 2024).

3.280 In preliminary consultation, and in written submissions, some stakeholders commented that consistency in sentencing practice, particularly in the summary jurisdiction, might be aided by greater public access to sentencing remarks in previous OHS cases. Access to sentencing remarks would allow prosecutors and defence practitioners greater insight into the facts that led to previous sentences, and help them gather more comparable cases to present to sentencing courts.

3.281 This issue was also raised in the review of Queensland's *OHS Act*, based on the model laws:

> [I]t was noted that the decisions of the Magistrates' Court imposing sentences for breaches of the [Work Health and Safety] Act are not published. Rather, those sentences are the subject of a brief summary prepared by the relevant prosecutor, which do not contain the presiding problems in respect to other magistrates, prosecutors and defendants relying upon those summaries, and for the purposes of general deterrence. The lack of published decisions which are publicly accessible may be an impediment to both the specific and general deterrence.[377]

3.282 However, we ultimately do not believe it is strictly necessary to make a recommendation that more sentencing remarks be made public. We consider that the primary issue identified in this chapter is that sentencing practices, both generally and in specific cases, are significantly out of step with community expectations, and in some cases fail to adequately achieve the purposes of sentencing. This is a more fundamental issue regarding the *adequacy* of sentencing approach and outcomes, as opposed to consistency or access to comparable cases. Accordingly, we are of the view that remedying this issue is best achieved by changes to maximum penalties coupled with a comprehensive legislated sentencing guideline that will decompress sentencing practices, give greater effect to the purposes of sentencing, and achieve more effective OHS-related outcomes.

### *Prosecutorial resourcing implications of changed sentencing practices*

3.283 Finally, we note that the introduction of a legislated sentencing guideline is expected to significantly increase fine amounts for OHS offenders that receive fines. This, in turn, may have some bearing on the number of matters that are able to be heard summarily in the Magistrates' Court, given the court's jurisdictional limit, which we do not propose should change. If more matters are heard in the indictable stream, there will need to be, within the Office of Public Prosecutions, an increase in the specialisation and level of resources dedicated to running those matters.

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377. Craig Allen et al., *Review of the Work Health and Safety Act 2011: Final Report* (2022) 117.

# 4. Payment of fines for OHS offences

4.1 Our terms of reference asked us to examine the enforcement of sentencing orders for OHS offences, especially court fines. In other words, how many fines for OHS offences are actually paid, and are there opportunities to improve payment rates for those that aren't? Thanks in large part to data provided by the courts, WorkSafe Victoria ('WorkSafe') and Fines Victoria, we made a number of important findings about payment of fines for OHS offences in Victoria in our *Consultation Paper* and our *Statistical Report*, both published in February 2024:

- First, there are multiple avenues for paying fines for OHS offences, and while these avenues provide flexibility in payment, they also mean that there is no single entity responsible for monitoring payment rates for OHS fines.
- Second, while most fines for OHS offences are directed to WorkSafe to help fund the WorkCover Authority Fund, there is some uncertainty in both the legislation and practice, and some OHS fines appear to instead be directed to consolidated revenue (in Victoria, 'the Consolidated Fund').
- Third, while 67% of fines for OHS offences are fully paid and 4% are partly paid (most likely due to ongoing payment plans involving individuals), the remaining 29% of fines are entirely unpaid, accounting for almost $2.5 million a year in unpaid fines.[378]
- Fourth, the factor most commonly associated with complete non-payment of an OHS fine is the offender being a company that has deregistered since the offending. We heard many stakeholders raise concerns that some companies may be 'phoenixing' – that is, undertaking substantially similar work, with the same people and plant, but registered under a new company name – to avoid paying fines.
- Fifth, at the date of publishing our *Consultation Paper* and our *Statistical Report*, in February 2024, the 'declared director' provisions in the *Fines Reform Act 2014* (Vic) had not yet been utilised for any offenders, let alone OHS offenders, as a means of holding individual directors personally liable for fines imposed on deregistered companies.

378. It should be noted that unpaid fines (including entirely unpaid fines and the balance of partly paid fines) accounted for 43% of the total value of fines imposed, representing $10.3 million.

4.2 Based on these findings, we asked in our *Consultation Paper* whether there were any opportunities to simplify or improve the process for paying fines imposed in OHS cases (Question 17) and also whether there might be any opportunities to improve fine payment rates for OHS offences (Question 18).

4.3 In this chapter, we present stakeholders' views on these topics and our recommendations for reform.

## Where should fines for OHS offences go?

4.4 In our *Consultation Paper*, we observed that there was some ambiguity in the *Sentencing Act 1991* (Vic) ('the *Sentencing Act*') and *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) about where monies paid from OHS fines should be directed.[379]

4.5 First, section 69ZB of the *Sentencing Act* specifies that:

> [t]he whole or any part of a fine, penalty or sum of money which by or under any Act is authorised or directed to be imposed on a person forms part of, and must be paid into, the Consolidated Fund if no other way of appropriating or applying it is prescribed by law.

4.6 That is, unless there is an express intention to the contrary in another legislative instrument, the default approach is that all court fines collected will be distributed to the Consolidated Fund as general revenue.[380]

4.7 Section 513(3)(a) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) says that:

> (3) There must be paid into the Fund—
>
> (a) any amount received or recovered by or on behalf of the Authority … as a penalty for an offence under … the Occupational Health and Safety Act 2004[.]

4.8 This is the provision currently relied upon by WorkSafe as authority for the distribution of most court fines collected for OHS offences to its WorkCover Authority Fund.[381] What is not, however, immediately apparent in the provision is a clear intention that fines collected for OHS offences are 'recovered … on behalf of' WorkSafe.

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379. *Consultation Paper* 93–94.
380. As established pursuant to section 9 of the *Financial Management Act 1994* (Vic).
381. As originally established under section 32 of the *Accident Compensation Act 1985* (Vic) (as enacted). The purposes for which monies distributed to the WorkCover Authority Fund may be used are specified in sections 513(4)–(5) of the *Workplace Injury, Rehabilitation and Compensation Act 2013* (Vic), and effectively relate to WorkSafe performing its functions of compensating injured workers and enforcing the regulatory scheme.

4.9 Relatively few stakeholders directly commented on this issue in their submissions. Among those who did, however, there was a unanimous view that there should be legislative reform to more clearly specify where fines for OHS offences should go, and even more specifically, that those fines should be directed to WorkSafe.[382]

4.10 For instance, the Law Institute of Victoria wrote that:

> [L]egislative clarification is crucial to specify whether all fines are to be allocated to the WorkCover Authority Fund or [to the Consolidated Fund], thereby eliminating the current parallel pathways and ensuring consistency in the distribution of collected fines.[383]

4.11 The Victorian Automotive Chamber of Commerce agreed, saying that:

> [c]onsideration might also be given to the monies going … to WorkSafe – if those monies were utilised for the purpose of … achiev[ing] healthy and safe workplaces.[384]

4.12 So too did the Workplace Incidents Consultative Committee, saying that it was currently 'unclear which agency receives the monies from payment of fines', and recommending that fines should 'accrue to WorkSafe, which would enable proceeds to be invested back into OHS prevention and used to support WorkSafe's enforcement activities'.[385]

4.13 We agree with these submissions. Legislative clarification that court fines for OHS offences should be directed to WorkSafe would largely confirm the current practice in most instances. It would also remove any ambiguity in the provisions, and ensure that anomalous OHS fines are not inadvertently sent to the Consolidated Fund.

## Recommendation 10: Distribution of paid court fines

The Victorian Government should amend the *Occupational Health and Safety Act 2004* (Vic) to more clearly specify that all court fines paid for OHS offences are to be paid into the WorkCover Authority Fund.

382. Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 12 (Law Institute of Victoria); Submission 15 (Victorian Automotive Chamber of Commerce); Submission 17 (Workplace Incidents Consultative Committee).
383. Submission 12 (Law Institute of Victoria).
384. Submission 15 (Victorian Automotive Chamber of Commerce).
385. Submission 17 (Workplace Incidents Consultative Committee).

## Improving fine payment rates

4.14 As mentioned at [4.1] above, we found that a substantial number of fines for OHS offences are entirely unpaid, in large part due to offender companies no longer being in existence at the time of – or soon after – sentencing.

4.15 Numerous stakeholders wrote in their submissions about the importance of addressing this problem.[386] WorkSafe, for instance, wrote that 'potential phoenix activity as a way to avoid criminal liability needs to be addressed', [387] and also provided a pseudonymised case study of phoenixing (Case Study 5, page 147). Similarly, the Victorian Trades Hall Council wrote that non-payment of fines can undermine the efficacy of the regulatory system, whereas ensuring full payment has the potential to improve safety outcomes:

> Directors or officers of a deregistered company may go on to 'phoenix' their operations. The capacity for a company to avoid punishment for their crimes threatens the efficacy of the entire OHS system, and we need sentencing reform in this space to reduce the incidence of fine avoidance … All fines for companies should be attached directly to the individual directors until it is paid in full … Creating structural directorial liability will ensure a greater likelihood of full repayment and will reduce the appeal and ease of 'phoenix' companies. A further positive outcome of this step would be to enhance the personal involvement in OHS matters of company directors resulting in an increased focus on safety throughout companies.[388]

4.16 The Australian Centre for Justice Innovation also wrote that:

> [f]ines do not have much punitive effect if they are not, in fact, paid … Phoenixing is a wicked problem. It undermines both the functional and expressive purpose of the law. Wrongdoers are not punished; the deterrence effect of the system is undermined; and people are left frustrated at its injustice and impunity.[389]

386. Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 21 (WorkSafe Victoria).
387. Submission 21 (WorkSafe Victoria).
388. Submission 8 (Victorian Trades Hall Council), as endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union).
389. Submission 18 (Australian Centre for Justice Innovation, Monash University).

## Case Study 5: Phoenixing case study

On 3 March 2022, Fake Carpentry Pty Ltd (not a real entity) was charged with offences under the OHS Act.

On 18 March 2022, WorkSafe receive an ASIC alert regarding Fake Carpentry Pty Ltd indicating that external administrators had been appointed. The liquidator indicated to WorkSafe and the court that Fake Carpentry Pty Ltd did not have funds to take active part in the prosecution in order to defend the charges and would have accepted whatever decision the court would have ultimately taken.

On 8 December 2022, WorkSafe applied for the matter to proceed as an ex parte hearing. The court found all charges proven. Fake Carpentry Pty Ltd was convicted and sentenced to pay a total fine.

On 17 January 2023, WorkSafe become aware that the director of Fake Carpentry Pty Ltd is the sole director and shareholder of another company called Fake Woodwork Pty Ltd, carrying on the same business undertaking with the same employees (except the one that had been injured).

**Source: Submission 21 (WorkSafe Victoria)**

4.17 Two stakeholders advocated against the need for reform in this space. The Victorian Congress of Employer Associations wrote that it is 'not aware that there is a particular … problem with low collection rates [for OHS fines] compared to other fines against businesses' and therefore suggested that 'this would not seem to be a matter that warrants further consideration'.[390] Similarly, the Victorian Automotive Chamber of Commerce said that it does 'not believe that there is an evidenced need to improve fine payment rates for OHS offences' and argued that when insolvent companies receive fines 'there was never an intention for the offender to pay the fine'.[391]

390. Submission 11 (Victorian Congress of Employer Associations).
391. Submission 15 (Victorian Automotive Chamber of Commerce).

4.18 We do not agree that there should ever be an intent for fines for criminal offences to go unpaid.[392] We are instead more persuaded by the submission that unpaid fines have the potential to undermine the efficacy of the regulatory system. In addition, a discrete focus on the payment of fines for OHS offences is warranted, as they are the largest fines imposed for criminal offences in Victoria.[393] Moreover, given the greater rationality of corporate actors, maximising the deterrent value of criminal sanctions is of utmost importance.

4.19 In effect, we do not see 27% of fines for workplace health and safety offences going entirely unpaid, at almost $2.5 million a year, to be an acceptable state of affairs. If there are ways to better ensure accountability for OHS fines, and better achieve the purposes of sentencing in OHS cases (and therefore improve safety practices more broadly), they should be pursued. Indeed, as the Australian Centre for Justice Innovation said in its submission, multiple concurrent solutions may be required to address the complex problem of ensuring fine payment in cases involving deregistered companies.[394]

4.20 We raised a number of possible solutions for improving payment rates for OHS fines in our *Consultation Paper*. These included (1) making directors personally liable for fines imposed on companies in appropriate cases, (2) allowing courts to disqualify individuals from being directors of companies and (3) introducing successor liability for companies that are a 'mere continuation' of a deregistered entity.[395] We consider each of these options in detail, including stakeholder views, below.

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392. Indeed, it would be difficult to reconcile such an intent with the various purposes of sentencing in section 5(1) of the *Sentencing Act 1991* (Vic) if the sentence has no punitive effect, offers no rehabilitative potential, and plays no role in protecting the community from the offender. This leaves just the purposes of denunciation and deterrence, the latter of which also becomes questionable if other would-be offenders are aware that the fine is a mere fiction.
393. Unpublished court data. The largest non-aggregate fines imposed by Victorian courts to June 2021 were for offences against the *Occupational Health and Safety Act 2004* (Vic).
394. Submission 18 (Australian Centre for Justice Innovation, Monash University).
395. *Consultation Paper* 95–98. In our 2014 report on court fines, we also recommended that the relevant enforcement body (i.e. Fines Victoria) be empowered to seek a winding-up order against companies that do not pay their fines: Sentencing Advisory Council, *Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria* (2014) 156 (Recommendation 25). We do not, however, propose to reconsider this possibility here as the issue of non-payment of OHS fines appears to be much more significantly associated with already deregistered companies, not with companies that continue to exist but fail to pay their fines.

## Making company directors personally liable

4.21 There are two key circumstances in which a director of a company can be held personally liable for a fine imposed on the company:[396]

- **Directors liable for company fines at sentencing**: section 55 of the *Sentencing Act* allows the prosecution to apply for a court order that directors be made jointly and severally liable for a fine imposed on a body corporate if certain criteria are met. Those criteria include (1) that the body will not be able to pay an appropriate fine and (2) that immediately before the commission of the offence there were reasonable grounds to believe that the body would not be able to meet any liabilities that it incurred at that time. In other words, the company would effectively have had to be trading while insolvent at the time of the OHS offence, which is rarely the case. This requirement is likely why, as far as we can tell, this provision has never been used.
- **Directors liable for company fines *after* sentencing**: the second means of holding directors personally liable to pay a fine for an offence committed by a company is perhaps more promising. Provisions in the *Fines Reform Act 2014* (Vic) allow the Director of Fines Victoria to serve a person with a 'declared director notice' if satisfied that certain criteria are met. In particular, the person must have been a director of the relevant body corporate, and the body corporate was deregistered after the commission of the alleged offence, it does not have sufficient personal property to pay the fine imposed, or it is under administration.[397] Once a declared director notice has been served on a person, they become jointly and severally liable for the fine imposed on the body corporate. They can, however, apply to the Magistrates' Court, within 28 days of being served the notice, for an order that they are *not* a declared director.[398] The court can make such an order if the person was not involved in the management of the organisation, or they took all reasonable steps (or there were no reasonable steps they could have taken) to ensure that the fine was paid after the fine was registered with Fines Victoria.[399] If the person does not seek an order that they are not a declared

396. This is distinct from a director being personally charged and sentenced for an offence that is attributed to that director by virtue of section 144 of the *Occupational Health and Safety Act 2004* (Vic). Under that provision, directors may be sentenced as a co-offender with the company where the contravention of the company is attributable to the officer of the company failing to take reasonable care: see, for example, *DPP v AM Design and Construction Pty Ltd & Anor* [2018] VCC 373, [17], [42] (in which the company received a $380,000 fine and the director received a separate $100,000 fine).

397. *Fines Reform Act 2014* (Vic) ss 29(1)–(2).

398. *Fines Reform Act 2014* (Vic) ss 30(1)–(2).

399. *Fines Reform Act 2014* (Vic) ss 30(4)(a)–(b).

director, or if the Magistrates' Court refuses to make such an order, they will be personally liable to pay the fine imposed on the company.

4.22 It is beyond the scope of our sentencing enquiry to consider whether more directors should be *charged* as officers of body corporates, in order to enhance directors' personal accountability for OHS fines. That is a matter of prosecutorial discretion for WorkSafe Victoria and (in appropriate cases) the Director of Public Prosecutions.

4.23 It is, however, particularly given our terms of reference, within our purview to examine the extent to which fines, as sentencing orders, are complied with and enforced. In that context, it is fair to describe the director liability provisions as having been relatively underutilised since their introduction at the end of 2017. At the time of publication of our *Consultation Paper*, in February 2024, Fines Victoria had not issued any declared director notices. Fines Victoria has, though, issued four since then, all in OHS cases.[400]

4.24 While it is encouraging to see increased use of this enforcement tool, we believe Fines Victoria should undertake a comprehensive review of *all* unpaid OHS fines (which are the largest fines in Victoria by individual value) and consider whether to issue a declared director notice on any relevant persons in appropriate instances. Fines Victoria should also undertake a similar review on an annual basis. While few stakeholders expressed a specific view on the potential utility of declared director notices (in written submissions, it was only the Australian Centre for Justice Innovation[401] that supported increased use of these provisions) there was nevertheless broad support for enhancing directors' personal liability in appropriate cases.[402]

## Recommendation 11: Declared director provisions

Fines Victoria should, initially and then annually, review all unpaid court fines imposed on body corporates for offences contrary to the *Occupational Health and Safety Act 2004* (Vic), and consider whether to serve a declared director notice on any relevant persons.

400. Email from Fines Victoria (24 July 2024); *Fines Reform Act 2014* (Vic) s 29.
401. Submission 18 (Australian Centre for Justice Innovation, Monash University).
402. Submission 8 (Victorian Trades Hall Council), endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 19 (Australian Institute of Health and Safety).

## Introducing successor liability

4.25 In the United States, the concept known as 'successor liability' emerged in the context of corporations law, in particular, mergers and acquisitions. Typically when companies merge, they bring their past liabilities with them into the new larger entity. But when one company buys another (an 'asset sale' transaction) those past liabilities can fall away. Successor liability functions as an exception to that latter scenario, preserving liability.[403] The successor can be held liable for the liabilities of the predecessor if certain criteria are met: (1) it is a specific form of liability, (2) the successor had actual or constructive notice of the liability, (3) the successor's operations are 'a substantial continuation' of the predecessor's and (4) the predecessor cannot provide the relief sought.[404]

4.26 There is considerable flexibility in the applicable test of whether one entity is a 'continuation' of another. The test involves examining consistency in various factors (known as the '*MacMillan* factors') including:

- management personnel (e.g. directors and supervisors);[405]
- other personnel (e.g. staff);
- clientele;
- plant and equipment;
- work and work product;
- corporate identity; and/or
- geographical location of the workplace(s).[406]

4.27 The policy intent of successor liability is to ensure corporations '[cannot] avoid liability by simply changing their form or name'.[407] But currently, as the New South Wales Court of Appeal noted in 2010, 'the successor liability principle … does not apply to corporations in Australia'.[408] Nor does it apply in England and Wales:

403. George W. Kuney, 'A Taxonomy and Evaluation of Successor Liability (Revisited)' (2017) 18 *Transactions: The Tennessee Journal of Business Law* 741. See also Thomas J. Hall and Judith A. Archer, 'The Mere Continuation Approach to Successor Liability', *New York Law Journal* (16 April 2020).
404. *Equal Employment Opportunity Commission v G-K-G Inc*, 39 F 3d 740 (7th Cir, 1994).
405. For instance, in one case a court wrote that the successor had 'retained most of' the predecessor's 'personnel, including most of its management personnel', and '[i]f this is not a case of substantial continuity, we do not know what is': *Equal Employment Opportunity Commission v G-K-G Inc*, 39 F 3d 740, 748 (7th Cir, 1994).
406. Many of these are known as the '*MacMillan* factors' in successor liability cases in the United States: *Equal Employment Opportunity Commission v MacMillan Bloedel Containers Inc*, 503 F 2d 1086 (6th Cir, 1974). See also *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v Tasemkin Inc*, 59 F 3d 48 (7th Cir, 1995); *Equal Employment Opportunity Commission & Anor v Product Fabricators & Anor*, No 13-2103 (8th Cir, 2013); *Prince v Kids Ark Learning Centre LLC*, 622 F 3d 992 (8th Cir, 2010).
407. John H. Matheson, 'Successor Liability' (2011) 96 *Minnesota Law Review* 371, 391.
408. *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332 [529].

> There is no serious possibility that under English law the successor company could be made liable for the debts of its predecessor … [even if] "the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names".[409]

4.28 The concept of successor liability has, though, been applied widely in the United States, in thousands of cases.[410] Despite this, there is limited literature on the topic, particularly from non-United States countries. In 2015, one United States scholar described that there was 'negligible scholarly output' on the topic, and that successor liability 'has remained largely under-empiricized'.[411] This may partly explain why it has not become a prominent consideration for reform elsewhere, especially in the context of ensuring payment of fines that have been imposed on deregistered corporate entities in criminal proceedings.

4.29 In our *Consultation Paper*, we raised the possibility of introducing a form of successor liability in Victoria, allowing successor companies to be held liable for fines imposed on predecessor companies in criminal proceedings, as a potential means of improving fine payment rates in OHS cases.[412]

## Stakeholder views

4.30 A number of submissions we received raised concerns about some companies 'phoenixing', that is, continuing under a new name to avoid paying fines imposed for OHS offences.[413] WorkSafe, for instance, argued that phoenixing 'as a way to avoid criminal liability' is a problem that 'needs to be addressed'.[414] All three stakeholders who specifically addressed the potential utility of successor liability as a solution to phoenixing supported such a reform.

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409. Dan D. Prentice, 'Veil Piercing and Successor Liability in the United Kingdom' (1996) 10(3) *Florida Journal of International Law* 469, 480–481, citing Phillip I. Blumberg, 'The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law' (1996) 10(3) *Florida Journal of International Law* 371.
410. See, for example, Frank Fagan, 'From Policy Confusion to Doctrinal Clarity: Successor Liability from the Perspective of Big Data' (2015) 9(3) *Virginia Law & Business Review* 391 (which presented the results of 'an advanced computational linguistic analysis of slightly more than 2,100 successor liability decisions'): at 394.
411. Ibid 393.
412. *Consultation Paper* 98.
413. Submission 6 (Australian Manufacturing Workers' Union); Submission 8 (Victorian Trades Hall Council), as endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union); Submission 9 (Uniting Vic.Tas); Submission 12 (Law Institute of Victoria); Submission 18 (Australian Centre for Justice Innovation, Monash University); Submission 19 (Australian Institute of Health and Safety); Submission 21 (WorkSafe Victoria).
414. Submission 21 (WorkSafe Victoria).

4.31 The Victorian Trades Hall Council expressed support for successor liability as a possible reform alongside enhanced director liability for fines.[415]

4.32 The Law Institute of Victoria also wrote that:

> given the approximately $2.5 million in unpaid annual fines, an approach that targets fine evaders is necessary. Legislative amendments should target 'phoenix' companies by holding successor entities liable for fines imposed on their predecessors, thus closing the loophole that allows companies to evade financial penalties through dissolution and liquidation.[416]

4.33 Monash University's Australian Centre for Justice Innovation considered the options raised in the *Consultation Paper* and indicated that a variety of solutions, including the introduction of successor liability, are likely required to address the problems associated with phoenixing:

> Each of these options is worthy of further, more detailed investigation. Indeed, such is the wicked nature of phoenixing, that it may be that all three options are required to operate in combination to effectively address the problem.[417]

## The Council's view

4.34 The wicked problem created by phoenix companies is not new. What is believed to be the earliest report in Australia raising the issue[418] was published by the Victorian Parliament's Law Reform Committee in 1994, describing phoenixing as:

> [a] limited liability company fails, unable to pay its debts to creditors, employees and the State. At the same time, or soon afterwards, the same business arises from the ashes with the same directors, under the guise of a new limited liability company, but disclaiming any responsibility for the debts of the previous company.[419]

4.35 A journal article from 1998 provides the following example:

> [A] real estate company ceased trading on one day with substantial debts – the company being placed into liquidation. On the same day another company received a real estate licence – the second company having the same directors, the same address, the same staff and the same telephone number.[420]

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415. Submission 8 (Victorian Trades Hall Council), as endorsed by Submission 5 (Construction, Forestry and Maritime Employees Union) and Submission 10 (Community and Public Sector Union).
416. Submission 12 (Law Institute of Victoria).
417. Submission 18 (Australian Centre for Justice Innovation, Monash University).
418. Helen Anderson et al., 'Illegal Phoenix Activity: Is a "Phoenix Prohibition" the Solution?' (2017) 35(3) *Company and Securities Law Journal* 184, 187.
419. Parliament of Victoria, Law Reform Committee, *Curbing the Phoenix Company – First Report on the Law Relating to Directors and Managers of Insolvent Corporations*, Report 83 (1994) 1.
420. Lynden Griggs, 'A Note on the Application of Enterprise Theory to the Problem of Phoenix Companies' (1998) 2 *Macarthur Law Review* 53, 55, citing Parliament of Victoria, Law Reform Committee (1994), above n 419, xi.

4.36 There are estimated to be thousands of phoenix companies operating in Australia,[421] costing billions of dollars annually.[422]

4.37 The Law Reform Committee in 1994 made a number of recommendations to better improve the ability of creditors (including the state) to seek relief, despite deregistration of the liable entity. None of its recommendations, however, raised the possibility of successor liability; they focused instead on holding the former directors of the deregistered entity personally liable. The same is true of multiple other inquiries since,[423] which grappled with the issues created by phoenixing, but did not expressly consider the potential utility of introducing successor liability. These inquiries have instead focused on other solutions, such as director disqualification, sanctions for illegal phoenix activity, and limitations on successor companies using similar names as predecessors.[424]

4.38 We are of the view that a framework enabling court fines to follow successor companies would be a crucial component of ensuring enforcement of, and therefore accountability for, those fines. This would operate as a major disincentive to offenders engaging in illegitimate company phoenixing motivated purely by the desire to avoid paying court fines, and would also ensure a higher level of accountability in all cases.

4.39 In consultation, Fines Victoria's preliminary view was that it would be feasible for them to investigate and identify successor companies by reference to an appropriate threshold for similarity between successors and the entities they replaced.[425] We believe the criteria discussed above at [4.26] – a modified version of the *MacMillan* factors – could be used for this purpose.

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421. See Helen Anderson et al., 'Illegal Phoenix Activity: Quantifying Its Incidence and Cost' (2016) 24 *Insolvency Law Journal* 95, 97.

422. PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *2018 Taskforce Report—The Economic Impacts of Potential Illegal Phoenix Activity* (2018) 1.

423. See, for example, Commonwealth of Australia, Royal Commission into the Building and Construction Industry, *Final Report: Volume 8 Reform – National Issues Part 2* (2003) 164–166; Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake* (2004) 131–147; Australian Government, *Action Against Fraudulent Phoenix Activity: Proposals Paper* (2009) 12–21; PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *Phoenix Activity: Sizing the Problem and Matching Solutions* (2012) 37–53; Australian Law Reform Commission, *Corporate Criminal Responsibility, Final Report,* Report 136 (2020) 511–516.

424. As Professor Helen Anderson has observed, the 'limitations are clearly evident' in simply restricting the use of similar names, and even coupled with other recent measures, these efforts 'fall far short of what is required to significantly overcome the problem' created by phoenix companies: Helen Anderson, 'The Proposed Deterrence of Phoenix Activity: An Opportunity Lost?' (2012) 34 *Sydney Law Review* 411, 427, 435. See also Helen Anderson, 'Illegal Phoenix Activity: Practical Ways to Improve the Recovery of Tax' (2018) 40(2) *Sydney Law Review* 255. The one exception in the Australian literature where someone has advocated successor liability appears to have been a journal article in 1998: Griggs (1998), above n 420.

425. Email from Fines Victoria (24 July 2024).

4.40 We believe a mechanism for successor liability could operate in a similar way to that relating to declared director notices. That is, Fines Victoria would be given the power, after conducting necessary investigations, to declare a company a 'declared company', rendering it liable for the court fine imposed on the previous, now deregistered company. The declared company, upon being served with a notice, would then have the opportunity to apply to the Magistrates' Court for an order that the company is not a declared company and therefore not liable to pay the fine of the predecessor company.

4.41 We note that the introduction of successor liability raises a number of issues, the first of which is that it would have a very broad application. While the focus of this review is cases involving OHS offences, successor liability would, in theory, apply to all matters involving a sentenced corporate offender. There are also a number of potential challenges involved with the implementation of such a scheme, perhaps most significantly being the constitutional permissibility of a state-based scheme affecting corporations, which are governed by a federal regulatory regime. We believe a number of key questions would have to be answered, such as:

- What kinds of legal proceedings should the framework apply to?
- Where should the framework be located (i.e. in what legislation)?
- What resourcing would be required, and which agencies would be resourced, to give successor liability provisions operative effect?
- Would any specific provisions need to be put in place to ensure the constitutional validity of the framework?
- How should impugned entities be permitted to challenge and/or defend against successor liability declarations?
- What are the full consequences of being deemed liable under the successor liability provisions (e.g. do the provisions extend beyond criminal law)?
- Should there be a statute of limitations for successor liability, and if so, how long should that time period be?

4.42 While our preliminary view, echoed by stakeholders, is that there is great potential in the introduction of successor liability to hold companies accountable for criminal penalties (especially for OHS offences), these issues are beyond the scope of this review and our remit as a sentencing advisory body.

4.43 Instead, we believe the issue should be the subject of its own inquiry. For this, we believe the Victorian Law Reform Commission is best placed to investigate the potential for successor liability reforms in Victoria, and to address any issues arising from such a proposal, including those outlined above. Appropriately crafted terms of reference should allow adequate scope for a holistic consideration of the proposal and ensure any reforms do not yield unintended consequences, are workable, apply equitably, and properly interface with other relevant legal frameworks, including the *Corporations Act 2001* (Cth).

## Recommendation 12: Successor liability

The Victorian Government should provide the Victorian Law Reform Commission with terms of reference seeking its advice about whether to introduce a legislative framework for successor liability for corporations and other legal entities in Victoria, and if so, what the key features of that framework should be.

# 5. The recommendations we didn't make

5.1 As a matter of transparency, it's important to discuss some of the recommendations we considered but have not made. This not only provides insights into our rationales for making, or not making, recommendations but also acknowledges the contributions that numerous stakeholders made on the following topics:

- expanding the use of court-ordered diversion in OHS cases;
- using compensation orders in sentencing OHS cases; and
- expanding the types of sentencing orders that are available to courts sentencing OHS offences.

## Expanding the use of court-ordered diversion in OHS cases

5.2 Individuals and companies prosecuted for any offences, including OHS offences, may be able to avoid a formal finding of guilt if they participate in a diversion plan.[426] For a diversion plan to be made, the defendant must acknowledge responsibility for the offence, the prosecution must consent, and the court must consider diversion an appropriate outcome. A diversion plan involves the defendant complying with certain conditions for a period of up to 12 months. If the defendant complies with these conditions, the matter is dismissed without a finding of guilt being recorded.

5.3 In our *Statistical Report*, we found that in the 16 years to June 2021, 27 OHS offenders received a diversion plan (out of a total of 1,903 charges).[427] It is fair to describe diversion as an uncommon outcome of criminal proceedings involving OHS offences. This is no doubt primarily due to the WorkSafe Victoria ('WorkSafe') policy on diversion, which states that 'WorkSafe is of the view that the aims and benefits of the Diversion Program are not relevant to corporate accused … and WorkSafe will not consent to the Diversion Program in the case of corporate accused'.[428]

426. *Criminal Procedure Act 2009* (Vic) s 59.
427. *Statistical Report* 18.
428. WorkSafe Victoria (2016), above n 175.

5.4 In our *Consultation Paper*, we asked if there should be increased use of diversion in OHS cases (Question 10), which would likely only occur through a revision to WorkSafe's policy.

## Stakeholder views

5.5 A number of stakeholders supported an increased use of diversion, particularly if doing so would result in positive OHS-related outcomes. The Housing Industry Association, for example, said that 'well-designed OHS diversions could be much more beneficial and effective than imposing fines'.[429] Ai Group and the Australian Institute of Health and Safety concurred, saying that when compared to fines, OHS-specific conditions in diversion plans would provide more positive OHS outcomes for the defendant and their industry/community.[430] The Victorian Congress of Employer Associations also advocated for increased use of diversion, given that, in their view, it would result in 'less burden on the judicial system and, the potential to educate industry and rehabilitate the offending party at less cost'.[431]

5.6 The various employer associations did, however, caution that if diversion is used more often, the conditions of diversion plans should not be used as a means to impose harsher punishments than might have otherwise been imposed if the matter had proceeded to sentencing (in the form of a fine or a health and safety undertaking).[432]

5.7 The Australian Manufacturing Workers' Union was opposed to the increased use of diversion in OHS cases, saying that '[d]iversion is not appropriate to bring justice to victims or act as a deterrent to others'.[433] OHSIntros suggested that diversion may possibly be utilised more frequently, but 'not where there has been a serious offence where harm has been done'.[434] Similarly, the Workplace Incidents Consultative Committee said that diversion should only be considered 'in a case where there has been no death or serious injury as a result of the offence'.[435]

429. Submission 1 (Housing Industry Association).
430. Submission 4 (Australian Industry Group); Submission 19 (Australian Institute of Health and Safety).
431. Submission 11 (Victorian Congress of Employer Associations).
432. Submission 1 (Housing Industry Association); Submission 11 (Victorian Congress of Employer Associations); Submission 15 (Victorian Automotive Chamber of Commerce).
433. Submission 6 (Australian Manufacturing Workers' Union).
434. Submission 13 (OHSIntros).
435. Submission 17 (Workplace Incidents Consultative Committee).

5.8 The Victorian Trades Hall Council also acknowledged the utilitarian benefits of diversion, 'including the reduced cost burden on the courts and WorkSafe and the deterrent benefits of punishing first-time offenders who do not cause serious harm to their workers'. However, they considered that current sentencing practices meant that priorities for reform must lie elsewhere:

> [A] balance must be struck between diversion and appropriate consequences for OHS breaches, ensuring that victims feel that justice has been done. Fines are already so low that they fail to deter OHS breaches, [and] any attempts to introduce an increased spread of diversion tactics may worsen the problem by letting offenders off with a slap on the wrist. The seriousness of OHS offences cannot be understated, and offences with low risk and no outcome are rarely prosecuted anyway.
>
> **Submission 8 (Victorian Trades Hall Council)**

## The Council's view

5.9 One of the key drivers behind our initial enthusiasm for increased use of diversion was that we heard how inaccessible enforceable undertakings were for most companies accused of OHS offences. One legal professional told us that, anecdotally, the legal fees associated with negotiating an enforceable undertaking will usually be in the realm of $250,000. That is clearly unaffordable for the vast majority of businesses, meaning that only larger companies, with the financial means, can afford to negotiate an enforceable undertaking and avoid a finding of guilt. Enforceable undertakings are already effectively a form of diversion that occurs outside court processes. Our original thinking was that making diversion plans available via court processes might be a way of reducing the costs involved for defendants, enabling smaller entities to access the benefits of diversionary initiatives.

5.10 There are a number of benefits to diversionary initiatives in criminal matters. For one thing, as we found in a recent report, individuals receiving diversion are about half as likely to reoffend as people receiving other court outcomes.[436] Diversionary initiatives are also more cost-effective for the parties and reduce burdens on the justice system. In OHS cases, such initiatives typically include conditions that involve considerable investments in improvements to health and safety practices. In that context, there are clear benefits to diversionary options being utilised sooner rather than later, and outside court processes if possible.

436. Sentencing Advisory Council, *The Criminal Justice Diversion Program in Victoria: Second Statistical Profile* (2024) 31 (though these findings may not translate to corporate offenders).

5.11 In its submission, WorkSafe indicated that it is currently in the process of revising its approach to enforceable undertakings to ensure they 'are an accessible option for a range of offenders'.[437] We do not wish to make any recommendations regarding diversion that may interfere with WorkSafe's work to revise its enforceable undertakings policy[438] and associated processes to make undertakings more widely accessible for individuals or companies alleged to have contravened the *Occupational Health and Safety Act 2004* (Vic) ('the *OHS Act*') or regulations. We are of the view that, if that revisionary work is successful and produces meaningful outcomes for the accessibility of enforceable undertakings, reform of court-ordered diversion will not be necessary.

5.12 We also note that prosecutions make up a small proportion of WorkSafe's enforcement activity.[439] Where WorkSafe has decided to proceed with a prosecution, and therefore considers an enforceable undertaking is not appropriate, it may be more appropriate in those cases to seek a health and safety undertaking with behavioural conditions as a sentence upon a finding of guilt, rather than asking the court to approve a diversion plan.

## Use of compensation orders in sentencing

5.13 When sentencing offences, including OHS offences, courts can order an offender 'to pay compensation of such amount as the court thinks fit' to someone who has 'suffered an injury as a direct result of the offence'.[440] These compensation orders can include compensation for pain and suffering, medical expenses, counselling expenses, and any other expenses reasonably incurred as a result of the offending,[441] and can be made on the court's own motion, or by application by, or on behalf of, a person who has suffered an injury.[442]

5.14 In our *Consultation Paper*, we noted that compensation orders are seldom sought or imposed in OHS cases, especially because many people harmed by OHS

437. Submission 21 (WorkSafe Victoria).
438. WorkSafe Victoria (2018), above n 174.
439. For example, in 2023-24, WorkSafe conducted 50,177 workplace visits and issued 13,943 improvement notices, compared to 134 prosecutions commenced: WorkSafe Victoria, *WorkSafe Annual Report 2023–24* (2024) 8–9, 139.
440. *Sentencing Act 1991* (Vic) s 85B(1).
441. *Sentencing Act 1991* (Vic) s 85B(2).
442. *Sentencing Act 1991* (Vic) s 85C(b).

offences are ineligible for compensation orders under the *Sentencing Act 1991* (Vic) ('the *Sentencing Act*'). This ineligibility is because many people harmed by OHS offences are entitled to workers' compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic). Section 371 of that Act provides that courts must not make a compensation order in sentencing an offender if the compensation would be for a matter arising from an injury or death in respect of which it appears to the court that the person has an entitlement to any compensation under the Act, and arises from an event that constitutes an offence against the *Dangerous Goods Act 1985* (Vic), the *OHS Act* or the *Equipment (Public Safety Act) 1994* (Vic).[443]

5.15 This exclusionary provision is replicated in the *Accident Compensation Act 1985* (Vic)[444] and the *Transport Accident Act 1986* (Vic),[445] with the same purpose: to ensure that compensation for harm suffered in contexts covered by those two respective schemes is determined under the appropriate scheme.

5.16 As a result, in our *Consultation Paper* we indicated that, while there are a number of benefits to seeking compensation orders in criminal cases,[446] we would not be seeking any reforms in this space.[447]

## Stakeholder views

5.17 In their submission, however, Monash University's Australian Centre for Justice Innovation suggested that there may be cases in which someone is *not* otherwise entitled to compensation, and it may therefore be beneficial for WorkSafe to seek compensation orders on their behalf in sentencing proceedings.[448] This might include, for example, members of the public who are not employees of the duty-holder.

443. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 371.
444. *Accident Compensation Act 1985* (Vic) s 138B.
445. *Transport Accident Act 1986* (Vic) s 107A.
446. *Consultation Paper* 49; Sentencing Advisory Council, *Restitution and Compensation Orders: Report* (2018) 27. These advantages include, for example, allowing victims to obtain compensation without having to pay the legal costs associated with litigating the claim themselves, and the process would likely be more streamlined than bringing a separate claim for civil damages. See also, Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 1730 (Rob Hulls, Attorney-General, Minister for Industrial Relations and Minister for WorkCover).
447. *Consultation Paper* 49–50.
448. Submission 18 (Australian Centre for Justice Innovation, Monash University).

5.18 The Victorian Trades Hall Council was also of the view that compensation orders should be used more in OHS cases.[449]

## The Council's view

5.19 In consultation on the draft recommendations, WorkSafe advised that there is a great deal of complexity in understanding whether someone affected by OHS offending is entitled to compensation under various schemes, and their ineligibility for those forms of compensation is a necessary precondition to being able to seek a compensation order in sentencing proceedings. There are also practical issues in the perceived conflict of interest in WorkSafe being the same body making a decision about eligibility for workers compensation, while also potentially making a different decision (within a different unit of the organisation) about eligibility for an ancillary compensation order in sentencing. Even if WorkSafe does initially seek compensation orders, if there are objections by the defendant (as occurred in the first workplace manslaughter case[450]), people who may be entitled to compensation may need to seek their own legal representation.

5.20 Ultimately because of how our process and interactions with stakeholders unfolded during this review, we do not feel we have consulted widely enough to justify making a recommendation about changing WorkSafe's approach to compensation orders. It is also beyond our expertise and remit to examine and consider the extent to which various legislative instruments interact to render injured people eligible or ineligible for various compensation schemes. This would be a critical first step in understanding whether there is any merit in WorkSafe seeking compensation orders more frequently. As a result, we do not propose any reforms in this space. It may, however, be useful at some stage for WorkSafe to exhaustively review eligibility for compensation orders in OHS cases to inform future decisions.

449. Submission 8 (Victorian Trades Hall Council).

450. *R v LH Holding & Hanna* [2024] VSC 90.

## Additional types of sentencing orders

5.21 Several submissions and survey responses, as well as community consultation participants, raised the possibility of new sentencing orders that are currently *not* available under the *Sentencing Act* or *OHS Act*, namely dissolution orders and director disqualification orders. The Australian Centre for Justice Innovation included these in its suite of suggested reforms intended to deter phoenixing and improve fine payment rates.[451] Some online survey respondents considered that these kinds of orders (alongside the threat of imprisonment) provide 'stronger punitive options'[452] that should be available alongside fines and undertakings to deter and adequately punish persistent or recidivist offenders.

5.22 The introduction of new sentencing orders was not a focus of our *Consultation Paper*. We instead focused on the orders already available under the *OHS Act*, which appeared to be underutilised. We have, nevertheless, considered whether new and distinct forms of sentencing outcomes should be available in OHS cases, such as:

- **monetary benefit orders**, which require an offender to pay an amount corresponding to the amount of monetary benefit acquired as a result of the offence (for example, by not spending money on adequate safety measures);[453]
- **company dissolution orders**, known as the 'capital punishment' for corporate offenders, requiring that the entity be wound up and deregistered;[454] and
- **director disqualification orders**, which disqualify an individual found to have been connected with the management of an offending company from managing companies for a specified period of time.[455]

5.23 The Australian Law Reform Commission (ALRC) has previously recommended that the *Crimes Act 1914* (Cth) be amended to allow a court to make an order dissolving a corporation convicted, on indictment, of a Commonwealth offence.[456] Flowing from that kind of order, the ALRC also recommended that there should be a power to disqualify individuals from managing corporations, particularly to prevent phoenixing.[457]

451. Submission 18 (Australian Centre for Justice Innovation, Monash University).
452. Survey Participant (male, 65–74).
453. See, for example, *Environment Protection Act 2017* (Vic) s 329.
454. Australian Law Reform Commission, *Corporate Criminal Responsibility: Final Report,* Report 136 (2020) 359–360.
455. Australian Law Reform Commission, *Corporate Criminal Responsibility: Final Report*, Report 136 (2020) 361.
456. Australian Law Reform Commission, *Corporate Criminal Responsibility: Final Report*, Report 136 (2020) 347 (Recommendation 13).
457. Australian Law Reform Commission, *Corporate Criminal Responsibility: Final Report*, Report 136 (2020) 348, 360–361 (Recommendation 14).

5.24 There is clear merit in these sorts of sentencing orders being available in OHS cases. However, there is also merit in these sentencing orders being available more broadly in the sentencing of companies and those who manage them. There is nothing about such orders that would necessitate them being limited to cases involving OHS offences. As such, we consider it more appropriate for any consideration of new sentencing orders for companies and directors to occur in a project with that broader focus.

# Appendix 1: Consultation and submissions

## Preliminary consultation

| Date | Meeting |
|---|---|
| 7 March 2023 | WorkSafe Victoria |
| 18 April 2023 | WorkSafe Victoria |
| 9 May 2023 | Fines Victoria |
| 2 June 2023 | County Court of Victoria |
| 2 June 2023 | Rob O'Neill (Barrister) |
| 6 June 2023 | Workplace Incidents Consultative Committee |
| 7 June 2023 | Victorian Chamber of Commerce and Industry |
| 8 June 2023 | Herbert Smith Freehills |
| 8 June 2023 | Duncan Chisholm (Barrister) |
| 13 June 2023 | Tim Bourbon (Barrister) |
| 13 June 2023 | Seyfarth Shaw |
| 14 June 2023 | Australian Industry Group (Ai Group) |
| 15 June 2023 | Law Institute of Victoria (LIV) |
| 19 June 2023 | WorkSafe Victoria |
| 20 June 2023 | Magistrates' Court of Victoria |
| 20 June 2023 | Office of Public Prosecutions (OPP) |
| 28 June 2023 | Victorian Court of Appeal |
| 28 June 2023 | Sentencing Council for England and Wales |
| 4 July 2023 | Victorian Government Solicitor's Office |
| 5 July 2023 | Andrew Palmer KC (Barrister) |
| 6 July 2023 | Victorian Trades Hall Council (VTHC) |
| 11 July 2023 | Ariadne French (Barrister) |
| 11 July 2023 | Paul Holdenson KC (Barrister) |
| 25 July 2023 | Comcare |
| 25 July 2023 | Fines Victoria |
| 27 July 2023 | Environment Protection Authority Victoria (EPA) |
| 15 August 2023 | Victim Services, Support and Reform |
| 17 August 2023 | Office of the Commonwealth Director of Public Prosecutions |
| 1 September 2023 | National Heavy Vehicle Regulator (NHVR) |
| 13 November 2023 | Safe Work Australia |

## Written submissions

| Submission number | Organisation/individual |
|---|---|
| 1 | Housing Industry Association (HIA) |
| 2 | Australian Association for Restorative Justice (AARJ) |
| 3 | Office of Public Prosecutions (OPP) |
| 4 | Australian Industry Group (Ai Group) |
| 5 | Construction, Forestry and Maritime Employees Union (CFMEU) |
| 6 | Australian Manufacturing Workers' Union (AMWU) |
| 7 | Maurice Blackburn |
| 8 | Victorian Trades Hall Council (VTHC) |
| 9 | Uniting Vic.Tas |
| 10 | Community and Public Sector Union (CPSU) |
| 11 | Victorian Congress of Employer Associations (VCEA) |
| 12 | Law Institute of Victoria (LIV) |
| 13 | OHSIntros |
| 14 | Anonymous |
| 15 | Victorian Automotive Chamber of Commerce (VACC) |
| 16 | RMIT Centre for Innovative Justice |
| 17 | Workplace Incidents Consultative Committee (WICC) |
| 18 | Australian Centre for Justice Innovation, Monash University (ACJI) |
| 19 | Australian Institute of Health and Safety (AIHS) |
| 20 | County Court of Victoria |
| 21 | WorkSafe Victoria |

## Community consultation events

| Date | Location |
|---|---|
| 19 February 2024 | Ballarat |
| 21 February 2024 | Morwell |
| 23 February 2024 | Shepparton |
| 26 February 2024 | Bendigo |
| 28 February 2024 | Geelong |
| 18 March 2024 | Lilydale |
| 20 March 2024 | Dandenong |
| 22 March 2024 | Melbourne |

## Consultation on draft recommendations

| Date | Organisation/individual |
|---|---|
| 24 May 2024 | Professor Richard Johnstone |
| 6 August 2024 | County Court of Victoria |
| 6 August 2024 | Australian Association for Restorative Justice (AARJ) |
| 8 August 2024 | RMIT Centre for Innovative Justice |
| 9 August 2024 | Magistrates' Court of Victoria |
| 12 August 2024 | Stakeholder Roundtable:<br>• Office of Public Prosecutions (OPP)<br>• Construction, Forestry and Maritime Employees Union (CFMEU)<br>• Victorian Trades Hall Council (VTHC)<br>• Uniting Vic.Tas<br>• Workplace Incidents Consultative Committee (WICC)<br>• Community and Public Sector Union (CPSU)<br>• Victorian Automotive Chamber of Commerce (VACC)<br>• Australian Centre for Justice Innovation, Monash University (ACJI)<br>• Australian Institute of Health and Safety (AIHS)<br>• WorkSafe Victoria (WorkSafe) |
| 15 August 2024 | Australian Centre for Justice Innovation, Monash University (ACJI) |
| 16 August 2024 | OHS Barrister Roundtable:<br>• Karen Argiropolous SC<br>• Ariadne French<br>• Leigh Crosbie<br>• Tim Bourbon |
| 19 August 2024 | Australian Industry Group (Ai Group) |
| 21 August 2024 | Workplace Incidents Consultative Committee (WICC) |
| 27 August 2024 | Herbert Smith Freehills |
| 29 August 2024 | Environment Protection Authority (EPA) |
| 19 September 2024 | Emeritus Professor Arie Freiberg AM |

# Appendix 2: Our approach to community consultation

The Sentencing Advisory Council's functions are provided under section 108C of the *Sentencing Act 1991* (Vic). Several of our functions relate to providing information to, and seeking input from, the community on sentencing matters. The community was especially important in the context of this project, as the terms of reference we received from the Victorian Government specifically asked us to 'consider whether current sentencing practices align with community expectations'.

There are a number of reasons it is important to understand community expectations when recommending reforms to sentencing practices. First, it better ensures trust and confidence in the justice system when sentencing practices align with community expectations. Second, an awareness of community expectations can help the courts to achieve the various purposes of sentencing, including denunciation of the offending behaviour (expressing society's condemnation of it) and ensuring the punishment is appropriate in light of contemporary norms.

In order to understand community expectations about the sentencing of occupational health and safety (OHS) offences, we organised, promoted and facilitated eight community consultation events around Victoria. We also hosted a survey via Engage Victoria and made a public call for written submissions, but this appendix focuses exclusively on the community consultation sessions we organised.

## The consultation framework we used

The Department of Justice and Community Safety utilises the community engagement framework established by the International Association of Public Participation (IAP2). We also adopt that framework in our approach to community consultation. That framework sets out five levels of engagement with the community, ranging from the least amount of influence that the public has on decision-making, to the most. They include informing, consulting, involving, collaborating and empowering.

Our consultation process was one of involving the community and was in the middle of the IAP2 spectrum of community consultation. This involves working 'directly with the public throughout the process to ensure that public concerns are consistently understood

and considered'.[458] Our commitment was to ensure the community's concerns and views would be directly reflected in the recommendations we developed, and that we would provide a summary of their views in this report.

## Promoting the events

In February 2024, when we published our *Consultation Paper* and our *Statistical Report*, we also announced all eight of the community consultation sessions that we planned to host. This included five sessions in regional Victoria (Ballarat, Bendigo, Geelong, Morwell and Shepparton) and three sessions in metropolitan Melbourne (Dandenong, Melbourne CBD and Werribee). The events were open to the general public.

In order to promote the events, we asked key stakeholders in this space – such as the various employer associations and unions we consulted – to share the details of the events with their members and to encourage attendance. For example, the Victorian Trades Hall Council emailed all 90,000 or so health and safety representatives on their mailing list, and a number of attendees said they attended because they received that email. We posted in various community pages on Facebook in the various regional areas. We posted via all other Council social media profiles, including X (Twitter) and LinkedIn. We sent targeted emails to journalists in each region, including local radio, ABC journalists, and the crime and courts reporters of the major newspapers. Each of those emails included not only the key findings of the review and the key questions for consultation, but also some recent OHS cases sentenced in the area. This led, for example, to a promotional article about the consultation process in the *Lilydale Star Mail*. We sent targeted emails to local unions and employer associations in all of the regional areas. There are a number of work health and safety blogs in Victoria (e.g. *OHSIntros*, which also made a written submission), and most of those blogs published a dedicated post about the consultation events, encouraging attendance. We contacted local community centres, councils and libraries in each region to promote the event. We also used a promotional flyer briefly explaining the review, the locations of the consultation sessions, what the sessions would involve and that food would be provided, and the flyer used a QR code to allow potential attendees to register their attendance. We attached a copy of that flyer to all of the targeted and promotional correspondence (see Figure A1, page 170).

Our promotional activities resulted in 50 participants attending the eight sessions. Some sessions were better attended than others, with the highest turnout in regional Victoria.

458. International Association for Public Participation Australasia, 'IAP2 Public Participation Spectrum' (iap2.org.au, 2024).

**Figure A1:** Promotional flyer for community consultation events


## Selection of case studies

Our aim was to alternate between two case studies during the community consultation events, to allow a comparison between the two. One case involved a very large company (with an annual turnover of more than $1 billion) and a fatality. The other case involved a very small company (with just four staff) and no-one being injured. Both cases were based on real-life OHS cases sentenced in Victoria (but anonymised through minor changes in details), and both were representative of OHS cases. For instance, most OHS cases (83%) involve companies rather than individuals, most OHS offences (66%) are breaches of duties by employers, one of the most common risks is falls from height (14%), and the most common industry involved in OHS cases is the construction industry (35%). Both cases involved a risk of fall from height in the construction industry, resulting in a breach of duty by a company as an employer.

The first case study (which we renamed 'Daylight Solar Pty Ltd') involved workers installing solar panels on the roof of a residential building. The second case study (which we renamed 'Brick & Mortar Pty Ltd') involved the installation of glass panels at a warehouse. Table A1 (page 171) summarises the consistent and contrasting factors between the two case studies.

**Table A1:** Factors present in each case study

| Factor | Daylight Solar Pty Ltd | Brick & Mortar Pty Ltd |
|---|---|---|
| **What was the risk?** | Working at height with inadequate safety measures in place | |
| **Guilty plea?** | Yes (early stage) | |
| **Criminal history?** | 1 previous conviction (involving a fall-from-height risk) | |
| **Extent of harm resulting from breach** | No injury (risk only) | Fatality |
| **Size of company** | Very small (<10 employees) | Very large (500+ employees) |
| **Jurisdiction (and maximum penalty)** | Magistrates' Court (approx. $450,000) | County Court ($3.5 million across 2 charges) |
| **Actual sentence imposed in case** | $35,000 with conviction | $475,000 with conviction |

## Delivery of sessions

Each consultation session featured two parts. Part 1 was an informative presentation on sentencing law generally, including the legislated purposes of sentencing, and matters generally to be taken into account in sentencing OHS offences. This provided participants with sufficient context to meaningfully interrogate the case study and express their views. Part 2 was an interactive presentation of the case study. At the end of the presentation, participants were asked to apply what they had learned about sentencing law and the details of the case study to decide what sentence they would impose on the offender. Participants were asked nine written questions – using a form distributed at the session – about their decision-making process and expectations around sentencing of the offence. After each question, participants were verbally asked follow-up questions which allowed them to elaborate on their choices. A copy of one of the consultation forms is reproduced in Appendix 3.

### The questions in the consultation form

The questions in the form distributed to participants were almost identical between the two case studies, with some slight variations to account for differences (e.g. how relevant participants considered the fact that someone was killed or that no-one was injured).

#### Question 1: What sentence type would you impose on the company?

After being told about the sentencing options available to be imposed on a company for an offence under section 21 of the *Occupational Health and Safety Act 2004* (Vic) ('the *OHS Act*'), the first question asked of participants was what sentence type they would impose

on the company. Participants were given the option of a fine, an undertaking, diversion or finding the charge(s) proven and dismissed. An 'undertaking' was explained as being a health and safety undertaking under the *OHS Act*, which enables courts to impose a range of behavioural conditions to be fulfilled over a defined period of time. While participants were not expressly given the option of imposing a combination sentence (for example, a fine and an undertaking), many participants either asked if this was an available option or selected both of their own volition. For participants who chose to impose an undertaking, they were verbally asked to describe what types of conditions they would consider.

### Question 2: If you chose to fine the company, or to make them pay a charitable donation, what value of fine/donation would you impose?

Participants were then asked to specify the amount of fine (or donation) they would impose on the company. Many participants also regularly commented on the value of the conditions they would have imposed as part of a health and safety undertaking.

### Question 3: In deciding what type of sentence to impose, which sentencing purpose was most important for you (please select one)?

Participants were then asked to specify which of the legislated purposes of sentencing they considered *most important* in deciding what type of sentence to impose (general deterrence, specific deterrence, rehabilitation, just punishment, denunciation or community protection). Participants were advised that courts are not required to isolate a single purpose, and that many of the purposes are either complementary or at odds with one another; however, the question intentionally aimed to discern which sentencing purpose participants considered most important.

### Question 4: In deciding what sentence to impose, how relevant were each of the following considerations for you?

In question 4, participants were asked to consider, on a sliding scale, how relevant six factors specific to the case were to them in deciding what sentence to impose on the company (factor 2 was worded differently depending on the case study):

1. The risk of someone being hurt
2. The fact that no-one was hurt/the fact that someone was killed
3. The company's prior conviction
4. The size of the company
5. The company's response to the incident
6. The company having pleaded guilty

This question was constructed to directly highlight the key contrasting features of the two case studies: the harm resulting from the breach of duty (factor 2) and the size/financial

circumstances of the offender (factor 4). The scale ranged from 1 to 4, with 1 being 'not very relevant' and 4 being 'very relevant'. We intentionally did not offer a neutral option on a scale of 1 to 5 to best gauge the relevance of each factor.

### Question 5: Would you record a conviction?

Participants were then asked whether they would record a conviction for the offence(s) sentenced. Participants were advised that the recording of a conviction is a separate order to a finding of guilt, and it carries limited but distinct consequences for corporate offenders – for example, damage to reputation, increased insurance premiums, and having to disclose the conviction if tendering for certain government contracts.

### Question 6: Would you impose an adverse publicity order?

Participants were then asked whether they would impose an adverse publicity order. Participants were also verbally asked what information would be disseminated under such an order, and in what form/medium the information would be published.

### Question 7: Now that you've heard what sentence was imposed in the case, how appropriate do you think that sentence was?

After participants shared what sentence they would impose and why, they were told what the court in their relevant case actually imposed. Participants were asked whether they thought the actual sentence imposed was (a) much too low, (b) a little too low, (c) about right, (d) a little too high or (e) much too high.

### Question 8: Is the maximum penalty for companies set at the right level?

Participants were then asked to reflect on the effect that the application of the maximum penalty for the offence had on their decision-making, and whether they thought it was set at an appropriate level. A maximum penalty of $1.73 million per charge was stated to apply at the time of the offence in both cases. Participants were asked whether they thought (a) it should be lower, (b) it's about right, (c) it should be closer to $10 million, (d) it should be closer to $100 million or (e) it should be unlimited.

### Question 9: If someone is seriously injured or killed in a workplace incident, how should this affect the sentence imposed?

Finally, participants reconsidered the issue of harm resulting from an OHS offence, and whether that factor should result in a more severe sentence, that is, rather than applying this consideration to the case at hand, whether in the abstract they believe that sentencing outcomes should be more severe if someone has been hurt.

## Demographics of participants

Participants were asked to fill in basic demographic details to enable us to assess the representativeness of participation, namely age, gender and primary occupation. There were no identifying details requested. Of the 50 participants:

- **Gender**: 18 participants were female, including six in the Daylight Solar Pty Ltd case study and 12 in the Brick & Mortar Pty Ltd case study. The other 32 participants were male, including eight in the Daylight Solar case study and 24 in the Brick & Mortar Pty Ltd case study.
- **Age**: The median age for participants was 45–54. This included three participants aged 18–24, five participants aged 25–34, 12 participants aged 35–44, 11 participants aged 45–54, and 18 participants aged 55 and over. One participant preferred not to specify their age.
- **Occupation**: Participants were from a wide range of occupations, from IT account manager or factory worker to a forensic alcohol and drug assessor. The two most common types of occupation were working as a union official (10 participants) and working as an OHS adviser (7 participants). It would be expected that community members with an especial interest in work health and safety (such as union officials and OHS advisers) would be over-represented.

## Analysis of responses

Questionnaire responses to each question were compiled via Microsoft Excel to determine trends. In addition, each session was recorded and transcribed (using transcription software 'Otter', the product of which was quality-checked by a staff member), and various quotes from participants can be found cited throughout the report to elucidate the results of the quantitative information from the forms. For example, in addition to knowing whether participants chose to impose an adverse publicity order, it was important to understand the purpose for which the order was imposed.

# Appendix 3: Community consultation form

## Sentencing Occupational Health and Safety Offences

### Community Consultation Form

#### About you

Your responses will help us understand the representativeness of survey respondents.

Age: ☐ 18–24 ☐ 25–34 ☐ 35–44 ☐ 45–54 ☐ 55+

Gender: ☐ Male ☐ Female ☐ Other ☐ Prefer not to say

Occupation: _____

#### Question 1: Sentence type

What sentence type would you impose on Daylight Solar Pty Ltd:

☐ Fine ☐ Undertaking ☐ Diversion ☐ Proven and dismissed

#### Question 2: Fine amount

If you chose to fine Daylight Solar Pty Ltd, or to make them pay a charitable donation, what value of fine/donation would you impose?

$ _____

#### Question 3: Sentencing purposes

In deciding what type of sentence to impose, which sentencing purpose was most important for you (please select one)?

☐ General deterrence ☐ Rehabilitation ☐ Just punishment

☐ Specific deterrence ☐ Denunciation ☐ Community protection

## Question 4: Sentencing considerations

In deciding what sentence to impose, how relevant were each of the following considerations for you?

| | Not relevant | | | Very relevant |
|---|---|---|---|---|
| a. the risk of someone being hurt | 1 | 2 | 3 | 4 |
| b. the fact that no one was hurt | 1 | 2 | 3 | 4 |
| c. the company's prior conviction | 1 | 2 | 3 | 4 |
| d. the size of the company | 1 | 2 | 3 | 4 |
| e. their response to the incident | 1 | 2 | 3 | 4 |
| f. the offender pleaded guilty | 1 | 2 | 3 | 4 |

## Questions 5 and 6: Additional sentencing orders

Would you record a conviction?

☐ Yes ☐ No

Would you impose an adverse publicity order?

☐ Yes ☐ No

## Question 7: The sentence imposed

Now that you've heard what sentence was imposed in the case, how appropriate do you think that sentence was?

☐ Much too low
☐ A little too low
☐ About right
☐ A little too high
☐ Much too high

## Question 8: The maximum penalty

Is the maximum penalty for companies ($1.7m) set at the right level?

☐ It should be lower
☐ It's about right
☐ It should be closer to $10m
☐ It should be closer to $100m
☐ It should be unlimited

## Question 9: The relevance of injury/death

If someone is seriously injured or killed in a workplace incident, how should this affect the sentence imposed? Should it be:

☐ About the same ☐ A bit more severe ☐ Much more severe

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*Crimes Act 1958* (Vic)
*Crimes Amendment (Bullying) Act 2011* (Vic)
*Criminal Procedure Act 2009* (Vic)

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*Environment Protection Act 2017* (Vic)
*Equipment (Public Safety Act) 1994* (Vic)
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*Financial Management Act 1994* (Vic)
*Fines Reform Act 2014* (Vic)
*Occupational Health and Safety Act 1985* (Vic)
*Occupational Health and Safety Act 2004* (Vic)
*Occupational Health and Safety (Miscellaneous Amendment) Act 1990* (Vic)
*Sentencing Act 1991* (Vic)
*Sentencing Amendment (Community Correction Reform) Act 2011* (Vic)
*Sentencing (Further Amendment) Act 2005* (Vic)
*Sentencing (Victim Impact Statement) Act 1994* (Vic)
*Social Services Regulation Act 2021* (Vic)
*Transport Accident Act 1986* (Vic)
*Victims and Other Legislation Amendment Act 2018* (Vic)
*Victims' Charter Act 2006* (Vic)
*Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)
*Youth Justice Act 2024* (Vic)

## Interstate

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*Corporations Act 2001* (Cth)
*Crimes Act 1914* (Cth)
*Crimes (Restorative Justice) Act 2004* (ACT)
*Crimes (Sentencing Procedure) Act 1999* (NSW)
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*Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth)
*Heavy Vehicle National Law 2012* (Qld)
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*National Parks and Wildlife Act 1974* (NSW)
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