

Date: 9 October 2013  
Our Ref: WC02066/13

Mr Paul McKnight  
Executive Director  
Law Reform Commission  
Attorney General and Justice  
GPO Box 5199  
SYDNEY NSW 2001

Dear Mr McKnight

Thank you for your letter of 30 August 2013 inviting submissions on the issues raised in the Question Paper "*Criminal Appeals: Preliminary issues*".

There are a number of aspects of criminal appeal procedures which, although not specifically referred to in the Question Paper, are relevant to WorkCover. These are described below.

WorkCover investigates and prosecutes alleged breaches of the *Work Health and Safety Act 2011* and alleged workers compensation fraud. Each year WorkCover considers about 100 matters for possible prosecution. At any time, there are approximately 100 work health and safety prosecutions and a small number of prosecutions for workers compensation fraud underway.

#### **Section 5C *Criminal Appeal Act 1912***

The majority of WorkCover work health and safety prosecutions are for matters where there has been a serious injury or death. As a matter of policy, WorkCover commences those prosecutions in the District Court.

The most serious offences under the *Work Health and Safety Act 2011* are category 1 offences, referred to in section 31, which relate to reckless conduct exposing individuals to risk of death, serious injury or illness. Those offences are imprisonable and are tried on indictment in the District Court. No proceedings have yet been commenced for any category 1 offences.

Other work health and safety prosecutions in the District Court are for offences punishable by fine. They are dealt with summarily under Part 5 of Chapter 4 of the *Criminal Procedure Act 1986*, and under section 246(1) of that Act.

If the District Court quashes a charge pursuant to section 246(1), an appeal lies to the Court of Criminal Appeal under section 5C of the *Criminal Appeal Act 1912*.

However, an appeal can only be instituted by the Attorney General or the Director of Public Prosecutions. In *Attorney General v Built NSW Pty Ltd and Air Conditioning Engineering Services Pty Ltd*, an appeal under section 5C was instituted by the Attorney General following representations by WorkCover. The appeal was conducted by WorkCover on behalf of the Attorney General and on 21 June 2013 judgment was reserved.

In view of WorkCover's role as an independent prosecutor, it would be preferable if section 5C of the *Criminal Appeal Act 1912* was amended to enable WorkCover to initiate appeals under the section.

### **Section 23 *Crimes (Appeal and Review) Act 2001***

All WorkCover prosecutions for workers compensation fraud are commenced in the Local Court. WorkCover also conducts some work health and safety prosecutions in the Local Court. They are typically for matters where the breaches were relatively minor and no one was injured or killed.

WorkCover has no right of appeal to the District Court in cases where it considers the penalty imposed in the Local Court was manifestly inadequate. Pursuant to section 23 of the *Crimes (Appeal and Review) Act 2001* and clause 4 of the *Director of Public Prosecutions Regulation 2010*, the Director of Public Prosecutions does have the right of appeal in such matters.

In the matter of *Director of Public Prosecutions v Carlos Camacho*, an appeal under section 23 was instituted by the Director of Public Prosecutions following representations by WorkCover. The appeal was conducted by WorkCover on behalf of the Director of Public Prosecutions and on 2 November 2010 the appeal was dismissed.

In view of WorkCover's role as an independent prosecutor, it would be preferable if section 23 of the *Crimes (Appeal and Review) Act 2001* was amended to enable WorkCover to initiate appeals under the section.

### **Section 245 *Workplace Injury Management and Workers Compensation Act 1998***

Section 245 of the *Workplace Injury Management and Workers Compensation Act 1998* (WIM Act) allows WorkCover to commence proceedings for offences against that Act or the *Workers Compensation Act 1987* in the Industrial Court or in the Local Court. Under section 245(4), the avenue of appeal for defendants prosecuted in the Local Court is to the Industrial Court. It would be preferable if the avenue of appeal was to the District Court, consistent with most other criminal matters conducted in the Local Court.

WorkCover prosecutions for workers compensation fraud can be under the *Crimes Act 1900*, the WIM Act or the *Workers Compensation Act 1987*, and it is possible for charges under all of those Acts to be laid against the same defendant and conducted as one set of proceedings. In such cases, an appeal would lie to the District Court in relation to the Crimes Act charges, but to the Industrial Court in relation to the other charges.

I note that you are developing proposals for reform which you expect to release to stakeholders for consultation later this year. I would be grateful if you would keep me informed.

The contact officer for this matter is Wendy McMichael, Manager, Litigation, of Safety, Return to Work and Support Division's Legal Services. Ms McMichael can be contacted on 8258 7124 or [wendy.mcmichael@srwsd.nsw.gov.au](mailto:wendy.mcmichael@srwsd.nsw.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Julie Newman', with a large loop at the end of the name.

*Julie Newman PSM*  
Chief Executive Officer  
**Safety, Return to Work and Support Division**