

# INVESTIGATOR INVESTIGATED

In June, RNZ obtained a report by former police assistant commissioner Gavin Jones. Written almost a year earlier at the request of WorkSafe NZ, his brief was to review the regulator's investigation process and suggest improvements.

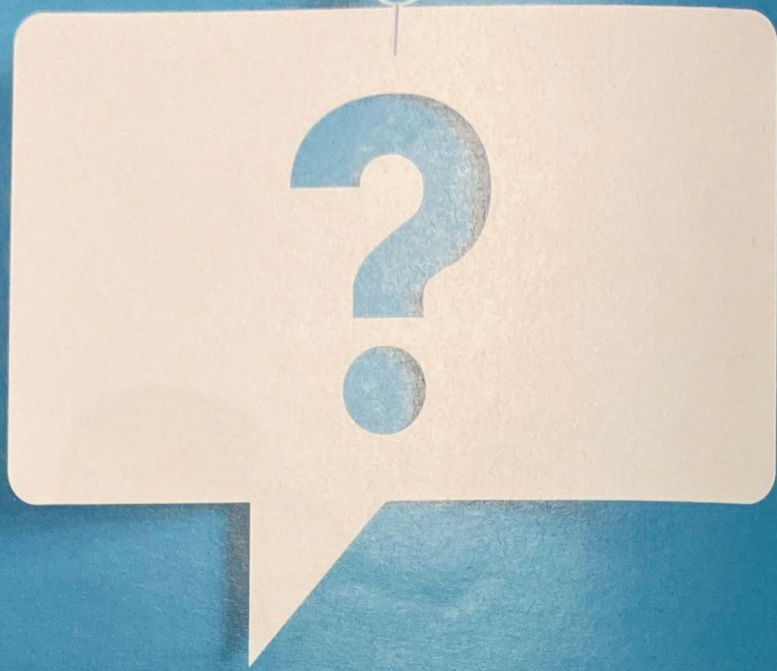
He found that investigators, on the whole, produce good quality cases consistent with best practice investigative standards.

However, he found a number of factors needed to be addressed, including:

- Unsustainable workloads for investigators and legal team;
- Lack of an end-to-end case management system;
- Outdated systems for gathering evidence;
- Poor supervision/oversight of cases as they unfold;
- Difficulty in laying charges within the required 12 months;
- Poor ability to share information between investigators;
- Investigators also required to deal with victims without appropriate training.

We invited four people to give their own take on the Jones review and how WorkSafe should respond, and naturally we gave the regulator a right of reply.





# TRIUMPH OR TRAGEDY?

**GARTH GALLAWAY** says WorkSafe should be commended for commissioning the Jones report but needs to draw the right lessons from it.

One of the ironies of the Jones report is that it highlights significant issues within the inspectorate. To an objective reader with an eye to the future the problems are palpable;

- There are not enough inspectors;
- The cases are complex;
- There is inadequate training;
- There is little or no supervision;
- Case complexity is not matched with investigator capability; and
- Some inspectors are close to burnout.

Rather than express concerns about the report, it seems from the public comments made by the organisation that it regards the report as a triumph, a catalyst for taking the organisation from 'good to great'. I suggest if a WorkSafe investigation uncovered the issues above when investigating one of my clients, then the book would be thrown at it.

WorkSafe should be commended for commissioning the report and condemned for trying to cover it up.

## DECLINE IN INVESTIGATIONS

In February I was interviewed on RNZ. I raised the issue that the number of investigations being undertaken by WorkSafe had significantly declined. In April 2016 WorkSafe opened 62 investigation files, and a further 65 the following month. Three years later, in June 2019, only seven files were opened for investigation. (While the number of prosecutions/

convictions remains broadly unchanged.)

In offering an explanation (as to why no investigation took place) to the family of a 15-year-old boy who lost his left eye when a slingshot snapped at a team building day organised by a PCBU, WorkSafe wrote: 'In order to commence an investigation WorkSafe needs to be fairly sure that there is evidential sufficiency for any resulting prosecution'.

The approach was reiterated when WorkSafe's chief executive, Phil Parkes, told RNZ that WorkSafe is actively targeting cases to investigate where there is a 'significant' prospect of charges being laid.

## RISK OF PRE-DETERMINATION

The problem is this: how can WorkSafe determine that there is a 'significant' prospect of prosecution prior to commencing an investigation? I would have thought that the investigation should establish whether there is an evidential foundation; that's the point. Such an approach smacks of pre-determination.

The reduction in investigations represents an abject failure by WorkSafe. The investigation tool is a vital part of a healthy and functional system. Just because a duty-holder is being investigated, it should not follow that a prosecution will ensue. The Solicitors Guidelines should operate to ensure that a balanced approach is taken.

But the real value in investigation is that the regulator learns what has occurred and is able to educate the public to



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ensure that a similar incident does not occur. Recently, a client of mine reported an incident to WorkSafe which could have resulted in multiple fatalities – luckily, no one was harmed. They were astounded to be told that same day that no investigation would take place.

Mr Parkes' most recent comment, following the release of the Jones report, is that WorkSafe have done 'less [sic] investigations for the same amount of prosecutions. That's an efficiency drive'. I disagree. It is better described as a tragedy.

**WORKSAFE HAS LOST ITS WAY**

It seems clear that WorkSafe has lost its way and that the opportunity presented by the Pike River tragedy has been wasted. The Royal Commission was at pains to emphasise the importance of the regulator's role. Of particular relevance, it noted that there were too few mining inspectors and there was not enough training for them. They were unable to adequately do their job. There were only investigations and prosecutions in the event of serious harm accidents.

Looking to the future, the Royal Commission said that the regulator should promote excellence in management, including systematic management of health and safety. As part of this the regulator 'needs to ensure that inspectors carry out their functions properly'. To credibly perform its functions the regulator should have 'well-qualified and trained inspectors'.

The Royal Commission went on to say that inspectors need clear guidance and training; that they should collaborate with their counterparts overseas to keep up with international best practice; and that their activities should be reviewed regularly by their manager (who needs relevant expertise).

**DON'T SHOOT THE MESSENGER**

The people I feel for are those at the front line: the inspectors. The current focus on WorkSafe's inadequacies may cause people to lose confidence in them, but that would be akin to shooting the messenger. In my experience, inspectors are predominantly hard-working, decent people who do their best in a system which offers them little in terms of reward, training, supervision, enhancement and thanks.

It's little wonder that after my comments on National Radio, a number of inspectors contacted me to thank me for raising the issue.

Don't be fooled by WorkSafe's suggestion that the number of successful prosecutions means that all is well in the world. It is more a reflection on the fact that the charges are notoriously difficult to defend – and the mantra that they only investigate where there is a significant chance of prosecution.



Garth Galloway is a partner with Chapman Tripp.



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# PENDULUM SWINGS

**BRETT MURRAY** argues that WorkSafe was installed with the expectation to go easy on its enforcement role, and that it is time for the pendulum to swing the other way.

Comments made on RNZ critically comparing a WorkSafe investigation to a Police homicide investigation fail to recognise key differences. First, there is no statute of limitations on homicide investigations so there is little comparative time pressure on evidence gathering. Second, homicide investigations have little concern with causal analysis and culpability is a relatively simple determination. Third, they are also far better resourced and will often have more staff working a homicide than WorkSafe's total investigation team.

The Jones report found that "WorkSafe investigators produce cases of a good quality that on the whole meet best practice investigative standards." That statement is testament to the dedication of the staff, despite the lack of investment and strategic thinking that has been put into the area in recent years, particularly at board level.

## INVESTMENT DECISIONS

The level of investment into the investigative function has been a vexed issue since WorkSafe's creation in 2013. The increasing complexity of cases under the HSW Act has resulted in only the most serious incidents being referred for investigation. Investigations by their nature tend to end up in some form of enforcement outcome.

WorkSafe's initial establishment budget of around \$85m was 15% shy of the \$100m recommended by the Ministerial Taskforce. There was a strong push for the organisation to be intelligence-led and data-driven, to vastly improve its regulatory oversight of the high hazards sector, and to make significant improvements in its guidance and educational material. All worthy but costly to implement.

WorkSafe was created under a National government whose hand was forced by the Royal Commission into Pike River. The government had only recently set up MBIE as its business-facing ministry, with a focus on cutting red tape and reducing compliance costs. There was little appetite among senior ministers for the establishment of a stand-alone H&S regulator. The selection of the board reflected the prevailing political view of WorkSafe being a business-friendly regulator. Tight ties to MBIE as its monitoring agency, which controlled both budget and policy, influenced where money and investment was directed.

## FINDING THE BALANCE

There has been much discussion around regulatory effectiveness and the role that prosecutions play, largely from a deterrence perspective but also considering the need for public accountability. Getting the balance of interventions right is key. Effective regulation needs to be tailored to the industry or sector, considering risk, maturity and the willingness to comply of the particular regulated community.

Contrasting approaches have been taken in Australia over the past five years. Victoria has adopted a greater focus on enforcement, while NSW has moved to a softer regulatory approach more focused on education and engagement. This is reflected in their approach to prosecutions. In the 2019 calendar year, Victoria took 137 prosecutions while NSW only took 37. Overall effectiveness is up for debate, but since 2014 Victoria has had significantly fewer workplace fatalities than NSW.

## PUBLIC CONFIDENCE

What is not up for debate is need for the public to have confidence in the ability

of the regulator to conduct competent and thorough investigations into serious potential breaches of the legislation. To do that requires investment; it is fair to say that over the past several years that investment has not occurred.

Caseload is an area that needs particular consideration. It is linked tightly to WorkSafe's triaging model and it is difficult to get the balance right. While safety academics and business groups like to focus on the learning opportunities that result from serious incidents, victims and their families move quickly to wanting accountability and justice, which in most cases means prosecution. Alternative resolution processes such as enforceable undertakings do not reduce the caseload burden to a significant degree as the investigation and file preparation is well advanced by the time decisions are made. The 12-month statute of limitations also puts investigators and the legal team under huge pressure to complete investigations. Jurisdictions in comparable countries typically have a two-year time limit.

Recent increases in funding mean that WorkSafe is now well resourced to effectively deliver on its mandate. However the level of investment in the investigation function has not been at the level it needs to be, and that carries significant risk for WorkSafe as a regulator.



*Brett Murray is chief executive of Site Safe NZ. From 2012 to 2015 he was GM High Hazards and Specialist Services with WorkSafe NZ, and GM Operations from 2015 to 2017.*



# SEVEN OUT OF 44

WorkSafe's sweeping powers are meant to support public scrutiny of work fatalities, but **HAZEL ARMSTRONG** notes it has prosecuted in only seven out of 44 forestry-related deaths.

In 2016, Coroner Bain held inquest hearings into the causes and circumstances of the deaths of eight people who had died in forestry accidents between 6 March 2012 and 26 November 2013. He recommended strengthening enforcement. "WorkSafe NZ", he said, "has significantly increased its compliance and enforcement effort on forestry, however as the 2013 deaths show there needs to be constant vigilance in the sector."

Forestry and its supply chain has killed 44 workers between 2014 and 2020. This is a significant loss of life in one sector. Coroner Bain is right: there needs to be constant vigilance of safety in forestry.

Under the WorkSafe NZ Act 2013, WorkSafe has 16 functions, one of which is to: *monitor and enforce compliance with relevant health and safety legislation.*

While WorkSafe has the legal powers to bring prosecutions, what it may lack are the resources to use those powers, the skill to carry out an investigation that will bring home a successful prosecution, and the political will to wield their powers.

## FEW CHARGES LAID

Few charges have been laid by WorkSafe in forestry: since 2014, only seven out of 44 fatalities have resulted in a prosecution – about 16 percent of the total.

WorkSafe has powers of entry and inspection; it can require the production of information; it has the power to take objects and things; the ability to obtain a search warrant; require names

and addresses; and have duty holders provide reasonable assistance. If people do not assist the inspector they can be charged with an offence.

Part of the reason that we give WorkSafe such sweeping powers is to achieve public scrutiny of the companies where workers have been killed. Unless there is a coroner's inquiry or a WorkSafe prosecution the only public scrutiny is by the media, for there is no right to sue a negligent employer.

## LESSONS FROM A CASE

When there is a prosecution or a coroner's inquiry (and it's published), we learn a lot. Take for example the findings of Judge Cathcart in the case of **WorkSafe v James Thompson [2018] NZDC 3295**. The Court made it abundantly clear what it thought of this gentleman: had there not been a prosecution, there would have been no public accountability for his failures to keep **Dallas Hickey** safe at work. Judge Cathcart's description of Mr Thompson may caution workers, contractors and suppliers in the sector. A prosecution focuses the mind on who should have social licence to operate. Judge Cathcart told him he was an unfit candidate to remain in the industry.

On 13 February 2014, **Dallas Hickey** died at work. James Thompson was the duty holder prosecuted by WorkSafe. He was prosecuted for failing to ensure Dallas Hickey was inducted correctly. The vehicle that was being operated was also below the standard of safety required.

Judge Cathcart said: "Thompson was

aware of those processes but, motivated to earn money, chose to turn a blind eye and run a potentially fatal risk to Mr Hickey who, although an experienced truck driver, was unfamiliar with the vehicle, the skid site and terrain".

James Thompson pleaded guilty and was fined. We learnt that reparations of \$100,000 were ordered along with a fine of \$80,000.

## VIGILANCE REQUIRED

The Court was advised of Mr Thompson's assets in order to judge his ability to pay the reparations and the fine. Mr Thompson had livestock worth \$18,500, a custom cruiser worth \$15,000, a Harley Davidson valued at \$10,000, a boat worth \$5000, sundry farming plant worth \$15,000 and farming machinery worth \$10,500. We learnt that Mr Thompson had told the Court in 2016 that he intended winding up his company, and that he sought five years to pay reparations and fines in instalments. In 2018, however, the Court learnt he had retained assets and had not ceased trading. The Court made an order against him.

WorkSafe's prosecution is providing some justice for the Hickey family and public scrutiny of forestry operators. This is what vigilance looks like. ■



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# CRIME AND PUNISHMENT

Rather than jump to condemn the regulator, **MICHAEL COSMAN** calls instead for a wider debate about what enforcement should aim to achieve.

**T**here seems to be a blurring of the lines between the civil and legal functions of the Court in health and safety cases. The vast majority of those who suffer work-related injury cannot sue, receive no compensation for pain and suffering, and are limited to 80% of their allowable earnings if they cannot work.

However, once a criminal conviction occurs, under the Sentencing Act the Court has to make reparations to the victim its first obligation. Recent awards have been significant. In the Oceana Gold fatality the Court initially awarded reparations of \$350,000 on top of voluntary reparations already paid of \$660,000. On appeal the High Court set aside the reparation order but still felt that an amount of over \$200,000 was appropriate.

If reparations to victims are to form a significant part of the process then someone has to advocate for them – but should it be WorkSafe? This would put an undue obligation on the regulator to consider victims' needs, rather than objectively applying sound enforcement principles to the facts of the case. Is there a need for an independent victims' advocate?

Equally, as Jones notes, most investigators feel uncomfortable and ill-equipped to deal with victims and their whānau at the same time as undertaking a technical and procedural investigation. Should there be dedicated Family Liaison Officers and Victim Support either within or aligned to WorkSafe to perform this function?

A WorkSafe decision maker looking at a file where someone has been severely injured, and having to decide whether to launch a formal investigation that could lead to a prosecution, must inevitably be influenced by the knowledge that if you

decide not to, you are denying victims the possibility of significant reparations.

## FORENSICS AND WITNESSES

The Jones report also looked at WorkSafe's forensic and evidence gathering capability. The Police have specialists in this area, including scientists, photographers and exhibits officers. Is it not reasonable to expect that the expertise available for a fatal workplace accident should be the same as for a road crash?

Could not an agreement be reached where WorkSafe can call on forensic resources from Police and pay for it on a case by case basis, or have it built into their annual funding?

The HSW Act allows prosecutors to claim back investigation costs on conviction (these are covered by a PCBU's insurance.) However, WorkSafe typically never claims investigation costs, only generally asking for a contribution to legal costs.

Expert witnesses are another concern. In many cases an inspector acts as the expert witness to give an opinion on what was reasonably practicable. Yet few of them are objectively qualified to be considered an expert by the Court, because they are often not members of professional bodies and therefore not subject to continuous professional development (as evidenced for example by being on the HASANZ Register); or because they are giving evidence to support their employer and not the Court. I'd like to see a register of expert witnesses as exists in other countries and disciplines to ensure true independence.

## A WIDER CONTEXT

Finally, the report notes that some investigators do not understand the

link between their proposed action and WorkSafe's objectives of sustainable reductions in deaths, injuries and ill health. This transactional approach is a real impediment to progress.

Change occurs through building an understanding of the root causes and addressing them. Punishment is a simple financial transaction in most cases.

We should be asking investigators to take a much broader, strategic view of organisational performance and to see events in context. Using enforcement tools in combination should be much more common: prohibition notices to deal to the urgent and immediate, improvement notices for the system failings, and prosecution only where the circumstances are so egregious that punishment and deterrence is required.

Even then, enforceable undertakings, work project orders and the like hurt the company financially the same as a fine, but ensure investment is made in putting things right at an industry, sector or community level, rather than simply swelling Treasury funds (no, fines do not go to WorkSafe!).

Having been a regulator for 28 years, but also consulting with clients and acting as an expert (for prosecution and defence), I believe we will achieve a lot more if we have a widespread debate about what we want to achieve in this part of the criminal/social justice space.



*Mike Cosman is a partner in consultancy Cosman Parkes Ltd and is chair of NZISM.*



# THE REGULATOR RESPONDS

The report by Gavin Jones has generated considerable reaction, some of it published in this edition. WorkSafe's **PHIL PARKES** responds.

**D**o we think we are perfect? Definitely not. Should we always be striving to improve? Absolutely. That is why we proactively commissioned Mr Jones to put an expert eye over our investigations function. The report confirmed some issues we were already moving to address, and raised further suggestions for improvement – all of which we are implementing.

The narrative that has emerged on the Jones report and WorkSafe's performance requires some re-balancing. Mr Jones says in his report: '...WorkSafe investigators produce cases of a good quality that on the whole meet best practice investigative standards ...'.

I certainly don't claim this as a triumph, but nor do I see it as the serious failure that some have asserted.

What we've done with Mr Jones' findings has also been lost in the coverage. The point of his commission was to help us improve and we have. [See box]

It's right that we should be scrutinised for our performance, but there is also a much wider issue that plays out beyond Mr Jones' findings and the number of investigations we undertake. The fundamental issue here is that if businesses were meeting their obligations to keep their workers healthy and safe, then we would not be having this discussion.

Fewer than 20 percent of businesses manage health and safety based on shared responsibility, with two-way employer-worker dialogue, a desire to care for the wellbeing and safety of others, a holistic view encompassing physical and psychosocial issues and, importantly, a strong, evolving culture. That tells me emphatically that as a nation, we have a long way to go before we can truly change the way work is done for the better.

Investigations and enforcement activity is important, and will always be core to our regulatory role. That is why

## THE JONES REPORT FINDINGS AND WORKSAFE'S RESPONSE

### *Demand, workload and caseloads; Investigation and investigator management*

- New structure to better spread work and reduce pressure on investigation team.
- The investigation function structure has been changed.
- New national manager roles, new area manager (and deputy) roles.
- New Investigations Principal roles.

### *Victim focus*

- Created Victim and Coronial Services team managed by National Manager Critical Response (a new role itself).

### *Alignment and national consistency*

- National Manager Interventions and Support driving new ways of working.
- Continuous improvement through regulatory practice.
- Improved file management.
- Video interviewing.

we have invested an additional \$5m into our operations group, which includes the investigations team. However, increased inspectors, investigations and enforcement action alone is not a panacea. These activities must be part of a mixed model where we also focus on changing how work is designed and carried out – before an incident or near miss.

There is still a substantial number of businesses who approach meeting their health and safety obligations as a way of keeping WorkSafe out of their workplaces – the compliance focus. We need to find new ways to change the mind-sets of these individuals, mainstreaming health and safety into the day to day running of organisations.

What we need to add are the motivators and the enablers of change. Think Safety-II, think innovation, think focusing on and learning from what goes right, think of the need for us as a system to create better ways of doing our work. Without losing the important focus on holding people to account, we must add a broader focus on influencing organisations to achieve a social purpose – a better New Zealand doing better work and creating value for the country.

We will learn from the Jones report, and from others who see the opportunities to make WorkSafe the most effective regulator it can be. I own the need for WorkSafe to learn and to continually improve. But the health and safety system as a whole – not just WorkSafe – has to find the circuit breakers that will halt the plateauing we're currently experiencing in harm and fatality statistics.

Despite increased activity and investment from many parties across the health and safety system, what we are collectively doing has, at best, held the line. A new approach is required, and it cannot be left to WorkSafe alone to find it and make it work.

So, better that the health and safety system and all its players collaborate on the future to find the right mix of levers, approaches, the culture change drivers. The energy expended in doing so and making fundamental changes to how work is done will in turn protect workers, which, after all, is what we all care deeply about. ■

*Phil Parkes is chief executive of WorkSafe New Zealand.*