

Modernising Work Health and Safety Laws in Western Australia

Submission by the Department of Fire and Emergency Services

Confidentiality

This document has been modified to remove personal information not specifically authorised for publication or that is not in the public domain. This includes some contact and personal details, and metadata. Electronic signatures have also been removed.

This process may have resulted in minor changes to the appearance of the submission but has not modified the substantive content. If you believe there have been changes to content of the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.

Accessibility

This is a third party document and DMIRS has conducted a basic review to ensure the majority of the substantive content is accessible. There may be elements of this submission that are not fully accessible (for example, scanned or hand-written elements). If you are having difficulties accessing the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.



Government of Western Australia
Department of Fire & Emergency Services



Our Ref: 28634:18/136640

Mr David Smith
A/Director General, Safety Regulation
WHS Reform
Locked Bag 14
CLOISTER SQAURE WA 6850

Dear Mr Smith

SUBMISSION ON WHS REFORM

Thank you for the opportunity to provide feedback on modernising work health and safety laws in Western Australia (WA). The Department of Fire and Emergency Services (DFES) is committed to a continuous improvement approach to safety and achieving best practice safety outcomes for our employees and volunteers.

DFES recommends volunteers be covered under the general duty of care under the proposed scheme arrangements.

Emergency management arrangements in WA are complex with a myriad of interdependencies between the relevant entities which includes local government Bush Fire Brigades (BFBs) which do not directly come under DFES.

Local governments are responsible for recruiting, training and equipping BFB volunteers. DFES provides grant funding via the Emergency Service Levy (ESL) to local governments for the operation of BFBs and provides training materials.

The commitment of volunteers to respond to an emergency to protect our communities should not be understated. Emergency service volunteers willingly give up their time to respond to emergencies.

Any reforms which significantly increase the amount of time emergency service volunteers undertake non-emergency activities, or raise the possibility of criminal charges against them could become a major deterrent to the retention of emergency service volunteers.

DFES welcomes the opportunity to provide further information. [REDACTED]
Director Health and Safety Services is available via email at [REDACTED]
[REDACTED]

Please find attached DFES's Submission on the WHS Reform 2018.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Darren Klemm', with a long horizontal flourish extending to the right.

**DARREN KLEMM AFSM
COMMISSIONER**

31 August 2018

Att: WHS Reform 2018

Model WHS Bill – Department of Fire and Emergency Services (DFES)

<p>Questions for you to consider:</p> <ol style="list-style-type: none"> 1. What is the likely cost to implement a specific proposal? 2. What is the benefit to workplace participants? 3. Is a specific recommendation likely to be effective in achieving safer workplaces? 4. Are there any unintended consequences of a proposal? 5. If a new requirement is proposed, what are the costs and benefits? 	
<p>Recommendation number in the Consultation Paper and/or section number in the model WHS Bill.</p>	<p>Comment (including costs and benefits)</p>
<p>Section 19 – Primary duty of care</p>	<p>From a DFES perspective, one of the major changes proposed by the model WHS legislation is the inclusion of volunteers in the definition of a “worker”. DFES welcomes the recognition in the model WHS legislation that volunteers should be owed the same duty of care as workers.</p> <p>Following close consideration of the model WHS legislation, DFES has taken the view that under the provisions of the Bill, the FES Commissioner would have a primary duty of care for the following emergency services volunteers</p> <ul style="list-style-type: none"> • Volunteer Fire and Rescue Service (VFRS) • State Emergency Service (SES) • Volunteer Fire and Emergency Services (VFES) • Volunteer Marine Rescue Services (VMRS) <p>This is due to these volunteer Brigades, Groups and Units coming under the responsibility of the FES Commissioner under the <i>Fire and Emergency Services Act 1998</i> and the <i>Fire Brigades Act 1942</i>. In addition, the FES Commissioner is likely to have a primary duty of care for bush fire brigade (BFB) volunteers (shared with the local government that maintains the bush fire brigade) when they assist at DFES-managed incidents. Local Governments are responsible for recruiting, training and equipping BFB volunteers under the <i>Bush Fires Act 1954</i>. DFES provides grant funding via the Emergency Services Levy (ESL) to local governments for the</p>

operation of BFBs. Although DFES has ability to influence and control VFRS, SES, VFES and VMRS volunteers, it does not have the same influence and control over BFBs.

It is not entirely certain whether the Department's interpretation (i.e. that DFES has a primary duty of care for volunteers) is correct, and DFES is making further enquiries in relation to this view.

If, on a strict interpretation of the model WHS Bill, DFES does not have a primary duty of care for VFES, SES, VFES and VMRS volunteers, DFES requests that a provision be included which allows a *person conducting a business or undertaking* (PCBU) to be prescribed as having a section 19 duty of care to certain workers, and DFES should be prescribed as having such a duty for VFRS, SES, VFES and VMRS volunteers. This could be similar to section 5(6) of the model WHS Bill, and would ensure these emergency services volunteers are provided the same WHS protections as paid workers.

If the primary duty of care was applied to the emergency services volunteer groups listed directly above, it is likely DFES already meets the requirements of section 19 in relation to emergency services volunteers, by:

- providing tailored standing operating procedures (SOPs) and directives applicable to incident response
- providing volunteers with appropriate vehicles, appliances, equipment and personal protective clothing to carry out their functions
- consulting on suitability of proposed new vehicles and equipment
- providing training, information and instruction on the use of vehicles and equipment
- providing for volunteers' welfare, including first aid, refreshments where possible, relief for fatigued crews and welfare services.

However, in addition to the above, DFES may also need to establish and deliver minimum training standards for emergency services volunteers to adequately meet the primary duty of care. If so, there will be an increased resource requirement to achieve this.

Setting minimum training standards was considered in a Consultation Regulatory Impact

	<p>Statement (RIS) released by DFES in April 2014 for the reform of the emergency services Acts.¹</p> <p>Following feedback in response to the Consultation RIS, the costs to implement increased training requirements resulting from minimum training standards were estimated as follows:</p> <p>\$500,000 <u>One-off cost</u> for online system development</p> <p>\$2,712,000 <u>Annual cost</u> for 15 FTE training and support officers (11 regional, 4 metropolitan).</p> <p>This estimate includes support for local governments to ensure their BFB volunteers meet minimum training standards.</p> <p>The establishment of the Bushfire Centre of Excellence (proposed 2019) as part of the new Rural Fire Division of DFES may reduce the cost impact to some extent (insofar as the above estimate relates to bush fire training).</p> <p>There will be further costs associated with training DFES staff who supervise volunteers on the new WHS legislation once it is implemented.</p>
<p>Section 5(6) – Meaning of <i>person conducting a business or undertaking</i></p>	<p>The arrangements for emergency response to bushfires in Western Australia are complex, and there are some misunderstandings about the extent to which the FES Commissioner has control of some volunteer groups, and BFBs in particular.</p> <p>Under the <i>Bush Fires Act 1954</i>, local governments are responsible for establishing and maintaining BFBs for their local government area, and equipping each BFB with appliances, equipment and apparatus (s41).</p> <p>However, when the response to an emergency is being managed by DFES, BFB volunteers on the incident ground will be subject to the direction of the incident controller who may or may not be a DFES employee or volunteer.</p> <p>Under the current arrangements in Western Australia for bushfire response, it is often the case that an incident controller (i.e. the person</p>

¹ Department of Fire and Emergency Services (April 2014), “Concept Paper: Review of the Emergency Services Acts”, page 86

	<p>with responsibility for directing the response to the incident) does not come from the agency which is the “controlling agency”. Under these circumstances the incident controller will be directing paid personnel from agencies such as DFES, Department of Conservation, Biodiversity and Attractions, WA Police Force and local government, in addition to VFRS, VFES, SES and BFB volunteers, as well as spontaneous volunteers responding to the incident. This arrangement can be further complicated when an emergency situation is declared under the <i>Emergency Management Act 2005</i> by the FES Commissioner as the hazard management agency (HMA) for fire. Under this arrangement hazard management officers (HOMs) are appointed under that Act and can exercise various powers in accordance with the directions of the HMA (noting HMOs can include employees from a variety of agencies and volunteers).</p> <p>DFES holds the view that the FES Commissioner’s primary duty of care should only apply to BFB volunteers to the extent the FES Commissioner has control over the applicable workplace (i.e. where a DFES employee is the incident controller at a DFES-controlled incident ground, as opposed to a local government-controlled incident ground or BFB premises), and this should be reflected in the WHS regulations.</p> <p>As such, DFES requests the WHS regulations, when they are developed, prescribe that the FES Commissioner is not a PCBU for BFBs unless they are responding to a DFES-controlled incident. The power to do this would appear to fall under section 5(6) of the model WHS Bill.</p>
Section 17 – Managing of risks	It is important to note that when emergency services workers enter onto an emergency incident ground, they are entering into an uncontrolled environment. DFES welcomes the recognition provided in section 17 there will be occasions where the risks to health and safety cannot be completely eliminated.
Section 22 – Duties of persons conducting businesses or undertakings that design	It is important that building designers recognise emergency services are required to respond to emergency incidents within buildings, and the design and construction of buildings must consider emergency responders and ensure the

<p>plant, substances or structures</p> <p>Section 26 – Duties of persons conducting businesses or undertakings that install, construct or commission plant or structures</p>	<p>design and construction does not introduce increased risk for emergency responders that could otherwise be avoided.</p> <p>Section 28 of the <i>Occupational Health and Safety Act 2004</i> (Vic) imposes a duty on designers of buildings and structures, to ensure hazards and risks that may exist in a workplace are eliminated or controlled at the design stage, so far as is reasonably practicable. It is important designers recognise buildings need to be safe during an emergency situation, including fire, for all who may use it as a workplace.</p> <p>DFES therefore recommends a provision be inserted into the proposed Act which places a duty on designers to take emergency service response into account when designing and constructing buildings.</p>
<p>Section 28 – Duties of workers</p>	<p>Section 28 provides that while at work, a worker (including a volunteer) must:</p> <ul style="list-style-type: none"> (a) take reasonable care for his or her own health and safety (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other person (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with the model WHS Act (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers. <p>While DFES is generally supportive of a requirement for emergency services volunteers to follow policies and directions which relate to their safety, especially at emergency incidents, DFES is concerned there is the potential for volunteers to be criminally liable for breaching the WHS legislation if they do not do so.</p> <p>Although there have been no prosecutions of volunteers under the new WHS laws in other</p>

	<p>jurisdictions,² this requirement is likely to cause anxiety for emergency services volunteers, with potential negative implications for the recruitment and retention of volunteers.</p>
<p>Section 29 – Duties of other persons at the workplace</p>	<p>Assuming an emergency incident ground is a workplace for the purposes of the model WHS legislation, DFES supports the proposal certain duties are imposed upon other persons at a workplace to:</p> <ul style="list-style-type: none"> • take reasonable care of their own safety • take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons, and • comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to comply with the model WHS legislation. <p>It is particularly important in emergencies that spontaneous volunteers on the incident ground act as directed, to ensure their safety and that of others.</p>
<p>Part 3 – Incident Notification</p>	<p>DFES is of the view it will also have a duty of care under the model WHS Bill to notify the regulator when there has been a notifiable incident involving an emergency services volunteer. It is not clear whether this understanding is correct and DFES will make further enquiries in this regard.</p> <p>If, on a strict interpretation of the model WHS Bill, DFES does not have a duty under Part 3 to notify the regulator of a notifiable incident for its emergency services volunteers, DFES requests a provision be included which allows a PCBU to be prescribed as having Part 3 duties for certain workers, and DFES should be prescribed as having such duties for VFRS, SES, VFES and VMR volunteers, and other volunteers at a DFES-controlled incident. This would ensure these emergency services volunteers receive the same protections as paid workers.</p>

² Safe Work Australia, “Volunteer Organisations: The Essential Guide to Work Health and Safety for Organisations that Engage Volunteers”, page 22 <
https://www.safeworkaustralia.gov.au/system/files/documents/1702/volunteer_organisations_guide.pdf>

Part 5 – Consultation, representation and participation

DFES welcomes the opportunity to communicate and consult on work health and safety matters with emergency services volunteers. DFES consults with emergency volunteers using a number of mechanisms without imposing substantially upon the volunteers' time. Current mechanisms allow volunteers to elect when and how to engage, depending upon their level of interest and their availability at any given time.

DFES acknowledges improved outcomes arising from consulting with workers and volunteers about WHS matters, however there is concern an increased requirement for volunteers to engage further with DFES, particularly if volunteers need to be appointed as health and safety representatives (HSRs), is too onerous. Emergency services volunteers already dedicate a significant amount of their time to their emergency services functions, and it would be unfair to expect them to commit any more of their time so DFES can meet its consultation obligations under the model WHS legislation, especially if the HSR is required to attend training (as per recommendation 14).

As such, DFES requests the WHS regulations, when they are developed, prescribe that the FES Commissioner is not a PCBU for VFRS, SES, VFES and VMRS volunteers for the purposes of Part 5 of the model WHS Bill. The power to do this would appear to fall under section 5(6).

If DFES were exempted from the application of Part 5 of the model WHS Bill in relation to emergency services volunteers, it would continue consulting with volunteers on WHS related matters using the following channels:

- liaison with Volunteer Associations
- *Safety Matters* online consultation forum
- Health and Safety Services' attendance at Volunteer Advisory Committees
- inviting volunteers to Health and Safety Services organised events
- Health and Safety Services visiting volunteer Brigades, Groups and Units
- placing volunteer representatives on steering groups such as Operational Fleet
- regular volunteer newsletters.

	<p>DFES would also continue to explore improved consultation mechanisms with volunteers for WHS purposes, such as:</p> <ul style="list-style-type: none"> • extending access to the HSS online hazard reporting system to volunteers • establishing an “innovation portal” directed solely at WHS matters. • establishing a regional health and safety network where there is volunteer support for this initiative.
<p>Recommendation 35</p>	<p>DFES is concerned that the recommendation to incorporate the Dangerous Goods legislation into the model WHS Bill does not recognise the fundamentally different purposes of the two acts. The <i>Dangerous Goods Safety Act 2004</i> (DGS Act) requires (at section 8) the minimisation of risk from dangerous goods to people, property and the environment, whilst the model WHS Bill seems to be limited to minimising risk to people.</p> <p>At present, the DGS Act aligns with the definition of hazardous materials (HAZMAT) incidents in the <i>Fire Brigades Act 1942</i>, and facilitates prevention and preparation activities by the regulator and site operators, which in turn align with response and recovery actions by DFES, site operators and others to effectively address the risk to people, property and the environment from dangerous goods. The prevention and preparedness requirements of the DGS Act also align with prevention, planning, response and recovery provisions in Westplans under the <i>Emergency Management Act 2005</i>.</p> <p>By contrast, under the model WHS regime, a range of current risk control measures for the management of dangerous goods may be difficult or impossible to prescribe in regulations, unless the scope of the Bill is expanded to include managing risks to property and the environment. For example:</p> <ul style="list-style-type: none"> • Secondary containment may be difficult to mandate under the model WHS legislation unless it can be shown that <i>people</i> are at risk due to a leak/ spill. As a result, the <i>property</i> and <i>environment</i> protection benefits of the DGS Act may be lost, or devolved in part under other instruments so that the hazard is regulated under multiple regulators, leading to

	<p>gaps of coverage, and increased red tape and costs in liaison, compliance, inspection and so forth. This would create significant difficulties for emergency responders in dealing with leaks and spills (as is currently the situation when dealing with premises regulated under the <i>Workplace Health and Safety Act 2011</i> (Cth)).</p> <ul style="list-style-type: none"> • The present requirement to have a fire protection system to combat foreseeable fires on a dangerous goods site (reg 73 of the <i>Dangerous Goods Safety (Storage and Handling of Non-explosives) Regulations 2007</i>) would be difficult to enact under the model WHS Bill, as the PCBU could meet their WHS duties by evacuating the area and leaving it to the emergency services to manage the threat to property and the environment. Regulation 73 has been very beneficial to DFES as it ensures facilities have appropriate fire suppression systems to facilitate an adequate response to hazards involving dangerous goods. This regulation has also benefitted industry as it has allowed the use, storage and handling of dangerous goods materials which the emergency services would not otherwise have an ability to respond to, due to either the nature, location or quantity of the material. <p>DFES strongly recommends that the DGS Act should not be incorporated into the model WHS legislation, for the above reasons.</p>
<p>Schedule 1</p>	<p>Schedule 1 of the model WHS Bill would make all places where dangerous goods are present “workplaces” for the purposes of the model WHS Bill. It appears the effect of this provision would be to extend a workplace-centric instrument into one which regulates the hazard (dangerous goods) irrespective of the location (workplace or otherwise). However, this extension of the definition of “workplace” to all places where dangerous goods are present does not address the shortfalls relating to the management of risk to property and the environment, which are currently addressed in the DGS Act.</p> <p>As noted above, DFES holds the view that the DGS Act should not be incorporated into the model WHS legislation.</p>

<p>Powers of Inspectors</p>	<p>If Stage 2 of the reform is progressed, and the DGS Act is incorporated into the model WHS legislation, DFES strongly recommends that WHS inspectors be provided with equivalent powers to Dangerous Goods Officers under the DGS Act. For example:</p> <ul style="list-style-type: none"> • Dangerous Goods Officers have the power to stop vehicles for enforcement purposes. As the model WHS Bill is currently drafted, it appears WHS inspectors will be reliant on other statutory officers to undertake this for them, as is currently the case for WorkSafe Inspectors under the current <i>Occupational Safety and Health Act 1984</i> (WA). • Dangerous Goods Officers have emergency powers under section 50 of the DGS Act to immediately address dangerous situations without recourse to issue written notices. These powers of Dangerous Goods Officers recognise the significant public safety risk of dangerous goods as opposed to other workplace hazards, and have been used effectively in conjunction with DFES in response to previous incidents.
<p>Powers of Emergency Response Organisations</p>	<p>The Department's experience of the provisions of the model WHS Bill, insofar as those provisions relate to the management of dangerous goods, is drawn from the application of the <i>Workplace Health and Safety Act 2011</i> (Cth) to Commonwealth-regulated Major Hazard Facilities situated in Western Australia. That Act does not provide a statutory basis for emergency response organisations to obtain sufficient information about dangerous goods sites and the activities on those sites to adequately understand the hazards and risks, and plan for an appropriate emergency response. Under the Commonwealth WHS Act, DFES is not empowered to require a Commonwealth-regulated Major Hazard Facility to provide information about major incident scenarios and other parts of a safety case for the facility, and Comcare as the regulator is not empowered to release the information without the approval of the regulated party.</p> <p>If the DGS Act is to be incorporated into the model WHS legislation, DFES requests that a provision be included which allows DFES to require a dangerous goods site to provide any</p>

	information that, in the opinion of the FES Commissioner, is necessary for DFES to adequately understand the hazards and risks associated with the site, and plan for an appropriate emergency response.
--	--