

Changes to occupational health and safety laws and the impact on volunteers in the emergency services

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ABSTRACT

The states and territories have agreed to enact new, nationally consistent workplace health and safety laws. These new laws are based on the Model Work Health and Safety Bill and will come into effect on 1 January 2010. This article compares the position under the Model Act with the current legal position to identify the implications for volunteers in the Australian emergency services. It is argued that the new law will reinforce the message that Australia's emergency service volunteers provide an important and professional service. The new law should not impede volunteers but should facilitate their work both at home and inter-state. ^R

On the first of January 2012, the Australian states and territories are scheduled to implement new, national occupational health and safety laws. These laws will be modelled on the Model Work Health and Safety Bill published by Work Safe Australia ('the Model Act').¹

A significant feature of the new legislation is the inclusion of volunteers into the definition of 'worker'. Volunteers are already included in the definition of 'worker' in the Australian Capital Territory, the Northern Territory and Queensland² so the changes will be of most significance in the other States.

This article will compare the position under the Model Act with the current legal position to identify the implications for volunteers in the Australian emergency services. This is not a comprehensive review of the legislation but is limited to an analysis of the key provisions that may impact on emergency

service volunteers. Naturally this article cannot be considered as a substitute for legal advice to deal with specific situations and issues.

Duties owed to volunteers

Current law

The application of occupational health and safety law to volunteers varies across the Australian states and territories. In New South Wales an employer '... must ensure the health, safety and welfare at work of all the employees ...'³ (which does not include volunteers) as well as anyone else who is at the 'place of work' (which would include volunteers).⁴ Place of work means 'premises where people work' as 'an employee or self-employed person.'⁵ This leads to uncertainty if a local incident is being managed entirely by volunteers.

It is arguable that the site of emergency service operations is the place of work of the Service, the Commissioner and/or regional staff.⁶ If that is correct then the service and its paid officers have legal obligations to take steps to ensure the safety of everyone at their workplace, including volunteers. That does not mean that the SES Region Controller or RFS Fire Control Officer must turn out to every response as it would not be reasonably practicable for them to do so, but they may still have an obligation to do what is reasonably practicable to ensure safety. Ensuring safety may involve ensuring that suitably qualified and competent volunteers are in a position to take control of operations, that procedures and processes are in place to ensure safety, that people are adequately trained and that the units or brigades under their direction have a culture where safety measures are taken seriously.

It is, however, also arguable that where the only responders are volunteers then there is no one at the site who is working as an employee or self-employed

1. See Work Health and Safety Bill 2011 (Cth); Work Health and Safety Bill 2011 (ACT); Work Health and Safety Bill 2011 (Qld); Occupational Safety and Health Amendment Bill 2010 (WA); Work Health and Safety Act 2011 (NSW).

2. Work Safety Act 2008 (ACT) s 9; Workplace Health and Safety Act 2007 (NT) s 4; Workplace Health and Safety Act 1995 (Qld) s 11.

3. Occupational Health and Safety Act 2000 (NSW) s 8(1).

4. *Ibid* s 8(2).

5. *Ibid* s 4.

6. State Emergency Service Act 1989 (NSW) ss 11 and 16; Rural Fires Act 1997 (NSW) ss 12 and 37.

person and so the area is not a 'place of work'. If that is correct then the New South Wales emergency services would not be bound by the *Occupational Health and Safety Act* to take steps to ensure the safety of the volunteers.

The position is similar in Tasmania where an employer must ensure that the health and safety of any person, including a volunteer, is not 'adversely affected as a result of the work carried on at a workplace';⁷ that is 'any premises or place ... where an employee, contractor or self-employed person is or was employed or engaged ...'⁸ As in New South Wales a place where only volunteers are responding is, arguably, not a workplace and therefore outside the operation of the Act.

In the Australian Capital and Northern Territories there is a duty upon the employer to ensure health and safety at the workplace.⁹ Work is not defined but, in those jurisdictions the definition of 'worker' includes a volunteer¹⁰ so wherever a volunteer is performing his or her duties must be a workplace.

In South Australia and Queensland an employer must ensure the safety of any person who may be affected by the employer's work.¹¹ A volunteer, even if not at a workplace, will be affected by the acts and omissions of the organisation they volunteer for and so there is a duty to take steps to ensure the volunteer's wellbeing is protected.

In Victoria and Western Australia the employer must ensure that non-employees are not exposed to risks to health and safety 'from the conduct of the undertaking of the employer'.¹² As the emergency services are an employer and the site of operations is part of their undertaking, they would have an obligation to ensure that their volunteers are not exposed to undue risks to health and safety.

It is important to note that the application of the relevant occupational health and safety legislation is unrelated to the application of compensation schemes for injury. All the states and territories have in place schemes to ensure volunteer emergency service personnel are compensated for personal injury and property losses that they suffer in the course of their volunteering.¹³ These provisions apply regardless of whether or not the health and safety provisions apply.

The impact of the health and safety provisions is to enforce the obligation to undertake prescribed risk management procedures with criminal, rather than civil penalties.

The Model Act

In order to make it clear that everyone should be protected from risks to their health and safety, the Model Act no longer refers to employers and employees. Under the Model Act the duty to ensure health and safety is imposed upon any '... person conducting a business or undertaking'.¹⁴ 'Person' includes a corporation.¹⁵ The person conducting the undertaking will have to ensure that workers and others are not put at risk whilst at work or as a result of the conduct of that undertaking.¹⁶ The emergency services are conducting an undertaking so they must ensure that their operations do not expose anyone to unreasonable risks to health and safety. The obligation does not depend on whether or not the person exposed to the risk is a paid employee but whether they are exposed to a risk due to a relevant business or undertaking.¹⁷

Further, in the Model Act a worker is:

- (a) an employee; or
- (b) a contractor or subcontractor; or
- (c) an employee of a contractor or subcontractor; or
- (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
- (e) an outworker; or
- (f) an apprentice or trainee; or
- (g) a student gaining work experience; or
- (h) a volunteer; or
- (i) a person of a prescribed class.¹⁸

This duty to protect workers, including volunteers, applies when they are 'at work in the business or undertaking'.¹⁹ 'At work' is not defined but given the definition of 'worker', a volunteer performing their duties is performing work in the business or undertaking and is, therefore, 'at work'.

7. Workplace Health and Safety Act 1995 (Tas) s 9(3).

8. *Ibid* s 3.

9. Work Safety Act 2008 (ACT) s 21(3)(a) [defined as a place 'where work is or is to be carried out' s 12]; Workplace Health and Safety Act 2007 (NT) s 56.

10. Work Safety Act 2008 (ACT) s 9; Workplace Health and Safety Act 2007 (NT) s 4.

11. Occupational Health, Safety and Welfare Act 1986 (SA) s 22; Workplace Health and Safety Act 1995 (Qld) s 28.

12. Occupational Health and Safety Act 2004 (Vic) s 23; Occupational Health and Safety Act 1984 (WA) s 21.

13. See for example: Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987 (NSW); Disasters Act 1982 (NT); Public Safety Preservation Act 1986 (Qld); Disaster Management Act 2003 (Qld); Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999 (SA); Emergency Management Act 2006 (Tas); Emergency Management Act 1986 (Vic); Country Fire Authority Act 1958 (Vic); Victoria State Emergency Service Act 2005 (Vic); Bushfires Act 1954 (WA).

14. Safe Work Australia, Model Work Health and Safety Bill (Commonwealth of Australia, 2011) s 19.

15. See for example Interpretation Act 1987 (NSW) s 21; see also Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, National Review into Model Occupational Health and Safety Laws –First Report to the Workplace Relations Ministers' Council (Commonwealth of Australia, 2008) [6.56].

16. Safe Work Australia, above n 14, s 19.

17. Stewart-Crompton et al, above n 15, [6.46]-[6.55].

18. Safe Work Australia, above n 14, s 9 (emphasis added).

19. *Ibid* s 19(1).

Duties owed by volunteers

Current law

Under current law, volunteers may not have any obligations under occupational health and safety legislation. In all jurisdictions employees have a duty to take reasonable care of their own, and other's safety²⁰ but, as noted above, in most jurisdictions the term employee does not extend to volunteers.

The Model Act

Under the Model Act, volunteers will not only be owed a duty of care, but they will be obliged to exercise due care in the performance of their duties. Workers, including volunteers, must:

- (a) take reasonable care for their own health and safety;
- (b) take reasonable care that they do not adversely affect the health and safety of any other person;
- (c) comply, so far as they are reasonably able, with any reasonable instruction that is given by their organisation to ensure compliance with the Act; and
- (d) co-operate with any reasonable policy or procedure relating to workplace health and safety.²¹

Penalties

Failure to meet obligations under the new Act can have significant penalties. The range of penalties depends upon whether:

- 1) The defendant is an individual, an officer of the organisation or a corporate entity (including a corporate entity that represents the Crown or is a public authority²² which would include all the statutory emergency service organisations);
- 2) Whether the breach of duty exposes someone to a risk of death or serious injury, or only to a less than serious injury; and
- 3) The mental state of the accused that is whether they intended or realised that by their action they would expose someone to risk of death or injury or whether their actions were inadvertent.

The penalties are the maximum penalties. It is always open to a court to impose a penalty less than the maximum.

Criminal negligence, that is a failure to take reasonable steps to ensure health and safety, it is not the same as civil negligence. Civil negligence requires proof

that the defendant failed to take 'reasonable care'. Criminal negligence requires proof that the accused's failure was 'such a great falling short of the standard of care, which a reasonable man in their position would have exercised, as to merit criminal punishment'.²⁴ This criminal standard may be summarised in the phrase 'gross negligence'. Whether conduct meets that description is a matter for judgement in each case but it is the case that a criminal prosecution requires the court to be satisfied, beyond reasonable doubt, that the accused's conduct demonstrates something more than civil negligence.

When bringing a prosecution it is not sufficient for the prosecution to simply allege that some conduct exposed another to a risk to health and safety, or to show that there was an actual workplace injury. The burden is on the prosecution to show, beyond reasonable doubt, that there was something that the defendant should have done, or should not have done, and that the alternative conduct was both reasonably practicable and would have been effective in reducing or eliminating the risk. Mere proof of injury does not prove a breach of the Act.²⁵

Even if there has been a breach of the Act, it is not essential or required that the authorities launch a prosecution. The Model Act provides for a number of other options short of criminal prosecution including the service of 'improvement notices' requiring a rectification or modification of practice and procedure and a power to accept undertakings to improve work place health and safety.²⁶

In the context of penalties, the word 'officer' does not refer to the system of rank employed in the emergency services. An 'officer' of a corporation, the Crown or a public authority is a 'person who makes, or participates in making, decisions that affect the whole, or a substantial part' of the 'undertaking'.²⁷ The Commissioner or Chief Officer easily falls within the definition of an officer, as will some subordinate officers but exactly how far down the chain of command that responsibility will fall is not clear. The decisions of senior executive will affect the whole of the organisation, but it will be a question to be answered in later court proceedings whether regional or local staff affect a 'substantial' part of the organisation.

An officer is required to exercise due diligence to ensure that their organisation meets its obligations. 'Due diligence' means taking reasonable steps to:

- (a) acquire and keep up-to-date knowledge of work health and safety matters,

20. Work Safety Act 2008 (ACT) s 27; Workplace Health and Safety Act 1997 (NT) s 59; Occupational Health and Safety Act 2000 (NSW) s 20; Workplace Health and Safety Act 1995 (Qld) s 36; Occupational Health, Safety and Welfare Act 1986 (SA) s 21; Workplace Health and Safety Act 1995 (Tas) s 16; Occupational Health and Safety Act 2004 (Vic) s 25; Occupational Health and Safety Act 1984 (WA) s 20.

21. Safe Work Australia, above n 14, s 28.

22. Ibid ss 245 and 249.

23. Ibid ss 31-33.

24. Stewart-Crompton et al, above n 15, [9.21].

25. Kirk v WorkCover [2010] HCA 1.

26. Safe Work Australia, above n 14, ss 90-102; 191-194; 216-222.

27. Ibid ss 247 and 252.

The following table gives the maximum penalties under the Model Act.²³

Offence	Description	Individual	Officer	Corporation
Category 3	Failure to comply with an OHS duty.	\$50 000	\$100 000	\$500 000
Category 2	Failure to comply with an OHS duty that exposes a person to a risk of death or serious injury or illness.	\$150 000	\$300 000	\$1 500 000
Category 1	Reckless conduct that exposes a person to a risk of death or serious injury or illness.	\$300 000 or five years imprisonment or both.	\$600 000 or five years imprisonment or both.	\$3 000 000

- (b) ensure that they have a full and proper understanding of the nature of the operations of the Service and the risks and hazards that are associated with its work.
- (c) ensure that the Service has appropriate resources and processes to eliminate or minimise risks
- (d) ensure that the Service has appropriate processes for receiving and considering information about incidents, hazards and risks and responds, in a timely way, to that information, and
- (e) ensure that the Service has, and implements, processes for complying with its work place health and safety obligations and
- (f) monitor and verify that the relevant resources and processes are in fact applied and followed.²⁸

This provision will be of particular importance in jurisdictions where the emergency services are managed by a Board of Management²⁹ and where persons appointed to the Board may have no prior involvement in the organisation. These provisions require members of the Board to be proactive in learning about the processes of the organisation, how it works, what it does and what can be done to ensure health and safety. Directors cannot be passive and merely take the word of the Chair or a written report on its face value.

Where the services are managed by a Commissioner or other Chief Officer, and there is no 'Board' equivalent, then officers such as the various Directors should exercise due diligence even if the extent of their power is to bring a matter to the attention of the Commissioner rather than have it discussed at a Board meeting.

Volunteers may also be members of a relevant governing board and therefore 'officers'. In order not to discourage volunteers from taking on key leadership roles, volunteer officers cannot be prosecuted for failing to exercise due diligence or otherwise failing to fulfil the duties of an 'officer'.³⁰

Should volunteers be worried?

There are many benefits, and few costs, for volunteers in the new law.

First volunteers should be reassured that the law will be consistent across Australia. As noted above, the application of health and safety laws does not impact upon a right to compensation but it may be of some reassurance to know that they have equal protection under the criminal law regardless of the jurisdiction that they are in.

For volunteers that travel interstate to assist with the response to floods, fires and other emergencies the introduction of consistent legislation will mean that they are not faced with a variety of legal obligations and rights. Volunteers and the emergency services they volunteer for can be reassured that the risk management processes that they have adopted in their home jurisdiction will be sufficient to meet obligations in the jurisdiction in which they are working. This should reassure volunteers that if they apply the processes and training they are familiar with, they will be meeting their legal obligations in all Australian jurisdictions.

Changes to work place health and safety laws will however, open a new, potential liability for emergency service volunteers. Once the Model law is in force then volunteers will have occupational health and safety duties and could be prosecuted for failing to meet those duties. Whether they will, or will not, be prosecuted will always depend on the particular circumstances.

In *WorkCover v NSW Fire Brigades*³¹ there was no effort to prosecute individual fire fighters. There the failure was a failure to adequately train and resource the fire fighters to deal with the situation of a grain silo fire. In *Worksafe v Victoria SES*³² the issue was not about the conduct of volunteers or staff but the failure of the SES to issue appropriate instructions and safety

28. Ibid s 27.

29. See Country Fire Authority Act 1958 (Vic) s 7; Victoria State Emergency Service Act 2005 (Vic) s 9; Fire and Emergency Services Authority of Western Australia Act 1998 (WA) s 6; Fire and Emergency Services Act 2005 (SA) s 10.

30. Safe Work Australia, above n 14, s 34.

31. [2006] NSWIRComm 356.

32. (Unreported, Melbourne Magistrates Court, Couzens P, 25 November 2009) <<http://www1.worksafe.vic.gov.au/vwa/vwa097-002.nsf/content/LSID161018>> accessed 12 July 2011.

equipment. In *Cahill v NSW Police*³³ a police radio technician was working at the front of a police truck when a police officer, as a joke, activated the siren. The impact was permanent damage to the victim's hearing and his ultimate retirement on medical grounds. Even in that case it was the NSW Police, rather than the individual who activated the siren, that was prosecuted for failing, amongst other things, to ensure staff knew of the dangers of turning on the siren in those circumstances. Although volunteers are already included in the definition of employee or worker in the Australian Capital Territory, the Northern Territory and Queensland³⁴ the author has been unable to find any reported case where a volunteer has been prosecuted for breaching his or her health and safety obligations.

Even now, where volunteers are not included as 'workers' and therefore cannot be prosecuted for breaching the relevant occupational health and safety Act, they could be prosecuted if they committed offences under other legislation. Offences such as assault, recklessly causing injury and in the most extreme cases, negligent manslaughter are possible if the facts warrant such a prosecution.

The result is the new laws open, in theory, a new area of personal liability for emergency services volunteers but their potential application should not cause concern. It is unlikely that they will be applied to individuals as the responsibility for managing health and safety and for ensuring everyone, including volunteers, act properly with regard to safety rests with the organisation rather than individuals. The circumstances where prosecutions could take place is likely to be in the sort of circumstances where prosecutions could now take place, albeit based on different legislation.

Volunteers who are thoughtful about safety and think about the welfare of their colleagues and their community should not be worried about this legislation. It will not open the floodgates of personal liability and will not see volunteers prosecuted or held personally to blame for any and every unfortunate outcome. The emergency services are engaged in inherently hazardous activities and that must be considered when determining what is 'reasonable care' and what is 'reasonably practicable'.

Volunteers who do not think about safety or about the welfare of their colleagues and their community should not be in the emergency services. For them there may be a risk of prosecution because the person they put at risk '... should not be any less protected by the law in relation to health and safety simply by reason that the person making key decisions is a volunteer.'³⁵ It is assumed that such persons are rare and should be managed by the service's internal procedures long before a prosecution takes place.

Conclusion

The introduction of uniform workplace health and safety law based on the Model *Workplace Health and Safety Act* will bring the legal position of volunteers in New South Wales, South Australia, Tasmania, Victoria and Western Australia into line with their colleagues in the Australian Capital and Northern Territories and Queensland. The new law should not cause concern for volunteers in the Australian emergency services. The uniform law will ensure that volunteers are entitled to legal protection and the services for which they volunteer are required to take the same care for their safety as they take for the safety of the paid staff.

Volunteers will be reassured that steps they take to meet their own health and safety obligations will be sufficient to meet their legal obligations wherever they are in Australia.

Although there will be a legal option to prosecute individual volunteers who fail to take reasonable steps to protect their own safety, or the safety of others, the reality is that prosecutions will be unlikely. Even without these laws volunteers could be criminally responsible for gross failure to take reasonable care for safety and that remains the case. The reality is that volunteers who act with consideration for their safety and the safety of others, and apply the training and procedures of their service, will face no greater risk of legal liability under this law than they do under the current law.

Australia's emergency service volunteers provide an important and professional service. The new work health and safety legislation will reinforce that message by showing that volunteers are entitled to protection by law, and equally the community that depends upon them should not expect shortcuts on safety. The new law should not impede volunteers but should facilitate their work both at home and inter-state.

About the author

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33. [2005] NSWIRComm 33.

34. Work Safety Act 2008 (ACT) s 9; Workplace Health and Safety Act 2007 (NT) s 4; Workplace Health and Safety Act 1995 (Qld) s 11.

35. Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, National Review into Model Occupational Health and Safety Laws –Second Report to the Workplace Relations Ministers' Council (Commonwealth of Australia, 2009) [23.145].