



# **Presumptive Legislation for volunteer and former firefighters – Consultative Paper**

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## 1. Background

Firefighters place themselves in a unique position of risk with regards to the exposure to carcinogens. During a fire, there is often a release of carcinogens due to the combustion of materials that occurs at the high temperatures produced in a fire. It has been demonstrated that certain types of cancer are caused by accumulated exposure to carcinogens.

There have been a number of studies regarding the increased risk of cancer for firefighters. In recent years, these studies have been bolstered by meta-analyses. The combined effect of these studies and analyses show that firefighters are at increased risk of certain types of cancer through accumulated exposure to carcinogens.

In the past, career and volunteer firefighters who developed cancer were required to provide proof of the link between firefighting and cancer in order to submit a workers' compensation claim. Due to the unique circumstances of firefighting (i.e.: toxins and chemicals encountered at an incident are not recorded), proving the circumstances that led to the development of cancer is difficult.

On 31 October 2012, the Premier, Minister for Emergency Services and Minister for Commerce announced the establishment of a firefighter and volunteer support package consisting of three initiatives. One of these initiatives was the introduction of legislation for career and volunteer firefighters who have contracted one of the 12 cancers provided for in the *Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Act 2011* (Cth).

WorkCover are currently progressing amendments to the *Workers' Compensation and Injury Management Act 1981* to provide such coverage for career firefighters.

The purpose of this project is to develop a Bill that will provide for compensation for all volunteer firefighters and former firefighters who have suffered one of the prescribed cancers and have served as a firefighter for the prescribed period.

### 1.1 Federal Legislation

The *Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Act 2011* (the Amendment Act) commenced on 7 December 2011 following passage through Federal Parliament. This Act amended the *Safety, Rehabilitation and Compensation Act 1988* to provide that if a firefighter contracts a prescribed disease after having been employed as a firefighter for the requisite qualifying period, the disease is presumed to be a result of their employment as a firefighter. The firefighter in question is then entitled to receive compensation for the disease.

Previously where a firefighter had an illness, injury or disease, the onus was upon the firefighter to prove that the cause of the illness, injury or disease was work related.

The *Safety Rehabilitation and Compensation Act 1988* provided for 12 cancers to be prescribed. The specific cancer types and the associated minimum qualifying service periods are outlined below:

Disease	Qualifying Period of Service
Primary site brain cancer	5 years
Primary site bladder cancer	15 years
Primary site kidney cancer	15 years
Primary non-Hodgkins lymphoma	15 years
Primary leukemia	5 years
Primary site breast cancer	10 years
Primary site testicular cancer	10 years
Multiple myeloma	15 years
Primary site prostate cancer	15 years
Primary site ureter cancer	15 years
Primary site colorectal cancer	15 years
Primary site oesophageal cancer	25 years

The prescribed cancers were those which had been proven were an increased risk to firefighters and were cancers likely to be suffered due to the nature of the risk faced by firefighters. The relevant qualifying periods were based upon the latency periods for the prescribed cancers, as well as being consistent with existing international legislation.

## 2. Purpose

It is intended the Federal legislation will be used as a base for any new legislation developed in this State for volunteer and former firefighters. Where possible any amendments made to Western Australian legislation will be consistent with the Federal legislation so there is consistency for firefighters across jurisdictions.

This paper examines the Federal legislation and other international models to assist in identifying a proposed model option to provide presumptive coverage for volunteers and former firefighters. A model option has been provided as the Department is endeavouring to expedite this matter to provide a consolidated level of insurance coverage as soon as possible.

This paper will be used for consultation with external stakeholders. The model option provided is available for comment.

### 3. Federal Legislation

Section 7 of the Safety, *Rehabilitation and Compensation Act 1988* (the Federal Act), which is attached as Appendix A, provides five criteria that an individual must satisfy in order to access the compensatory provisions of the Federal Act:

1. They must be an employee
2. They have sustained one of the diseases listed in section 7(8) of the Federal Act;
3. The employee was employed as a firefighter;
4. The person was employed as a firefighter for the qualifying period for the particular disease; and
5. They were exposed to the hazards of a fire scene during that period.

The first criterion is not applicable, as neither former nor volunteer firefighters are considered an employee for the purposes of existing State compensation laws.

### 4. Presumptive Model

It is proposed that criteria 2 – 5 will be utilised as a base for the bill with each criterion being adapted to reflect volunteer and former firefighters. Each of these criteria is examined below.

#### 4.1 Diseases covered

In the Premier's announcement of 31 October 2012, it was stated that:

*[t]he Liberal-National Government will introduce legislation to simplify workers' compensation claims for career and volunteer firefighters exposed to this risk who have contracted one of 12 cancers prescribed in Commonwealth legislation.*

It is proposed that this bill will provide coverage for the 12 cancers in the Federal Act. As such, the following 12 cancers will be included:

- Primary site brain cancer;
- Primary site bladder cancer;
- Primary site kidney cancer;
- Primary non-Hodgkin's lymphoma;
- Primary leukaemia;
- Primary site breast cancer;
- Primary site testicular cancer;
- Multiple myeloma;
- Primary site prostate cancer;
- Primary site ureter cancer;
- Primary site colorectal cancer; and
- Primary site oesophageal cancer.

As per the above list, most of the cancers will only be covered if they are primary site cancers. If the cancer is secondary, meaning that it originated in and spread from another part of the body, it will not be covered.

## 4.2 Employed as a firefighter

### 4.2.1 Employed

It is proposed that the bill will provide that the individual must either:

1. be a volunteer firefighter;
2. have been an employed firefighter; or
3. have been a volunteer firefighter.

Category 1 is designed to capture currently registered volunteers. Categories 2 and 3 will cover former firefighters, both career and volunteer.

### 4.2.2 Definition of Firefighter

The Federal Act is limited to an individual who is a 'firefighter'. The qualifying term 'firefighter' will remain in the bill. This is because the scientific research that this bill is premised upon is based around a firefighters' exposure to carcinogens.

The term firefighter is not defined within the Federal Act. Within WA legislation the definition of a firefighter varies depending upon the legislative instrument. The *Fire and Emergency Services Superannuation Act 1985* defines a firefighter as 'an officer or member of a permanent fire brigade under the *Fire Brigades Act 1942*'. The *Bush Fires Act 1954* defines a volunteer firefighter as a 'bush fire control officer, a person who is a registered member of a bush fire brigade established under this Act or a person working under the direction of that officer or member.' Both of these definitions place a barrier on who may be deemed a firefighter. For the purposes of this bill it is not intended to limit an individual based on their affiliation to a particular brigade, group or unit.

It is proposed to provide different definitions of 'employed firefighters' and 'volunteer firefighters' within the bill. Providing a single definition for firefighter which captures both volunteers and employed staff does not reflect the differing nature and roles of volunteers and employees.

#### 4.2.2.1 Employed Firefighters

For 'employed firefighters' a suggested definition is:

*A person who:*

1. *was employed under an industrial agreement or award applicable to firefighting;*
2. *firefighting duties made up a substantial portion of his or her duties; and*
3. *was employed by either:*
  - a. *a department of the Public Service;*
  - b. *an agency, authority or instrumentality of the Crown in right of the State; or*
  - c. *a body, whether corporate or unincorporated, that is established or continued for a public purpose under a written law, other than a body, or a body of a class, that is excluded by regulation from the operation of this definition.*

This definition is consistent with both Federal Legislation and the proposed bill for employed firefighters.

#### 4.2.2.2 Volunteer Firefighters

It is proposed that a volunteer firefighter will be defined as ‘a person who is a registered member of a volunteer brigade, group or unit under the emergency services Acts and whose duties as a volunteer substantially involve responding to fires.’

The reference to brigades, groups or units under the emergency services Acts means that any volunteers from the following could be captured:

1. Volunteer Fire & Rescue Service;
2. Bush Fire Brigades;
3. SES Units;
4. VMRS Groups; and
5. FES Units.

It is not intended that any volunteer be excluded purely because of their affiliation to a specific volunteer organisation under the emergency services Acts.

The use of ‘registered member’ would mean that informal volunteers would not be included. Were informal volunteers included it would be very difficult to determine when the qualifying period for such an individual commences and ends.

### 4.3 Qualifying periods of service

As the bill will be capturing the cancers listed in the Federal Act, it is intended to also use the same qualifying periods provided in the Federal Act. As such, the below table outlines the diseases intended to be covered by the bill and the requisite qualifying periods of service.

Disease	Qualifying Period of Service
Primary site brain cancer	5 years
Primary site bladder cancer	15 years
Primary site kidney cancer	15 years
Primary non-Hodgkins lymphoma	15 years
Primary leukemia	5 years
Primary site breast cancer	10 years
Primary site testicular cancer	10 years
Multiple myeloma	15 years
Primary site prostate cancer	15 years
Primary site ureter cancer	15 years
Primary site colorectal cancer	15 years
Primary site oesophageal cancer	25 years

These qualifying periods are based on the latency periods for the cancers, which is the interval between exposure to the carcinogen and the clinical appearance of the disease. In the event that no qualifying periods were provided, claims would be able to be contested on the basis of insufficient latency to support a work contribution.

Section 7(9)(b) of the Federal Act provides that *an employee who was employed as a firefighter for 2 or more periods that add up to the qualifying period is taken to have been so employed for the qualifying period*. It is intended that this bill will also provide that any individual who had non-consecutive terms of service would be included as long as they served for the qualifying period.

## 4.4 Exposed to the Hazards of Fire Scene

### 4.4.1 Extent of Exposed

Section 7(8)(c) of the Federal Act provides that an employee must be ‘exposed to the hazards of a fire scene’.

Equivalent presumptive legislation provisions in other jurisdictions do not always use the same test. For example, presumptive laws for firefighters in British Columbia<sup>1</sup>, Alberta<sup>2</sup>, Manitoba<sup>3</sup>, Nova Scotia<sup>4</sup> and Saskatchewan<sup>5</sup> provide that the presumption only applies to a person who has been *regularly exposed* to the hazards of a fire scene. In Arizona, a firefighter has to have been ‘regularly assigned to hazardous duty’.<sup>6</sup> In Texas the firefighter must have ‘regularly responded on the scene to calls involving fires or fire fighting’.<sup>7</sup>

It is proposed to provide that a volunteer or former firefighter need to have been ‘exposed’ to the hazards of a fire scene.

### 4.4.2 Fire Scene

Within the Federal Act, for a firefighter to be covered, they must have been ‘exposed to the hazards of a fire scene’.

Certain jurisdictions place an effective limit on which exposures to fire will be covered. The presumptive provisions in British Columbia, Alberta, Manitoba, Nova Scotia and Saskatchewan provide coverage for firefighters exposed to ‘the hazards of a fire scene, other than a forest fire scene’. Each of these provinces has exempted firefighters who respond to forest fires from their presumptive provisions.

Comparatively, in the United States, the States that have enacted presumptive provisions for firefighters have not placed any similar limitations in place regarding the type of fire responded to.

For the purposes of this bill, it is proposed that no limitation be inserted on the exposure to fire scenes.

## 4.5 Further issues

### 4.5.1 Date of the Disease and Commencement

It is intended that the bill will only covers individuals who suffered a disease after the commencement of the Federal Act. It is proposed that the date the disease is suffered is deemed to

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<sup>1</sup> Section 6.1 of the *Workers Compensation Act* [RSBC 1996].

<sup>2</sup> Section 24.1 of the *Workers’ Compensation Act* RSA 2000.

<sup>3</sup> Section 5.2 of *The Workers Compensation Act* S.M. 2005

<sup>4</sup> Section 35A(1) of the *Workers’ Compensation Act 1994-95*.

<sup>5</sup> Section 29.1 of *The Workers Compensation Act, 1979*.

<sup>6</sup> Section 23-901 Arizona Code.

<sup>7</sup> Section 607.055 Government Code.

be the date on which a medical practitioner diagnosed the individual with the disease. However the qualifying period can still begin before the commencement date of the bill.

#### 4.5.1.1 Commencement Date

The bill will have retrospective effect to provide that it commences on the same date that the proposed legislation for employed firefighters will commence. This is to ensure that volunteers and former firefighters do not suffer any loss due to the proposed bill being introduced later than the bill for employed firefighters.

#### **4.5.2 Rebuttable Coverage**

Even if an individual is able to meet each of the criteria outlined in Part 2, the presumption that the cancer in question is related to their employment as a firefighter will remain rebuttable.

### **4.6 Compensation provided**

In the event that an individual's claim is accepted it is intended that the individual will be entitled to the following:

- reasonable medical and health treatment expenses;
- compensation for loss of wages (only if the individual is employed; retired persons will not be covered by this);
- reasonable workplace rehabilitation expenses (where applicable);
- travel and other expenses; and
- death benefits (where applicable).

These entitlements are consistent with the proposed entitlements to Career Firefighters under their equivalent presumptive legislation.

#### **4.6.1 Medical and Travel Expenses**

It is proposed that this presumptive bill will link to Schedule 1, Clauses 17 and 19 of the WCIM Act. The clauses provided for medical/other expenses and travel expenses arising out of an injury/disease. This is consistent with the entitlements provided to career firefighters under the WCIM Act

It is further proposed to link to Clause 18A of Schedule 1 as well as this Clause entitles the individual receiving expenses under Clauses 17(1) and 19(1) to apply to an arbitrator to receive additional expenses where the arbitrator considers that the maximum amount is inadequate. The maximum amount payable under Clause 17 is 30% of the prescribed amount.<sup>8</sup> Under Clause 18A an arbitrator may allow an additional sum that does not exceed \$250,000.00.

#### **4.6.2 Loss of Wages and Benefits**

For Career Firefighters the methodology for loss of wages is dealt with in the WCIM Act. As volunteers and former firefighters do not sit within that act, the proposed Bill will establish a methodology within this legislation for any compensatory measures.

For presumptive legislation, the intent is to use a pure compensation model akin to that provided within section 37(2) of the Bush Fires Act. The terminology used within the Bush Fires Act is 'actual weekly earnings'. It is intended that any volunteer or former firefighter be recompensed for any

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<sup>8</sup> Currently amounts to \$59,509.50.

losses suffered, this may include benefits such as superannuation. As such it is proposed to provide sufficiently general wording to capture all wages and benefits that may be lost by the individual due to the prescribed cancer.

#### **4.6.3 Death Benefits**

Death Benefits will be provided as per Schedule 1 of the WCIM Act.

### **4.7 Claims Management**

At this stage, it is intended that the relevant insurers will have carriage of any claims management.

#### **4.7.1 Attendance at Medical Examinations**

Within the emergency services Acts, there is currently no provision whereby the Commissioner or Local Governments may require an emergency services volunteer to attend any medical rehabilitation or examination or provide a medical certificate.

There are equivalent provisions in this state and in other National jurisdictions. Regulation 86 of the *Country Fire Authority Regulations 2004* provides that the Country Fire Authority may require a member, including a volunteer member, who is receiving compensation payments to attend any medical, rehabilitation, vocation or like examination. If the member unreasonable fails to do these things, the Authority may suspend compensation payments.

## Appendix A– Relevant Provisions

### A.1 Safety, Rehabilitation and Compensation Act 1988 (Cth)

#### 7 Provisions relating to diseases

- (8) If an employee:
- (a) suffers a disease mentioned in the following table; and
  - (b) before the disease was sustained, was employed as a firefighter for the qualifying period mentioned for that disease; and
  - (c) was exposed to the hazards of a fire scene during that period; and
  - (d) in the case of a cancer of a kind covered by item 13 of the following table—satisfies the conditions (if any) prescribed for such a cancer;
- the employment is, for the purposes of this Act, taken to have contributed, to a significant degree, to the contraction of the disease, unless the contrary is established.

Item	Disease	Qualifying period
1	Primary site brain cancer	5 years
2	Primary site bladder cancer	15 years
3	Primary site kidney cancer	15 years
4	Primary non-Hodgkins lymphoma	15 years
5	Primary leukemia	5 years
6	Primary site breast cancer	10 years
7	Primary site testicular cancer	10 years
8	Multiple myeloma	15 years
9	Primary site prostate cancer	15 years
10	Primary site ureter cancer	15 years
11	Primary site colorectal cancer	15 years
12	Primary site oesophageal cancer	25 years
13	A cancer of a kind prescribed for this table	The period prescribed for such a cancer

- (9) For the purposes of subsection (8):
- (a) an employee is taken to have been employed as a firefighter if firefighting duties made up a substantial portion of his or her duties; and
  - (b) an employee who was employed as a firefighter for 2 or more periods that add up to the qualifying period is taken to have been so employed for the qualifying period; and
  - (c) an employee is taken to have been employed as a firefighter only if he or she was (disregarding the effect of any declarations under subsection 5(15)) employed as a firefighter by the Commonwealth, a Commonwealth authority or a licensed corporation.