

28 October 2024

Commissioner Brad Royce
State of Western Australia
Responsible Agency: Department of
Justice

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Dear Commissioner Royce,

Referral of issue to the regulator for resolution by inspector – Executive Summary

I am writing to inform you I have made decisions to resolve issues relating to fire response raised by the WA Prison Officers Union (WAPOU) on 18 September 2024.

The issues raised by WAPOU relate to;

- Implementation of personal protective equipment – specifically the Draeger X-Plore 6300 (DXP6300) without adequate consultation.
- Whether the DXP6300 is actually appropriate.
- An HSR put “Do not use” tags on the DXP6300, those tags were removed by the person conducting a business or undertaking (PCBU).

I was appointed by the regulator to make a decision or decisions resolving the issues. The Work Health and Safety Tribunal extended the statutory response time given in s. 82(3) of the *Work Health and Safety Act 2020* (WHS Act) on 21 October 2024 with the decision required to be made by 1 November 2024.¹

My inquiries have identified significant gaps in consultation and risk mitigation relating to fire response. WorkSafe Inspectors have taken enforcement action relating to fire response and inadequate consultation on controls to mitigate risks associate with fire response. I have outlined the notices and letters in the subheading titled [Background & Enforcement History](#).

I made an initial decision to issue a prohibition notice while I finalised my views on the necessity of further decisions to resolve issues. Prohibition notice 90032270 was issued prohibiting the activity of workers responding to fires in the DXP6300 if;

- Worker has not been Fit-tested.
- Worker is not clean shaven.
- Worker cannot achieve a proper seal.

Further to this requirement, I have set out a series of decisions to resolve the issues raised by WAPOU. Those decisions are categorised in the table of contents on the next page.

¹ WHST 16-2024 hearing date 25 September 2024 with original extension provided to 18 October 2024.

Introductory remarks

Commissioner, during my inquiries I identified significant issues relating to culture, training & skills, emergency management and risk management. The level of dysfunction, skills shortages, resources to respond to fire, application of the hierarchy of control to manage health & safety risks, and engagement in consultative mechanisms identified during multiple interviews with PCBU² representatives and HSRs³ are deeply concerning.

Commissioner, I appreciate you are in a delicate position whereby you must balance the health and safety of workers within prisons/detention centres and, the welfare of the prisoners/detainees.⁴ In coming to a decision to resolve the issues raised by WAPOU, I have had regard to the complex environment of prisons and what is reasonably practicable to mitigate risks to the health and safety of workers and prisoners in prisons.

I have made decisions to resolve the issues between the Department of Justice and WAPOU which are set out in the following categories:

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² Person Conducting a Business or Undertaking s5 *Work Health and Safety Act 2020* (WA).

³ Health and Safety Representatives s4 *Work Health and Safety Act 2020* (WA).

⁴ s7 *Prisons Act 1981* (WA).

Background & Enforcement History

Inspector Wingrove issued Improvement Notice (IN) 90019458⁵ on 20 May 2022 identifying that the Department of Justice had inadequate systems of work to respond to fires. Inspector Wingrove required compliance with the notice by 20 October 2022.

Following a request for an Inspector to address complaints regarding consultation associated with IN 90019458 I made inquiries with the WHS team and the RPE project team. I attended a virtual meeting with Department of Justice management representatives on 15 August 2022 where I made specific inquiries on what consultation has occurred.

During this meeting I explained the Person Conducting a Business or Undertaking (PCBU) duty to consult with workers, or where elected, HSRs. The conversation was generally adversarial relating to consultation with the view that HSRs will generally slow things down and add little value.

As a result of my inquiries and a demonstrated refusal to consult with workers, I issued IN 54600011⁶ on 6 January 2023. Compliance with IN 54600011 was set for 7 February 2023. The Department of Justice submitted compliance with IN 54600011 on 23 February 2023.

The Department of Justice sought an extension of time for IN 90019458⁷. An extension was granted through to 24 August 2023. The Department of Justice submitted confirmation they had complied with IN 90019458 on 20 August 2023.

Inspector Wingrove conducted a verification process of IN90019458 and sent a letter to the Department of Justice on 27 November 2023. The letter highlighted that the Department of Justice had failed to comply with IN90019458, which subsequently resulted in the issue of three additional improvement notices;

- **IN 90026890** - Safe Systems of work – Cell fire and prisoner extraction.
- **IN 90026892** - Training - Cell fire and prisoner extraction.
- **IN 90026891** - Respiratory Protective Equipment - Suitable size and fit.

Inspector Wingrove made the following relevant comments;

My inquiries identified that the Department has implemented the lowest levels of controls from the hierarchy of control measures i.e. training and PPE to address one of the Departments greatest hazards.

The decisions I have made are because of issues raised by WAPOU⁸, on behalf of workers, and as a result of ongoing risks which were brought to the attention of the Department of Justice between 2022 and 2024. Pursuant to Part 12 of the WHS Act, the decisions I have made under s.82(3) are reviewable.

Persons eligible to request a review include a worker whose interests are affected by the decision/s, a person conducting a business or undertaking whose interests are affected by the decision/s, a health and safety representative who represents a worker whose interests are affected by the decision/s and a union representing a person eligible to request a review.

Section 229 of the WHS Act provides that an eligible person may apply to the Work Health and Safety Tribunal for review within 14 days of the notice of the decision. Information on the Work Health and Safety Tribunal is available here - <https://www.wairc.wa.gov.au/work-health-and-safety-tribunal/>.

⁵ Improvement Notice 90019458 - Safe Systems Incident Response to Fire and Prisoner Extraction issued 20 May 2022.

⁶ Improvement Notice 54600011 - Failure to consult workers about matters affecting health and safety issued 6 January 2023.

⁷ Improvement Notice 90019458 - Safe Systems Incident Response to Fire and Prisoner Extraction issued 20 May 2022.

⁸ s80(1)(d) *Work Health and Safety Act 2020*.

Reasonably Practicable and the Primary Duty of Care

The Department of Justice is a PCBU who engages workers and has a duty to ensure, so far as is reasonably practicable worker health and safety in prisons operated by the PCBU in Western Australia. The Department of Justice also has a duty to ensure other persons are not put at risk from work carried out by the PCBU.

Alongside meetings with affected parties, I required production of documents to assist with my inquiries. The Department of Justice provided documents, with two of those documents referring to hazards and incident notifications. There have been 89 hazards submitted during the March 31, 2022, and 18 September 2024 period. There have also been 120 incidents recorded between the same period, which also relate to fire. The Department of Justice notified WorkSafe of 82 fires between the March 31, 2022, and 18 September 2024 period.

It is my understanding that the most controversial element of reasonably practicable will relate to whether the cost is grossly disproportionate to the risk. In forming a reasonable belief about whether there are additional reasonably practicable controls over and above the implementation of a PPE control, I have considered;

- the likelihood (and foreseeability) of fires in prisons;
- the degree of harm that workers have suffered;
- the knowledge the Department of Justice has of the hazards and risks (including hazards notified by workers to the department of justice);
- the availability of different categories of controls in the hierarchy of control;
- finally, the costs of implementing further controls and whether the costs are grossly disproportionate to the risks;

Between June 2022 and April 2024 workers compensations claims totalling \$410,342 dollars has been paid from workplace injuries relating to fire. I have not required information regarding the costs on damaged infrastructure or medical expenses for treating injured prisoners due to time constraints and an effort to not cause further disruption to the teams of people retrieving documents. There are also hidden costs, the costs borne by families of affected workers and prisoners, those costs are difficult to quantify.

In terms of likelihood and foreseeability, it is likely there will be further fires, given the frequency of incidents. Further, it is likely there will be further serious harm to worker and prisoner health if additional controls measures are not implemented given the rate of injury over a two-year period.

The Department of Justice has had knowledge of the hazards and risks, and there is an abundance of information available to the Department of Justice identifying the hazards and risks associated with fire response.

There is also an abundance of controls available to, so far as is reasonably practicable, minimise the risks associated with fire response. WorkSafe has provided information to the Department of Justice regarding additional control measures.

I have formed a reasonable belief that it is reasonably practicable to implement all of the control measures I have **directed** the Department of Justice to implement in my decision below. I do however acknowledge that these controls cannot be implemented immediately and some of the directions will likely take a period of years rather than weeks or months.

This document is not an improvement notice, it is a series of decisions I have made to resolve the issue raised between WAPOU and the Department of Justice. I have determined this is the appropriate way to resolve these issues given the volume of issues identified and the number of requirements placed upon the Department of Justice. The number of issues, complexity of issues and length of time these issues have existed for requires a flexible approach to enforcing compliance, which leads into my first direction.

I am **directing** the Department of Justice and WAPOU to engage in a quarterly consultative meeting with me, the decision maker, and any other representative of the regulator the regulator deems necessary (including the regulator themselves) to facilitate compliance.

Consultation and leadership

On 1 October 2024 I met with elected Health and Safety Representatives (HSRs) from a variety of prisons. These HSRs represented your organisation in a very positive way. There has been a clear refusal to positively engage in an appropriate consultative mechanism by leaders within the Department of Justice. In the space of four weeks, at my direction, the following consultation has occurred;

- Meeting between HSR's selected by both WAPOU and DOJ.
- Meeting with senior stakeholders and WAPOU at Hakea to hold discussions with a Draeger representative.
- Meeting with senior stakeholders and WAPOU at Hakea to hold discussions and conduct an assessment of RPE with an Occupational Hygienist.

Before my involvement, the only consultation with HSRs I have evidence of is;

- A singular consultative meeting with 2 HSRs, a WAPOU organiser a DOJ WHS representative and a Corrective Services management representative.

Other communications that have been recorded includes;

- A risk assessment meeting between the Department of Justice and Department of Fire and Emergency Services (DFES) in 2022.
- A letter to Andy Smith (WAPOU Secretary) inviting WAPOU to a briefing on 3 March 2023.
- Email communications confirming phone discussions with DFES.
- Meetings with satellite trainers.
- Meetings with Casuarina Prison Officers who initially came up with the RPE concept.

I required production of hazard reports relating to fire response and I identified the issue relating to RPE had been raised on four occasions at Pardelup, Bunbury, Eastern Goldfields Regional Prison and Hakea Prison.

The main theme identified during my inquiries is that the consultative mechanisms are not meeting the standard prescribed in section 47 of the *Work Health and Safety Act 2020*. I was told by workers that many changes are made with minimal consultation with workers. I was told the consultative mechanisms are viewed as tokenistic. I was told by workers they do not feel engaged with or valued.

Section 48 of the *Work Health and Safety Act 2020* is titled **Nature of consultation**, this section explains how consultation must occur. Additional guidance is available in the following documents;

[Code of practice - Work health and safety consultation, cooperation and coordination](#)

[Worker representation and participation guide](#)

As I demonstrated during my inquiries, it is reasonably practicable to seek feedback from HSRs and workers providing sufficient importance is placed on the consultative mechanism. Further mechanisms to seek feedback from workers may have included;

- A *survey monkey* for all prison officers asking for feedback on fire response.
- A meeting with all Superintendents explaining the importance of consultation with HSRs, and to require them to make HSRs of affected workgroups available for consultation if HSRs wished to participate.
- Engaging an occupational hygienist to attend site and conduct an assessment with HSRs present.
- Engaging HSRs and others at the beginning of the process to take part in working group.

There appears to be a cultural reliance on the command-and-control model of leadership. Command-and-control leadership is effective in responding to emergencies, but not the best approach to engage in meaningful consultation.

Significant research into leadership in prisons exists and supports a departure from autocratic leadership styles and a focus on humanistic and community focussed leadership.⁹ Australian research into emergency management has identified cultural difficulties relating to consultation and discussion in uniformed workplaces.¹⁰

The Department of Justice needs to invest in leadership within Corrective Services, particularly on how to balance maintaining the good order of a prison and engaging in meaningful consultative mechanisms. Effective consultative mechanisms are the foundation of a robust health and safety management system.

I wrote to the Department of Justice in 2023 regarding the need to refocus on consultation and leadership. The content of the letter focusses on Wooroloo Prison Farm, however, many of the comments are relevant to this process.

WorkSafe have continually notified the Department of Justice of the importance of consultation and the legislative duty placed upon the Department of Justice to consult on health and safety matters. Any deficiencies in consultation brought to the attention of the regulator following this decision may require the use of other enforcement options.

The following decisions are aimed at developing the leadership knowledge and skills regarding consultation;

I am **directing** the Department of Justice to do a training needs analysis of leadership skills within custodial facilities.

I am **directing** the Department of Justice to investigate additional training for leaders in conflict resolution, communication, and consultation.

I am **directing** the Department of Justice to investigate additional training for workers in conflict resolution, communication, and consultation.

⁹ Skuza, Sebastian & Modzelewska, Anna & Kotowska, Justyna. (2021). Management in Polish prison units – conclusion from a pilot study. *Resocjalizacja Polska*. 21. 277–302.

¹⁰ Owen, C., Scott, C., Adams, R., & Parsons, D. (2015). Leadership in crisis: Developing beyond command and control. *The Australian Journal of Emergency Management*, 30(3), 15–19.

Tagging

HSRs tagged out RPE as they had raised concerns about the adequacy of the RPE. The Department of Justice removed those tags as they believed it was not in line with their current policy. HSRs demonstrated their concern about using the RPE, and provided the Department of Justice appropriate notice that there were concerns about the masks.

The Department of Justice tagging out of plant and electrical equipment guidance note provides the following information under the heading “Out of Service tags”

*Out of Service tags (see Appendix 1) are yellow tags used to signify that plant and electrical equipment is unsafe, **not fit for purpose**, or is undergoing repair and/or maintenance. Plant and electrical equipment with an Out of Service tag attached must not be operated.*

*An Out of Service tag can be attached **by any worker** where there is reasonable grounds for believing the plant or equipment is unsafe to use (see above). **An Out of Service tag can only be removed by a competent person once it has been deemed safe after inspection and servicing and/or repair.***

Plant is defined in the *Work Health and Safety Act 2020* as;

plant includes —

(a) any machinery, equipment, appliance, container,

implement and tool; and

(b) any component of any of those things; and

(c) anything fitted or connected to any of those things;

The DXP6300 is classified as respiratory protective equipment and meets the definition of “plant”.

HSRs attached the tags as they were concerned the item of plant the Department of Justice put into service was not safe. The Department of Justice did not engage a competent person to remove the tags. The Department of Justice only engaged a competent person to provide advice following direction from WorkSafe.

I am **directing** the Department of Justice to ensure whenever safety concerns are raised by workers that a suitably competent person is engaged to provide advice, and that suitably competent person provides the advice in the presence of the relevant PCBU representative and either, or both of the following people;

- The worker who raised the concern.
- An HSR from the workers work group.

Training

One of the major gaps identified during my inquiries relates to the lack of qualified workers that can use the Compressed Air Breathing Apparatus (CABA) to respond to smoke or fire. I was told that there are often not enough qualified CABA operators on shift to respond to a fire. During my inquiries, I asked for views on fire response generally. I was met with a variety of responses; the most poignant answer was what some new prisoners have been told during induction into the prison;

“Don’t light a fire in your cell because there is no one coming to save you”.

I was told the implementation of the Draeger 6300 is to ensure a faster response time and to address the shortfall of trained CABA responders. However, I was also told that prison officers or vocational support officers are not required to complete CABA training during their induction program at the Corrective Services Academy.

Historically, new prison officers were required to undergo CABA training through the academy. However, no one could provide a reason as to why it is no longer a requirement. I have been told by workers and management representative that there are often insufficient CABA operators on shift to mount an effective fire response. I have also been told this is due to a number of factors including but not limited to;

- Insufficient numbers of workers trained in CABA.
- “Book-offs” the colloquial term used for people accessing sick leave/personal leave.
- “Admin swaps” the colloquial term used for prison officers swapping shifts with one another.

Risks exist to both workers and prisoners/detainees within custodial facilities if there is a fire an effective fire response cannot be mounted. To resolve the apparent lack of CABA response in Department of Justice managed prisons in Western Australia please see the following list of directions and recommendations;

I am **directing** the Department of Justice to require all new starters that attend prison officer training at the Corrective Services Academy to undertake BA training. Any workers unable to participate in the practical training elements due to religious/cultural beliefs or medical exemption **MUST** still participate in the theory elements of the training.

I am **directing** the Department of Justice to ensure all Superintendents complete AT LEAST the theory component of the BA training.

I am **directing** the Department of Justice to ensure all persons in a leadership position within a prison and may direct fire response to undertake EEO/ECO/FSO (front line emergency management training).

I am **directing** the Department of Justice to ensure all current ranks complete AT LEAST the theory component of the BA training.

I am **directing** the Department of Justice to ensure each custodial facility facilitates at least four desktop fire/smoke response exercises per year and two practical site-specific training exercises per year.

I am **directing** the Department of Justice to ensure all qualified BA operators **MUST** conduct refresher training at least once every six months.

I am **directing** the Department of Justice to consult with HSRs about the content of the refresher training.

I am **directing** the Department of Justice to ensure these directions are driven by senior leaders within the organisation and the appropriate resources are directed to completing with these directions.

I am **recommending** all Superintendents to complete the practical element of the training if medically fit to do so, and if they do not have a religious/cultural belief that prevents them performing the practical training.

I am **recommending** the Department of Justice ensure all ranks above complete the practical element of the training if medically fit to do so, and if they do not have a religious/cultural belief that prevents them completing the practical training.



I am **recommending** the Department of Justice engages with the Department of Fire and Emergency Services to facilitate some desktop exercises for joint fire response.

Emergency Response Working Groups

I am **directing** the Department of Justice to implement emergency response working groups at each prison to discuss fire and fire response issues specific to their prison. These working groups **MUST** involve HSRs. Department of Justice must ensure less than half of the participants are management representatives.

Pilot Programs

I am **directing** the Department of Justice to pilot a fire response team pilot at Bandyup Women's Prison. This pilot should encompass a 24-month period, six months of consultation and planning, six months of training and twelve months of operational implementation. This fire response team will consist of a full CABA response team, whose duties are focussed on training and fire response.

I am **directing** the Department of Justice to investigate engineering controls including but not limited to;

- Further investigate the implementation of upgraded cell doors with inclusion of inundation points.
- Investigate fit for purpose portable mechanical extraction systems to assist in removing smoke.
- Investigate implementation of fixed mechanical extraction systems to assist in removing smoke.

I am **directing** the Department of Justice to pilot a system for identifying **previous** fire lighting behaviour and implement strict staged processes for reducing fire-load and for ensuring these people have priority on cells with RCD's low voltage circuits, fire retardant materials and the lowest possible fire load.

Respiratory Protective Equipment

One of the primary issues that is in dispute is whether or not the DXP6300 is suitable for use in the corrective services space. An independent assessment was carried out by Dr Sugil Lee (PhD in OH, COH, MAIOH). **Dr Lee's assessment is linked here.** Dr Lee determined the following;

Based on the site observation and document review, it can be concluded that the nominated full-face respirator with appropriate cartridges/filters is suitable to ensure they are not exposed to the possible airborne toxic chemicals emitted from the fire when they control the fire from the outside of the cell.

Internal discussions with WorkSafe's own occupational hygiene team agree that the DXP6300 provides adequate protection from airborne toxic chemicals emitted from fire, providing the fire is controlled from outside the cell.

Implementation of the DXP6300 may assist in reducing a fire from growing, but it does not assist the Department's other fire response issues. I was informed the response time from CABA teams donning gear to making entry to fire affected area may take as long as 14 minutes.

Some of the response issues relate to training, and resources which I have addressed in other areas of this decision. However, there are other matters which could be easily addressed to reduce response times. Increasing the amount of available CABA, including placement in units and support units needs to be explored.

I am **directing** the Department of Justice to review the number of available CABA across the estate.

I am **directing** the Department of Justice to review the locations of available CABA across the estate.

I am **directing** the Department of Justice to assess whether the locations of available CABA across the estate are appropriate.

I am **directing** the Department of Justice to ensure each custodial facility to assess appropriate placements for CABA into units and support units in consultation with each prisons Emergency Response Working Groups.

I am **directing** you to provide a comprehensive report to WorkSafe detailing the CABA review findings.

Infrastructure and fire load review

I am **directing** the Department of Justice to inspect all custodial facilities and provide WorkSafe with a comprehensive report identifying and reporting on;

- A detailed list of each custodial facility identifying where residual current devices (RCDs) are not installed.
- A detailed list of each custodial facility identifying where residual current devices (RCDs) are installed.

A common theme in my inquiries identified that prisoners are able to easily light a fire, even without a lighter. Prisoners have been known to use electronic devices such as TV's, game consoles, fans and other electronic devices to start fires. Consider methods to reduce misuse – research conducted and to be outlined below.

I am **directing** the Department of Justice to assess the practicability of installing low voltage fuses for power outlets.

I am **directing** the Department of Justice to notify WorkSafe when this assessment is finalised.

I am **directing** the Department of Justice to review the current furnishing guidelines for cells in custodial facilities and research furnishing options that have a lower fire risk, but do not introduce further risk (such as the introduction of ligature points).

I am **directing** the Department of Justice to conduct the above listed infrastructure and fire load reviews in consultation with HSRs and engage suitably competent persons to assist where technical concerns arise.



Review of decision

Pursuant to Part 12 of the WHS Act, the decisions I have made under s.82(3) are reviewable. Persons eligible to request a review include a worker whose interests are affected by the decision/s, a person conducting a business or undertaking whose interests are affected by the decision/s, a health and safety representative who represents a worker whose interests are affected by the decision/s and a union representing a person eligible to request a review.

Section 229 of the WHS Act provides that an eligible person may apply to the Work Health and Safety Tribunal for review within 14 days of the notice of the decision. Information on the Work Health and Safety Tribunal is available here - <https://www.wairc.wa.gov.au/work-health-and-safety-tribunal/>.

Should you have any queries in relation to these issues, please contact Steve Crabb (Acting Director, Service Industries and Specialists Directorate), Ivor Roberts (Deputy WorkSafe Commissioner), or Sally North (WorkSafe Commissioner).

Yours sincerely,

Steve Crabb

Acting Director Service Industries and Specialists Directorate

WorkSafe