

**COMMUNITY DEVELOPMENT AND JUSTICE
STANDING COMMITTEE**

INQUIRY INTO FIRE AND EMERGENCY SERVICES LEGISLATION

SESSION TWO

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 19 OCTOBER 2005**

Members

**Mr A.P. O’Gorman (Chairman)
Mr M.J. Cowper (Deputy Chairman)
Mr S.R. Hill
Ms K. Hodson-Thomas
Mrs J. Hughes**

Co-opted Member

Mr P.D. Omodei

Hearing commenced at 10.47 am

GOW, MR PETER

**Executive Director, Office of Policy and Planning,
Department of Housing and Works, examined:**

YAZDANI, MR NABIL

**Principal Policy and Technical Officer,
Department of Housing and Works, examined:**

The CHAIRMAN: The committee hearing is a proceeding of Parliament and warrants the same respect that proceedings in the house itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as a contempt of Parliament. Have you completed the "Details of Witness" form?

The Witnesses: Yes, we have.

The CHAIRMAN: Do you understand the notes attached to it?

The Witnesses: Yes.

The CHAIRMAN: Did you receive and read an information for witnesses briefing sheet regarding giving evidence before parliamentary committees?

The Witnesses: Yes.

The CHAIRMAN: The committee has received a submission from the Department of Housing and Works.

The Witnesses: Yes.

The CHAIRMAN: Do you wish to propose any amendments to the submission?

The Witnesses: No.

The CHAIRMAN: Is it your wish that the submission be incorporated as part of the transcript of evidence?

The Witnesses: Yes.

The CHAIRMAN: Do you wish to make a statement in addition to the submission?

Mr Gow: Only if it would help the committee to have some background to the role of the Department of Housing and Works in respect of this.

The CHAIRMAN: That would be very appropriate.

Mr Gow: The Department of Housing and Works and the Minister for Housing and Works are responsible for building control legislation in this state. That has been the case since 2003 when the relevant sections of the Local Government (Miscellaneous Provisions) Act were transferred from the Department of Local Government and Regional Development to the Department of Housing and Works. That was done primarily so that the Department of Housing and Works, which has a stronger building focus, could prepare for the state proposals for a new building act to replace the rather outdated legislation that dates from 1960. In preparing this legislation, for which a discussion paper has recently been approved by cabinet and will be released for public comment next month, the Department of Housing and Works dealt with other agencies that have building control functions or roles that impact on building standards. Discussions were held also about the way building standards are enforced in Western Australia. In that regard the Fire and Emergency

Services Authority has discussed with the Department of Housing and Works its legislative proposals and, equally, the Department of Housing and Works has discussed its building proposals with FESA. The evidence that the Department of Housing and Works has provided in the submission is essentially about the relationship between the two organisations and about which matters should properly be put into building legislation and which matters should be left for the FESA legislation.

The CHAIRMAN: Is it possible to give the committee an idea about how FESA and the fire regulations operate in the building regulations? Can the building regulations not proceed because of regulations for sprinklers etc?

Mr Gow: The current act provides that anybody who wishes to construct a building must provide drawings and a submission to the relevant local government and then receive a building licence from that local government. That process is covered by the 1989 building regulations, which require that a copy of the drawings that have been submitted for certain buildings be provided to FESA and that FESA be given the opportunity to comment on those drawings.

[10.50 am]

The CHAIRMAN: Is that just commercial buildings or also private dwellings and right through?

Mr Gow: Nabil can give the detail of that.

Mr Yazdani: Buildings other than single residential buildings.

Mr Gow: In general terms, the local government building surveyor controls the issuing of the licence and will seek the advice of Fire and Emergency Services. One issue that has been raised is that it is not clear under current legislation what FESA is meant to do with the drawings when it gets them.

The CHAIRMAN: Is it the case that FESA makes a recommendation but that that recommendation does not necessarily have to be implemented, because there is no legislative method of insisting that certain fire standards are maintained in terms of emergency evacuation etc?

Mr Gow: No. At the moment, FESA is essentially totally dependent on the local authority and the local authority building surveyor taking note of its advice. There is nothing to prevent the building surveyor from issuing a building licence over the top of objections from FESA.

The CHAIRMAN: Okay. Does that not leave the state and FESA in a rather precarious position? If I built a facility and the local government overrode what FESA had said, would that not leave me open to litigation should anything happen in the future?

Mr Gow: Potentially. I must say that it is very rare for the local authority to not take note of what FESA says. There are issues. I will expand on the background to it. The building standards that local authorities primarily look to enforce are contained in the Building Code of Australia, which includes a number of fire safety measures. Typically when the drawings go to FESA, FESA looks at both how a fire might be fought in the building, which are operational issues, and at building standards issues. Local authority building surveyors are not necessarily fire engineering experts, so they may well rely on FESA advice on the proper interpretation of, say, one of the building standards. A dispute could potentially arise between the designer, the local government and FESA on the proper interpretation of the building standard. There may well be cases where, after what could be called a professional or technical review, in the end the designer's view prevails over that of FESA, but it is usually after a fairly thorough and well-documented review of those decisions.

The CHAIRMAN: Is that for new buildings or new projects?

Mr Gow: Yes.

The CHAIRMAN: What happens in the case of existing buildings with FESA inspections? Does FESA or the Department of Housing and Works have any authority to inspect a building to make sure that it meets a particular fire prevention standard?

Mr Gow: They do. Nabil may want to give a slightly more technically precise answer. The current FESA Act gives FESA the ability to inspect most buildings. Is it just public buildings or most buildings? They certainly have a reasonably broad power to inspect, to clear the building and to require work to be done on those buildings. That is one potential area of conflict with the building regulations, in that FESA could potentially want work to be done that is perhaps contrary to or different from the building code. The process that FESA might use to enforce modifications to a building is not clear under current legislation, as opposed to the processes the local government might use under the building regulations.

Mr Yazdani: I just want to clarify that. The building regulations provide no authority for FESA to inspect buildings. Whatever authority it has would be within its own regulations. Building regulations give local governments the authority to enforce compliance with the building code, which includes all the fire safety measures in buildings such as sprinklers, hydrants and hose reels. That is all contained within the building code, which local governments enforce. A building that complies with the building code should meet all the requirements of FESA. There should be no other requirements.

The CHAIRMAN: Aside from the building code, is there a point at which an owner of a building has to put up an evacuation plan or emergency management plan for a building? Are there any legislative procedures to enable that to happen, or is that purely done off their own bat?

Mr Gow: There may be something in the FESA legislation. I have seen it, but I do not hold myself out to be an expert on the detail of it. There is not very much in the building regulations that controls buildings in use and gives the local government the ability to place those sorts of obligations on owners. There are other regulations such as health regulations for public buildings, fire regulations and so on that may require an owner to have an evacuation plan or other things.

Mrs J. HUGHES: It was interesting that you said that all these regulations were adhered to for everything but single residential dwellings. For instance, does the Department of Housing and Works, especially with state housing tenancies and so forth, fall under the same guidelines in terms of duty of care? Do private owners of rental accommodation fall under any of the fire guidelines? Can you comment on that?

Mr Gow: The Building Code of Australia sets out the basic requirements for buildings, which covers such things as fire safety in terms of compartmentalising buildings so that fire does not spread, having exits and things like that. There are provisions that relate to houses, but they are not necessarily obvious fire regulations; that is, there are no requirements for such dwellings to have fire extinguishers or things like that.

Mrs J. HUGHES: Alarms and that type of thing.

Mr Gow: No. The requirements for a private house are much -

Mrs J. HUGHES: Are the same as for a tenancy agreement.

Mr Gow: In essence, yes. Having said that, the policies of departments such as the Department of Housing and Works on how buildings are designed and built take into account fire issues, because fires sometimes occur in tenancies. For example, we have hard-wired smoke alarms in all public rental housing, which is not a mandatory requirement in other dwellings, although there are proposals to look at that. By and large, the specific fire regulations for houses are quite light. They are mostly about having adequate doors and lighting, reasonable ventilation and things like that, rather than technical fire solutions like fire alarms.

[11.00 am]

The CHAIRMAN: Can I ask a question in relation to apartment blocks that we are now seeing spreading? These are essentially clusters of private dwellings. Are they treated differently from single stand-alone residences? You mentioned that earlier.

Mr Gow: Yes.

Mr Yazdani: What was the -

The CHAIRMAN: We have an explosion of apartment blocks around the place. They are essentially clusters of private dwellings. Would they not be treated the same as a stand-alone residence?

Mr Yazdani: No, they are treated differently. Apartment buildings are a different class of building in terms of the building code, and they have higher requirements. The fire separation between units is quite strict. In certain situations, they require smoke detection and alarm systems in public areas. If they have large car parks, they may require sprinklers, so it is quite different from a single house. A single house is very simple. All the requirements are pretty simple and they are contained in the building code. Smoke alarms and all those things are in there, and there is no FESA involvement with those.

Mrs J. HUGHES: I do not know whether you are going into this aspect, but local government buildings, for instance, such as libraries and community centres, are often older buildings. Until they actually go into retrofitting, there is no mechanism at all to bring them up to any safety standard, like, say, what would be put forward now. For instance, I know of a building in the northern suburbs that needs new pumps and such things as a result of its square metreage. Would you see a need for local governments to become more proactive in reassessing their buildings, even if they are not going to retrofit? Unless they go through a retrofit, it does not appear to come up to the requirements of the change.

Mr Gow: Potentially, yes. As I said earlier, the current legislation is pretty heavily focused on getting the building licence; once that has happened, the building is built. Certainly, a strong tradition in building control regulation states that once the building is built, even though the standards may change, you do not have to upgrade the building until you do a major refurbishment and have to go back to get another building licence. By and large, that works okay in balancing the problems of the building owner having to monitor standards and to keep spending money on a building. The building act proposals that we are putting forward, and are set to be publicly released next month, try to cover the design phase, the construction phase and the building use phase. We propose that every building at the end of construction would be given a certificate of occupancy that states that the building has been built in accordance with the approved plans, and is safe to be used as class-whatever building - be it a school, hospital, apartment block, house or whatever. If, as a result of the design or construction choices that have been made, there is a need for ongoing maintenance of critical facilities in that building - for example, lifts, smoke exhaust fans, sprinkler systems or things like that - they would be listed on the certificate of occupancy, and there would be a requirement for an appropriate inspection at regular intervals during the use of the building. That will open up to local authorities the ability to monitor whether buildings are still being used for the purpose for which they were designed, to ensure that nobody has changed that use and to ensure that they are functioning in the way that they were designed and constructed. Obviously, even though the legislation may not give an overt power to do this, it would also give the local authority an opportunity to raise concerns about a risk or a problem that they see there, and they can discuss that with the building owner. Whether that process is taken to the point of forcing people to upgrade is something upon which we are looking for public comment, rather than jumping in and saying "Here is an extra piece of regulation." It will be a much more transparent process. Local governments will have a much better idea of what is happening to buildings in their area.

Mrs J. HUGHES: So, under the legislation that is being put forward for public comment, if a building designated for a particular use was changed, and, God forbid, somebody was caught in a fire, would the owner of the building be held liable?

Mr Gow: If you have a circumstance in which the owner changed the use of the building without notifying the local authority and making whatever changes were necessary to make it comply with the standards for that changed use, the owner would, I think, clearly be liable for doing that. The legislation would require the owner to notify the local government of the change of use and have a reissued certificate of occupancy for that changed use. That would then normally give the local government a chance to -

Mrs J. HUGHES: Or increased use - would that also come into subsequent use?

Mr Gow: No. It would only be if it were a change of class in the building code. The building code has 10 classes of buildings, and there are different provisions, or enhanced provisions, that relate to the different classes. It would only really be picked up -

Mrs J. HUGHES: Would it be for those out of one particular class?

Mr Gow: It would be if it fell out of one and into another class. If it were a dormitory for, say, university students, and then it was changed to being a dormitory for nurses, it would not change class. However, if the dormitory became a backpacker hostel, it may become a different class because that is a different class. But if it were a similar use within the class, there would not normally be a requirement to notify.

The CHAIRMAN: Your submission recommends that FESA be provided with the power to enter, inspect and evacuate and/or close down a building, but you suggest that this power should be limited to extreme circumstances - that is, if there were an imminent danger to the safety of the building's occupants. Can you tell us who should be responsible for determining what is an extreme circumstance or an imminent danger?

Mr Gow: We would see that as a judgment call for FESA officers, because they are the people who go into the building and see something of concern. If they believe that there is a danger to the occupants that required the building to be evacuated, they would make that call.

The CHAIRMAN: If a FESA officer determines that a risk is possible or inevitable, yet the building owner refuses to rectify the risk, what do you propose as a course of action?

Mr Gow: In broad terms, our position covers anything that requires modification to the fabric of the building, and, by implication, things that are governed by the building code and the building regulation process. Any rectification or enhancements of those should go through the building regulation process. In essence, the FESA person may go in and see that all the exit signs are not working in the building, or perhaps a more critical thing in the fabric of the building. They clear the building because there is a danger, they notify the local government to say what the problem is, and the local government then issues the notice under the building control regulation that these things must be fixed before you can reoccupy the building.

The CHAIRMAN: Is that not a bit cumbersome? Should that authority not fall to FESA to say, "We're condemning the building as not being fit, and we suggest that you bring it up to this standard"? Is going back through local councils not just prolonging the process?

Mr Gow: If it relates to the building fabric, I do not think it is unreasonable. Consider two scenarios. If FESA goes into a building and discovers that someone has put moveable filing cabinets in front of the exit doors, FESA could justifiably say "Clear the building; get out; shift the filing cabinets!" That is a building management and building operation issue. We are very happy that FESA controls that process, judges that escape routes are back open and allows re-occupancy. However, if FESA came in and said it was really concerned about no sprinklers being in a particular area, or that the exit signs do not meet the codes or something like that, which is a thing normally

regulated under the building code, we would prefer that that was then fixed up under the building code so that the relevant certificates of occupancy and the building record etc could be maintained.

[11:09 am]

The CHAIRMAN: At the moment, local government has the power to enforce that, and FESA clearly does not.

Mrs J. HUGHES: So if FESA had the call and local government did not carry through with that, who would the liability fall to? Would it fall to local government?

Mr Gow: I would think it would fall to local government if it failed to follow a notice from FESA that a building had to be cleared because FESA had concerns. To be honest, I imagine the building owner would be beating down the local government's door to get quick rectification so that they could reoccupy the building.

The CHAIRMAN: The building code is the baseline - the bare minimum that must apply. Are you proposing that FESA should be able to recommend a higher level of safety than what is in the building code because it is a particular-use building; for example, a hospital or a children's hospital? There is a standard there. Are you proposing that FESA should be able to come in and say they should raise that standard?

Mr Gow: In philosophical terms, no, but there are a couple of complications on this that I probably need to explain. The building code at the moment has very much concentrated on life safety issues rather than property protection issues. FESA and fire authorities generally - this probably relates to its original tie-up through insurance companies and funding through insurance levies and so on - has had a much greater interest in property protection, such as stopping the spread of fire to adjacent properties and things like that. At the moment there is a bit of a philosophical mismatch between the building code and the fire authorities and the insurance companies about what the code should say.

The Productivity Commission last year did a review of the Australian Building Codes Board and the building code, and highlighted that as an area that needs to be addressed. Therefore, the Australian Buildings Code Board, which handles the building code of Australia, is taking that on as one of its main work programs for next year. At the moment there is possibly an argument to say, yes, FESA should be able to say that it wants the property protection standards built over the top of the life safety standards. However, in due course, the philosophy is to try to get the building code to include all the building standards, so that will come up. Philosophically, we would prefer everything to be in the building code, but we acknowledge that it is not there now.

The other area in which FESA should be able to have an input - this is referred to, I think, in our submission - is that FESA has the job of fighting a fire and getting people out of a building, and there may be things that are required for operational issues that are not specifically covered in the building code or might be seen as enhancements to the building code. So, we would consider it perfectly proper for FESA to require those additional standards or additional items to be included in a building.

The CHAIRMAN: The member for Carine has been called away. I just want to ensure that we still have a quorum, because we have certain legislative requirements. Two members present represent a quorum. I just want to clarify something in your submission, Mr Gow. At page 2, paragraph 5, you limit the power to close down or evacuate a building to situations in which there is an immediate threat to life, property or the environment. Later on in paragraph 5.1, you further limit this power to imminent danger to the safety of the building's occupants. What did you mean by that?

Mrs J. HUGHES: Paragraph 6 refers to extreme situations.

Mr Gow: In board terms we see FESA as managing the situation as it finds it. It is certainly necessary to safeguard people's lives. There are also situations in which there may be a chemical spill or something like that and work needs to be done to prevent chemicals from getting into drains or things like that. We see FESA's role as going in and managing the emergency. When the emergency is over, the normal processes would then kick back in to do things such as building modifications, repairs to buildings that have been damaged etc. We try to get those situations managed by the normal building regulation process where possible.

The CHAIRMAN: If I was running a chemistry experiment on the second floor of a building and there was a chemical leak or spillage, the chances are that it would run downstairs, in which case FESA would come in, clear the building and remove the risk. But then it can stipulate that if that particular activity is to continue, the top floor would have to be sealed, or something like that, so that a chemical spill could not get into other areas. Is that the type of thing you are talking about?

Mr Gow: Yes, although if FESA said the building should be modified to put bunds in place or something on the top floor, for example, we would suggest that should go to local government to enforce that, and it should be included in the building plans etc so that it would become a building control issue rather than something that FESA would have to come back and keep checking.

The CHAIRMAN: Would it not be something that would normally be picked up under the building codes? We seem now to be adding things. I am very conscious that local government hates state and federal governments cost-shifting to local governments. We are adding a cost to local government to enforce something that has been determined by a state body.

Mr Yazdani: If what FESA is asking for is not a requirement of the building code or the building regulations, the building regulation process might not apply, because there might be other processes in place in this state. For example, WorkSafe or other environmental laws and requirements might come in that apply to industrial plants and things like that. Those things may or may not be linked to a building approval process when a building is built, and local government may not have a role to play. However, whether it is appropriate for FESA to take over those things is another matter.

Mrs J. HUGHES: That would create a bit of a dilemma. If FESA came forward with a proposal for safety reasons, or whatever, and local government assessed it and it was found not to fall within the regulations, so it did not go ahead with it, but subsequently an incident were to occur, that would be a very sticky situation should it be found that FESA had talked to local government about having that put in place. You are saying that FESA should have to issue a certificate so that local government could go ahead with that. Would such a certificate process not put the local government at a huge risk of liability?

Mr Gow: No. I will outline the building act process that we are putting forward. As you can probably imagine, a pile of regulations and rules apply to buildings, such as planning, heritage, health, or whatever. We propose with the building act to clearly make it a requirement of the body that issues the building licence, which in almost every case will be the local government - although our new building act will provide for the state government to also act in this area, whereas the current legislation does not; at the moment only local governments can issue building licences. We would propose that the state also issue building licences. That would provide some degree of flexibility. The licence issuing authority - the local government - must check that it has all the approvals from the relevant bodies for that type of building. We would suggest that for those classes of buildings with which FESA wants to be involved, there be a formal process under the FESA act for FESA tick-off in respect of buildings, with the emphasis being placed on its ability to fight the fire in the building or to rescue people in the building or deal with the issues, and not so much second-guessing the building code stuff, which is done through the building code process.

[11.20 am]

Before a building licence is issued, FESA gives a certificate to the local authority indicating that it is happy with the building, that it requires certain modifications before it is happy or that it requires ongoing maintenance regarding some fire services to be carried across into the certificate of occupancy. In that scenario, FESA's role is fairly formal in what it covers, what it signs off on and what is enforced. However, enforcement during the construction process and during the building-in-use process largely sits with the local authority. If, for example, FESA went to a building in response to an emergency, and said it thought its original certification was deficient because it learnt of the possibility of a chemical spill or something and it wanted some additional requirements included, if the requirements were covered by the building code, FESA would inform local government of the building code deficiencies and that local government needed to deal with it. If the requirements related to firefighting and so on, FESA would say it wanted to deal with them under the Fire and Emergency Services Authority of Western Australia Act. FESA might wish to deal with those matters directly with the building owner or it might prefer to deal with them through the local government. We suggest that the process be concentrated in local government under the building legislation. In other words, it would be a one-stop shop in which one set of people has all the building records and through which all issues can be addressed in a holistic way. However, there is no fundamental reason that it cannot be split so that the various people who approve applications up-front, such as planning and heritage and so on, cannot act independently. That is an area upon which we will seek public comment.

Mrs J. HUGHES: It will be interesting to see what happens.

Mr Gow: When we have talked to local governments, they have indicated that, to some extent, they are conscious of their workload and their liability responsibilities. Equally, they do not want to be dealt out of the building control function, which has happened in some other states, and it has not necessarily worked well. Finding the right balance will be interesting.

The CHAIRMAN: A couple of minutes ago you indicated that the local government authority is usually the agency that gives building approvals. You said that you were also putting in place a state government approval process. Can you explain how that might work? Would I need to make a choice between local and state governments to approve my building?

Mr Gow: No. The current legislation, dated 1960, exempts the Crown; therefore, any building owned or occupied by the Crown is not covered by local authority building control. The department sees that as a gap in the continuity of process. Although government agencies such as the Department of Housing and Works clearly try to design buildings according to the building codes, there is no formal process for recording that. We propose that under the new act, all buildings, no matter who owns them, must go through the certification process; that is, have a building licence and a certificate of occupancy. The state government's concern is that if it must go through local government to obtain a building licence, local government could frustrate the process. For example, which council would want a prison in its local government area? That scenario could frustrate the issuing of a building licence. For those reasons, we say that the state government and an appropriate minister, and appropriately qualified people in state government, will issue building licences for state buildings.

Mrs J. HUGHES: They would no doubt use the same mechanisms.

Mr Gow: They would still use the same mechanisms and so on. With the state's having the ability to issue a building licence or regulate for building anywhere in the state, it opens up the possibility for the state to handle building regulations for a major development of state significance such as the North West Shelf gas developments, where the local government simply does not have the resources or the technical capability to handle building regulation. The state might take that over by agreement. It is not intended that an individual have the choice of where to go. People must go to local government first. Unless local government wanted to make a case to the state for the state's

taking over the regulation of a building or facility for some reason, approval would remain with local government.

The CHAIRMAN: Would you like to make a final comment on, for example, the interaction between FESA, local government, and the Department of Housing and Works?

Mr Gow: The basic issue is where we draw the dividing line between the two processes and the two areas of responsibility. We have been working with FESA now for probably 18 months in discussions on this - very constructively I must say - and there are no fundamental differences through which we do not seem to be able to work. I think the outcome will be that it is a lot clearer, particularly when new building legislation will clarify both the qualifications of people who must do the checking and certifying of these things and the process by which it is pulled into the building process and checked and so on. It will give both FESA and the owners and occupiers of buildings a much clearer idea of who is responsible for what. We are both headed in the same direction reasonably well. There are issues that we have not broached in our paper to the committee that need to be worked through. They include emergencies such as earthquakes or cyclones in which FESA requires expert building advice to carry out search and rescue functions and to decide whether buildings should be demolished and so on. That is an area that I believe needs more work. However, again, we and FESA are working quite constructively to address the various issues that arise. I am reasonably comfortable that the FESA proposals are quite sound in how they impact on building control.

Mrs J. HUGHES: Do you have a preference or an ideology of how the command structure should work in an emergency and the interplay between the agencies of local government and FESA?

Mr Gow: It is not something we have done any detailed thinking about, so this is a somewhat off-the-cuff response. In broad terms, the Department of Housing and Works considers the local authority is responsible for buildings in its local authority area. When FESA needs advice about the buildings or access to building plans or to someone with some expert knowledge about buildings and what may or may not be safe, in the first instance, FESA will go to the local government building surveyor to provide that information. We think that part of the philosophy behind our building legislation is to try to concentrate the records in one spot where we know we can get them. Our preference is for FESA to quickly deal with that building area in local government should it need to do so. Given that some local authorities are relatively small and have only one building surveyor who is not on duty 24 hours a day, clearly, in intense emergency situations, there may well be a need for FESA to act independently and source independent advice etc. I have just mentioned that we need to do a little more work with FESA to determine just how that works out. In general, FESA's relationship with local government - from FESA directly to the relevant local government person - should work quite soundly in the area in which we are interested.

The CHAIRMAN: We have exhausted our questions. Thank you for coming in. You have raised a few questions that I had not anticipated.

Mr Gow: If we can be of assistance, we are most happy to come back or provide further information if you want it.

The CHAIRMAN: Thank you.

Hearing concluded at 11.31 am
