## OCCUPATIONAL SAFETY AND HEALTH AMENDMENT BILL 2010

*Introduction and First Reading*

Bill introduced, on motion by **Hon Alison Xamon**, and read a first time.

*Second Reading*

**HON ALISON XAMON (East Metropolitan)** [10.30 am]: I move —

That the bill be now read a second time.

The Occupational Safety and Health Amendment Bill 2010 seeks to introduce important reforms to increase the safety of workplaces in Western Australia, including the principle of corporate criminal responsibility. The primary issue that the bill seeks to address is to ensure that culpable employers are held responsible for workers' deaths. Every workplace death is a tragedy that also results in a lifetime legacy for loved ones left behind. Under existing laws, when an employer is responsible for an employee's death, the penalties it faces are woefully inadequate. This bill seeks to remedy that.

On average, one person every 17 days is killed in WA from traumatic work-related incidents. In 2008–09 this equated to 21 work-related deaths in WA. Once the figures associated with work-related injury and disease are also factored in, the situation becomes even more grim. Currently, one worker is injured every 30 minutes with injuries serious enough to take one or more days or shifts off work. On average, 3 657 workers are injured each year to the extent that they have to take 60 or more days off work. This is a very serious and real problem, yet the seriousness of this is not reflected in existing legislation and this is unacceptable.

Several reforms in this bill are based on Safe Work Australia's model work health and safety legislation, as amended in May 2010. This model law came out of the national review of occupational health and safety and intergovernmental agreement to harmonise work, health and safety laws across Australia. We are yet to see the implementation of the model laws or to get a clear indication of when they are likely to be introduced into this state. Instead, we have an indication from this government of its intention to deviate from the model laws in favour of weaker provisions. Therefore, this bill seeks to ensure that some of the more important aspects of the harmonisation laws are enshrined in our legislation as soon as possible and, indeed, to go further than the harmonisation process, preferring to err on the side of worker safety. If we wish to deviate from the harmonisation process, then it should be for the purpose of strengthening provisions for occupational safety and health and to not make it easier for employers to evade best practice in workplace safety.

Under the Criminal Code, it is currently extremely difficult to prosecute a company for manslaughter. Attributing the will of the decision makers to the resultant effect on the ground is unrealistically onerous. The national review of the model OSH laws reveals that there were likely to be no successful Australian prosecutions for ordinary criminal manslaughter in this context. Yet if an employer is reckless or negligent about exposing workers to serious risks to their safety and an employee dies as a consequence, this should be recognised in its own right as a criminal offence. For that reason, this bill seeks to introduce the offence of industrial manslaughter into the Western Australian Criminal Code. This offence has precedent in other jurisdictions and is already recognised in the United Kingdom and, closer to home, in the Australian Capital Territory.

Three elements to the offence of industrial manslaughter must be satisfied. First, this offence applies when an employee dies in the course of employment, or is injured in the course of employment and later dies; second, the employer's conduct or omission must have caused the death of the employee; and, third, the employer must have been reckless or negligent in causing the death of the employee. If these three elements are proven beyond reasonable doubt, the employer will be convicted of a criminal offence. Individuals will be liable to up to 20 years' imprisonment and corporations will be liable to a penalty of up to $3 million. These penalties are an appropriate and proportionate response to the most serious circumstances of workplace death.

The current WA Occupational Safety and Health Act 1984 contains provisions that address circumstances in which an employer knows that he is exposing employees to a hazard likely to cause the death of, or serious harm to, an employee, and yet that employer chooses to disregard that risk. When this disregard has caused the death of, or serious harm to, an employee, an employer can be convicted of gross negligence. Under the current provisions, the fine is $250 000, or two years' imprisonment, for an individual, or $500 000 for a corporation. The penalties are even lower when a court cannot find gross negligence but when an employer causes the death of a worker due to an unsafe workplace. In this situation, employers are liable to a $200 000 fine and corporations are liable to a $400 000 fine. These fines are simply too low and fail to reflect the seriousness of causing an employee's death. As legislators, it is beholden on us to ensure that there is a genuine incentive for employers to ensure that they provide safe workplaces and that it is not more cost effective to simply risk a fine rather than employ appropriate safety standards.

Under current law if an employee is exposed to a substantial risk or harm by a negligent or reckless employer but by sheer luck does not die or is not seriously injured, the WA OSH act does not have adequate recourse. To address this, the bill inserts an offence of negligent or reckless endangerment into the WA OSH act. There are three elements to the offence. First, a person must breach one of the their duties in part III, division 1 of the OSH act, such as the duty to take reasonable care to ensure safety and health at work; second, in doing so, the person must have exposed an employee to a substantial risk of death or serious bodily harm; and third, that person must have been negligent or reckless about exposing the employee to that risk.

Often the employees themselves are best placed to identify particular hazards or dangerous practices in the workplace. Therefore, it is both useful and important to ensure that employees are effectively consulted on OSH issues in the workplace. This bill introduces a clearer definition of consultation to ensure that employees are given the reasonable opportunity to contribute information and express views where required in the act, to ensure that their views are considered in the decision-making process and to give guidance to employers as to what is an appropriate level of consultation.

This bill increases the penalties for breaches of the existing OSH act in line with the penalties suggested in the model act. This will increase the accountability of any person who breaches the OSH act and bring the penalties in line with the seriousness of the offences. The proposed penalties in the bill are similar to those already implemented and currently being implemented across Australia. These penalties reflect community expectations of what is appropriate.

The current law imposes a duty upon employers to report deaths, injuries or diseases that occur in the workplace. However, there is a gap in the current law for instances in which a dangerous incident exposes an employee or any other person to a serious risk to safety or health, but when that exposure does not necessarily result in a death, injury or disease. This bill introduces an offence for failing to notify the WorkSafe Western Australia Commissioner of such a dangerous incident. A dangerous incident for this purpose has been defined in this bill to include a range of situations; for example, an uncontrolled explosion or the partial collapse of a structure. Similarly, the bill introduces an obligation to preserve, as far as it is safe, incident sites until the arrival or direction of a WorkSafe inspector. These are important reforms to ensure that all workplace incidents are duly notified and investigated, increasing accountability and safety in the workplace. Inspectors can use notified incidents as an opportunity to advise employers about how to better prevent risks. The information from these reporting requirements can be used by the government to inform industries of particular hazards, develop OSH policy and allocate resources accordingly.

This bill creates important reforms to prosecution. Currently, if a prosecution is not brought under the OSH act, that is the end of the matter. This bill gives standing to "interested persons"; that is, persons who have been affected physically by the alleged offence, their trade unions or their close relatives, or close relatives of a person who has died because of an alleged offence. Interested persons have standing to bring legal proceedings automatically for any offences, with a few exceptions. For alleged offences committed in circumstances of gross negligence or the new negligent or reckless endangerment offence, interested persons are required to request in writing to the commissioner that a prosecution be brought. This request must be submitted no later than 12 months after the alleged offence occurred. The commissioner is to inform the interested person whether the investigation is complete and whether prosecution has been, or will be, brought and written reasons for that decision. If the interested person is informed that a prosecution will not be brought, and writes to inform the commissioner and alleged offender that he or she considers that the prosecution should be brought, the interested person can initiate legal proceedings.

The bill also inserts a variety of sentencing options for offenders that can be awarded in addition to any other penalty under the act. These include adverse publicity orders, orders for restoration, work health and safety project orders, occupational safety and health undertakings, injunctions and training orders. The purpose of this is to not only ensure that employers are accountable via penalties, but also potentially require employers by court order to put in place changes to make their workplaces safer. For example, the court can order that an employer undertake a specified project for the general improvement of occupational safety and health within a specified time frame.

The current Occupational Safety and Health Act was developed with a tripartite focus—the government, business and employees—and this bill continues this approach. One reform in the bill for business is the introduction of OSH undertakings. The bill allows for employers to enter into an enforceable undertaking with the commissioner when employers consider that they have or may have contravened the act. This undertaking is not an admission of guilt, but allows employers to defer court proceedings in favour of immediately improving the safety of their workplaces. This option is not available for level 4 penalties—the most serious offences. However, for lesser offences, the commissioner can require employers to undertake certain actions in respect of contraventions or alleged contraventions of the act. If employers breach the OSH undertaking, the commissioner

may take court action for contravention of that OSH undertaking, and when the undertaking is no longer in effect, the employer will no longer be protected from legal action.

There is no doubt that the current OSH act is due for a comprehensive and thorough overhaul, and the provisions in this bill serve only to touch on those elements most urgently in need of change to address the unacceptably high number of workplace deaths and injuries. This bill unashamedly takes largely a "stick" approach to the issue of worker safety, rather than a "carrot" approach. Conscientious employers who diligently address issues of workplace safety will be wholly unaffected and unconcerned by the provisions of this bill. Likewise, those same employers already engaging in best practice occupational safety and health requirements will experience no additional financial, administrative or legal burden. Instead, this bill seeks to capture that minority of employers who are either indifferent, careless or, at worst, callous towards the safety and lives of their employees, and seeks to provide further incentive to ensure workers' safety. Industrial manslaughter as an offence is long overdue in this state and will capture only the absolute worst employers; and, even then, only in the event of the tragedy of an employee's death.

I commend the bill to the house.

Debate adjourned, pursuant to standing orders.