WORK HEALTH AND SAFETY BILL 2019

Committee

Resumed from 16 September. The Deputy Chair of Committees (Hon Martin Aldridge) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

The DEPUTY CHAIR: I draw members' attention to issue 6 of supplementary notice paper 155 of Wednesday, 16 September 2020.

Hon NICK GOIRAN: Yesterday afternoon, when we briefly had the opportunity to start consideration of clause 1, I drew to the minister's attention appendix 3 at the back of the Standing Committee on Legislation's report. When I asked whether the government was in a position to endorse it or not, the minister indicated that, upon a cursory examination, that appeared to be the case. I wanted to see whether there has been an opportunity to consider it in greater detail since that time.

Hon ALANNAH MacTIERNAN: We are working on a definitive statement. As the member is aware, that particular document includes material that has been added, as I understand it, by the committee. It is not in fact a government document pure and simple; it is an amendment of a document that was provided by government. We are now putting together a definitive list, which will be ready before lunchtime, hopefully; but certainly by today. It will be a definitive list of all the things that are in and out. Obviously, we stand by the components of the list that were provided to the standing committee. I do not think it is appropriate to actually expect us to necessarily endorse all of the additions that were made to that list, which appear in bold in that document. We are working on making sure that we have a definitive list. I will certainly be asking the advisers to put every effort into ensuring that that is done before lunchtime.

Hon NICK GOIRAN: Thank you, minister; that will be most helpful. The difficulty for us will be how to progress things between now and that time.

Hon Alannah MacTiernan: Each clause can be dealt with and the member can ask the question, "Is this part of the model law?" This has already been through two committees, member. As each clause comes up, if the member wants to ask, "Is this part of the model law or not?", we can do it. There should be no reason, after two committee reports and an undertaking that we will answer as each clause comes up —

The DEPUTY CHAIR: Order, minister! That was a very lengthy interjection. If you want to speak, you can wait until Hon Nick Goiran has resumed his seat and I will give you the call.

Hon NICK GOIRAN: Thank you, Mr Deputy Chairman. Minister, can I just make these observations. The approach that the minister has just suggested would be incredibly inefficient. I draw to the minister's attention that there are 425 clauses in the bill. I cannot imagine that the minister is suggesting to the chamber that she would like me and all members to ask on 425 occasions: is this clause consistent with the model law? I cannot imagine that the minister is seriously suggesting that. I suggest a far more efficient approach is the one that I suggested last night, which is that the government provide a list of the deviations so that we know which clauses are consistent with the model law. It seems somewhat nonsensical that the government cannot provide a list, but will be able to provide an answer if asked that question on each and every clause. Why not do that right now? Which of the clauses between clause 1 and clause 145 deviate from the model law? That is a rhetorical question; I am not asking the minister to do that right now, because, believe it or not, we would like to make some progress. I suggest that the way the minister has suggested we proceed will do the exact opposite.

I am trying to work with the minister. The minister has indicated that, hopefully, by about one o'clock, when the chamber adjourns for the luncheon interval, we might be in a position to receive this list. I respect the fact that the advisers and the departmental workers are doing the best that they can. I am simply saying that between now and one o'clock, we need a mechanism to deal with this. I do not think we should do it in the way that the minister suggested, which is for us to repeat the question on each and every clause. However, we are on clause 1 and clause 1 is the beginning of part 1 of the bill. There are 16 parts to the bill, so perhaps we can deal with things on a part-by-part basis. We are looking at just part 1 now. Would the minister be in a position to indicate which elements in part 1, or which clauses in part 1, deviate from the model law?

Hon ALANNAH MacTIERNAN: It would take some hours to read through all these particular changes. We do not have that information readily available in that format. I am seeking clarification on the information that was provided to the Standing Committee on Legislation. Perhaps at this stage we can deal with some of the early clauses

whilst we attempt to deal with this. We will have to go on a clause-by-clause basis, because at this stage the advisers are unable to provide a document that does that.

Hon NICK GOIRAN: We are on clause 1, which is in part 1. Part 1 goes from clause 1 to clause 12B. I am simply asking whether it is possible to identify which clauses between clause 1 and clause 12B deviate from the model law? Yes, I could ask that on 15 occasions, but I would rather not do so. There are 15 clauses, as I count them, in part 1, even though the numbering goes to clause 12B. I would rather just cut to the chase: which clauses in part 1 deviate from the model law?

Hon ALANNAH MacTIERNAN: My advisers tell me that they cannot do that at this point. I understand that clause 1 does not deviate from the model law process.

Hon COLIN de GRUSSA: Before us is issue 6 of supplementary notice paper 155. It contains, by my reckoning, 88 amendments, including, again by my reckoning, 39 government amendments to the bill before us. Can the minister possibly indicate which of those government amendments on the supplementary notice paper seek to address the findings and recommendations of the 126th report of the Standing Committee on Uniform Legislation and Statutes Review; and, if so, are all the findings and recommendations in the 126th report addressed by those government amendments?

Hon Alannah MacTiernan: Which committee report—of which of the two committees?

Hon COLIN de GRUSSA: I am referring to the 126th report of the Standing Committee on Uniform Legislation and Statutes Review and the 39 government amendments contained on the supplementary notice paper. Which of those 39 amendments address the findings and recommendations in that report, and are all the findings in that report addressed?

Hon ALANNAH MacTIERNAN: I do not think it necessarily will be all that productive to get those global statements, because it appears that we are not in a position to provide that global information. I think that it will probably be more constructive to do this clause by clause. Certainly, some of the findings of the committee report have been embraced and have resulted in changes. There are other findings, such as those in relation to codes of practice, that we feel would compromise the architecture of work health and safety, so we are not prepared to embrace them. Some of the other amendments that we have put forward seek to address concerns raised by Hon Colin de Grussa, Hon Nick Goiran and Hon Michael Mischin; some of them deal with concerns raised outside the committee and some deal with concerns of the committee. We have not adopted every recommendation of the committee, but changes certainly have been made. The findings concerning sunset clauses, clause 12A and schedule 1 are the ones that were adopted.

Hon COLIN de GRUSSA: To simplify it, is the minister in a position to identify which recommendations of the 126th report of the Standing Committee on Uniform Legislation and Statutes Review are not contemplated in the government amendments?

Hon Alannah MacTiernan: I will need some time; the advisers have not formed their advice in this way.

Hon COLIN de GRUSSA: Perhaps while the minister seeks to gather the information to answer that question, I could ask another one that might be more easily answered; that is, when were amendments based on the findings and recommendations in this report first contemplated by government?

Hon ALANNAH MacTIERNAN: The Minister for Industrial Relations provided a response, and I now ask whether anyone listening could let me know the date of when the response was provided. A comprehensive response was provided by the minister to the recommendations of the Standing Committee on Uniform Legislation and Statutes Review. I imagine that that response reached the Parliament at some point, but I will table this document for members.

[See paper 4234.]

Hon MICHAEL MISCHIN: I may be able to assist the minister. Hon Bill Johnston, Minister for Mines and Petroleum; Energy; Industrial Relations, wrote to me, as Chair of the Standing Committee on Uniform Legislation and Statutes Review, by letter dated 29 June this year, setting out a response to the committee's report. Some of the recommendations were accepted; some were not. A copy of that letter went to the Chair of the Standing Committee on Legislation, who was cc-ed into that document. Therefore, I would have hoped that it would have been made available to the Parliament at some point.

Hon COLIN de GRUSSA: I thank Hon Michael Mischin for clarifying the date of the response. My questions were actually: When did the government start working on the amendments proposed in the 126th report of the Standing Committee on Uniform Legislation and Statutes Review? Did the government respond immediately or at a later date?

Hon ALANNAH MacTIERNAN: Obviously, the government started considering those matters once the report came down.

Hon COLIN de GRUSSA: Thanks, minister. I want to turn our attention now to the industrial manslaughter provisions in the bill and also the forty-third report of the Standing Committee on Legislation. As I said earlier, there are around 90 amendments on the supplementary notice paper, 39 of which are government amendments. A number of those amendments are around the industrial manslaughter provisions in the bill. When were those amendments contemplated and when did drafting commence on the government's proposal to amend, in particular, clause 30B, and the consequential amendments around it?

Hon ALANNAH MacTIERNAN: It was an iterative process. To some extent, the drafting of those amendments occurred after we had various briefings with members of this place. I am not sure what the member is trying to get to here, but this was an iterative process in which we considered the reports—I think very critically—and we gave briefings to various opposition and crossbench members of this place, and after that we determined that there was scope for making these amendments. I cannot elucidate on what day we started drafting and on what date we started considering the amendments, but I can say that the process evolved. As members would expect, after we had briefings and got an understanding of members' concerns, we tried to accommodate those concerns. That is an entirely proper process. This is a house of review. We listen to the feedback that we get during the briefings. The briefings are, I guess, a two-way process—they are an opportunity for us to not only elucidate the legislation, but also get feedback. I am not quite sure what point the member is making about which day we actually started drafting amendments. As I said, it is a process. The feedback we received from members during those briefings contributed to the formulation of those amendments.

Hon COLIN de GRUSSA: The minister has very helpfully provided information that this was obviously an iterative process, and that after briefings with members of this place, work began on contemplating those amendments. Obviously, those amendments relate to follow-up that occurred from some of the briefings with members of this place. Were any other people or entities outside of Parliament consulted on those amendments as they were drafted?

Hon ALANNAH MacTIERNAN: We did not consult outside of government on those amendments, but we did consult within government—with the Attorney General's office and the Director of Public Prosecutions et cetera. We felt that these sorts of changes and concerns could be dealt with internally. The amendments are, to some extent, ones of process and jurisprudential issues.

Hon COLIN de GRUSSA: On that basis, there was no external consultation on the proposed amendments to the industrial manslaughter provisions. Other members, including myself, have raised the concerns that were expressed to us by a number of groups, on both sides of the debate, around the provisions contained in the bill, yet it appears that the government, in formulating its amendments, did not consult with those stakeholders. Is that correct?

Hon ALANNAH MacTIERNAN: No. The amendments were proposed in light of the concerns that had been raised. There has to be a process at some time of committing something to paper. We were listening to those concerns. We heard those concerns, sometimes directly and sometimes through the representations made by members of this place, and, accordingly, we drafted those amendments.

Hon COLIN de GRUSSA: I thank the minister. The amendments are obviously pretty comprehensive, particularly in relation to the industrial manslaughter provisions. When did drafting commence on those amendments, and when were briefings on those amendments offered to members of this place?

Hon ALANNAH MacTIERNAN: We presented the legislation after long consultation. We then provided briefings to members. Members raised certain concerns and we then started drafting amendments to address those concerns. I am sorry, but I am not able to say that we started drafting them at 12 o'clock on 30 August. I am not going to say that! The legislation was introduced into this place. We have had two committee reports, and we have responded to those reports. After those two committee reports, we then had more detailed briefings with members. Between those two committee reports being tabled, there was a period of consultation with members. There are amendments on the supplementary notice paper to the industrial manslaughter provisions, because the government has responded to the concerns that were raised. I cannot give the member an exact date on which drafting of the amendments started, but it was after we understood the level of concern that had been raised by members of this place during debate and the briefings.

The DEPUTY CHAIR (Hon Martin Aldridge): Hon Colin de Grussa, Hon Rick Mazza is seeking the call, but I want to allow you to finish your line of questioning to help facilitate debate. Please keep that in mind.

Hon COLIN de GRUSSA: Thanks, Mr Deputy Chair. I will wrap up this part of the debate pretty shortly. Perhaps I can be of some assistance to the minister. On Tuesday this week, I was contacted by her office and offered the opportunity to discuss the amendments that were on the supplementary notice paper at that time. I duly accepted that offer and 10 minutes before the chamber sat on that Tuesday, I met with representatives of Minister Johnston's office and the Department of Mines, Industry Regulation and Safety outside, barely 20 metres behind where the minister currently sits. I thought that we were going to discuss the amendments that were on the supplementary notice paper at that time, which did not include any government amendments, but I was presented with a fairly weighty

document that contained a number of amendments that the government was seeking to add to the supplementary notice paper that day and duly added later on in the afternoon of that Tuesday. I received no offer of a briefing on those amendments. They are considerable amendments and it is disappointing that it was left until the last minute for those amendments to be proposed by the government and that members of this place were not offered a briefing on what the government was proposing. I am not sure whether other members had the same experience. Of course, that has all led to a rather lengthier debate occurring in the Committee of the Whole stage now. Were any other members consulted or offered a briefing before that date? Can the minister please provide that information?

Hon ALANNAH MacTIERNAN: There have been a number of meetings. As I said, part of the problem is that these amendments have come out of a consideration of comments that were made during briefings and during the debate that occurred. We were mindful of some of those concerns and constantly worked to see whether there was a way that we could address them. Obviously, every time we had a briefing, new concerns were raised and we responded to those. At some point, we had to get to the stage of putting this before the chamber. Extensive consultation has been done on this bill over a number of years. It has been the subject of not one, but two committee reports. I think that now is the time to make a decision about whether these provisions will be supported and which ones we want to have changed.

Hon NICK GOIRAN: We will not make progress if every answer the minister gives refers to the fact that there have been two committee reports. I might draw to the minister's attention that there is a third report. As one of the members who was on one of those committees and has spent a lot of time looking at the other report from the other committee, I draw to the minister's attention that the work that was done by the Standing Committee on Uniform Legislation and Statutes Review had very narrow terms of reference. It looked into issues of parliamentary sovereignty with regard to this national scheme. The committee that I served on under the chairmanship of Hon Dr Sally Talbot was able to look at only part 2 of the bill. This bill has 16 parts, so it is quite reasonable for any member in this place to ask questions during Committee of the Whole about matters that are in the reports. In my case, there are 15 other parts and three schedules that the Standing Committee on Legislation did not get the opportunity to consider. We were told by the government—I think it might even have been the minister who moved the motion—that we were to look at only part 2. I do not think it is helpful to keep saying that there have been two committee reports. What the minister is saying is a statement of fact, but there are plenty of very interested stakeholders. They include families who have had to live through the trauma of their loved ones dying in the workplace; employers, who will have the responsibilities of the duties in this bill and will face the possibility of penalties, including imprisonment, as a result of this; administrators; and the Director of Public Prosecutions, who is one of the people who will be responsible for implementing and enforcing these provisions. These are serious issues and it is no good for the minister to keep on telling us that there have been two committee reports. It is true, but there is much more to be dealt with in this debate.

Hon ALANNAH MacTIERNAN: I agree with the member in that regard. That certainly was not my intention. The line of inquiry that we have spent about half an hour on has been about when we started drafting amendments. Quite frankly, I think we can quite properly respond to that by saying that there has been a lengthy consultation process and a very iterative process. At some point, I would love for us to start talking about the legislation and how it will impact people's lives. I absolutely understand and think that we need to do that. All I am asking is for us to start focusing on the content of the bill.

Hon Michael Mischin raised an issue the other day when he was expressing some concern about some examples that might have been raised in the past. We would agree that when we introduced this legislation to increase penalties, some of the case studies that were introduced or cited at that time were possibly not, in hindsight, the most appropriate. However, I would say that those that we have referenced and that have come out of the "Families Left Behind" report are very appropriate and demonstrate what we are trying to achieve, which is very much a change of culture by getting industry and those people who are running companies to internalise the need for much higher standards of workplace health and safety than many of those companies currently embrace. I totally understand that members want to debate the substance of these clauses, but we have spent half an hour talking about the timing of when amendments were drafted. I think it would be great if we could get on to the substance of the legislation.

Hon RICK MAZZA: I know that the minister is pretty keen to get into the clauses of this bill but, of course, consideration of clause 1 is a very important part of Committee of the Whole for members to sound out some issues that they have concerns with. In some of the answers that the minister has recently given, she has referred to extensive consultation that has been undertaken over many years in developing this piece of legislation. I would like to refer to the forty-third report of the Standing Committee on Legislation. Paragraph 1.3 of the executive summary states —

> The main task facing the Committee is to consider Part 2 of the Bill. Notably, it includes two new offences of industrial manslaughter that are not included in the Model Bill.

Is the minister able to provide us with a list of stakeholders that have been consulted about this part of the bill?

Hon ALANNAH MacTIERNAN: I provided that list in my reply to the second reading debate. I listed those entities that had been consulted as part of the federal Senate inquiry and the Boland review. I provided an extensive list of entities, particularly the commercial employer entities, that had been involved. If members want to go into that, I would urge them to do that when we consider clause 30A and clause 31. I think that would be the productive time to do it. That issue was raised and I explained that after the ministerial advisory panel had concluded its work, two reports had come out—from the Boland review and the Senate inquiry. Both those recommended industrial manslaughter laws and both those recommendations followed from wide consultation. That was the basis for us including that in these changes.

Hon RICK MAZZA: I thank the minister for that information. Why is it, then, that finding 9 in the forty-third report of the Standing Committee on Legislation states —

> The extensive consultation process undertaken about modernising Western Australia's work health and safety laws —

The minister alluded to the fact that there was consultation —

> did not include the industrial manslaughter provisions proposed by cl 30A and 30B of the Work Health and Safety Bill 2019.

Is it true that this part of the bill—those two clauses—was not part of that consultation process?

Hon ALANNAH MacTIERNAN: As I explained, this provision for industrial manslaughter was recommended at the conclusion of the process after extensive consultation at a national level. The government felt that it was appropriate to add it, so a decision was made to add it. I acknowledge the representations by the families and the work that has been done, particularly by Regan Ballantine, that led us to determine that we would put this within the work health and safety package. Subsequent to that, discussions were held with various industry groups by Minister Bill Johnston about those provisions. The decision was made fundamentally after those recommendations came out. After two reports nationally and extensive consultation, the entities have been listed, and a decision was made by my government that it would adopt the positions that were advocated for in those national reviews. We had the discussions about how that would work after we made that in-principle decision.

Hon RICK MAZZA: I have one last comment to make on this matter. Why is it, then, that key employer stakeholders feel so aggrieved that they were not consulted on this part of the bill? It is a shame in some respects that we have this modernisation and harmonisation of a 425-clause bill—I am sure a lot of good work went into that—yet this part of the bill has caused so much angst among employers. They do not feel as though they were properly consulted and that it was outside the model bill. It seems to me that the government may have failed in properly consulting those employer bodies.

Hon ALANNAH MacTIERNAN: I point out that subsequent to the government making the decision to include the industrial manslaughter provisions, the standing committee had reported on that. It would be fair to say that there are elements of concern within industry about the industrial manslaughter provisions, just as there were concerns in the mining industry—if I use that analogy—about the ramping up of the occupational health and safety requirements, as they then were, for the mining industry in the early 1990s. People responded to those and they developed a very different culture around work health and safety, and that is why we are trying to do that. We all know what the propositions are and we are now charged with the responsibility of making the decision on whether to allow those provisions to go forward. I hope we do, and I hope no-one is ever prosecuted under them because my hope, as is Minister Johnston's hope, is that this will lead to such a step change in workplace culture that we will not see families whose children and partners do not come home after an industrial accident.

We could argue all day about more and more consultation, but this has been an extensive national debate. I again point out that Queensland and Victoria have embraced these provisions. We have all had the discussions with industry, unions and families. The decision now has to be made on where we stand on this issue. I urge members to support these provisions because they will be absolutely the best thing for people in Western Australia. It is hoped that it will create that cultural change that we need.

Hon MICHAEL MISCHIN: I appreciate the lengthy encouragement that we should get on to the clauses of the bill, but I would like some information first rather than simply being told how important it is. I am aware that the government wants this bill passed before the end of the year—it has been a long time coming—but this bill goes well beyond so-called industrial manslaughter. For some reason that has become the centre point of this bill, but the whole industrial manslaughter provisions could easily have been passed separately to this work health and safety legislation at any time over the past three years. It does not depend on this bill's passage in the slightest. For a start, to develop that thesis with some facts, the original work health and safety legislation did not contain it. The legislation we are purporting to harmonise with did not contain it. The government had reservations about it until Minister Johnston decided, following a Labor Party conference after having been pressured by the unions, that

suddenly it was a good idea and he had better put something in to that effect. The government has consulted widely on the bill generally, but this is an afterthought. Now it is being bolstered with a document from a group called Families Left Behind, which the minister earnestly entreats us to have regard to as a justification for an industrial manslaughter provision in the way it has been framed—never mind about the concept. I have not had the opportunity to see that document; I do not know what is in it. I am sure that each of the tragedies outlined are appalling for the families concerned. That does not answer the question about whether an industrial manslaughter provision as a concept, or in the way it has been framed in this latest iteration of the supplementary notice paper received yesterday evening, would make the slightest bit of difference to any one of those cases. I will get on to those. Before the minister starts saying, "Let's not worry about all that; we're going to try to change the culture", we will deal with that as well.

The whole concept of duties with consequences has not been invented in this bill. It was invented in Western Australia, it started in 1984 and it has remained pretty much the same. Our work health and safety record in Western Australia has been pretty darn good compared with other states for a combination of reasons. The first is the legislation that was derided as being so much out of date. The second is enforcement, not by union officials going into people's premises and businesses, grubbing around and taking photos, but by reports, with evidence, to the inspectorate that then investigates, compiles a brief and prosecutes. Perhaps the court penalties have been low, but there is no guarantee that they will be any higher under this bill. The culture was changed when these duties were introduced through a process of education and encouragement. Every year—the minister ought to know about this—work health and safety awards ceremonies are conducted, at which firms that have done their best are lauded for their efforts. I was very proud to attend those ceremonies during my previous manifestation as a minister. The message for those firms all the time is that workplace safety is not a question of laws but of attitude and culture, not only on the part of the employers, but also in setting up systems and having employees look out for each other and raising hazards. If any of that is changed by one provision in this bill, I would like to know how and why, particularly if that provision would not make the slightest bit of difference to the tragedies that occurred in the past but was simply an idea of trying to label something as a homicide. That is not the way to get workplace safety. It might appeal to those who are after punishment and it might appeal to the unions as a "message" as if we are some propaganda machine sending out messages, but it has nothing to do with this legislation.

I will ask the minister one question about dates, and I hope she will be able to answer it. When was the decision made to move towards harmonisation of laws in work health and safety and to adopt the model law?

Hon ALANNAH MacTIERNAN: There is definitely some truth in the analysis of the history, with a step change in the 1980s of the way we frame responsibilities for work health and safety. I think the legislation was introduced by the Burke government. It was one of its key platforms during an election campaign. Awards are presented, and there is continuous improvement, but it is certainly the case that we have a way to go in some areas.

We have situations in which it is quite evident that there has been no internalisation of the need to elevate this issue to get every company on board. I visited the wonderful company Geographe Underground Services the other day. Its attention to detail and insistence on all of us and the media complying with every piece of workplace safety etiquette was admirable. This is entrenched in many workplaces. It is very clear from the stories we hear, a couple of which I referred to last night, that this has not been internalised by every company. Two federal reviews that looked at the laws that exist across the country were undertaken. In a sense, they are similar to the general standards and duties that are opposed. Recommendations were made after both those reviews, but we now need to go a step further. We were not achieving in some of those areas; we had not achieved what we set out to do in legislation that was introduced in the 1980s and continually modified, and all the celebration and achievement that comes with the awards night. As I said, we are talking about very comprehensive inquiries that were undertaken by the Boland review. It was determined that we needed to move forward a step. I think that is very appropriate. The member asked why we would not introduce a standalone piece of legislation to deal with that issue.

Hon Michael Mischin: I didn't. I said it could be.

Hon ALANNAH MacTIERNAN: It could be. We could break up any parts of the bill. We considered two factors that principally drove why we wanted to include it in this legislation. First, if we had a very broad-based system-wide review of the work health and safety legislation, we would want to include the latest thinking. As I said, the Boland review clearly recommended this. If we are going to make the bill more contemporary, let us put the most contemporary thinking into it. Second, I am advised that the Boland review recommended that this become part of the harmonised laws. That gave us more impetus for incorporating it into the legislation.

The member asked when the move towards harmonisation was embraced. We believe that the intergovernmental agreement was in 2008. It takes a long time to make progress, obviously, in this area, as the member would personally know.

Hon MICHAEL MISCHIN: I can see why this is going to be a very long debate. I cannot get a simple answer to a straightforward question. I was asking when the government decided that it was going to harmonise work health

and safety laws. It was not 2008. Yes, a lot of work has been done since. In fact, our government released a green bill. Part of what we were wrestling with was whether harmonisation would achieve what had been promised by it. I draw the minister's attention to the fact that one jurisdiction, apart from Western Australia, had not adopted harmonised laws, and that was Victoria. Victoria and Western Australia had the best record on occupational health and safety. Of course, conservative governments are conservative about messing around and reforming systems that seem to be working, with a bit of adjustment, for something completely new that might help international companies and cross-border companies but may be difficult for local businesses to conform to as they create uncertainty, extra expense, distress and confusion. We will move away from all that. When did this government decide to harmonise work health and safety laws?

Hon ALANNAH MacTIERNAN: The member would be aware of that because I think he led the green bill process in 2014. Is that correct? His nod indicates, yes, that is correct. I understand that we supported that in principle. On coming into government in 2017, the minister established the ministerial advisory panel to advise on the work that had been done to date, including on the previous government's green bill, which formed part of that consideration. I understand that the ministerial advisory panel was set up to report on how we would harmonise the principles. We built on the work that the previous government had started and determined that we wanted to put in place the panel that would advise on what we believe needed to be adjusted to achieve harmonisation. Our understanding is that all the other states except Victoria have moved down the same path. Victoria's view is that its current system is so similar to this model that it does not need to do this. Being Victorians, they probably believe that the model was based on their system—and I have just been advised that it actually was; it was not just Victorian-centricity! The Victorian system on which the model legislation was significantly based was obviously more advanced. I am advised that the premise of harmonisation that commenced under the previous government with the green bill was adopted and incorporated into the terms of reference for the ministerial advisory panel. The ministerial advisory panel was requested to consider how the model laws could be best embraced to suit Western Australia's circumstances. It was a very early commitment by government to work through that MAP process.

Hon MICHAEL MISCHIN: I am not talking about moving towards harmonisation; I am talking about adopting the model law as the basis of harmonisation. The minister just said that there was a ministerial panel; that is right. Presumably, before that ministerial panel was set up and given its terms of reference, a decision had been made by government that it was going to pick up on the model work health and safety laws and harmonise our laws with every other jurisdiction in accordance with that model law, with perhaps a few tweaks and variations. When was that decision made?

Hon ALANNAH MacTIERNAN: In terms of the precise dates, I understand that the media release was put out in July 2017. That made it clear that we were looking to harmonise our laws with the national provisions, which I think is synonymous with adopting elements of the model code; I do not think that they are two different things. Underlying the MAP process was an acceptance that we wanted harmonisation, and that was enshrined in the public statement that Minister Johnston made in 2017. The MAP process would involve detailed work on how it would work for Western Australia. As I said, it was obviously building on work that had already been done with the green bill.

Hon MICHAEL MISCHIN: This is important because debate on clause 1, apart from anything else, reveals the extent to which we can rely on what the government says about these things. It is interesting that it took fewer than five months for this government to shift its position entirely. As I recall, on 22 February 2017, Hon Mike Nahan and I, in our capacity as ministers, attended a forum hosted by the Housing Industry Association. It was also attended by a number of representatives of the then opposition, including the shadow Minister for Commerce. Back in those days, work health and safety issues fell under the commerce portfolio. At the end of that forum, which was attended by various business groups, the shadow minister volunteered as a closing remark—it was not in response to a question—that the Labor Party would not be working towards the harmonisation of work health and safety laws. I have a transcript of that and I am happy to provide it to the minister in due course. But that emphatic assurance was given to industry on 22 February 2017, before the election, presumably to allay any concerns that business, industry, employers and those responsible for workplaces might have that there would be a radical rewrite, rather than an improvement, of our work health and safety regime. We do not have that shadow spokesperson as minister now; I think she would have made a very good minister.

The government took the opportunity then to ignore that, like several other election commitments, because commitment it would have been, on behalf of the minister who said that Labor would not do something, and then within a matter of months, it was doing exactly the opposite. This minister now tells us that the focus of the Work Health and Safety Bill 2019 is the importance of improving workplace culture with an industrial manslaughter provision. I do not want to be misinterpreted or misrepresented here. I have no problem with an industrial manslaughter provision if that is what the government wants. How it is framed is a different issue, and that is going to have to be analysed. But I find it intriguing that that now has become the centrepiece of this 420-something clause bill, and that as

recently as a couple of days ago, a provision as important as this was redrafted with the abandonment of bits of it and the tacking on of pieces somewhere else, which has been rationalised as "listening to concerns". This has been drifting around for quite some time. It is a unique provision, as I understand it, for Western Australia. It is not something that is integral to this bill. In 2017, penalties were increased. That was justified then by what the minister now admits were case studies that, in some case, were not the most apt. None of the three presented in the second reading speech were accurate or apt, and one of them gave false information, as we found out in the debate on clause 1 of that bill.

Industrial manslaughter is one component of this bill. I do not have a problem with the improvement of duties and the bringing of legislation into the contemporary scene by updating and improving it, massaging it, filling in the gaps and removing problems. But to dress this bill up that the whole core of it is the safety of workers—"It will be fixed if we have an industrial manslaughter provision of some sort but we are still working on the detail of it"—is just insulting. We will get to the case studies to see whether they are apt and really do form the basis for supporting that particular provision in the way that the government has drafted it today. Who knows what will happen by next week? There might be another couple of drafts.

As for listening to concerns and being "on the case", I mentioned the government's response to the 126th report of the Standing Committee on Uniform Legislation and Statutes Review, having been dated 29 June 2020. In that, the minister says, "We're going to abandon clause 12A of the bill. I am not going to proceed with it." When did we see that on the supplementary notice paper? I think we had iteration 4 a matter of days ago. All this stuff is being done on the run.

Point of Order

Hon SUE ELLERY: I rise on the issue around what a clause 1 debate is supposed to be about. To assist me to properly understand that again, I have just referred to the "Legislative Council Procedural Note for Members". Although it certainly sets out clearly that the short title debate can "range over the clauses of the bill, foreshadow amendments and indicate, consistent with the policy of the bill, how its formal content may be improved", essentially since we started, we have canvassed at what point various MPs were offered briefings on various amendments and we have certainly canvassed the policy of the bill, which has actually already been set by the second reading vote. I would appreciate the Deputy Chair's guidance in making sure that this debate on clause 1—it can be wideranging about how the content of the bill may be improved, and, indeed, members may foreshadow amendments and indicate, consistent with the policy of the bill, how the bill's formal content may be improved—is not used to challenge the policy of the bill nor repeat matters raised by members in their second reading contributions. So far, we have had a whole range of questions and propositions put, which I say go not only directly to the policy of the bill but also to matters about when briefings were offered on amendments. That is not the purpose of a clause 1 debate and I seek the Deputy Chair's assistance.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Debate on clause 1 has traditionally been given a fair degree of largesse in that it encompasses a broad area of debate. Bearing in mind that I have been in the chair for 20 minutes and not heard most of the morning's debate, from listening to Hon Michael Mischin, he has not indicated a wish for the bill not to proceed or that he opposes clause 1. I accept that the member is making a broad range of points about the history of the bill and not necessarily about improving the policy of the bill. At this point I am not convinced that it is outside the scope that is generally considered, but I will ask the President to read this morning's debate and give her view on the process. In the meantime, I will allow Hon Michael Mischin to continue, but urge him to focus on how the bill might be improved. We might have come to the end of the history of the process to date.

Committee Resumed

Hon MICHAEL MISCHIN: I was about to get to a question that is pertinent to a way that we can consider the bill. My concern is that things to do with very material and important matters are being done at very short notice, hence having some idea of what the government now has in mind is critical if the government wants this bill passed with any alacrity. Much of it depends on the government's genuineness and cooperation. I have not been able to be told when the decision was made to harmonise or to what extent. Leaving that aside, are any other government amendments proposed that are not responsive to the debate to date? Are we going to see an issue 7 of the supplementary notice paper? Given that we have had two issues in the past 24 hours, before we even got through the second reading, is there anything else that the government is trying to improve on?

Hon ALANNAH MacTIERNAN: At this stage, only one possible amendment is being contemplated, and that is an amendment to clause 230, which is of a very technical nature. As soon as we have some clarification on that, we will advise the member.

Hon MICHAEL MISCHIN: Thank you. We will not need to worry about it for a while, unless it has implications for other clauses.

Secondly, I note that the government is preparing a comparison table so that we can see to what extent harmonisation is or is not occurring. I confess some surprise that one is not available. When I was minister and looking at the green bill, I received reports, from those responsible for the drafting instructions, with comparative tables of what the current law was, how the work health and safety model law would change it, and, if we were not adopting the model laws, the reasons why, so that I as minister could be informed and understand what was being done in my name and on behalf of the government. To find that we are now having to have one compiled from scratch does not give me much confidence, given that this bill passed the other place in November last year—about a year ago. Is there anything that the Minister for Industrial Relations has that kept him informed of what the state of Western Australia was and was not adopting in respect of each clause, or part, of the work health and safety model law? I would be astonished if there was not one that could be provided.

Hon ALANNAH MacTIERNAN: The information is available to the Minister for Industrial Relations, but we just do not have it at this point in time in a format, apparently, that would be appropriate. Work is being undertaken to produce that.

Hon MICHAEL MISCHIN: In her second reading reply yesterday, the minister mentioned that she had received a copy of a document titled "Families Left Behind: Taking Action for Workplace Safety Reform". She said —

> I certainly hope that we are able to get copies of this for all members, because it is very powerful reading.

That seemed to form part of the government's argument for the importance of an industrial manslaughter provision, broadly speaking, and presumably the importance of the one that appeared last night in issue 6 of supplementary notice paper 155. Does the minister have a copy of that document that she can table for our benefit? It would be good to have access to it so we can see what it says, since it seems to be critical to the government's argument for that particular reform, whether it is in clause 30A, 30B, 31 or wherever—whatever is being categorised as industrial manslaughter.

Hon ALANNAH MacTIERNAN: I cited these as points of illustration, not that the government needed this document before it could advance its arguments. This document was compiled by the families. I do not have more than one copy at the moment.

The DEPUTY CHAIR: Perhaps you could identify the document for *Hansard*?

Hon ALANNAH MacTIERNAN: The document is called "Families Left Behind: Taking Action for Workplace Safety Reform". I understand it has been compiled by families whose members have suffered workplace deaths. It has just been released. We are checking to see whether we can get other copies. I will table that.

[See paper 4235.]

Hon MICHAEL MISCHIN: Although the minister has cited at least one case out of that document, I should not be misinterpreted as feeling anything less than sympathy for the families concerned. As minister, I was distressed whenever there was a report of not only a workplace fatality, but also any serious maiming injury in a workplace. That is easily overlooked by looking at fatalities as somehow judging workplace safety. That is not the case. Some failure or some incident at a workplace leads to either a near miss, an injury, a serious injury or a death. The key is not to focus on fatalities; the key is to stop workplace incidents that put workers at risk. We must always be conscious of that. Industrial manslaughter focuses on a punishment at an end, not necessarily in the right place. However, I do not dismiss what is being argued and said by next of kin, families and loved ones of deceased workers. We must always strive to have workplace safety, but am I to understand that that document did not influence the drafting or the government's decision to introduce some kind of industrial manslaughter provision?

Hon ALANNAH MacTIERNAN: The document itself has been produced in only the last week or so, as I understand it; but, of course, the families have been making representations for quite some years, and possibly would have made representations to the member when he was a minister. The stories that are behind that publication, of course, are compelling examples of why we need to act.

Hon MICHAEL MISCHIN: The minister said, for example—I am quoting the uncorrected proof of *Hansard*, but no doubt, if there are errors, they can be corrected —

> The document sets out the situations of a range of overwhelmingly young Western Australians who have died in the workplace, and consequences for their employers have seemed very, very minor compared with the extraordinary loss that has been suffered by the families and friends of the person who lost their life.

Correct me if I am wrong, but the Occupational Health and Safety Act and this Work Health and Safety Bill set out duties of care that have to be exercised by those responsible for a workplace as well as those who work within that workplace. It may very well be that someone, whether an employer or employee, has failed in a duty that has resulted in either a near miss, an injury or a death, but the breach of duty may be relatively minor. There is not necessarily a correlation between the end result and the breach of the duty concerned. I take the example of careless driving. That is not recklessness. That is not gross negligence. It is carelessness and it may lead to a death; yet, tragic

as it may seem for those who have lost a loved one in those circumstances, one would not necessarily have a court punish someone with imprisonment simply for carelessness as opposed to gross negligence.

Hon Pierre Yang: By way of interjection, are you quoting the minister's second reading reply speech?

Hon MICHAEL MISCHIN: Part of it, I have; yes.

Point of Order

Hon PIERRE YANG: I am also referring to the procedure notes. On 29 May 2008, the then Chairman of Committees, Hon George Cash, made the following remarks —

> … members have been using the short title of bills to stand and respond to minister's second reading responses. As Hon Kate Doust just indicated by the frown that she gave me, that is not on.

Mr Deputy Chair, I ask for your guidance in light of what happened then?

The DEPUTY CHAIR (Hon Dr Steve Thomas): Hon Pierre Yang, I believe that, first, Hon Michael Mischin indicated at the beginning of his address that he was using the uncorrected *Hansard*, which was appropriate, given, in particular, that it was the uncorrected *Hansard*. I also believe that he was using the quote of the minister to deal with a point, which I think was related to the greater functioning of the bill. I would not like to see this generally used as a revamp of the second reading debate, but, I think that in this case—I was listening carefully—Hon Michael Mischin was simply using this as evidence on a separate point rather than debating the second reading reply speech. In fact, he was, I think, using it as evidence to prove his point rather than debating the veracity of the second reading reply. Under those circumstances, I will allow Hon Michael Mischin to continue.

Committee Resumed

Hon MICHAEL MISCHIN: Thank you, Mr Deputy Chairman. You are quite right. The question I was going to ask the minister in light of all that was to do with the citing of the case of one Jarrod Hampton and the Paspaley Pearls incident in April 2012. I am curious as to the relevance of that to the industrial manslaughter charge. Is the minister saying that if the current version—last night's version—of industrial manslaughter in the supplementary notice paper, or the bill, were in place, Paspaley Pearls would have been the subject of a charge under either clause 30A(1)(a), or former clause 30A(1)(b), or whatever the current iteration of the industrial manslaughter provision is?

Hon ALANNAH MacTIERNAN: I have already answered that. I have already explained how I believe the change in culture will have an impact across the board. One of the other cases that I quoted was one in which quite clearly the penalty was covered by insurance, and that was to illustrate the importance of our provision.

Members, the government did think that the industrial manslaughter provisions were, in fact, going to be supported by the Liberal Party. I think it would be very useful to get an indication now whether that is the case, because it would seem from the debate that that support may have evaporated. I would be interested in getting some clarification on that point. I think we can have some more debate on this when we get to clause 30A. Mr Deputy Chairman, if we look at where this debate is going, with these very detailed questions on clauses and the whole notion of the genesis of the bill, which I find quite curious, I suspect that we have probably come to the end of any useful further discussion on clause 1. However, we make our point: we believe this legislation will take us a step forward to make a step change in the culture of workplace safety just as we had a step change in the 1980s.

Hon MICHAEL MISCHIN: Thank you for the speech, minister, but that is not an answer to the question. The minister cited these cases.

Hon Alannah MacTiernan: And I have explained precisely what I was seeking to illustrate.

Hon MICHAEL MISCHIN: No, the minister has not. The minister has cited two cases. I cast the minister's mind back to when she was working on increasing penalties in 2017 and cited three examples. We tested those examples and found that each of them had a story behind them that the government had not volunteered and, according to the minister's admission today, they were not the most apt examples to support what the government said was the policy of that bill. I now want to find out the relevance of these two cases. It is all very well to pull up tragedies and say, "This is all going to be fixed by what the government is doing. We are going to be moving forward. It is well overdue. Something needs to be done now." But if these are not apt examples and if the expectations are being built up that somehow a result would have been different in these cases, then that is a fraud on the public. We will get to them in the context of the industrial manslaughter provision—whatever version comes up by the time we get to it.

Yes, the opposition has indicated, through its lead speaker, that we do support the bill, and we have supported the bill, but that is not to say that what is being proposed by way of drafting will necessarily achieve the ends that the government claims. If the minister thinks that it is not a legitimate job of the Parliament to test, I do not know what the minister has been doing during her career, because I recall the minister, in opposition, doing precisely the same thing.

The minister has cited two examples; we will get to them. But are these examples of how the minister thinks the culture will change or is the minister saying that the result would have been different in those two cases and there would have been a charge of industrial manslaughter according to what is currently on the supplementary notice paper or in the bill if it had been in place at the time? The minister cited the examples. She must have had a reason for doing so.

Hon ALANNAH MacTIERNAN: Member, three times now I have articulated the reason I cited both those examples, and I do not intend to keep on repeating that.

The DEPUTY CHAIR: With that being the case, honourable members, I am afraid I am not going to allow the question to be asked another time. The minister has indicated that the answer she has given is the answer.

Clause put and passed.

Clause 2: Commencement —

Hon NICK GOIRAN: The minister will be aware that there are some amendments standing in my name. For the benefit of members and so we can make some efficient progress on clause 2, the amendments are outlined on the supplementary notice paper, issue 6, at 12/2, 13/2 and 14/2. I propose to briefly explain each of those three amendments.

Hon Alannah MacTiernan: Perhaps could we do it one at a time? Can we do that, or not?

Hon NICK GOIRAN: I will move only one at a time, but I will provide one explanation for all three amendments right now. If there are any questions, of course I will be happy to take them. Briefly, by way of explanation, the first of the amendments that stand in my name is 12/2 and is what I would describe as a Parliamentary Counsel's Office stylistic amendment that will facilitate to the other two amendments that stand in my name.

The second amendment is 13/2, and this simply ensures that the section 277 statutory review provision will be operational forthwith. It is something that members are familiar with because I have pursued it on many occasions and members have agreed with me in the past.

The third of my amendments is 14/2 and has been termed by me and others as the "Mischin amendment", which simply gives effect to recommendation 1 of the 126th report of the Standing Committee on Uniform Legislation and Statutes Review. For the benefit of Hansard, that is M-I-S-C-H-I-N, not to be confused with M-I-S-S-I-O-N, as it appeared in a recent iteration of *Hansard*.

With that, I move —

Page 2, line 8 — To insert after "Royal Assent" —

(***assent day***)

Hon ALANNAH MacTIERNAN: To get some progress on this, we indicate that we will not oppose the three amendments that the member referred to. There is some concern with amendment 13/2, which is a drafting matter, so as long as we understand that there will need to be some Parliamentary Counsel's Office renumbering of that clause, it is my advice that we can accept it as is. But we will not oppose any of those amendments.

Amendment put and passed.

Hon NICK GOIRAN: I move —

Page 2, after line 8 — To insert —

(aa) Part 14, other than Divisions 1 to 3 — on the day after assent day;

In moving this amendment, I note the comments the minister just made about some potential parliamentary counsel drafting issues. I draw to the minister's attention that it was parliamentary counsel that drafted the amendment at 13/2. Nevertheless, I appreciate that the minister has indicated that the government will not oppose it.

Amendment put and passed.

Hon NICK GOIRAN: I move —

Page 2, after line 9 — To insert —

(2) However, if no day is fixed under subsection (1)(b) before the end of the period of 10 years beginning on assent day, this Act is repealed on the day after that period ends.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 3: Object —

Hon NICK GOIRAN: As per the minister's invitation during consideration of clause 1, I simply ask whether clause 3 is in alignment with the model law or is it in any way a deviation from it?

Hon ALANNAH MacTIERNAN: The advice that I am being given is that it reflects the model, but that the ministerial panel made three recommendations for changes. The first recommendation relates to consultation and cooperation. The second recommendation proposed that the object in subclause (1) be amended to refer specifically to Western Australia. This has been adopted by replacing the generic reference to "this jurisdiction" with a reference to "the State", which is defined in the Interpretation Act as "the state of Western Australia". There was a recommendation for a further change that we include section 5(f) of the Occupational Safety and Health Act, which states —

> to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health.

This object applies most directly to the role of the various consultative bodies established in schedule 2 of the bill, such as the Work Health and Safety Commission and the Mining and Petroleum Advisory Committee. The government has implemented this recommendation by including it at paragraph (h).

Hon NICK GOIRAN: Interpreting that response, I understand that the minister is saying that clause 3 is consistent with the model law with the exception of three areas that were recommended by the panel. Perhaps we should confirm that first. We will take it one thing at a time. Is clause 3 consistent with the model law, with the exception of the three areas that the minister has just outlined?

Hon ALANNAH MacTIERNAN: I am advised that that is the case.

Hon NICK GOIRAN: I want to take a moment to look at those three areas. I think the second of those three areas is the easiest to understand. I think the minister is simply saying that where the words might have said "Western Australia", clause 3 uses the word "the State".

Hon Alannah MacTiernan: Correct.

Hon NICK GOIRAN: I will take the minister to the third issue she raised. She mentioned 5(f), but I cannot see 5(f) anywhere in clause 3. The minister also made a reference to an item (h). I assume that means clause 3(1)(h). Can the minister provide some clarity about that?

Hon ALANNAH MacTIERNAN: When I talked about section 5(f), that was of the Occupational Safety and Health Act. The MAP report proposed the inclusion of the object that appears in section 5(f) of the OSH act in this bill. That now appears in this clause at paragraph (h).

Hon Nick Goiran: Clause 3(1)(h)?

Hon ALANNAH MacTIERNAN: Yes.

Hon NICK GOIRAN: Dealing with the first of the deviations, the minister mentioned that that has to do with the issue of cooperation and consultation. I see that in clause 3(1)(c) there is an object of "fostering cooperation and consultation". Does the model law say that one of the objects is cooperation and consultation and we are in some way expanding or deviating from the model law, or does it not mention cooperation and consultation at all?

Hon ALANNAH MacTIERNAN: I am advised that the fundamental change is that the model law talks about "encouraging" consultation and cooperation. We wanted to take a more robust approach and talk about "fostering" consultation. That is the fundamental change.

Clause put and passed.

Clause 4: Definitions —

Hon ALANNAH MacTIERNAN: There is a little complexity here. We have sought advice from the Clerk about how best to deal with this. The proposition is that we defer consideration of clauses 4, 30A, 30B and 31 until after clause 34. The government's amendment on the supplementary notice paper to clause 4 is consequential on the fate of clause 30B or clause 31. The advice we sought yesterday that has been obtained from the Clerk is that we seek to postpone clauses 4, 30A, 30B and 31 until after clause 34. Can I seek —

Hon NICK GOIRAN: Before anyone moves anything or seeks leave for anything, I will make an observation. The idea of deferring clause 4 has the support of the opposition. The minister is quite correct. There are a number of amendments on the supplementary notice paper, including two by the government, one in my name, and one in the name of Hon Alison Xamon. Each of those is plainly consequential on amendments that those respective members have elsewhere on the supplementary notice paper. It seems to me that they should be considered at a later stage. The reasons I have jumped up to deal with that are twofold. One reason is that there may well be other questions that members might want to ask about clause 4. I personally do not mind whether they are dealt with now or later, but I think there would be some merit in discussing those matters now because clause 4 is the definitions clause.

Several of those definitions will be in other clauses that we will get to in the very near future. The other observation I make is that when I look at the amendment standing in the name of Hon Alison Xamon, I see that it is consequential on matters pertaining to new clause 230A. Moving clause 4 to be considered after clause 34 will not address the honourable member's amendment. I think that clause 4 needs to be considered after new clause 230A. By way of explanation, the government's first amendment needs to be considered after clause 31; its second amendment needs to be considered after clause 30B; my amendment needs to be considered after clause 30B; and Hon Alison Xamon's amendment needs to be dealt with after new clause 230A. For those reasons, they all need to be considered after new clause 230A, and not after clause 34.

Hon ALANNAH MacTIERNAN: That is not the advice that I have received from the Clerk, so I need to understand the relevance of new clause 230A.

Hon NICK GOIRAN: I will take the minister to the amendment standing in the name of Hon Alison Xamon at 38/4 of the supplementary notice paper. Members will have a view about whether they want to agree or disagree with her about that, but that is not the point of this discussion. The point is that the member is looking to insert —

(ca) an authorised officer as defined in section 230A;

From memory, later in the supplementary notice paper, I think the member is looking to insert a new clause 230A. Clearly, these words cannot be inserted at clause 4 unless there is agreement that there should be a new clause 230A. It is for that reason that I am saying that all of clause 4 should not be considered until we get past new clause 230A.

Hon ALANNAH MacTIERNAN: I do not think I agree with that, because if we postpone clause 4, we will then have an idea about which of the competing schemes we are embracing and we can make a decision on whether we will embrace Hon Alison Xamon's proposal. If it is successful, that would then be incorporated into new clause 230A, which we may or may not agree with. The important thing is that we cannot consider clause 4 generally before we know which of the schemes we are going to embrace. Rather than having the debate about the fundamental issues of industrial manslaughter now, it is better to postpone it. However, I do not think that same logic requires us to delay the consideration of Hon Alison Xamon's proposal until after new clause 230A. If we did not have those issues with clauses 30A and 31, we would be considering an amendment like this at this point. I do not think the logic requires us to postpone the clause. It is important that we move on with the bill and we get the opportunity to debate it, as it is one of the most substantial pieces of legislation that we will deal with. I propose that we do not defer clause 4 until after new clause 230A.

Hon Nick Goiran: What are you proposing?

Hon ALANNAH MacTIERNAN: I propose that we move to postpone consideration of clauses 4, 30 and 30A until after clause 34. If we start debating clause 4 now, I do not think there will be any clear way of ending it, given that we will not be contemplating the amendments until after clause 4. In the interests of making progress and being able to deal with the substantial issues that I understand members will have, I advocate that we do this.

Hon NICK GOIRAN: Just to be clear, the opposition will support the government's request to postpone consideration of clause 4. We have no problem with that. However, we will not agree to the postponement of other clauses that are not before the Chair. The only clause that is before the Chair at the moment is clause 4. When we get to clauses 30 and 30A, the minister can make whatever argument she wants at that point.

Hon Alannah MacTiernan: I am happy with that.

Hon NICK GOIRAN: We are happy to postpone the consideration of clause 4. My view is that we will have a problem when we get to clause 34 and we will then have to defer it until after new clause 230A, but I am happy to have that discussion. If the minister wants to move that debate on this clause be postponed until after clause 34, she has my support.

Hon ALANNAH MacTIERNAN: I thank Hon Nick Goiran.

Further consideration of the clause postponed until after consideration of clause 34, on motion by Hon Alannah MacTiernan (Minister for Regional Development).

Clause 4A: Meaning of officer —

Hon NICK GOIRAN: Is this clause consistent with the model law or is it a deviation?

Hon ALANNAH MacTIERNAN: I am advised that the definition of "officer" was modified to include the Western Australian approach to imputing conduct to the Crown and for consistency with Western Australian parliamentary drafting requirements—for example, appropriate references to the Governor. Clause 4A(2) interacts with division 5 under part 13, which is the application to the Crown, which is itself modelled on the current approach in the Occupational Safety and Health Act and the Mines Safety and Inspection Act. Generally, it is consistent with the model law, but it has some modifications to make it more consistent with WA practice.

Clause put and passed.

Clause 5: Meaning of person conducting a business or undertaking —

Hon ALISON XAMON: As I indicated in my contribution to the second reading debate, I am concerned that there has been a potential oversight in this legislation. I would like to see whether the government is able to explain whether that is the case. As I said before, page 9 of the explanatory memorandum states that householders who engage people other than employees for home maintenance and repairs—for example, bringing in tradespeople—are not intended to be interpreted as being a person conducting a business or undertaking. However, the concern is that a strata company doing exactly the same thing may be considered to be a PCBU unless it has been specifically exempted by regulation. That is concerning because we are simply talking about a different type of home ownership, so it should be able to be captured in the same way. During the course of the second reading debate I referenced the model regulations that specifically exempt them, yet I note that this bill does not contain an exemption and that the government has made no commitment to date to prescribe an exemption. I will move the amendment to ensure that it is clear that the bill is not intended to capture strata bodies. I move —

Page 12, after line 15 — To insert —

(7A) A strata company that is responsible for any common areas used only for residential purposes may be taken not to be a person conducting a business or undertaking in relation to those premises.

(7B)Subsection (7A) does not apply if the strata company engages any worker as an employee.

Hon ALANNAH MacTIERNAN: I appreciate Hon Alison Xamon's comments, but I ask her to consider withdrawing her amendment. I acknowledge that my notes in response to her contribution unfortunately were not as strong as they could have been. The government agrees with the substance of what she is concerned about. The model regulations contain a provision, regulation 7, that outlines the meaning of "person conducting a business or undertaking", and it lists the persons excluded. That includes that a strata title body corporate that is responsible for common areas used only for residential purposes may be taken not to be a person conducting a business or undertaking in relation to those premises. This regulation will not apply if the strata body corporate engages any worker as an employee. Minister Johnston gave an undertaking that that provision in the model regulation will be incorporated, with the references obviously changed to match the WA situation. Minister Johnston gave a firm undertaking that that will be included in the regulations. We think that is a more appropriate place to include it because various exemptions will be set out there. Hopefully, the member will accept that undertaking from the minister.

Hon RICK MAZZA: I am inclined to support the amendment moved by Hon Alison Xamon. I take on board what the minister said about regulations but we do not know when they may be gazetted and what form they will take. This amendment makes it quite clear—it certainly does no harm—that if a contractor turns up to do plumbing, electrical or other work, that business is responsible for its workers as it has insurance et cetera, not the strata company that ordered the work. It is quite different if a strata company employs a full-time gardener to carry out gardening at a complex or a full-time manager to look after a common area. They are employees of the strata company. It is quite clear that they would be workers. It is important that we make it crystal clear that when contractors are called in to undertake work at a complex, they are not captured by this bill. Even though we may have regulations, we have not seen those regulations, we do not know how those regulations will be worded and we do not know when they will be gazetted. It is quite prudent to insert this amendment in the bill so that everybody understands that a strata company will not be captured by the bill if a contractor is employed to do some contract work.

Hon ALANNAH MacTIERNAN: The bill will not become operative until the regulations have been framed, so we will not have a situation in which the legislation is enacted without the regulations. The whole schema of this thing is to draft the regulations before the legislation goes live. We are not opposed to the content of the amendment. There will be a number of different exemptions. However, we are not sure of the consequences of putting it into the legislation. We understand the concern. We are prepared to give the member an ironclad guarantee—I think I cited what the exact wording would be for the member—subject to the references to the principal legislation being brought into line with Western Australia, that we are absolutely committed to a regulation that does that. That will make the legislation easier to read. The fewer departures from the model that we have and the incorporation of provisions into regulations to reflect what happens elsewhere is really important. I understand the point that the member is making but I do not think we will gain anything from the amendment; in fact, it might make the legislation more cumbersome.

Hon NICK GOIRAN: The opposition was interested to hear the rationale behind the amendment moved by Hon Alison Xamon and also hear the government set out its position. The minister has not been persuasive. If I understand this issue correctly, the government intends to do exactly what Hon Alison Xamon is doing, albeit in subsidiary legislation and not in the primary legislation. There is a dispute about the form of words, which relates to where it will be housed. Clause 5 is headed "Meaning of person conducting a business or undertaking". My view

is that it is better if a person goes to the primary act to determine whether a person is conducting a business or undertaking. Is that person a PCBU or not? Clause 5(6) will provide the government with the capacity, under regulations, to specify circumstances in which a person is not a PCBU. Immediately after that, the bill provides that a volunteer association is not a PCBU. Immediately before that, the bill mentions that a local government member is not a PCBU. Other examples have been set out in this legislation, and include those that might be involved in a partnership or unincorporated association. It is not at all clear to me what harm Hon Alison Xamon's amendment would do. I would certainly have more sympathy for the government if there were some material deficiency in the wording. If the amendment simply uplifts what the government is providing in the regulations—an "ironclad guarantee"—I would rather do it now than wait for the regulations.

Hon ALANNAH MacTIERNAN: We are not going to die in a ditch on this, but we will not be supporting the amendment because it is an unnecessary departure from harmonisation. It will add a level of complexity. We are more interested in moving on and getting through the bill.

Division

Amendment put and a division taken, the Deputy Chair (Hon Robin Chapple) casting his vote with the ayes, with the following result —

Ayes (18)

Hon Martin Aldridge	Hon Peter Collier	Hon Rick Mazza	Hon Charles Smith
Hon Ken Baston	Hon Colin de Grussa	Hon Michael Mischin	Hon Colin Tincknell
Hon Robin Chapple	Hon Diane Evers	Hon Simon O'Brien	Hon Alison Xamon *(Teller)*
Hon Jim Chown	Hon Donna Faragher	Hon Robin Scott	
Hon Tim Clifford	Hon Nick Goiran	Hon Tjorn Sibma	

Noes (9)

Hon Alanna Clohesy	Hon Alannah MacTiernan	Hon Samantha Rowe
Hon Sue Ellery	Hon Kyle McGinn	Hon Matthew Swinbourn
Hon Laurie Graham	Hon Martin Pritchard	Hon Pierre Yang *(Teller)*

Pairs

Hon Jacqui Boydell	Hon Stephen Dawson
Hon Aaron Stonehouse	Hon Darren West
Hon Colin Holt	Hon Dr Sally Talbot
Hon Dr Steve Thomas	Hon Adele Farina

Amendment thus passed.

Hon ALISON XAMON: I move —

Page 12, after line 16 — To insert —

strata company means a body corporate established under section 14 of the *Strata Titles Act 1985* on registration of a strata titles scheme;

Amendment put and passed.

Clause, as amended, put and passed.

Clause 6: Meaning of supply —

Hon NICK GOIRAN: Minister, to what extent does clause 6 deviate from the model law?

Hon ALANNAH MacTIERNAN: Effectively, the ministerial advisory panel recommended that we include in the meaning of "supply of a thing" not just the sale and exchange of it, but also the "loan" of the thing. That is the basic amendment.

Clause put and passed.

Clause 7: Meaning of worker —

Hon NICK GOIRAN: I suggested in my contribution to the second reading debate that one of the clauses that needs amendment is clause 7. By way of explanation, I draw to members' attention the work of the Standing Committee on Legislation in its forty-third report, in particular finding 6, which states —

> Clause 7(1)(i) of the Work Health and Safety Bill 2019 allows regulations to prescribe additional classes of workers to be captured by the Bill, including Part 2.

Members will see that clause 7 contains a substantial list of persons who might be defined as a worker, including an employee and an apprentice or trainee. Interestingly, pursuant to a discussion that I had with a member behind the Chair earlier this morning, and for the benefit of that member, I note that the meaning of "worker" includes "a student gaining work experience" under clause 7(1)(g). At the very end of this list is paragraph (i), which simply states "a person of a prescribed class". Before I move the amendment standing in my name that seeks to delete that line, is there any reason why we need to retain line 30 on page 13?

Hon ALANNAH MacTIERNAN: The provision, as recommended, follows the national harmonisation process. All other jurisdictions have included this clause. To date, no subsidiary legislation has been introduced to include it, but it is important that there be the ability to prescribe additional classes of workers. If we do not keep this particular provision in the legislation, it is going to create a challenge in the harmonised model. We know that the world of work is changing very rapidly and that new ways of engaging people to undertake tasks are constantly emerging. We live in an environment in which the working circumstances of people are rapidly changing; we know that through contracting. We believe that the ability to prescribe a different class of worker—someone who is not included in that more traditional list—is very important because of the pace of change in the way work is emerging. We really urge members not to support this deletion.

Hon Nick Goiran: I have not moved it yet.

Hon ALANNAH MacTIERNAN: All right. It is important not to delete this provision. Given that new workplace relationships and structures are constantly emerging, this has formed part of the national model. If we do not include this in the legislation, this state will be precluded from dealing with these emerging problems nationally. I urge members not to go down this path.

Hon ALISON XAMON: I would like to make it clear from the outset that if this amendment is moved, I will not support it, and I will make it clear why. Ordinarily, I would try to make sure that we mitigate any government overreach by overprescription through regulations, as opposed to enabling provisions to be incorporated within the statute. In this instance, I have to go back to the substance of what this bill is trying to achieve. It is trying to make sure that people are kept safe when they are working. I am aware that the nature of how people are employed is changing constantly. Indeed, this is often the subject of interpretation within our industrial relations system. Therefore, it is quite important that we leave open the opportunity for any new class of worker who may be identified, particularly through the Industrial Relations Commission, to be automatically incorporated within our occupational health and safety laws. After all, this bill is ultimately about making sure that as many people as possible are kept safe when working.

Hon ROBIN SCOTT: For my benefit only, could the minister explain what an "outworker" is, please?

Hon ALANNAH MacTIERNAN: My understanding of an outworker, for example, is a person who sews at home. This is a very commonplace example: many people who manufacture garments undertake that task in their own home.

Hon NICK GOIRAN: Clause 7(1)(i) would allow for additional persons to be prescribed as a worker, and then would be captured by this legislation. What is the government's intention with regard to circumstances of prescribing such persons? Is it the intention of Western Australia to prescribe on an as-needs basis for Western Australia, or will it be prescribing only when the other jurisdictions have prescribed?

Hon ALANNAH MacTIERNAN: Obviously it can be done both ways. It is possible to contemplate that it could be done individually, if a particular issue emerged that became a serious issue in this state. For example, Western Australia has many more fly in, fly out workers than other states, so issues around FIFO attract our attention more than in other states. Generally, we want to make sure that we can take action as these issues emerge. The most likely sorts of arrangements that we are talking about would commonly also be occurring in other jurisdictions, so we would see this as part of us taking action. It would most likely be part of a national endeavour. I could not say it would be completely impossible that we might not see some variant emerge in Western Australia that had not occurred elsewhere and we might feel that it is important to deal with that situation. It would allow us to do it, but it is certainly not our intention to do it. We have a fairly comprehensive categorisation of people that many common workplace arrangements now cover. I think it is a backstop. Steps to make this expansion are not anticipated to be taken lightly or taken in the near future. These changes came out of a Council of Australian Governments' decision in 2008—12 years ago. It takes a long time to get legislation processed and through in this space. Given the pace of workplace change, it would be advisable to keep that in so that we have that flexibility.

Hon NICK GOIRAN: If the government decides to prescribe a person under this class of worker at clause 7(1)(i) and then table a regulation in this place and gazette it, what will be the process by which members will be informed whether that class has been undertaken because of a decision at the national level or a decision at the state level?

Hon ALANNAH MacTIERNAN: We could undertake to make it clear that if ever we were enacting a regulation pursuant to that, we would clarify whether it was as a result of harmonisation or the identification of an issue that had emerged in this state.

Hon NICK GOIRAN: On the basis of an undertaking that that process will be adhered to by the government, it is not my intention to pursue the amendment standing in my name at 15/7. The minister has made her case by saying it is important for the sake of the harmonisation of the national scheme. So long as members have had it drawn to their attention whether the prescribing of a person as a worker is done on the basis of a national decision or a state decision, we can certainly live with that. Members will have the opportunity to disallow it, if there is any reason for that. Is clause 7 a national model law provision or are there deviations? It certainly appears that clause 7(2), at the very least, may well be a deviation.

Hon ALANNAH MacTIERNAN: There is a modification in clause 7(2)(a). Fundamentally, we have done two things. I am advised that one is to correct the improper use of apostrophes—we obviously have more literate people here!—and we have added "WA police". The reference to police is obviously in the model law and we have ensured that we have made that applicable to WA police.

Hon NICK GOIRAN: Clause 7(2) states —

> For the purposes of this Act, a police officer is —
>
> (a) a worker of WA Police; and
>
> (b) at work throughout the time when the officer is on duty or lawfully performing the functions of a police officer, but not otherwise.

Do I take it that the model law will incorporate clause 7(2)(b) and not clause 7(2)(a)? If that is the case, why is it necessary to have clause 7(2)(a)?

Hon ALANNAH MacTIERNAN: Clause 7(2) in the model legislation states —

> For the purposes of this Act, a police officer is:
>
> (a) a worker; and
>
> (b) at work throughout the time …

Paragraph (b) is in the model bill. The only change we have made is to include "a worker of WA police".

Hon NICK GOIRAN: Why? I am not clear why it is necessary to do that. By way of explanation to the minister, I guess the issue is that a person could be a worker of WA police but not a police officer. That is why I am confused why we need to add that. We are complicating it with the additional words and deviating from the national law.

Hon ALANNAH MacTIERNAN: The national law still says "a worker; and at work throughout the time"—when the officer is on duty. It will apply only to a police officer; it does not apply to other workers. Administrative workers in WAPOL, obviously, are captured as employees. Because of the different standing that police officers have in the way their employment is conceived, it has been deemed, nationally, that it is necessary to make a specific reference to police officers. I presume that the reference to "WA police" is that we are not intending to have extra-jurisdictional reach. It was a recommendation of parliamentary counsel that we do that. We do not know whether other states have included it, but I do not think it changes the class of persons who will be covered.

Hon RICK MAZZA: I am somewhat confused by this also. Clause 7(2)(a) states, "a worker of WA police". That, to me, indicates it could be any worker of the Western Australia Police Force. It kind of defines a police officer as anyone who works with WA police, which, of course, is extensive. I understand the answer that the minister gave; however, I think that clause 7(2)(a) confuses the issue.

Hon Alannah MacTiernan: You have to be a police officer. You look at subclause (2), so it has to be a police officer. Then you go to subclause (2)(a) and it is "a worker of WA police". So you have to be a police officer and then "For the purposes of this act, a police officer".

Hon RICK MAZZA: To be honest, I think that it needs to be clarified better. It does not say a "police officer", it says a "worker". It defines "a worker of WA police". I think that will make interpretation a little cloudy. Maybe we can do something to try to tighten that up.

Hon ALANNAH MacTIERNAN: I understand the point the member is making. Can I ask that we postpone this clause until after the next clause so that I can get a bit more advice on that.

Further consideration of the clause postponed, on motion by Hon Alannah MacTiernan (Minister for Regional Development).

Clause 8: Meaning of workplace —

Hon NICK GOIRAN: Clause 8 is titled "Meaning of workplace". Is it consistent with the model law at a national level or are there any deviations?

Hon ALANNAH MacTIERNAN: It is identical to the model law.

Clause put and passed.

Clause 9: Notes —

Hon NICK GOIRAN: The same question applies: is clause 9 a model law clause or is it a deviation in any way?

Hon ALANNAH MacTIERNAN: It is a model law clause, but it has been clarified by formatting. There has been a formatting change, but the actual words are precisely as they are in the model law.

Clause put and passed.

Clause 10: Act binds Crown —

Hon NICK GOIRAN: I indicate, Mr Deputy Chairman, that I will be asking the same question on every clause until such time that the government can provide us with the list it promised. I do not say that in a critical way; there was a clear understanding earlier today that the government hopes that that will be provided by the end of the luncheon interval. In the meantime, in order to understand the deviations, we have no option other than to do this until such time as we are provided with that list. On that basis, I simply ask: although I note that clause 10 is a routine customary provision, is it in accordance with the model law or is it a deviation?

Hon ALANNAH MacTIERNAN: I am advised that the model allows for that deviation. A jurisdictional note permits each jurisdiction to include the appropriate language to bind the Crown. It was acknowledged that the custom and practice in each state is different, so the model law was framed in such a way to allow each state to have references consistent with the general practice in that state.

Hon NICK GOIRAN: I note that there was some controversy, I think, in Victoria. There was a suggestion that perhaps ministers might be prosecuted for industrial manslaughter. To what extent would that be a concern pursuant to clause 10?

Hon ALANNAH MacTIERNAN: I understand that there is an exclusion for ministers. We are looking to find where that is, if members can bear with us. As I understand it, this clause is not the one that gives rise to ministerial exclusion; there is another clause. The advisers have not been able to identify that at this time, but they will be looking furiously through the notes to find it. This is not the clause that will do that.

Clause put and passed.

Clause 11: Not used —

Hon NICK GOIRAN: Minister, with your indulgence, perhaps we could deal with clauses 11 and 12 cognately, because neither of them are being used. Perhaps the minister could explain to the chamber why they are not being used and is that the case in accordance with the agreement at a national level or is it something that Western Australia is doing of its own volition?

Hon ALANNAH MacTIERNAN: These two clauses were optional. It was anticipated that some states would or would not take the option. In relation to clause 11, Western Australia has decided that it is happy to have its normal jurisdictional reach. We are not seeking an extraterritorial claim with this legislation. Apparently, later there is some exception to that, but that is expressly raised in another clause. Both clause 11 and 12 relate to the jurisdiction. With one exception, which will be revealed at some point in the future, we are not seeking extraterritorial reach.

Hon NICK GOIRAN: I make this comment for both clause 11 and 12. Minister, there is no discussion about this point in the explanatory memorandum. It would be helpful, at the very least for the future, that if the Western Australian government does not want to take up one of the optional clauses that other jurisdictions are taking up, it should explain the reasons for that. The minister has just kindly done that for us. But for the question, no-one would have been any the wiser about that, because the bill simply says, "Not used" on two occasions—once at clause 11 and once at clause 12. The explanatory memorandum is silent on this point. Those in the industry, those who have duties and those who have a particular passion and interest in this area of law reform are left to wonder what is happening. The explanation that has been provided is more than satisfactory, and I am happy to support clauses 11 and 12 not being used.

Hon ALANNAH MacTIERNAN: The member makes a good point and we will ask the Parliamentary Counsel's Office and our team that prepares these documents to take note that when we are making those decisions, that should be articulated in the explanatory memorandum.

Clause put and passed.

Clause 12 put and passed.

Clause 12A: Effect of Schedule 1 —

Hon ALANNAH MacTIERNAN: We discussed this clause in the second reading and Minister Johnston proposes that we not proceed with clause 12A. We note the commentary in the committee —

A member interjected.

Hon ALANNAH MacTIERNAN: No, he is just trying to be very helpful!

We will not proceed with clause 12A, being mindful of the recommendation of the Standing Committee on Uniform Legislation and Statutes Review.

Hon NICK GOIRAN: In light of the explanation provided by the government, there would be no purpose in me moving an amendment to clause 12A, which is a clause that the government does not want in the bill and we will not stand it its way.

Clause put and negatived.

Clause 12B: Effect of Schedule 2 —

Hon ALANNAH MacTIERNAN: We want to move an amendment to this clause to remove the reference to health and safety magistrates. The reason we are moving this amendment is that we have had correspondence from the Chief Magistrate. It states —

> In my view the inclusion of the provisions relating to health and safety magistrates are unnecessary. If these provisions are deleted then any offence created by the Bill would be dealt with in accordance with the *Criminal Procedure Act*. Simple offences would be heard by Magistrates, indictable only offences by the District Court and any either way offences in either Court depending on the circumstances of the particular offence.
>
> I support the deletion of Schedule 2, Division 6 and any reference to health and safety magistrates contained in the transitional provision.

On the basis of that advice, we believe it is unnecessary and probably confusing to have a reference in this clause to health and safety magistrates. Accordingly, I am happy to table this document, if that would be useful for members.

[See paper 4236.]

Hon ALANNAH MacTIERNAN: With that, I move —

> Page 15, line 21 — To delete the line.

Hon NICK GOIRAN: Minister, we have no problem with that suggestion, and thank you for tabling the correspondence, as I understand it, from the Chief Magistrate. Would this amendment then be a deviation from the model?

Hon ALANNAH MacTIERNAN: We are permitted by the model law to craft the inclusions and exclusions that suit our judicial framework.

Hon NICK GOIRAN: Noting that we are dealing with clause 12B, is the entirety of the clause a Western Australia–specific provision?

Hon ALANNAH MacTIERNAN: This provision enables the establishment of various offices and bodies, so it is designed to give effect to schedule 2. It is anticipated that, obviously, in each state there will be different titles that need to be included. Therefore, the whole schema of this provision is to enable states to insert the titles in the descriptions that are appropriate for their jurisdiction.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 13: Principles that apply to duties —

Hon NICK GOIRAN: Minister, we are now moving on to part 2, so we have dealt with the first of the 16 parts of the bill. I indicate at this point—I made this point in debate on clause 1—that I would really prefer to not go through 425 clauses of this bill. I note that we will shortly be having a luncheon interval and I hope that when we return, we will be in a position to get advice about which provisions in the bill deviate from the national law.

By way of further explanation on that, the government very helpfully provided to the Standing Committee on Legislation a table, which is largely replicated at appendix 3 of the forty-third report of the Standing Committee on

Legislation on pages 97 and 98, and as we have discussed, it has some bolded text that was added by the committee. Nevertheless, it is very helpful because it indicates what appears in the model bill and what does not and where there have been deviations. That kind of information is particularly helpful because the position of the opposition is that if something is consistent with the model law or the existing law of Western Australia, we are broadly supportive of it. It is the deviations that require interrogation.

With all that, can the minister indicate what the situation is in respect of clause 13? I would be quite happy if the minister wanted to also give any indications on some subsequent clauses.

Hon ALANNAH MacTIERNAN: Other than the use of a different apostrophe and a different spelling of "transferable", clauses 13, 14, 15 and 16 fundamentally follow the model code.

Clause put and passed.

Clauses 14 and 15 put and passed.

Sitting suspended from 1.00 to 2.00 pm

Clause 16 put and passed.

Clause 17: Management of risks —

Hon NICK GOIRAN: Clause 17 is entitled "Management of risks". Is this clause consistent with the model law or does it deviate in any way?

Hon ALANNAH MacTIERNAN: I undertook that we would make a document available. We have provided the document to the Clerk. I do not know whether he has had an opportunity to distribute it, but in order to facilitate matters, I am happy to hand my copy to the member so that as we go through clause by clause, he is able to see the similarities to and departures from the model legislation. I will table the document, and I note that a copy of the tabled document has been made available to Hon Nick Goiran.

[See paper 4237.]

Hon NICK GOIRAN: I thank the minister for the mammoth document that has just been provided to me. Let it not be considered that I have had the opportunity to digest its 248 pages. I go to clause 17, which is before us, and I see that at page 24 of this 248-page document, it is clear that the first column sets out what is clause 17 of the bill, and the second column simply says "model clause". I take it that every time we see that in this document, it will be an indication that the clause is verbatim or precisely the same as the model clause, and if it is not exactly the same, there will be some commentary to that effect.

Hon ALANNAH MacTIERNAN: Yes, that is right. Occasionally there are formatting changes, but other than formatting changes, any non-formatting change will be expressly described.

Clause put and passed.

Clause 18: What is reasonably practicable in ensuring health and safety —

Hon NICK GOIRAN: It is clear from the document that the minister just tabled that clause 18 is a model clause. It deals with the definition of what is reasonably practicable. As I understand it, having served on the committee that looked into part 2 of the bill, and we are in part 2 at the moment, the term "reasonably practicable" is critical to the scheme because, in effect, it sets the standard that needs to be practised by Western Australians in the fulfilment of these health and safety duties. Can the minister indicate to the house to what extent this test of "reasonably practicable" differs from the existing law in Western Australia, if at all?

Hon ALANNAH MacTIERNAN: My advice is that there is no substantial difference between this and what is in the occupational health and safety legislation. We do not see this as elevating the standard or the duty. We are adopting terminology that is nationally consistent but, as a practicable matter, it will not change the standard or duty of care.

Hon NICK GOIRAN: Why then is clause 18(e) different from the existing law in Western Australia?

Hon Alannah MacTiernan: What do you mean "why then"?

Hon NICK GOIRAN: Clause 18(e) is not the same as the existing laws in Western Australia, so that should be justified, should it not?

Hon ALANNAH MacTIERNAN: I did not argue that this is exactly the same wording as in the current Western Australian legislation. This whole exercise is one of harmonisation that will bring in, to the extent that it is desirable, a common wording and set of principles. Of course, its wording will differ from what we have in our non-harmonised provisions. My advice is that it does not substantively change what is expected of people and their duty.

Hon NICK GOIRAN: I take the minister to the wording in clause 18(e). It is indicating that —

> after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

This is one of the matters that will be weighed and taken into account. Is that currently the case in Western Australian law?

Hon ALANNAH MacTIERNAN: This basically articulates a concept that we believe is already in place in the way these matters are judged in Western Australia. This is a codification or an articulation of what is already understood to be the case, so what we are seeing here is adopting a common language, but it only describes what is already the way in which reasonableness is determined in this area.

Hon NICK GOIRAN: So the minister's position is that under existing Western Australian law, it is already the case that an assessment of risk must be done before considering the cost of minimising the risk?

Hon ALANNAH MacTIERNAN: That is right, because we need to assess the risk before we can cost the minimisation. Clause 18(e) refers to assessing the extent of the risk, then assessing the available ways of eliminating that risk, and then the cost of the strategies of eliminating or minimising that risk. We then work out whether the cost of doing that is grossly disproportionate to the risk.

Hon NICK GOIRAN: The Standing Committee on Legislation has indicated that this is a variation to the existing standard under section 3 of the current law.

Hon ALANNAH MacTIERNAN: That is certainly not the view of the government.

Hon NICK GOIRAN: This is new information, then. I was not aware that the government was in disagreement with the Standing Committee on Legislation with regard to clause 18.

Hon Alannah MacTiernan: If you'd like, I'm happy to stand again and read you what the existing definition is.

Hon NICK GOIRAN: Under section 3?

Hon Alannah MacTiernan: Yes.

Hon NICK GOIRAN: Okay.

Hon ALANNAH MacTIERNAN: Under section 3, "practicable" means —

> (a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring; and
>
> (b) the state of knowledge about —
>
> (i) the injury or harm to health referred to in paragraph (a); and
>
> (ii) the risk of that injury or harm to health occurring; and
>
> (iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health;
>
> and
>
> (c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii);

We would argue that that implies that the cost of the minimisation or elimination of those risks has always been taken into account, but this is probably articulated better in terms of actually setting out the interrelationship between the assessment of the minimisation or elimination of the risks, and the cost.

Hon NICK GOIRAN: I think the minister said in her reply to the second reading debate that the sequence of events was that sometime after the consideration of matters there was the Boland review and that the government had decided to take on board some of the elements and recommendations of the Boland review. Did the Boland review make any recommendations with regard to this standard of "reasonably practicable"?

Hon ALANNAH MacTIERNAN: We are not aware that that is the case, but the significant matters that we took from the Boland review were the reference to industrial manslaughter and the changes to insurance. Those were the provisions from the Boland review that have informed this legislation.

Clause put and passed.

Clause 19: Primary duty of care —

Hon NICK GOIRAN: Clause 19 is entitled "Primary duty of care". Part 2 of the bill seeks to set out various health and safety duties. Division 1 deals with introductory matters and contains two subdivisions, which we have dealt with. We are now on division 2, "Primary duty of care". I see from the document that the minister tabled earlier today that there are some minor amendments that are of no particular consequence to us this afternoon, but the minister

made some reference to the emphasis in the bill that "health" includes mental health. Why was it considered necessary in Western Australia to add that note? I take it that that is not something the other jurisdictions have felt to be necessary?

Hon ALANNAH MacTIERNAN: The definition of "health" in the model code includes mental health, but in this case, given the degree of concern about mental health, we thought for the sake of emphasis that it was worth including mental health in this provision. Strictly speaking, if we had not added mental health, it would still have been included because of the general definition, but for the sake of emphasis and acknowledgement of something that is important to many sectors in the community, we have added in that reference.

Hon NICK GOIRAN: Clause 19 deals with the issue of primary duty of care. In effect, it looks to set out in statutory form the duty that is owed by an employer to an employee. My paraphrasing of it is that it says to employers, "You must have reasonable care and attention to the work health and safety of your employees." To what extent does the provision before us—that is, the primary duty of care—differ from the existing law, particularly under the Occupational Safety and Health Act?

Hon ALANNAH MacTIERNAN: The advice is that it is broadly and conceptually the same, but the articulation is now as per the national model. We do not see that there is any substantial change in the nature of that duty, but it is articulated in a way that is nationally consistent.

Hon NICK GOIRAN: I take it that it is therefore the case that a Western Australian employer who, under the existing law, conducts their operations in an appropriate fashion, is complying with the law, and is taking all adequate care and attention with regard to their employees, really has nothing to fear from the primary duty of care provisions under clause 19. Yes, some different language is being used to make sure that the legislation is harmonised with the other jurisdictions, but for our purposes, we as a Parliament are sending the message that it is, for all intents and purposes, the same, and that if employers are already meeting their existing primary duty of care, they will still be doing so under this legislation.

Hon ALANNAH MacTIERNAN: That is correct.

Hon ALISON XAMON: I am also interested in teasing out the scope of how mental health is incorporated into duty of care. I am particularly interested in using as my reference point the code of practice for fly in, fly out workers, because that has been a really important framework through which the potential mental health and suicide risks associated with FIFO work have been clearly articulated. There is also an obligation on employers to ensure that they take all reasonable and practical measures to minimise those risks. Is it envisaged that the various psychosocial hazards or risk factors will be incorporated within the existing wording? I have a proposed amendment on the supplementary notice paper, but whether I choose to move it will depend on how confident I feel that the full scope of what I think is necessary has been captured. For example, it refers to the need to address work demands and issues around extended working hours, working a large number of consecutive days, roster lengths and shift rotations. Is it envisaged that that will fall within the scope of this provision?

Hon ALANNAH MacTIERNAN: If I can get these various bits right, under the model legislation, health means physical and psychological health, and clause 19, "Primary duty of care", makes clear the sorts of risks that might be included in that regard. Given that definition, we think that the provision and maintenance of a work environment without risks to health and safety would take into account and be broad enough to encompass the sorts of concerns that the member outlined. If we look at all these through the lens of the fact that health includes psychological health, we would interpret all these duties of care to include psychological wellbeing. I am told that under the current legislation, it is assumed that it covers mental health, but this is perhaps just a clearer articulation of it. We now have the "Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors" code of practice, so hopefully it will become a standard code of practice under this legislation.

Hon ALISON XAMON: As I have mentioned, that is precisely the document that I am speaking about, because that was a bit of a watershed moment in identifying the sorts of psychosocial hazards that can potentially exist within a workplace. I am keen to see the degree to which it is anticipated this will be captured as a broad whole within the legislation. Apart from work demands, which I have just spoken about, the code of practice refers to low levels of control over things like sleep schedules and accommodation preferences; inadequate support from supervisors or co-workers; a lack of clarity around roles; poor organisational change management; low recognition and reward; poor organisational justice; the risks associated with not appropriately managing poor environmental conditions; the challenges posed by remote and isolated work; dealing with inappropriate behaviours such as bullying, harassment and discrimination; managing exposure to traumatic events; and issues of fatigue. I want to be assured that those things are very much required to be on the radar of any employer as potential occupational health and safety issues that need to be managed. I am seeking confirmation that the way it is currently interpreted will be as broad as that, and I hope it is.

Hon ALANNAH MacTIERNAN: I am a bit unclear from the member's question about what she wants from us. This bill will clearly enshrine psychological health. No other standard codes of practice in that area are currently

being prepared. All the issues that the member has articulated are very much part of the consideration around providing a safe workspace. I am not quite sure about the particular legislative response. We have not made any decisions about whether we will go beyond the FIFO code of practice. We want that to continue. A decision has not been made on whether we need to develop other codes of practice that might take these issues forward. The clear thing is that under this model legislation, it might arguably be a bit easier to do that and to perhaps look at the codes that have been adopted in other states that could be incorporated in this state.

Hon ALISON XAMON: I am seeking confirmation that this legislation, if it is not amended by the amendment I have on the supplementary notice paper, will be broad enough to incorporate the issues that I have raised that are already enshrined within the FIFO code of practice as matters that potentially need to be considered by employers in order to maintain the psychological and psychosocial good health of their employees.

Hon ALANNAH MacTIERNAN: The advice that I have been given is that the answer is yes. Because we are specifically prescribing a duty of care in relation to the psychological health of workers, this will require an employer to have consideration of the psychological health of the workforce that emanates from the work practices that are of concern to the member. I have been advised that the answer to her concern is yes, these sorts of matters will be required of an employer.

Hon ALISON XAMON: Based on that clarification, I see no reason to move ahead with the proposed amendment on the supplementary notice paper, so I will not do that. I seek one final clarification on this. Although we have acknowledged that there is a duty of care to employees around psychosocial issues, there is no intention to remove the ordinary autonomy and privacy of workers in their own downtime. In no way will the duty of care extend to an employer being able to compel a worker not to undertake behaviours in their own time that may be risky, such as drinking, smoking or anything like that. In no way will this encroach on personal privacy when workers are not actually working.

Hon ALANNAH MacTIERNAN: There is obviously a limit to that. As the member knows, in many workplaces there is drug and alcohol testing. A person might have downed cans of beer in their own time but, obviously, if, as a consequence, they register an alcohol level above zero when they go onto the workplace, that can create an issue. The issue really is how a worker presents at the workplace. It may well be that, in some instances, what they were doing before they entered the workplace is relevant. If the member considers that to be an invasion of privacy, it might be. I am not quite sure whether the member is asking whether an employer has the right to say that an employee cannot go to a party. We do not see that this legislation will give employers any greater reach into a person's privacy than those circumstances of drugs and alcohol.

Hon ALISON XAMON: Thank you, minister. Of course, the situation the minister just described is one of an employee being at work. Clearly, the requirement that an employee is to effectively have zero alcohol or drugs within their system, as it should be for all employees, is when they are at work. I suppose I am curious about psychosocial risks. I want to ensure that even if an employer is concerned about, and does not approve of, an employee engaging in behaviours in their own time that the employer might view are not necessarily good for the mental health of that employee, the employee retains their autonomy and privacy to continue those behaviours, as long as they do not engage in them at work. The concern raised with me is that although it is important and necessary to include psychosocial risks under occupational health and safety legislation, we do not want it to be misunderstood to mean enabling an employer to tell an employee what they can and cannot do with their own lives in their own time, even if it puts their mental health at risk. In the same way that an employer would not be able to tell an employee not to undertake physical risks in their own time.

Hon ALANNAH MacTIERNAN: I do not think it is anticipated that that will happen. However, I will say that a proper balance has to be struck here. If a person engages in a range of private activities that are likely to lead to them being psychologically incapacitated at work, there must be some protection for the employer so that they are not held liable due to the employee going to work in perhaps a debilitated frame due to something they had elected to do. This is certainly not seeking to give employers reach into the private life of people. Obviously, in determining whether a duty of care has been breached, we must have regard to what is reasonable from the employer's point of view, and the employee will have to accept responsibility for harm that might befall them if they have not come to work in a robust state. There must be a balance here; it is not intended to give employers the right to reach in. However, obviously, in an assessment of any situation about whether an employer has breached their duty of care, there may well be consideration of an employee's conduct.

Hon NICK GOIRAN: I want to be clear, because where we started in clause 19 was to get confirmation for employers that nothing will change here. I want to be clear that nothing has changed as a result of the dialogue between the minister and Hon Alison Xamon. The minister's earlier response was that employers in Western Australia have a primary duty of care. Once this legislation passes, they will still have a primary duty of care but it will be expressed

in a different way; in this instance, it will be expressed in the terms set out in clause 19. Other than some minor language change, the duty of care will remain the same.

Hon ALANNAH MacTIERNAN: Certainly that is the case. Indeed, a thread is running through some of these harmonisation provisions aimed at making explicit what has been implicit in legislation. In this case, there is express reference to psychological health. If the member looks at case law, he will see that it supports our interpretation that psychological health has been considered to be part of health. All this bill will do is make what was implicit, explicit.

Hon NICK GOIRAN: It is my understanding that the primary duty of care set out in clause 19 combines a number of provisions in two statutes, being the Occupational Safety and Health Act and the Mines Safety and Inspection Act 1994. Those duties are outlined at paragraph 3.32 of the Standing Committee on Legislation report, where it sets out —

- duties of employers
- duties of employers and self-employed persons
- duties of body corporate
- contract work arrangements
- labour arrangements in general
- labour hire arrangements
- duty of employer to maintain safe premises.

However, the Standing Committee on Legislation included a cautionary note at the end of this section on page 25, where it noted that these provisions will apply to a broader concept; namely, persons conducting a business or undertaking. The minister will see that clause 19 regularly refers to the notion of a person conducting a business or undertaking. This goes back to my original question about employers and the like in Western Australia who are conducting their business appropriately. Will anyone be captured as a result of the definition of PCBUs and have a primary duty of care that they do not have at the moment?

Hon ALANNAH MacTIERNAN: In terms of the actual duty of care, as the member was saying, we believe it is substantially the same. The PCBU has been framed more broadly in order to try to capture, as I said, the changing economy, the gig economy—namely, Uber drivers and those sorts of people. We do not have any actual cases, and to some extent this will depend on case law. The duty of care has not changed, but it is conceptually possible that a broader group of people will be covered by the PCBU over and above those who are covered in the existing OSH act. That has been very deliberate and a central part of the deliberations, because, as we have referenced on several occasions already, the nature of work arrangements is changing quite dramatically, so we need to make sure that we have a legislative framework that will enable people who are in these newly formatted jobs to have access.

Hon NICK GOIRAN: What the ordinary person in Western Australia would consider to be an ordinary employer–employee relationship will definitely continue under this legislation, but what the government is trying to do is to make sure that this primary duty of care, which is already owed by employers in Western Australia, will be also owed by those who might not fall into those traditional categories. The minister brought up a useful example about some non-traditional arrangements like Uber and other such arrangements. I do not profess to have any great knowledge and expertise about its contractual arrangements. However, I am sure that members do not want people to create structures for the express purpose of eliminating the need for them to adhere to this primary duty of care. That goes to the heart of my question. I want to be clear that the ordinary business owner in Western Australia, however described, is already captured by a primary duty of care, expressed in a different form, and they will continue to be captured under this provision and under the definition of "person conducting a business or undertaking", so that all those traditional business owners need fear nothing from what is happening here. The ones who might have something to be concerned about are those who deliberately create structures that one might describe as non-traditional or creative. Would that be a fair summation of things?

Hon ALANNAH MacTIERNAN: That is correct. The expansion is really the expansion into these novel forms of employment. The standard person who is engaged in working 20 or 38 hours a week and being paid on an hourly basis—all of that, the standard arrangements—we do not believe will be affected by this. The member would appreciate, as someone who operated in this area in his pre-parliamentary life, that one of the benefits will be the case law. If we have pretty identical clauses to those in other states, litigation in one jurisdiction will become much more useful, so we will have a stronger bank of case law to rely upon.

Clause put and passed.

Clause 20: Duty of persons conducting businesses or undertakings involving management or control of workplaces —

Hon NICK GOIRAN: With the minister's indulgence, I will make these comments on clauses 20 to 26 to alleviate the need, for my part at least, to individually discuss those clauses in that bracket. I note that according to the document the minister tabled earlier, all the clauses in that bracket, being clauses 20 to 26, are model clauses, with the exception of perhaps two that I can see, in which a note has been made about the clause that it is simply being moved to a different position, if I understand the document that was tabled earlier correctly. That said, I note that the Standing Committee on Legislation made finding 3 on this bracket of clauses, which states —

> The duties in cl 20–26 of the Work Health and Safety Bill 2019 have been included without significant amendment from the Model Work Health and Safety Bill 2019.

On that basis, I indicate that I have no further questions on those clauses.

Clause put and passed.

Clauses 21 to 26 put and passed.

Clause 26A: Duty of persons conducting businesses or undertakings that provide services relating to work health and safety —

Hon NICK GOIRAN: Clause 26A is not a model law provision. It is titled "Duties of persons conducting businesses or undertakings that provide services relating to work health and safety". I note that in the 248-page document that was provided to members, the explanation of clause 26A is what is referred to here as MAP recommendation 8. Minister, what was MAP recommendation 8?

Hon ALANNAH MacTIERNAN: The ministerial advisory panel's recommendation 8 was that we include a provision that clarified the duties of a WHS service provider and removed the ambiguity from the service provider's implied duty. The precise wording of the recommendation is the essence of it. Recommendation 8 states —

> Include a new duty of care on the providers of workplace health and safety advice, services or products.

It goes on to state —

> … New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.

The report states also —

> The National Review —

That was the Boland review, I believe —

> included recommendations regarding the provision of occupational health and safety … services.

The review that led to the model code included recommendations about the provision of occupational health and safety services. It continues —

> 37 The model Act should place a duty of care on any person providing OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act.
>
> 38 The model Act should include a definition of a 'relevant service' and a 'service provider' to make it clear what activities fall within the duty and who owes the duty. The definition will be discussed in our second report.

The MAP recommendations continue —

> Some submissions to the National Review suggested people or organisations that provide health and safety information, advice or services (including the provision of safety management systems) to the workplace should be subject to a specific duty of care.
>
> …
>
> The authors of the National Review noted that such a duty would require clear definitions of ***relevant service*** and ***service provider*** …

But the recommendations of that national review, which took place in 2007 or 2008, did not endorse that particular provision on the basis that it was already covered by the primary duty of care for PCBUs. I am sorry; the national review supported it, but the Workplace Relations Ministers' Council did not support it, but that was some years ago. It was the view of the ministerial advisory panel that, going back to the original findings of the review, it was important to have a specific duty imposed in the Western Australian version of the act. Again, as I think we have said, and Minister Johnston has certainly said, it is our view that this is already an obligation, but it is not properly

articulated. We are seeking to ensure that we have clarity here, so that what is considered to be implicit in the current legislation is made explicit. We think this will benefit small businesses, because it means that they will have greater protection. When they take WHS advice—of course, many smaller businesses rely on that because they do not have the personnel or expertise themselves—it is useful and appropriate for this to be explicitly addressed. I am not quite sure why it would be thought appropriate that a person who is providing advice on work health and safety not have some obligation in terms of the quality of the advice they are providing.

Hon NICK GOIRAN: If I understand correctly, the minister said that the genesis of this matter was one of the reviews. It was then considered by all relevant ministers at a national level and rejected. The government is now including it because it was a recommendation of the Western Australian ministerial advisory panel. Was this one of the MAP recommendations that was unanimous?

Hon ALANNAH MacTIERNAN: Normally, we would not consider it appropriate to get into that sort of detail on a committee report, but in light of the degree of interest in this provision, we can say that the five members of the MAP all supported this provision.

Hon NICK GOIRAN: The minister will be aware that there has been a lot of advocacy by various groups on this issue, and particularly that the non–model law provisions at clauses 26A and 30B be deleted. Is there something that the minister can table in this place to confirm that all five members of the MAP agreed that clause 26A should be included in the bill?

Hon ALANNAH MacTIERNAN: No, I cannot, member. I just want to point out that this is really quite extraordinary. Here is a whole bunch of provisions that are designed to advance the cause of work health and safety, and we have a group of people who are providers of work health and safety services who seem not to want to be held accountable for the quality of work that they do. There is no doubt that there is a division of opinion between the practitioners in this field; there are people who passionately support this provision and there are those who oppose it. If someone is providing services and advice on work health and safety that other people are going to be relying on, it is entirely appropriate that they be captured by a duty of care under this legislation. There is a division of opinion here. I would think that all other businesses that will rely on this work health and safety advice would probably be somewhat annoyed that these providers of advice are seeking to have their liability excluded. We are not pretending that everyone wants this. There are obviously always going to be people who do not want to be captured by legislation. We argue that it is probably the case that that liability is already there, but it is not clear. What we are trying to do here is to give greater clarity and certainty so that everyone is involved.

Hon NICK GOIRAN: To answer my question, the minister is not in a position to give us anything that can be tabled to confirm that all five members of the MAP agreed to this recommendation.

Hon ALANNAH MacTIERNAN: No, it is not possible to do that. It would probably be inappropriate to attempt to do that. We really have to look at the principle of whether we think it is appropriate that occupational health and safety experts want to exempt themselves from the duty of care that is being advanced for others.

Hon NICK GOIRAN: Can the minister help me understand why it would be inappropriate? The government's explanation for including clause 26A in this bill—remember, it is a non–model law provision—is that the MAP has said it should be included. According to the government, the ministerial advisory panel said at recommendation 8 that we should include clause 26A in the bill, which deviates from the national scheme. The Standing Committee on Legislation specifically highlighted two areas in which there are deviations: clause 26A was one and the industrial manslaughter provisions was the other. If the government would like the members of this place to agree to clause 26A on the basis of the MAP's recommendation, why is it inappropriate to provide advice or evidence to the chamber or table something to confirm that it was a unanimous recommendation?

This is very important, minister, because we know—it is on the public record—that multiple matters were not unanimous recommendations and the ministerial advisory panel had a divergence of opinion. During the Standing Committee on Legislation's public hearing, it was revealed that that included the situation in which voting was taking place on the ministerial advisory panel. As best as I can recall, the committee was informed that this was a highly irregular set of circumstances. To top it off, the minister might remember that I indicated in my contribution to the second reading debate that one of the people on the ministerial advisory panel was a member of the minister's staff. The minister's policy adviser was one of the people sitting around the table with the capacity to put up their hand and vote on these matters. It was supposed to be a discussion and consultation process between employers and employees or at least their representative groups. I simply ask for an explanation of why, in all those circumstances, it is now inappropriate for the government to table something. Is there a set of minutes that perhaps can be tabled that indicate which recommendations were agreed to unanimously and those ones on which there was a divergence of opinion? That is not asking too much.

Remember, this is the government that Mr McGowan, prior to the last election, promised would have a gold-standard level of transparency. Now, it wants to insert a non–model law provision into a model law uniform scheme. Ministers

at a national level previously considered the provision and said, "No, we don't want to do this." The government is doing it because of a process that involved people on a ministerial advisory panel, including the minister's own staffer, putting up their hand and voting. In those circumstances, it is appropriate that something is tabled in this place to confirm the views of the ministerial advisory panel. I think the most convenient way to do that would be to table the minutes, but I appreciate that other mechanisms may be at the government's disposal.

Hon ALANNAH MacTIERNAN: The MAP recommendations reflect the committee's views. I think the information the member is seeking would make it pretty impossible to ever run a review process. I am advised, in this case, and this is a departure from the norm, that we will say that this was unanimously recommended. But this is not a rote action. It was a recommendation of the MAP, but it was then considered by government. The government made the decision that it made sense. It was brought to our attention because it was a recommendation of the MAP review, but that did not mean it would automatically be included in the legislation. The arguments for this stand on their own merits. The importance of the MAP review just shows the history—that it was initially recommended in the national review some 12 years ago.

Hon Nick Goiran: It was rejected by the ministers' council.

Hon ALANNAH MacTIERNAN: It was rejected some 12 years ago. Time moves on, and this time it was one of the considerations of the MAP committee, and its advice was, going back to first principles, which I think the member should look at, that it should be considered on its merits. We are confident and comfortable that this provision had very strong support within the MAP review, but it is not just because the MAP recommended it that we are arguing for it.

I suggest that the member should start to address what he is trying to do here. Who is he trying to protect? Is the member seriously saying that people who hold themselves out to be experts in workplace health and safety and provide advice to businesses should not be captured by this legislation? I find that extraordinary. It came to the government's attention via the MAP review, but we made an independent decision that we were going to embrace it, and we are asking members to consider this provision on its merits. In the past, it has had support. The ministers' argument 12 years ago was that the definition of "PCBU" was broad enough to capture that. There has been a degree of concern on whether we should just leave it that way. It was not that the ministers were rejecting the concept of them being responsible; they thought that the broader definition of PCBU covered them. Our concern, as was the concern of the national review and the ministerial advisory panel, is that it is not explicit enough. Many of the provisions we have been arguing for today make explicit things long thought to be implicit in the legislation. This proposition turns on its merits. We are confident because the MAP committee strongly recommended we do it. We made the decision because we think the merits of the argument are strong.

Hon NICK GOIRAN: I am disappointed that the government will not provide confirmation, in a fashion that can be tabled in this place, that the ministerial advisory panel's recommendation was unanimous in all the circumstances that I have raised previously. I note in passing, minister, that it is interesting that the government said it would not normally be able to talk about these things but is prepared to tell us that this one was unanimous. The government is happy to do that on some occasions, but not on other occasions. I ask for consistency.

Hon Alannah MacTiernan: Whether it was four or five members does not derogate from the fact it was a recommendation. More importantly, we need to be prepared and capable of determining whether it is appropriate.

Hon NICK GOIRAN: I understand what the minister is saying, but about one hour and seven minutes ago she tabled this document that provides the justification for this provision in three words: MAP recommendation 8.

Hon Alannah MacTiernan: That has already been considered by the committee.

Hon NICK GOIRAN: Is that the Standing Committee on Legislation? Is the minister going to give me a lecture about an inquiry that I attended every single minute of? I know full well what that committee did, with all due respect, minister. The minister is absolutely correct. If the minister would like to turn to the relevant pages of the report, they are pages 25 to 29. There is no problem there, minister. Nevertheless, the minister said, "Don't worry about the MAP recommendation process; the matter stands on its own." Can the minister advise the house to what extent the duty set out in clause 26A is different from the primary duty of care we discussed earlier?

Hon ALANNAH MacTIERNAN: This provision is designed to clarify what is a WHS service. As I understand it, it is to be read conjointly, so it is not an alternative, and the duty of care as set out in the other provisions will still apply. The duty is set out in clause 26A(3), which says —

> The WHS service provider must ensure, so far as is reasonably practicable, that the WHS services are provided so that any relevant use of them at, or in relation to, a workplace of the kind referred to in subsection (2)(b) will not put at risk the health and safety of persons who are at the workplace.
>
> …

The following are examples of cases in which a relevant use of WHS services might put at risk the health and safety of persons who are at a workplace —

(a) a recommendation that is made on how to eliminate risks … at a workplace is inadequate for that purpose so that when the recommendation is implemented at the workplace the risks are not eliminated;

(b) the testing of plant at a workplace for risks to health and safety fails to identify existing risks so that, when the plant is subsequently operated in reliance on the testing, workers at the workplace are exposed to those existing risks;

(c) a training course for workers about how they can avoid being exposed to risks to their health and safety is inadequate for that purpose so that, when the workers put their training into practice at their workplaces, they are still exposed to the risks.

Hon NICK GOIRAN: That was not my question. My question was: to what extent do the duties set out in clause 26A differ from the primary duty of care at clause 19?

Hon ALANNAH MacTIERNAN: It is specific. Obviously, a WHS provider will not provide those services directly to the employee. The employer, for example, will have the responsibility for setting up the workplace. Clause 19, "Primary duty of care", is about those persons who have responsibility for setting up that workplace. This is putting in another layer and saying that if they are not in direct control of that workplace but are providing these services, they also have a responsibility. If they are providing training that turns out to be a dud, providing plant testing that turns out to be a dud or providing advice on elimination of risks that is inadequate, they also will be liable. The concept of primary duty of care is for a person who is responsible for setting up a workplace. To the side of that, under clause 26A, a person may not be the one who is responsible for establishing the workplace, but they are providing services that the person responsible for the workplace is implementing. That then creates a liability whereby someone is not directly providing the workplace but providing these services that inform the persons conducting a business or undertaking, who are trying to provide that safe environment. They are relying on the work that they are doing and I think it is incredibly appropriate that the service providers are then captured by this legislation.

Hon NICK GOIRAN: Clause 26A(1) sets out four definitions of terms that are used in the clause. One of those definitions is the phrase "WHS services". I am not going to have to repeat this question am I, minister?

Hon Alannah MacTiernan: Sorry.

Hon NICK GOIRAN: No? Okay. I am asking the minister to consider clause 26A(1) and in particular the definition of work health and safety services. Paragraph (a) says it "means services that relate to work health and safety". What is that definition?

Hon ALANNAH MacTIERNAN: The whole legislation is predicated on an understanding that this is about work health and safety. I am advised that we do not have a definition of "work health and safety" and these terms do not require further expansion. "What is the definition of work health and safety?" would apply to the entire legislation. These are not further defined. They take the ordinary meaning that these words have in the English language. They are distinct from advice, for example, that might relate to marketing, if one is providing services that are not related to work health and safety. At some time, there might well be litigation in which someone says, "My services didn't relate to work health and safety", and they would need to argue that with the courts. There is a principle, I guess, in statutory interpretation that we do not seek to define every single word in the English language before we include it in legislation. We accept that words have a meaning and that if these issues are contested, if someone says, "No, this service I provided was really about marketing, it wasn't about work health and safety", that matter would then be litigated. The courts would give consideration to: What is the custom and practice? What is the normal use of these words? What is the normal use of these words in the operation of this style of legislation that has been in place for many decades? We do not define every word that is used in every piece of legislation.

Hon NICK GOIRAN: That is of course correct, but I draw to the minister's attention that the definitions earlier in the bill at clause 4—the minister might recall that this is the clause she wanted to defer earlier—define the word "health". We do not define "work", "work health" or "safety". My concern is that we will now be imposing a duty, which the minister passionately made the case for, and I respect her right to do that, on people who are described as providing services for work health and safety, but the bill does not define work health and safety. It defines the word "health", but it does not define "work health and safety". I think that is of concern. It is not satisfactory to say, "Well, there could be litigation about that." We do not want the government, the regulator or businesses in Western Australia to be unnecessarily caught up in litigation, particularly at the moment, when it should all be about the creation of jobs. Nevertheless, we see under the definition of "WHS services" that clause 26A(1)(b) sets out at some length what is not included as a work health and safety service. What was the basis upon which these four exemptions were included?

Hon ALANNAH MacTIERNAN: I will first of all say that the reason "health" was specifically defined was to make it explicit that it related to psychological health as well as physical health. The bill does not seek to give a comprehensive definition of what "health" is; it simply makes explicit that it is both physical and psychological health. Arguably, "health" is not defined beyond that; nor is "safety", under the primary duty of care. As I said, the member will find throughout this bill references to work, health and safety, which are to have their normal meaning, provided that that normal meaning, with regard to health, includes both psychological and physical health. These recommendations came from the national review and from public comment. These exceptions were considered from some of the submissions made and it was thought that it was reasonable to exclude them without compromising the fundamental schema of the bill. It was a combination of the national review and public submissions.

Hon NICK GOIRAN: Were these public submissions made to the ministerial advisory panel? To whom were the submissions made?

Hon ALANNAH MacTIERNAN: The public submissions were made to the MAP and the majority of them are on the departmental website. Some were confidential, but I think those relating to this issue were public; we can perhaps have that checked. There was the national review, but some of these exemptions emerged from public submissions.

Hon NICK GOIRAN: Were any submissions made to the MAP recommending the exclusion of services as work health and safety services that were not adopted?

Hon ALANNAH MacTIERNAN: We do not have that level of detail available to us.

Hon NICK GOIRAN: That makes things very difficult, because this is a clause that the opposition is of a mind to oppose. I am listening carefully to the arguments and propositions that the minister has put forward for its inclusion and I am trying to give due weight to each of them. As I said at the outset, the primary point the minister made was that it was a recommendation of the MAP. My concern is about whether the recommendation was unanimous, but the government is not willing to put anything on the table to confirm the basis upon which the MAP made a unanimous decision. The minister then indicated that we should consider the substance of the clause, which is what I am doing now. I can see that a definition of "work health and safety" is not included in the bill, but there are at least four particular types of services that are expressly excluded from that definition. When I asked about the basis upon which those exemptions were made, the minister indicated that it was to do with the national review and submissions to the ministerial advisory panel. Understandably, I would like to know whether anyone made a submission to the ministerial advisory panel that a particular service should be excluded, but the panel said no, or that the panel said, "Yes, we think it should be excluded", but the government said no, or, in the process with Parliamentary Counsel, before the matter got here, something was missed.

Hon ALANNAH MacTIERNAN: Sorry, member; there has been a change in advice. Submissions were not made to the MAP; they were submissions made in response to the MAP's recommendations. The MAP made its general recommendation, which I read out earlier, recommendation 8. The MAP's recommendations were made public and then there was a period of public consultation. The MAP apparently specifically said that it would like to be informed by public comment about what should be exempted, so it made a recommendation that we have this provision, but that the exemptions be developed in response to public consultation.

Hon NICK GOIRAN: I thank the minister; I think it is helpful to have that clarification on the record. Did the public submissions that were made then go back to the MAP for reconsideration?

Hon ALANNAH MacTIERNAN: No, they were analysed and considered by government. The MAP produced its report, made its recommendations and that then became something that the public could make submissions on. Those submissions were analysed and a report was given to government and a decision was then made by government on those matters.

Hon NICK GOIRAN: One of the exemptions that is set out at clause 26A(1)(b)(ii) is services provided under a corresponding work health and safety law by a person or body corresponding to a work health and safety authority, a health and safety representative or deputy, or a health and safety committee. Who is it intended will be captured by such services? Who provides the sorts of services referred to in clause 26A(1)(b)(ii)?

Hon ALANNAH MacTIERNAN: For example, the New South Wales work health and safety authority might put on its website advice of a generic nature that is then relied upon by someone in Western Australia. Paragraph (b)(i) of the definition of "WHS services" in clause 26A(1) is seeking to ensure that the services provided by a work health and safety authority are not captured, and the services of authorities in another state will not be captured by it either.

Hon NICK GOIRAN: My only concern with that is that earlier in the debate today, I thought I understood the minister to say that the government had decided not to proceed with a provision to do with the extraterritorial application of the law. I am not clear why we would need this provision in light of her earlier response.

Hon ALANNAH MacTIERNAN: It is because we are not seeking to make our legislation reach beyond our boundaries if a work health and safety authority in another state puts on its website advice that is then used. We think it is a different thing. This is saying that we are not going to apply our laws to other states. We are making it clear that if a person in Western Australia accesses advice given by an interstate authority, that entity will not be captured within our reach. It is a different concept. One is saying that we are not taking our laws beyond the boundaries and the other is saying that if stuff is coming in because of access to the net, that authority will have the same protection as an authority here has.

Hon NICK GOIRAN: If a work health and safety service provider is set up in, for example, Sydney—the minister referred to New South Wales, so I will continue with that example—and people in Western Australia pick up the phone and take the advice of this Sydney-based organisation, clause 26A will not apply to them; is that what the minister is saying?

Hon ALANNAH MacTIERNAN: This provision does not seek to deal with this. It does not refer to private sector businesses; it refers to services provided under a corresponding law by a person or body corresponding to a WHS authority—that is the state agency, as I understand it—a health and safety representative, or deputy, or a health and safety committee. This does not capture businesses.

Hon NICK GOIRAN: Correct me if I am wrong, minister, but I think that a health and safety representative could be an individual working in a private business.

Hon ALANNAH MacTIERNAN: I think it is important for the member to see that subparagraphs (i) and (ii) are parallel—one relates to WA and one relates to people who operate in another jurisdiction. A health and safety rep is someone who has been chosen to look after health and safety issues; they are the representative or delegate who looks after the health and safety issues of people on the site. They are the representative of the employees or the committee. These are not people who are in the business of providing advice. That is not their job. This is quite separate from anyone who operates a business.

Hon NICK GOIRAN: I thank the minister. That is a helpful explanation to set out the distinction between subparagraphs (i) and (ii) of paragraph (b) of the definition of "WHS services" in clause 26A(1). Is it the intention of paragraph (b)(iv) of that definition in clause 26A(1) to exclude lawyers from liability?

Hon ALANNAH MacTIERNAN: If a law firm sets itself up to provide advice on how to operate premises in a general sense and it took that firm outside the realms of providing legal advice, it would not be protected. It is only when the advice that it provides is subject to legal professional privilege. As the member will be aware, if a client seeks advice on whether they have complied with the law or seeks advice on a charge, that matter is subject to legal professional privilege. In these days of multidisciplinary areas, if a firm provided advice specifically on what needed to be done to assess and eliminate risk, that advice would not be protected. The yardstick is that it is services that are subject to legal professional privilege.

Hon NICK GOIRAN: If someone in a business in Western Australia picks up the phone and speaks to a law firm to get advice on work health and safety and whether the business's structures comply with the law or whether improvements should be made by that business to comply with the law, would the advice provided by the law firm to that business not be subject to clause 26A?

Hon ALANNAH MacTIERNAN: I imagine that that advice would be subject to legal professional privilege; and, if so, it would be protected. We are trying to differentiate that advice. A work health and safety provider must ensure, so far as is reasonably practicable, that the services are provided so that any relevant use of them at the workplace will not put at risk the health and safety of persons at the workplace. Generally speaking, the sort of advice that a law firm would give would not have the potential to create risk for the health and safety of persons at the workplace. The sort of legal advice that would be given would basically be about statutory obligations and how they can be fulfilled. Generally speaking, a law firm would not advocate particular safety practices. It will provide advice on the legal consequences and the legal obligations. However, to the extent that a law firm might want to go further and provide ancillary services such as advice that is neither of a legal nature nor on the legal consequences, that firm could be captured. This seeks to make a distinction between those things that will provide practical and direct advice on what happens at the workplace and those things that pertain to advice upon the legal consequences of a person's conduct and obligations. I do not think this can be further defined. There are definitions and much case law about what is the subject of legal professional privilege. If a law firm decides to provide advice about things that would not be covered by legal professional privilege, it will not have the benefit of that exemption for those matters.

Hon NICK GOIRAN: The minister will see that clause 26A(1)(b)(iv) includes another scenario, not just the services that are subject to legal professional privilege that we have been having this dialogue on. It states in part —

> … or that would be subject to legal professional privilege but for that privilege having been waived.

In the case of a business scenario I gave the minister earlier, the business person goes to a law firm and asks for advice: "Do the systems that I have in place comply with the work health and safety act 2020 in Western Australia?" Does this second provision contemplate the law firm providing written advice to the business indicating whether the person is compliant and the person putting that legal advice on its website?

Hon Alannah MacTiernan: The member wants to know that what is being contemplated is where—sorry, I am just getting some advice.

Hon NICK GOIRAN: I know it is difficult because a lot of things are going on with a 425-clause bill that takes up 17 pages of the supplementary notice paper and involves lots of messages being delivered backwards and forwards. I appreciate the difficulty for the minister. It is also fine to ask me to pause so that I ask the question on one occasion rather than twice.

My question is about clause 26A(1)(b)(iv). There are two elements there. I am asking about the second element. If the legal advice provided by the law firm to the business is put on the business website, that will waive legal professional privilege because the privilege belongs to the client. The client owns the business and will have obtained the advice from the law firm and put it on the website.

Hon Alannah MacTiernan: Putting the legal advice on the website?

Hon NICK GOIRAN: If the business puts the legal advice on its website, the privilege will be waived, but that will not be a problem because the law firm will be covered under this exemption. Is that right?

Hon ALANNAH MacTIERNAN: We are waiting for the solicitor to come in to provide some more detailed advice. I am not sure whether that really is the circumstance. I think we need to check the circumstances under which that privilege would be waived.

The DEPUTY CHAIR (Hon Matthew Swinbourn): Minister, would you like to swap your advisers?

Hon ALANNAH MacTIERNAN: Yes, I wonder whether we can take a moment do that. Thank you.

I think the member is right; that is probably the best way of reading it. Even if that privilege has been waived because of the client's conduct in publishing it, it will still be captured by this exemption because that is where there is legal professional privilege, or there would have been legal professional privilege other than by virtue of the waiver. So the member's analysis is correct.

Hon NICK GOIRAN: I think that is fair, too, because it would be most unfair to the law firm otherwise. I think it is an appropriate provision to have. The reason that I asked some questions about this in particular is that in evidence provided to the Standing Committee on Legislation, some mention was made of what is referred to as "template advice in key industries". If that is the case, I would have thought that a whole range of law firms would be providing template advice to put on the websites of various industry groups and that everyone would rely on that, so I think clause 26A will go nowhere in practice. I am really concerned about why we are bothering with clause 26A given the Council of Ministers has previously said that it is not interested in doing this. A provision under clause 19 already deals with a primary duty of care. Now template advice seems to be covered, so long as the template is provided by a law firm. It will obviously not work for those who are not lawyers. However, someone who intelligently structures their work health and safety service, will make sure that this is the method they use. It seems to me, therefore, that clause 26A(1)(b)(iv) will provide template advice. Mr Mark Goodsell, the head of the New South Wales branch of the Australian Industry Group made observations to the Standing Committee on Legislation. They are set out on page 27 of the committee's report. I do not particularly want to read it out now because I read it out earlier, during my second reading contribution. Members can look at paragraph 3.39. The minister will see that the sixth last line of the quote towards the bottom of the page reads —

> Secondly, there are issues about how you deal with template advice in some key industries.

Now that we have interrogated this provision in clause 26A, I have even more sympathy for what Mr Goodsell had to say at that public hearing. Earlier we spent a bit of time talking about the ministerial advisory panel recommendation. Was the Chamber of Commerce and Industry of WA one of the groups that was on the MAP?

Hon ALANNAH MacTIERNAN: Yes, it was. I think this view that the provision of template legal advice will somehow or other do away with the need for clause 26A is not very well founded. Earlier, I gave some practical examples of the sort of advice that we are talking about. It is not about the legal consequences. The occ health and safety person goes to the factory and they go around identifying hazards and looking at machinery. We are not talking about template legal advice on a person's legal responsibilities. We are talking about people who are coming into a workplace and providing recommendations on, for example, the sort of guard that might need to be put around machinery. We are trying to capture people whose job it is to test equipment, and on the basis of their clearing that equipment for operation, someone then uses it and loses their arm. This is not template legal advice.

It is also about people who provide training courses about how to avoid exposure to risk, and it then turns out that the practices that they have entrenched in their training courses are inadequate, or, indeed, often may be wrong. These are the practical types of services we are talking about, not the template advice that a person might get on how they are supposed to set up their occ health and safety committees in their workplace and descriptions of their duty. It is about the practical work that is done to help people identify and eliminate risks, and help train people so that they can operate safely. I completely and utterly reject the proposition that template legal advice somehow or other is covering the field. It will be such a minor part of the equation. The real guts of it is those people who are making their living out of telling employers and employees how they should operate safely. We want to make sure that they have an obligation and a duty to ensure that the advice that they give, which employers and employees are relying upon, has some standards and a duty of care wrapped around that.

I am seeking advice once again. I am advised that the chamber was a member of the MAP. As I said, the MAP made a recommendation on this.

Hon Nick Goiran: A unanimous recommendation?

Hon ALANNAH MacTIERNAN: So I am advised.

Hon NICK GOIRAN: With regard to this unanimous recommendation that the minister has been advised of, I note that the Standing Committee on Legislation in its forty-third report states at paragraph 3.38 —

> Some stakeholders were critical of including a specific duty for work health and safety service providers because:
>
> - its inclusion is not consistent with the policy objective of harmonisation

We have discussed that, and this is not a model law provision —

> - it may cause work health and safety service providers to refuse offering quick advice (for example, over the phone) for fear of breaching cl 26A.

At the end of that paragraph on page 27, the Standing Committee on Legislation has footnote 102. That footnote lists the stakeholders who were critical of including clause 26A. Would the minister believe that the very first one listed is —

> Submission 11 from Chamber of Commerce and Industry of Western Australia, 26 June 2020, p 5 …

The minister can understand why I asked questions earlier about recommendation 8, which is the basis upon which the government is asking us to agree to this non–model law provision. It is a recommendation from the MAP. As we know, the MAP included various individuals with a voting capacity. The vote, on occasion, was not unanimous. We know that, because that is on the public record. I wanted to know whether this was one of those situations. I have asked that on a few occasions, and the minister indicated to me that it was unanimous. I asked for something to be tabled to confirm that that was the case, and the government has, consistent with its ongoing lack of fulfilment of its promise of gold-standard transparency, refused to do so. We now find that the Chamber of Commerce and Industry is not in agreement with clause 26A. Therefore, the minister can understand why I am concerned when we are getting a lot of conflicting information around this particularly important provision. It is not some type of provision that everybody has agreed to that is in the model law. No; this is a provision that was considered by the ministers nationally, and the ministers said, "Don't do this. We don't want to do this." However, the MAP has said, "Yes, we'd like to do it." The minister has said to us that we should not worry about the MAP process too much, because the argument stands on its own legs. I am not sure that is necessarily the case, particularly once we start to consider some of the exemptions.

That said, the minister just made quite a passionate plea to us about the circumstances in which this type of work health and safety advice should be captured. My question on clause 26A at this point is: would that include unions providing such advice?

Hon ALANNAH MacTIERNAN: We stand by what we said before. Of course, organisations can always change their position. It is possible that a representative of an organisation took one view on the review panel, but, subsequently, when the matter went out for further consideration, a different view was taken. No doubt that is what has happened here. As I said, the MAP was an important part of the process. However, as we have described, we put out the MAP recommendations, which included taking up this provision, and took public submissions. A range of public submissions was received. On the basis of those public submissions, we took the general recommendation of the MAP and turned it into this provision, which fills out that recommendation and provides some specific carve-out. My understanding is that there was support for this. We have never sought to hide the fact that there is a diversity of opinion. However, I go back to the essential logic of this. The idea that people can provide work health and safety services and that they themselves are not captured as having a specific duty of care in respect of those services we think is wrong. Therefore, we as a government, with the support of some in industry and not the support of others in industry, think the arguments stand on their merits. We are trying to strengthen and make clear

what the responsibilities are. We think it is arguable that it creates the problem. I suspect what happened is that not all ministers were opposed to the provision, but that they went ahead on the basis of the path of least resistance, so if there were one or two stand-outs on a provision, they did not go down that path. The member will note that the reason given at that stage was not that they opposed the concept, but that they thought that the concept was adequately captured by the definition of "person conducting a business or undertaking". We think that is a little dangerous. We think that things are always better dealt with more explicitly so that there is absolute clarity, so that we do not become tied up in court. The advice that ultimately meant they did not go ahead with it at the ministerial council some 12 years ago was they thought that it would have been picked up by the broad definition of PCBU. We think and MAP thought it preferable that we make it explicit rather than just relying on the definition of PCBU.

Hon NICK GOIRAN: Will the unions be captured by this?

Hon ALANNAH MacTIERNAN: Unions will be captured if they are providing advice or setting up businesses to provide advice. Some unions do have businesses operating in this field, so if a union is setting up a business that is providing services and advice in this regard, or providing training, for example—I think a number of unions have provided training—or setting up a business to go out and provide training or to provide advice to businesses, then it will be liable.

Hon NICK GOIRAN: Does it all hinge on whether they have established a business or not, or whether they provide the service?

Hon ALANNAH MacTIERNAN: Unions are already PCBUs in their own right for their own employees. They obviously have obligations to their own employees. I am advised that a union is already a PCBU for that purpose.

Hon NICK GOIRAN: It is not a case of a union having to set up a business; it is whether it provides a service or not.

Hon ALANNAH MacTIERNAN: That is correct.

Hon NICK GOIRAN: If the union is providing work health safety advice, it has to be to the employer. The union would have to be asked by the employer to provide advice, and if it gave incorrect advice, it would be captured by this provision.

Hon ALANNAH MacTIERNAN: That is correct.

Hon COLIN de GRUSSA: Minister, we and I am sure other members in this place have had considerable correspondence on clause 26A, and various entities have expressed a lot of concern on the inclusion of this clause in the bill and its departure from the model bill. My question is specifically on the idea that has been put forward that including clause 26A in the bill would lead to a reduction in safety services being provided, and in fact may have the perverse outcome that there is less safety advice provided to industry as groups may become fearful of being captured by the bill. Does the minister have a response to that?

Hon ALANNAH MacTIERNAN: I think that is highly unlikely. People might not provide ill-considered advice and might take seriously the need to ensure that they have developed the advice that they give with due care. The idea that someone should just ring and get quick over-the-phone advice and feel free to give that is not the workplace culture that we are looking for here. I certainly do not think it will mean that people will vacate the field. I think this legislation will make it clear that we want people who have the skills and professionalism to provide advice that can be relied upon.

Hon COLIN de GRUSSA: In that vein, the minister talked before about concerns that without clause 26A, some providers would not be captured by this bill. As we have talked about before, clause 19 refers to duties. The minister said a little earlier that clause 26A needs to be included because she is concerned that some providers may not be captured. The Standing Committee on Legislation found in its forty-third report at finding 4 that —

> The Model Bill contains an implicit duty on those providing … health and safety services under cl 19. The inclusion of cl 26A in the Bill makes explicit the implicit duty …

From the government's perspective, is clause 26A needed simply to make explicit the duties of those providers of work health and safety services; and, if clause 26A is not included, what risk is there that some of those providers will not be captured under the bill?

Hon ALANNAH MacTIERNAN: I do not think we need to drag this out. We have had a lengthy debate on precisely that topic. As I have said, much of what we are trying to do here is really make very clear what is generally considered to be implicit. We think that making this explicit will strengthen and make very clear to those providers of work health and safety services that those services need to be properly considered and professionally and reliably delivered. I have acknowledged that. Arguably, they would be captured, but the whole principle here is that over and again, we are introducing different provisions to make explicit, properly articulate and put very explicit boundaries around who is liable and who is not. This is not a fundamental change in responsibilities, but it is an absolute clarification, and I think that clarification is in the interests of the whole industry.

Hon RICK MAZZA: I refer to clause 26A(3), which states —

> The WHS service provider must ensure, so far as is reasonably practicable, that the WHS services are provided so that any relevant use of them at, or in relation to, a workplace of the kind referred to in subsection (2)(b) …

There are then some examples. Example (a) refers to a health and safety workplace that is "inadequate". I am a little curious as to what the test is for "reasonably practicable" and what training is deemed to be adequate. Even then, the bill goes on to refer to the risks relating to plant maintenance as being adequate. It seems a little arbitrary to me. Is the minister able to give some idea of what is the test for and the definition of "reasonably practicable" or "inadequate"?

Hon ALANNAH MacTIERNAN: We have had a whole debate on "reasonably practicable" in another clause. We have already determined that and voted on that clause. The things that the member is referring to are just examples. They are illustrations of real-life practical things. They are not framed legally. They are little vignettes, if you like, of the sort of occupational health and safety services we are talking about.

Hon NICK GOIRAN: On the issue of unions, would it make a difference whether the work health and safety services were paid or unpaid?

Hon ALANNAH MacTIERNAN: A contractual arrangement is helpful but it is not critical. Advice provided to a union member is obviously a different thing. Advice provided to another PCBU, whether it is voluntary or not, is capable of being captured. But the degree to which the employer can rightfully say they rely on it will depend on whether they have entered into a professional relationship. If they employ someone, engage someone, and they know they are relying on it, that is one thing, but talking to a union official over a beer and then making a recommendation is a very different class of thing, and the ability for a person to seek to rely on that would be different.

Hon NICK GOIRAN: What happens if the union turns up at a workplace and says to the employer, "Listen, you're doing it all wrong. You need to do these five things." The employer, particularly a small business owner who does not have the time to go to, or the money to pay, a law firm for specific advice and so on and so forth, may rely on the bullish advice provided by the union with a fair amount of robustness and say, "Okay; I'd better comply with these five things that the union has asked me to do." If it goes horribly wrong, would the union be captured by clause 26A in those circumstances?

Hon ALANNAH MacTIERNAN: This is getting very hypothetical. In protecting the employer, the degree to which he could rely on this provision to discharge his obligation would be very different for professional services he has paid for and acted in reliance on. It is not entirely clear whether a union giving that advice would be captured as providing a service. I think there would be some doubt about whether it was providing a service to the PCBU. I suspect that it probably would not be captured by that.

Hon NICK GOIRAN: I do not like it when we get to this level of detail and are told it is not entirely clear. The time for things to be not entirely clear has long past, and that is why consultation is so important. I return to my original point about the MAP process and the government's reliance on the fact that this provision is recommendation 8, which we were told was agreed to unanimously, but there is no capacity for the government to put anything on the record to confirm that that is the case. Now, when we start to interrogate the detail, we find that maybe things are not as clear as they should be.

Hon Alannah MacTiernan: I don't think it's going to be a service. I don't think providing gratuitous advice necessarily will be a service. Member, I need to report progress on the bill.

Hon NICK GOIRAN: I suppose you are going to ask me to sit down, then!

Progress reported and leave granted to sit again, pursuant to standing orders.

Sitting suspended from 4.15 to 4.30 pm