WORK HEALTH AND SAFETY BILL 2019

Committee

Resumed from 17 September. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

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

Progress was reported after the clause had been partly considered.

The CHAIR: I draw members' attention to the 126th report of the Standing Committee on Uniform Legislation and Statutes Review, which is relevant, and the forty-third report of the Standing Committee on Legislation, which is also relevant, together with the government's response to same, tabled on 15 September 2020. I also draw members' attention to a new supplementary notice paper 155, issue 7, issued today.

Hon NICK GOIRAN: I note that I have just been provided with issue 7 of supplementary notice paper 155. The difference between issue 7 and issue 6 is not immediately apparent to me, but with regard to the clause before us, clause 26A, there remains only one so-called amendment on the supplementary notice paper standing in my name, and that is simply to oppose the clause. It remains the position of the opposition that the clause ought to be opposed. By way of brief explanation, that is because clause 26A seeks to introduce a non–model law provision. It has been the government's view that this bill is necessary for various reasons, including harmonisation, but clause 26A will not go towards harmonisation; in fact, it will move away from harmonisation. In addition, members may recall from the debate at the end of last week that, according to the government, clause 26A had been introduced on the recommendation of the MAP process—that is, the ministerial advisory panel process. It is known to members who have been following this debate that the MAP process has been discredited because of the process embarked upon: the stacking of the ministerial advisory panel; the unusual situation in which members were asked to vote on different provisions rather than recommendations made by way of consensus; and the ongoing refusal of the McGowan government to adhere to its election commitment of gold-standard transparency and, instead, continuing to hide under lock and key the minutes of the ministerial advisory panel process. In addition, we know that it is a matter of public record from the work undertaken by the Standing Committee on Legislation that the ministerial advisory panel recommendations were not always unanimous; indeed, there were matters of disagreement. We will get to other clauses in due course that were not even brought to the attention of the ministerial advisory panel. However, with respect to this matter here, we cannot have any confidence in the ministerial advisory panel process, which is the sole reason that the government puts forward for its inclusion. We know that this matter has been considered previously by the council of ministers at a national level, but it was rejected. For those reasons, it remains the view of the opposition that clause 26A should be opposed. At this point, my only question to the minister is whether the minister is now in a position to table the minutes of the ministerial advisory panel process.

Hon ALANNAH MacTIERNAN: No; I can advise the member that we will not do this. If that is to happen, the ground rules need to be established before these bodies are established. As we said, we wanted full and frank discussion of these issues. I will reiterate that in 2008 a provision like this was considered and proposed as part of the national code because it provided clarity to small businesses and companies that are reliant on advice on these work health and safety matters, because they do not have the scale to have their own professional advisers. However, they were not able to get consensus on that particular point from the ministers in 2008, so this did not go forward as part of the package. One of the arguments used at the time was that it was already covered through the definition of "person conducting a business or undertaking". Through the MAP process, a proposal emerged to look at this, and the MAP committee adopted it. I understand that this was not an item of contention during the MAP process. I have also had a discussion today with the minister.

Hon Nick Goiran interjected.

Hon ALANNAH MacTIERNAN: I understand from the people involved in the meeting that this was not a contentious issue. I understand that subsequent to the MAP process, when Mr Johnston met with the representatives of the Chamber of Minerals and Energy and the Western Australian Chamber of Commerce and Industry, this was not raised as a contentious issue.

I understand that the Chamber of Commerce and Industry has a substantial role in providing this type of advice to small business. Many small businesses in this state use the CCI's services. I honestly do not think that that should become the basis for small businesses not to be able to rely on the advice that is given. We have canvassed the history of this issue very thoroughly, and I do not intend to say any more on it. We should just think about what this will do. This will mean that a provider of occupational health and safety services, whose customers, by and large, will be small business, will have an obligation to stand behind that advice. However, if the business relies on that advice and it turns out to be wrong—we have articulated a number of ways—such as advice provided through a training

process, the testing of equipment or the development of methodology, that liability can be sheeted home to the provider of the advice. I find it quite extraordinary that in a work health and safety bill in which we are seeking to make very clear who is liable for what, we would want uncertainty about the people who are in the business of providing these work health and safety services not being clearly responsible under the terms of this legislation. Some people could argue that the chamber has a bit of a conflict here: is it representing small business when it is providing this advice or is it looking after a significant strand of its own business? Members will have to make that determination. We have debated this now for many hours. I think we have been very clear on this. The government thinks it is in the interest of good work health and safety practice that those people in the business of providing advice to small business actually have to stand behind that advice. Members, I think it is up to us now to make some decisions on this. I do not think much more can be said by way of debate.

Hon MICHAEL MISCHIN: I have heard the minister's earnest entreaties that we simply should pass this clause. She finds it extraordinary that there could be any problem with the imposition of a duty on certain people to provide advice that can result in a criminal prosecution against them if they fail to meet that duty. Frankly, the idea that because organisations such as the Chamber of Commerce and Industry and other organisations of which there may be a membership would have no responsibilities for the advice they are giving businesses, big or small, is a nonsense. Of course, if a business happens to be a member of the Chamber of Commerce and Industry and, as part of their membership, they are entitled to get advice from that chamber regarding matters pertinent to work health and safety, and that advice is wrong and there are consequences to the employer or the PCBU that has taken that advice, there is a contract problem, quite apart from other things. I would have thought that that business could go looking at the CCI and demand redress. However, what is being proposed here is that a statutory duty be imposed—we do not know whether it goes beyond the contractual duty or is a subset of it, or any other duty of care—with consequences that can expose someone to prosecution. It is said that we need clarity in this area. As I recall, when we dealt with this last Thursday afternoon, the minister's answers were unable to help us. It was unclear whether a union adviser could go into a business and say, "Listen, PCBU, we don't like the way that you are doing things in this workplace. We think that you should take this action and that action in order to improve safety here." If the union adviser then goes away and the responsible entity improves safety, but an incident occurs that results in injury, or that entity is put to an unnecessary expense, it appears that the union adviser will not be responsible.

The minister said that it was unclear. Therefore, will the minister amend clause 26A to provide that clarity by either expanding its operation so that anyone who gives advice upon which a business acts—unions included—are subject to this duty, this responsibility, and the consequences thereof, or having a uniform provision, or no provision at all, and relying on the duties that are currently implicit in a breach of contract or in giving false advice? Will the minister amend the clause while she has the chance, instead of asking us to rubberstamp it, even though she is not even sure of the extent to which it will operate? That is up to the minister and the government. They put this clause forward and said that it is necessary for clarity, so clarify it! I want to know: Will a union, in the circumstances that I have outlined, be subject to this duty; and, if not, why not? Why will the unions be protected, whereas others, despite having professional and contractual obligations, will be subject to this duty, the consequences of which will be an offence?

Hon ALANNAH MacTIERNAN: There are two things. First, it is already the case, and certainly the view of the Standing Committee on Uniform Legislation and Statutes Review, that this clause makes explicit what is already an implicit obligation. The member might also want to look at finding 4 of the forty-third report of the Standing Committee on Legislation, which states —

> The inclusion of cl 26A in the Bill makes explicit the implicit duty of those providing work health and safety services under cl 19 of the Bill.

Therefore, this clause has always been about clarity. The construction of this clause is very much geared to those who conduct a business or undertaking that provides work health and safety services to a person who conducts a business or undertaking and who may reasonably be expected to use or act in reliance on those services. This is about people who are in the business of providing services to those people who have control of the workplace, and providing those services in circumstances in which it is reasonable to presume that the person to whom it is being provided would rely on that service. Therefore, this clause is clearly designed for those people who are in the business, either principally or as a side hustle, of providing those services, and, when it is reasonable, to presume that the PCBUs will act in reliance on that advice.

Hon NICK GOIRAN: The minister says that the minister who is responsible for this bill on behalf of the government met with the Chamber of Commerce and Industry of Western Australia and the Chamber of Minerals and Energy and no issues were raised. When did that happen?

Hon ALANNAH MacTIERNAN: I understand that that was shortly after—or possibly before—the ministerial advisory panel review was published.

Hon NICK GOIRAN: If there was unanimous agreement, why would it be necessary for the minister to meet those organisations?

Hon ALANNAH MacTIERNAN: I guess we wanted to have an extra degree of confidence going forward with the report.

Hon NICK GOIRAN: All right. To be clear, according to the minister and her government, the ministerial advisory panel was unanimous in its view on this. But unanimous agreement by the panel was not enough. The government thought that it should have an extra meeting with two of the five members to make sure there was no possibility of any confusion, even though, according to the government, the panel had unanimously agreed to the provision. The government thought that it should meet with those two members on an extra occasion just so it was absolutely without doubt.

This is particularly perplexing because it is plainly the case that those organisations do not support clause 26A. Those groups are two of 39 members that form the joint industry group that has consistently lobbied and advocated against clause 26A, so it does not pass the test for the minister to say that the ministerial advisory panel unanimously agreed to this recommendation, even though the government continues to keep the minutes of that meeting under lock and key. It refuses to provide those minutes despite the Premier promising gold-standard transparency. The minister says, "No way, José! We are not going to provide that information. We refuse to provide it!" That is the minister's choice, but it is also our choice and our right then to further examine the veracity of that information in light of the fact that the CCI and CME form part of a 39-member group that has consistently lobbied against clause 26A.

I also draw to the minister's attention that various submissions were provided to the Standing Committee on Uniform Legislation and Statutes Review, and the eleventh submission was from none other than the Chamber of Commerce and Industry of Western Australia. The date of that submission is 26 June 2020 and goes specifically to the issue of clause 26A, so something is very wrong here, minister. Somewhere in all of this, a very large piece of the puzzle is missing. It makes no sense for the minister to say to us that these groups unanimously agreed to a recommendation and in the next breath say that the minister responsible for the bill wanted to have a quick meeting with two of them afterwards to make sure that there was no confusion and that no issue was raised at that point in time, only for these two organisations to then spend a considerable amount of time and resources lobbying all the members of this chamber as part of the industry group and for one of those organisations, as a minimum, to submit a submission on this point to the Standing Committee on Uniform Legislation and Statutes Review. It does not make sense. It does not pass the test. It is not acceptable. I take it that the minister has nothing further to provide us on this matter, but I ask the minister to consider this example that was provided to the Standing Committee on Legislation by one of the members. Page 28 of the report states —

> … For example, a union might go into a workplace—their health and safety officer—and have a dialogue and provide information to a PCBU in pursuit of the interests of their members. It is a question of whether or not that kind of activity might be captured under this provision in that regard.

Would the example that was provided by the honourable member be captured under clause 26A?

Hon ALANNAH MacTIERNAN: For the reasons that I have set out, I do not believe so. This provision is for a person who is conducting a business. Clause 26A(2) states that it applies to a person "who conducts a business or undertaking that provides WHS services". They must be a service provider to that entity. Obviously, unions are not service providers to employers. They are the representatives of the employees in the workplace, so I believe that it is fairly clear that they would not be providing a service to the employer.

We do not contest that the Chamber of Commerce and Industry of Western Australia's position is now that it does not support this legislation.

Hon Nick Goiran: That's not true.

Hon ALANNAH MacTIERNAN: Sorry—its position is that it does not support this provision. We are not contesting that. We have explained that the CCI itself may well be a service provider in this area, so this might be a very complex issue for it to take a position on. I am asking members to exercise their judgement on this provision. The Standing Committee on Legislation stated that this provision codifies what is already an implicit responsibility within the legislation. We think that is a positive thing. As I have said, many of these changes are about lifting standards and culture. Of course, a small business that receives these services has always been able, and still will be able, to sue a company about advice that turned out to be incorrect. We are trying to prevent that from occurring and we want to have a very clear line of sight about who is liable for what. I urge members to make their decision about that. We are not in any way pretending that the CCI's current position is that it supports this clause. We understand that it does not. We think that this absolutely has merit and is the right thing to do. I think this clause will give greater security to small businesses. We will have raised the bar so that they can more readily rely on the advice given to

them by professionals. As I said, I think it is very much in the interests of all that we have a clear articulation of what has at times been found to be implicit. This provision simply makes it explicit.

Hon NICK GOIRAN: I have one further point to make on this clause. The minister says that she does not think that the example given by the honourable member during the course of the Standing Committee on Legislation inquiry would be captured by this provision. I note that later in the interaction between the member and that the witness, the member asked, "The service does not have to be for profit, does it?" The witness answered, "No, not at all."

The minister says that a service has to be provided by the union to the PCBU in order for it to be captured. It could well be the case that the service is being provided and relied upon, albeit there has been no payment provided for that service. The scenario provided by the member was that a union might go into a workplace and, in pursuit of the interests of their members, provide information to the PCBU. The PCBU might rely on that information and think that it had better get its house in order quick smart because bullish union officers are knocking down its door saying that it has to do something or else. What if the PCBU relies on that service that has been provided by the union?

Hon ALANNAH MacTIERNAN: The member should read clause 26A(2). It states quite clearly —

> (2) This section applies to a person (the ***WHS service provider***) who conducts a business or undertaking that provides WHS services —
>
> (a) to a person who conducts another business or undertaking …

We have said before that there might be some circumstances in which this provision might apply—for example, if a union set up a business. In the past, some unions have provided services through which people could get white cards, and some have provided training services. If a forklift driver's course is set up and run by a union or an amalgamation of unions, it could be captured by this provision. However, a union safety rep who comes onto a site to look after the interests of the employees is not providing a service. The member is a skilful enough lawyer to understand that and to know how clause 26A(2) will work. It will apply only if a service is being provided to a PCBU. If someone goes to a worksite to represent workers, they are not providing a service to the employer. To apply, the union would need to have established, as they sometimes do, a side business to provide training on work health and safety, as the CCI does.

Hon NICK GOIRAN: The minister has provided exactly the argument for the problem with clause 26A. According to the minister, unions can basically go into the workplace, say whatever they like, and not be held accountable for it. According to the minister, whatever it is that they are doing is not providing a service that will be captured by clause 26A. They can say whatever they like and put as much pressure as they want on the employer, but they will have no accountability because, according to the minister, the drafting of the government's non–model law provision in clause 26A is designed especially to make sure that that they are not captured. That is not good enough. What is good for the goose is good for the gander! If the government wants to make sure that this type of advice is captured and that those giving the advice are held accountable by these duties, those individuals should be covered as well. This is the very point: why has this —

Hon Alannah MacTiernan: This is about people who are in the business of providing the service. They have set themselves up in the business of providing work health and safety and say that if a business pays them a certain amount of money, it will provide the business with —

Hon NICK GOIRAN: No, no, no.

The CHAIR: Order! I will take one member at a time. Brief clarifications are helpful, but if members wish to make lengthy contributions, they need to seek the call. At the moment, Hon Nick Goiran has the call.

Hon NICK GOIRAN: During the committee hearing, the honourable member asked, "The service does not have to be for profit, does it?" The witness answered, "No, not at all." The minister should not give me this business about there having to be payment. Payment has absolutely nothing to do with the definition of a service. That was the evidence that was provided to the committee by the experts.

Hon Alannah MacTiernan interjected.

Hon NICK GOIRAN: Sorry, the minister will have to wait her turn. I know that she is anxious to seek clarification on this. The question that remains is whether this particular scenario would be captured. The minister has made the case to say that it would not be captured. I am saying if that is the case, that is patently unfair. People are running around the workplace proffering advice, and putting pressure on persons conducting businesses and implying to them that there will be ramifications if they do not adhere to that advice, but there will be no level of accountability. Why is this a problem? The problem is that the government has embarked upon a process to deviate from the model law, and it has done so in circumstances in which the only thing that it can provide to the chamber to support the contention is the discredited MAP process. That is not adequate. That will not be sufficient to pass the test.

I have one other further line of inquiry on clause 26A, and that is to ask the minister about the impact of the COVID-19 pandemic. As I understand it, the process that was embarked upon through the MAP, albeit discredited, and the minutes, which continue to be kept under lock and key, happened pre-COVID-19. Let us remember that we are dealing with a 2019 bill. All these decisions by the government were made last year. My question is: have any issues arisen from the COVID-19 pandemic that would give us cause to be concerned about this non–model law provision being incorporated?

Hon ALANNAH MacTIERNAN: I will just say one more time that this is making explicit what is already—according to the national body of the Council of Australian Governments committee, and according to the findings of the Standing Committee on Legislation—an implicit responsibility. In terms of COVID-19 services, as we say, this is not an absolute liability. A provider does not have to absolutely be correct. But a provider must ensure, so far as is reasonably practicable, that the services they provide will not put at risk the health and safety of the persons in the workplace. Obviously, the rules around and the understanding of COVID are another factor in the workplace that will have to be worked in. As we say here, it is "so far as is reasonably practicable". It is not an absolute standard. It is what is reasonable in all the circumstances.

Hon NICK GOIRAN: The minister would appreciate that during the COVID-19 pandemic, people would have been contacted for the provision of advice about health services. It strikes me, and it has certainly been put to me by industry groups, that during the height of the COVID-19 pandemic it was necessary, and no doubt perhaps is still necessary at this time, for rapid advice to be provided. The minister says that advice does not need to be 100 per cent accurate. However, the reality is, as we know—we will get to this in further clauses—that simple negligence is all that will be required in order for a breach to be established.

Hon Alannah MacTiernan interjected.

Hon NICK GOIRAN: The minister does realise that the Boland report explicitly recommended that gross negligence be the test. I assume the minister knows that. The point is if simple negligence has occurred in circumstances at the height of the COVID-19 pandemic, and a breach has been established as a result, that will lead, under the government's model, to significant penalties. My question is: in light of COVID-19—the new world order—have any lessons been learnt that would cause us to have any concerns about clause 26A? The government incorporated clause 26A prior to the events of the COVID-19 pandemic. That is the timing of the inclusion of this particular clause in the bill. Since that time, there has been the pandemic. It has been put to me and other members that there has been a need for rapid advice to be provided. I am simply asking the minister whether any lessons have been learnt as a result of that. The government might say, "No. No lessons have been learnt. Nobody has approached us whatsoever. We have talked to nobody about it. We continue to have no concerns whatsoever about clause 26A." That might be the government's response, but I am simply asking whether the government has learnt any lessons that would cause us to have any concerns about clause 26A.

Hon ALANNAH MacTIERNAN: No, there is not, because this is couched in such a way that it is referencing the idea of what is "reasonably practicable". The definition is —

> ***reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including —
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> …
>
> (c) what the person concerned knows, or ought reasonably to know, about —
>
> (i) the hazard or the risk …

No-one is talking about imposing standards that would be difficult to meet. Nothing has come out of the COVID pandemic. I guess it comes down to the nature in which the advice is framed. If people are not confident of their advice, they should perhaps take a bit of care and get it checked. I think people would take those steps to do what is reasonably practicable and acquaint themselves with the knowledge that we have at that particular time of what the risk is, and make that assessment in providing that advice.

Hon NICK GOIRAN: Has the government consulted with the Pharmacy Guild of Australia about clause 26A; and, if so, when did that occur?

Hon ALANNAH MacTIERNAN: We have had no specific discussions with it and we are not aware of the services that it provides in this regard.

Hon COLIN TINCKNELL: I have just one quick question. The minister mentioned before that small business is behind this. What consultation did the minister have with small business? Can the minister make that a bit clearer?

Hon ALANNAH MacTIERNAN: What I said was that we see this as protecting small businesses, because small businesses overwhelmingly rely on outsourced work health and safety services. They do not have their own specialist personnel. It is overwhelmingly small businesses that rely on these services. We are seeking to make it very clear to the people who will provide those services that they, too, have a duty of care. We believe, as did the legislation committee and the COAG committee, that that is already implicit in the legislation. However, along with many of the other things that we are doing, in which we are seeking to make explicit what is implicit, we do not think this will change liabilities. We think this will make it very clear. We think that is important in developing a new step up in the culture of responsibility around work health and safety.

Hon COLIN TINCKNELL: The minister mentioned the words, "I said. We believe." My question was: which small businesses did the government consult?

Hon ALANNAH MacTIERNAN: What I can say is that half the number of the people who made submissions did not comment on this provision, 26 per cent of submissions agreed with the proposal and 24 per cent disagreed. In total, 33 commentators did not take a position, 24 per cent disagreed and 26 per cent agreed.

Hon Nick Goiran: Who were the 24 per cent?

Hon ALANNAH MacTIERNAN: I do not have that information.

Hon MICHAEL MISCHIN: What was the basis for their disagreement with the proposition that is encapsulated in clause 26A? What reasons did they give?

Hon ALANNAH MacTIERNAN: I am sorry; I have no further information on the specifics, but presumably it was around whether they wanted an explicit duty.

Hon MICHAEL MISCHIN: Presumably, they found a problem with the idea, but the minister cannot tell us what reason they expressed for their reservations about what is proposed. Is that correct?

Hon Nick Goiran: She can give us statistics, though.

Hon MICHAEL MISCHIN: The minister can give us the statistics but she cannot give us any of the information behind it.

Hon ALANNAH MacTIERNAN: We made it very clear that we understand that many people who are providing these services do not want to have this duty of care. We believe that they already have the duty of care. I think it would probably be fair to say that they want that duty to be made more opaque rather than transparent. If the member just bears with us, we will see whether we have something here.

Members, I do not have that information available. However, we are not trying to hide the fact that some people who are in the business of doing this do not want their duty to be made explicit, as they perhaps believe that that provides them with a level of protection.

Hon MICHAEL MISCHIN: Certainly, some of those consulted did not have a problem with the encapsulation into a statutory duty of a duty that the government claims they already have, which, if not met, could result in them being prosecuted for an offence. Others did have a concern with either that concept or some element of it, but the minister cannot give us any of the reasons they might have had a problem with what is proposed. Is that right? The minister has the bald statistics of whether they agreed, disagreed or did not have any view, and that is supposed to be information for the Parliament to use in passing something that imposes a criminal liability on people. That is the best the minister can do. She can tell us the bald figures, but she cannot give us any arguments that underlie them, other than to say that, presumably, they do not want to be subject to a duty that the government thinks they already have. This provision has a consequence, as it will potentially make some people liable to an offence. The government cannot help us out. Did these people have a copy of the current iteration of clause 26A when they were consulted by the ministerial advisory panel?

Hon ALANNAH MacTIERNAN: People were consulted on the MAP recommendation to introduce a duty of care. I do not think there was anything unexpected about the nature of that duty of care.

Hon MICHAEL MISCHIN: We do not know, because we cannot see what was in the minutes or find out what was discussed with and put to these people in the course of consultation. We do not know whether they were told the parameters of this duty and how it might operate, or whether it would result in criminal liability if they fell short. When the Minister for Industrial Relations met with these interested parties afterwards, did he show them a draft of clause 26A?

Hon Alannah MacTiernan: No, that was prior to the consultation period.

Hon MICHAEL MISCHIN: Apart from anyone being moved to give evidence on clause 26A to the Standing Committee on Legislation, consultation consisted of asking people whether they had a problem with some vague idea

that those in the business of providing advice on work health and safety matters should have a duty imposed on them. That is about all the minister can tell us. We do not know whether they were told that it would result in a criminal offence if they failed. The minister cannot tell us whether there was a discussion of the potential penalties. She cannot tell us the reasons for their objection. She cannot tell us whether they were ever informed that, notwithstanding that people who are in the business of providing this advice are subject to contractual and other civil liability, they would also be bound by this statutory duty and its consequences.

However, what would happen if a union official—a shop steward—were to say, "Look, I don't like the way that you're handling safety in my workplace with my colleagues, my comrades. I want you to do A, B, C, D and E, and if you don't do it, there'll be consequences. You do this or else you might not have any workers"? If the small business that the government is trying to protect did what was asked and it turned out to be flawed or false advice, the shop steward would have no responsibility at all. Was any of that discussed with the interest groups?

Hon ALANNAH MacTIERNAN: This idea of explicit duty of care is not a new thing. It is not as though this would come as some surprise. As we said, it was originally mooted as early as 2008. It was then picked up in the ministerial advisory panel recommendation because it was thought it would contribute to an improvement of the culture by making explicit what is implicit. It was then published as part of that MAP report, and public submissions were made on it. The bill and the clause were drafted subsequent to that. I do not think there are any real surprises in the way the clause has been drafted, but that was the process of consultation.

Hon NICK GOIRAN: I take the minister to the third of the examples listed at clause 26A(3) in the note for the subclause. There the minister will see that the note states, in part —

> (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.

I go back to the earlier scenario I put to the minister about COVID-19. The minister could certainly envisage a scenario in which, at the height of the pandemic, people had to provide training courses to others about how they could avoid being exposed to risks to their health and safety and that somebody might argue that the information provided then was inadequate—for example, whether to wear a mask or not—and as a result of those workers putting that training into practice, they were still exposed to the risks. It seems to me that that scenario would be captured by clause 26A. Is that the type of scenario that the government intends to capture by clause 26A?

Hon ALANNAH MacTIERNAN: If the information was based on reasonable propositions and understandings as they existed at the time, there would be no liability.

Hon NICK GOIRAN: Yes, minister, but that is not what that clause says. Have a look at the third note. It refers to the information being inadequate.

Hon Alannah MacTiernan: But, member, that concept of "inadequate" takes into account the concept of what is reasonably practical. It is not, as I have said, an absolute standard; it is based on what a person could reasonably be expected to know.

Hon NICK GOIRAN: Is the minister saying that we can ignore the word "inadequate"?

Hon ALANNAH MacTIERNAN: It is an example for elucidation and has to be read in terms of standard legal concepts of interpretation and the very specific description of what is reasonably practicable.

Hon NICK GOIRAN: I make this final point: nothing of what I have heard this afternoon persuades me or the opposition that clause 26A warrants support. It should be opposed. It is a non–model law provision. The explanation provided by the government is that it is included because of a MAP process. The entire MAP process has been discredited. To worsen the situation, the government now refuses to provide us with information about the MAP process when, clearly, members of the MAP are in violent disagreement with the provision. I think it is in everyone's best interest that clause 26A is opposed. That was certainly the view of the council of ministers at a national level. According to the government, nothing will be lost if clause 26A is deleted, because it says that this duty exists in any event. I think the most prudent course of action is to oppose clause 26A. It will be removed from this piece of legislation. It is a non–model law provision. This will assist the government in working towards its goal of harmonisation. There is of course always the opportunity after this bill has passed for the government to embark upon a real, authentic consultation process to discuss this with those various industry groups that the government says it has not heard of or spoken to, or groups that it has spoken to that have apparently raised no objections. The government can still do all of those things in due course. Nothing will be lost because, according to the government, the existing duty of care will still apply in any event. For those reasons, the opposition will oppose clause 26A.

Hon ALANNAH MacTIERNAN: That is unfortunate. As I said, this is an opportunity to make explicit something that is implicit and to help us on the journey that we are trying to go on with this piece of legislation, which is to improve the culture and the understanding of everyone's place and responsibility in the pipeline of providing work health and safety.

Hon MICHAEL MISCHIN: I know that is what the government tells us is intended and is its desire. I am all for improving the culture in workplaces or other places subject to this proposed legislation, but I think it would be irresponsible to introduce a provision of this character, which quite plainly is intended to be limited. Although it is said that it is meant to provide clarity and make explicit what was previously implicit, the minister told us last Thursday that the provision's operation would be unclear on whether it extended to unions providing advice. If we are going to impose these sorts of responsibilities, it needs to be done properly to ensure that all of those who give advice are subject to that level of statutory responsibility and consequences if the advice does not come up to standard, because whether in the course of a business or simply because they expect others to take that advice, they hold themselves out in a position of responsibility and authority in workplaces to give advice and expect that advice to be followed. We know that the government is not interested in providing the information about what may be a concern, so the safest course is to oppose this clause. That is not to say that one ought not be introduced at some point. From my point of view, if we could find some information and have our concerns allayed by the time this bill gets through the Committee of the Whole House, perhaps we could revert back and deal with it, but at this stage, given the lack of information that the minister is capable of providing to us, I think that is the safest course in case there are any unforeseen, unintended and undesirable consequences.

Hon AARON STONEHOUSE: I can appreciate what the government is trying to do here in that it is trying to codify explicitly a duty of care in a scenario in which someone provides a service around work health and safety services, compliance and advice. However, I do not understand the great need to do this. Codifying something explicitly might make sense if the duty was an obscure one that the public did not readily know about, but it seems to me that the duty of care here is fairly well understood. It has been understood since 1932 with Donoghue v Stevenson. The idea that a duty of care is provided to someone to whom a service is provided is not obscure. It is quite well known and understood. Therefore, creating an explicit duty in this bill seems rather unnecessary. It also seems rather unevenly handed to create a duty in this instance for industry organisations and associations, but not to create a similar explicit duty for perhaps labour unions that provide a similar service to their members. That is not to say that I want to see an explicit duty created in this bill for labour unions; I think that would be inappropriate. I would rather look at this from a much more balanced, even-handed and principled approach, remove the explicit duty here, and simply rely on what exists in the tort of negligence. It seems unnecessary to explicitly codify that in this instance; therefore, I am happy to support the recommendation to oppose clause 26A.

Division

Clause put and a division taken, the Chair casting his vote with the noes, with the following result —

Ayes (15)

Hon Robin Chapple	Hon Diane Evers	Hon Martin Pritchard	Hon Dr Sally Talbot
Hon Tim Clifford	Hon Adele Farina	Hon Samantha Rowe	Hon Alison Xamon
Hon Alanna Clohesy	Hon Laurie Graham	Hon Charles Smith	Hon Pierre Yang *(Teller)*
Hon Sue Ellery	Hon Alannah MacTiernan	Hon Matthew Swinbourn	

Noes (14)

Hon Jacqui Boydell	Hon Nick Goiran	Hon Simon O'Brien	Hon Colin Tincknell
Hon Peter Collier	Hon Colin Holt	Hon Robin Scott	Hon Ken Baston *(Teller)*
Hon Colin de Grussa	Hon Rick Mazza	Hon Aaron Stonehouse	
Hon Donna Faragher	Hon Michael Mischin	Hon Dr Steve Thomas	

Pairs

Hon Darren West	Hon Jim Chown
Hon Stephen Dawson	Hon Martin Aldridge
Hon Kyle McGinn	Hon Tjorn Sibma

Clause thus passed.

Clause 27: Duty of officers —

Hon NICK GOIRAN: Clause 27 brings us to the commencement of division 4 in part 2 of the bill. That division captures clauses 27, 28 and 29. I note, in accordance with the document that the minister tabled late last week, that

clause 27 is a model clause, albeit that it allows for the minor rearrangement of notes for consistency purposes. Clause 28 is also a model clause under which minor amendments are made for general, neutral language and Western Australia's preferred spelling of "cooperate". That, in and of itself, is quite interesting—that there is apparently a dispute amongst Australian jurisdictions on the spelling of "cooperate"!

Hon Alannah MacTiernan: Member, it's even more interesting that a lot of our amendments to the model code involve us having a different typography for "commas"!

Hon NICK GOIRAN: Right!

I then note that clause 30 marks the beginning of division 5. It seems apparent from the document that the minister helpfully tabled last week that these three clauses are, for our purposes, model clauses and should be supported.

Clause put and passed.

Clauses 28 and 29 put and passed.

Clause 30: Terms used —

Hon NICK GOIRAN: It seems to me that clause 30 should be deferred to a later stage. I do not necessarily have a problem with what the government proposes to do here, and in one sense clause 30 could be passed in any event because it really does no harm. As I understand it, the government is simply moving the definition of "serious harm" that is currently found under clause 31(3), which specifically refers to an individual —

> … if it causes an injury or illness to the individual that —
>
> (a) endangers, or is likely to endanger, the individual's life; or
>
> (b) results in, or is likely to result in, permanent injury or harm to the individual's health.

I note that that is the same language as what is proposed here. No doubt, this has been suggested by parliamentary counsel because the term "serious harm" will perhaps be found more than once throughout the division. I simply indicate, minister, that I am quite happy to deal with it now or to have it deferred. I do not think it makes any difference either way.

Hon ALANNAH MacTIERNAN: I think it is useful to pass that now because we have rival clauses 31, but I think this provision applies to both of them. Although other provisions will rise and fall on which particular model 31 gets up, as I understand it, this is not one of those, so in order to continue this slight momentum forward that we have achieved, I would rather we deal with this one now. I move —

> Page 34, after line 26 — To insert —
>
> ***serious harm***, in relation to an individual, means an illness or injury that —
>
> (a) endangers, or is likely to endanger, the individual's life; or
>
> (b) results, or is likely to result, in permanent injury or harm to the individual's health.

Amendment put and passed.

Clause, as amended, put and passed.

The CHAIR: Members, there is something slightly out of the ordinary on the supplementary notice paper—that is, the proposed change to the part 2, division 5, subdivision 2 heading. Given it will be part of the act in due course, to amend it, we need a motion to that effect. Minister, would you like to move the amendment standing in your name?

Hon ALANNAH MacTIERNAN: I think it is appropriate for us to move it at this stage. As I understand it, there has been an agreement that a range of clauses will be considered after other provisions have been considered. It is my understanding that whichever of the competing schema for clause 31 gets up, this heading will apply.

The CHAIR: Have you moved, minister, along those lines?

Hon ALANNAH MacTIERNAN: Can I hear the commentary from the member?

Hon NICK GOIRAN: For what it is worth, I am not sure I agree with that because at the moment, this heading reads "Subdivision 2 — Industrial manslaughter". It will otherwise read "Industrial manslaughter and other offences". The "and other offences" makes sense only if we continue with one of the schemes, moving forward, because one of the options is to continue with existing clause 31, which is found under subdivision 3, "Other offences and penalties". I therefore think this minor issue to do with the heading is best dealt with after we have dealt with that package of amendments in due course.

Hon ALANNAH MacTIERNAN: Nothing much turns on it, member, because even under our proposition, if our schema for clause 31 gets up, we will want the change of heading because we propose to delete clause 30B and will

be, effectively, bringing some provisions of clause 30B into clause 31. Even on any schema, if we are successful in relation to our clause 31, we will want this amendment.

Hon Nick Goiran: What if ours is successful?

Hon ALANNAH MacTIERNAN: I think the same thing will apply.

Hon Nick Goiran: No. What if 30B stays?

Hon ALANNAH MacTIERNAN: Let us defer it then. I need some clarification because there is a proposition to defer consideration of some clauses. My proposition is that we move to clause 30A, and then we will need to move a motion that we defer consideration of various amendments to clauses 30B and 31, although we could probably deal with clause 30B. I seek leave to defer consideration of amendment 51/P2D5H until after, I think, clause 34.

The CHAIR: Members, I have been contemplating the best method by which to achieve what seems to be a sense that we want to achieve—that is, to postpone consideration of and a possible amendment to the part 2, division 5, subdivision 2 heading until after clause 34. The mechanics of it are quite interesting to those who take an interest in these things for how we should go about that. In this case, though, I think that with the agreement of the Committee of the Whole, the minister has done precisely the appropriate thing; namely, to seek leave to consider the amendment to that heading after clause 34.

Leave granted.

Clause 30A: Industrial manslaughter — crime —

Hon NICK GOIRAN: I note there are a number of amendments to clause 30A on the supplementary notice paper, which have attracted some degree of controversy but nowhere near the level of controversy over those to clause 30B. For the reason I outlined in my second reading contribution, I have certainly not been persuaded that clause 30A should be treated in any way other than with support. That said, I note there are amendments on the supplementary notice paper, six from the Minister for Regional Development and two in my name. Given I am not first on the list, I will leave it to the minister to move her amendment.

Hon ALANNAH MacTIERNAN: I move —

Page 35, line 3 — To insert after "crime" —

(***industrial manslaughter***)

I want to, effectively, put the argument for both that and the following clause. What we are seeking to do here, as I understand it, is to ensure that the standard for invoking an offence of industrial manslaughter does not require that, as under the current construction, the duty holder must know that they are likely to kill someone but carry on regardless. We think that is probably an unrealistic standard to set and we would never be able to establish that someone did that, so we want to say that the person knew that the contravention would be likely to cause death or serious harm. I believe it is a drafting error, but I am having some difficulty getting an explanation from my advisers. Getting to the essence of this, because we will not proceed with clause 30B, we do not need to reference a "crime". We can confine this subdivision simply to "industrial manslaughter", so this is consequential on our intention to oppose clause 30B. Therefore, it is more appropriate to talk just about industrial manslaughter because this subdivision refers only to industrial manslaughter.

Hon NICK GOIRAN: The amendment seems unobjectionable, but I question the necessity for it. The line in question is line 3 on page 35. At the moment, clause 30A reads —

(1) A person commits a crime if —

It then sets out four elements that will need to be proven for the person to be demonstrated as having committed a crime. If the minister's amendment passes, all that will happen is the line will read —

(1) A person commits a crime (***industrial manslaughter***) if —

It would then set out the different elements. It is not abundantly clear to me why it has been suggested to the government that this is something that would be useful to the bill.

Hon ALANNAH MacTIERNAN: All I can say is that it was recommended by the Parliamentary Counsel's Office. I suppose it is probably not the most elegant way of doing it, but parliamentary counsel seems to believe that this addition improved the reading of the clause.

Hon NICK GOIRAN: Normally, minister, when we add a bracketed phrase, it is intended to be read as a definition so that it can then be used as a definition in the future. Does this mean that if we pass this amendment, the minister will ask us to agree that every time there is reference in this bill—once it is enacted—to "crime", it pertains only to industrial manslaughter? In other words, can the only crime committed under the Work Health and Safety Bill 2019 be industrial manslaughter?

Hon ALANNAH MacTIERNAN: Other crimes are being contemplated in clause 31, so this amendment seeks to make it clear that this provision and this description relates to the crime of industrial manslaughter and that this amendment does not intend to cover the field because of the other offences proposed in clause 31.

Hon MICHAEL MISCHIN: There is nothing objectionable about the amendment, but I am curious, as was Hon Nick Goiran, why it is necessary. At the moment, clause 30A states that if a person commits a crime, one of the elements is that causing the death of an individual is subject to certain penalties. Subclause (3) imposes criminal liability on an officer of a person conducting a business or undertaking if there is a similar result, and the heading of clause 30A is "Industrial manslaughter — crime". Going down this path does not seem necessary, particularly at this rather late stage when the provision has been drafted, but I wonder whether there is any other point to it. Is it to distinguish this because the description of "industrial manslaughter" is being used in another context somewhere else in the legislation, so it is necessary to ensure that there is clarity as to what the offence is that has been referred to, rather than simply referring to an offence under clause 30A?

Hon ALANNAH MacTIERNAN: Member, I cannot add any more to it. It does not seem to be a matter of great importance or significance. Members might want to vote against it, but if it turns out to be something dire, it might be something that is taken up in the Legislative Assembly. I cannot provide any further elucidation why parliamentary counsel feels that this is superior drafting. Presumably, it has some knowledge of what it is doing. I do not see that the amendment harms anything and I just hope that members will support it.

Amendment put and passed.

Hon ALANNAH MacTIERNAN: I move —

> Page 35, line 12 — To insert after "of" —
>
> , or serious harm to,

As I was seeking to explain before, this amendment will ensure that we do not create a situation in which it will be very difficult to establish the offence of manslaughter by the standard of appreciation being that the person knew that the contravention was likely to cause the death of a person. We think that would set a bar that would be impossible to meet. Consequently, we are moving to amend that provision so that it would be sufficient that the party being charged knew that the contravention of the work health and safety standards was such that it would likely lead to serious harm, but they proceeded nevertheless. It is about the knowing element of the clause.

Hon NICK GOIRAN: The insertion of this phrase into clause 30A is a late arrival at the table. Considering everything that has gone on, including all the advocacy and the work done by the Standing Committee on Legislation to which the government referred part 2 of the bill, to my knowledge, this has never been raised until the lead-in to it appearing on the supplementary notice paper. That being said, it looks appropriate. My question is: what do the other jurisdictions that have introduced industrial manslaughter do about the issue of knowledge? Do they also include the necessity for the person to have knowledge that the conduct will cause serious harm; or do they just leave it to knowledge that the conduct will cause death?

Hon ALANNAH MacTIERNAN: I do not have advice on that, but I know that the equivalent provisions in the existing Occupational Safety and Health Act, which is section 18A(2)(a)(i), states that the standard that is the person —

> knew that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty is owed under that provision …

We are picking up the language that already exists in the Occupational Safety and Health Act.

This amendment was not specifically considered by the Standing Committee on Legislation, but finding 10 of the inquiry report stated —

> The legal test for prosecuting a crime under cl 30A of the Work Health and Safety Bill 2019 is substantially the same as that currently applied to a level 4 offence under s 19A(1) of the *Occupational Safety and Health Act 1984* and s 9A(1) of the *Mines Safety and Inspection Act 1994*. This can be described as a subjective test of actual knowledge.

We thought that this could lead to a duty holder escaping the reaches of the industrial manslaughter provision on the basis of thinking that the conduct might only maim someone rather than kill them, which is certainly not the consequence we want. We thought that would be inappropriate and, in any event, I think it is inconsistent with general manslaughter provisions. The much more appropriate test of the subjective knowledge of the person is not that the standard be that they thought that their conduct could kill someone, but that they thought it could cause serious harm. That is sufficient knowledge on which to base an industrial manslaughter prosecution.

Hon ALISON XAMON: I indicate that the Greens will most certainly support this amendment for a number of reasons, not the least of which is that it brings it completely in line with my bill that I brought to this chamber—

the Criminal Code Amendment (Industrial Manslaughter) Bill 2017. I note that this bill now reflects the original intent that I brought to this chamber.

Hon NICK GOIRAN: Did the honourable member's provision not want to be housed in the Criminal Code?

Hon Alison Xamon: Yes. That was the intent of my bill, but the definition is the same.

Hon NICK GOIRAN: The definition is the same. It is regrettable that the government does not have at its disposal information about other jurisdictions that have implemented industrial manslaughter and whether this is consistent with them, particularly given the government's ongoing desire for a harmonised approach to be taken across the nation. Nevertheless, if I understand it correctly, I think the minister is saying that this amendment will bring this provision better into line with manslaughter provisions in the Criminal Code.

Hon ALANNAH MacTIERNAN: I do not want to open a can of worms, because I have never practised criminal law, but the Office of the Director of Public Prosecutions has provided advice that it would be concerned about attempting to launch an industrial manslaughter prosecution if the standard was that a person had to have a belief or knowledge that their conduct was likely to cause death. That was perceived to be too high a standard and inconsistent with the current Occupational Safety and Health Act. I do not have expertise, but my understanding of how manslaughter provisions work in the Criminal Code is that there does not need to be an intention to kill at all. That is the very concept of manslaughter; that is, it is less than murder. I acknowledge that these definitions are consistent with the bill that Hon Alison Xamon brought into this place some time ago. It was the DPP's concern that the unamended provision would make it more difficult to prove than manslaughter under the Criminal Code. The whole concept of manslaughter is not predicated on there being an intention to kill. That is what distinguishes it from murder.

Hon NICK GOIRAN: The opposition will be supporting amendment 53/30A. It has been helpful that the minister has indicated that the genesis of this has come from the Director of Public Prosecutions. However, I think it would provide an extra level of comfort to the chamber if something could be tabled to that effect. Perhaps the Director of Public Prosecutions has written to the government, or there has been a memo to that effect. Presumably, this has resulted in some form of consultation. Clearly, that consultation occurred after 31 July 2020, because we have quite an explosive letter from the DPP in appendix 6 of the report of the Standing Committee on Legislation, which implies that, at the very least, limited consultation had taken place up until that point. Therefore, one would presume that at some time during the course of August, or the few weeks of this month so far, there has been some additional consultation with the DPP and that somebody will at the very least have had a verbal discussion with the DPP and will have transposed that into a memo of some sort. Would the government be in a position to table something to that effect?

Hon ALANNAH MacTIERNAN: We can certainly ask whether the DPP is prepared to provide that information. Obviously, we cannot direct that the DPP do it. As I said, my advice is that this came out of advice from the DPP. As the member said, the argument behind it stands on its merits.

Hon MICHAEL MISCHIN: Just to understand it, among the elements that would constitute the crime of industrial manslaughter, contrary to clause 30A(1), is conduct in the knowledge that that conduct is likely to cause the death of, or serious harm to, an individual, and that risk is disregarded. Is that a higher or lower standard than is currently the case for manslaughter under the Criminal Code, under which a negligent act in breach of a duty can result in a conviction for manslaughter and when there is a reckless appreciation of a risk of some kind of harm? Are we talking about a higher or lower standard than is currently available under the general manslaughter provision in section 280 of the Criminal Code?

Hon ALANNAH MacTIERNAN: Without taking legal advice on that, I cannot answer how this references the Criminal Code. We have clearly made the decision that we are not putting this into the Criminal Code. What I can say is that it is the same standard that currently exists and is applied under the occupational safety and health legislation to gross negligence level 4 charges. I do not have the ability to give the member informed legal advice about how that relates to the Criminal Code, but I note that we are not seeking to bring this under the Criminal Code. We are dealing with this as a separate piece of legislation.

Hon MICHAEL MISCHIN: That is what I was leading to. Why is this not under the Criminal Code? Homicide is under the Criminal Code. Murder involves causing another person's death unlawfully, accompanied by an intention either to kill or to do grievous bodily harm to another person. Unless I am wrong, the definition of "serious harm" that the minister has just had incorporated in the bill reflects what is termed under the Criminal Code "grievous bodily harm". There is a general manslaughter provision, under which if a person unlawfully kills another—without the necessity to prove any particular intent—it amounts to manslaughter and carries a penalty of life imprisonment. Specific duties are imposed in the Criminal Code, whereby a reckless disregard of those duties, more than just simple negligence, but what is usually termed gross negligence, or recklessness, can result in a conviction for manslaughter and carries a penalty of life imprisonment. Since the decision was made to pursue the industrial manslaughter path,

there has been a lot of large talk to explain how important it is to set a culture, yet we are including a crime of homicide based on recklessness. It seems to me that is not very much different from what is in the Criminal Code—we will get to the specifics of that—yet it is in what is otherwise a regulatory piece of legislation to be investigated not by the police but by work health and safety inspectors. I do not want to diminish the ability of those inspectors to investigate matters for a regulatory purpose. However, we are talking here about what will ultimately, as I understand it, be a trial on indictment before a jury. If it is the case that the government is trying to meet the expectations of those families who have been bereaved of someone and to say that the conduct was so egregious that someone should go to jail for it, why is this specific provision not contained in our Criminal Code?

Hon ALANNAH MacTIERNAN: That is an interesting commentary. It perhaps shows that, unfortunately, the member has not grasped what we are trying to do here. The intention is not to try to find people and put them in jail. We are trying to put through a piece of legislation that will contribute to an updating of and an uplift in the culture of work health and safety. It is very interesting that this matter was considered by the legislation committee. The legislation committee said in finding 13 —

> The offences of industrial manslaughter … are properly placed in the work health and safety legislation rather than the *Criminal Code*.

The legislation committee did some contemplation of what has happened elsewhere. This approach follows the approach taken in Queensland, the Northern Territory and Victoria. In the Australian Capital Territory, the offence of industrial manslaughter is in the legislative framework for criminal laws. The approach of including it in the Work Health and Safety Bill was first taken in Queensland in accordance with the recommendations of the "Best Practice Review of Workplace Health and Safety Queensland Final Report". It states —

> In terms of the design and statutory location of the offence, as previously stated, the Review considers the offence would be best placed in the WHS Act 2011 on the basis that it would send a clear message to PCBU's about the standard of safety required and the expectation on senior management to proactively manage health and safety risks. Additionally, the provisions under the WHS Act 2011 relating to the imputation of an individual's conduct to a corporation will ensure corporations are liable and reduce barriers to attributing criminal liability …

Although it is not included in this report, my understanding is that the Australian Capital Territory is the only place that has taken it out of the work health and safety framework, and that evidence was submitted that the ACT considers this to be a flawed decision. We believe that there is a strong case that this is much better and much more constructively placed within the work health and safety legislation. Again, I understand that that was the unanimous finding of the Standing Committee on Legislation.

Hon MICHAEL MISCHIN: If I understand it correctly, the decision to include it in the Work Health and Safety Bill was made before this was looked at by the Standing Committee on Legislation. The legislation committee may have decided that, yes, this is a good place for it and it is quite sound, but I was asking why the government took this path.

Hon Alannah MacTiernan: For the same reasons that the committee found it was sound.

Hon MICHAEL MISCHIN: I see. The minister said that the ACT's decision to include it in its equivalent of the Criminal Code, as part of the criminal law, was flawed. Why was it flawed?

Hon ALANNAH MacTIERNAN: As I understand it, evidence was given to the federal Senate inquiry that the ACT believed that that had been an error, and that if it did it again, it would not place it there. It is about trying to present the work health and safety legislation as a composite package. The concept of the duty of care that is owed to a worker is embedded in the legislation. For the semiotics and practicality of it, we believe that this is absolutely the right place for it. All the other states that have introduced this legislation—that is, Victoria and Queensland—and the Northern Territory chose the same pathway for that reason.

Hon MICHAEL MISCHIN: All right. Given that there is an unlawful homicide provision in the Criminal Code based on causation, on breach of duty or on otherwise directly or indirectly unlawfully causing the death of someone, why have there been no prosecutions from the egregious cases that have occurred and upon which the government relies for an industrial manslaughter provision? What has been the stumbling block in the past to a prosecution being brought pursuant to the Criminal Code, and how will it be eased by this bill?

Hon ALANNAH MacTIERNAN: Madam Deputy Chair, I wonder whether we could seek your guidance. We are discussing an amendment to add the words "or serious harm to". The member is looking at a different issue. I ask that we focus on the amendment that is before us—that is, whether we should add the words "or serious harm to" to the clause.

Hon MICHAEL MISCHIN: I appreciate that. I would like the questions to be answered in due course, but I accept that we are dealing with the amendment. I will defer seeking an answer on that until we fix this up in a way that the government is happy with.

Amendment put and passed.

Hon NICK GOIRAN: The next amendment stands in my name, but I just indicate to the chamber that I do not think it is appropriate for it to be moved at this time. By way of brief explanation, it is a consequential amendment that relies on the assumption that clause 30B will be deleted from the bill. I understand that this is one area on which there is now furious agreement between the government and the opposition. Nevertheless, if clause 30B is defeated, it will then depend on which scheme is to be followed as to whether the amendment standing in my name or the alternative amendment proposed by the minister should be followed. For those reasons, I think the following two amendments on the supplementary notice paper, at 2/30A and 54/30A, should not be considered until a later stage. While I am on my feet, I indicate that I also hold that view on amendments 3/30A and 57/30A, but I see no reason that we could not proceed with the other two amendments, which mirror the amendments we have just passed.

Hon ALANNAH MacTIERNAN: I agree that amendments 2/30A and 54/30A should be deferred until after clause 34. Do we need to seek leave to do that?

The DEPUTY CHAIR: I propose that we take the following course of action, if the chamber is willing to do so—that we defer consideration of amendments 2/30A and 54/30A to the end of clause 30A. Once we reach that point, we can then defer consideration of clause 30A, post dealing with clause 30B. That is because the Chair would not be able to put the adoption of clause 30A if elements of clause 30A have been postponed. I need a motion to that effect.

Hon ALANNAH MacTIERNAN: I seek leave to defer consideration of amendments 2/30A and 54/30A to the end of clause 30A.

Leave granted.

Hon ALANNAH MacTIERNAN: I move —

Page 35, line 20 — To insert after “crime” —

(***industrial manslaughter***)

This mirrors an earlier amendment that was made.

Amendment put and passed.

Hon ALANNAH MacTIERNAN: I move —

Page 36, line 7 — To insert after “of” —

, or serious harm to,

Again, this mirrors an earlier amendment.

Amendment put and passed.

Hon ALANNAH MacTIERNAN: These last two amendments on the supplementary notice paper, together with the other two amendments that we have postponed, really now need to be considered after clause 34. I suggest that we postpone consideration of clause 30A, together with the four remaining amendments to this clause, until after consideration of clause 34.

The DEPUTY CHAIR: Members, I suggest we handle this as we handled the previous two amendments, and that is that the minister seeks leave to postpone consideration of amendments 3/30A and 57/30A until the conclusion of consideration of clause 34. Once that is passed, the minister can move that consideration of clause 30A be postponed until after consideration of clause 34. It is a two-step process.

Leave granted.

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

Clause 30B: Industrial manslaughter — simple offence —

Hon ALANNAH MacTIERNAN: I think the opposition, most of the crossbench and the government will oppose this clause, so we can just put it.

Clause put and negatived.

Point of Order

Hon MICHAEL MISCHIN: I notice there is an amendment 59/P2D3H to be dealt with before we get to clause 31.

The DEPUTY CHAIR (Hon Adele Farina): I apologise, members. You are very right, Hon Michael Mischin. Thank you for bringing that to my attention. Minister, would you like to seek leave to do that?

Committee Resumed

Hon ALANNAH MacTIERNAN: I think consideration of the amendment perhaps needs to be postponed until after consideration of clause 34. I seek leave for amendment 59/P2D3H to be considered until after consideration of clause 34.

Leave granted.

Clause 31: Failure to comply with health and safety duty — Category 1 —

Hon NICK GOIRAN: Members will see that I have an amendment to clause 31 on the supplementary notice paper at 5/31. I appreciate that the government has foreshadowed that it intends to oppose clause 31, but it might still live to fight another day, given it was the original intention of the government. I move —

Page 37, line 17 — To delete "serious harm to" and substitute —

the death of, or serious harm to,

By way of brief explanation, this is a consequence of removing clause 30B. At the moment, there is a general understanding and agreement that clause 30A should be passed at some point, although the chamber has not adopted it yet. That is the highest standard. In other words, a person has died on a workplace and somebody is being found responsible for that because of their—what I and others have referred to as—reckless conduct. That is the highest standard. The government was already looking at having a two-tiered system of industrial manslaughter, which to my knowledge has not been proposed elsewhere. The government has now seen sense and heard from various stakeholders, and therefore has removed it from the bill. Nevertheless, a person could die on a worksite, but the highest standard is not met, so it is important to then introduce death in the lower offence. That is why I have moved the amendment. I seek the support of members.

Hon RICK MAZZA: I would like a bit of clarification. At amendment 60/31 on the supplementary notice paper the minister will oppose clause 31. We are now in the process of amending the current clause 31. Do we then oppose the new clause when the government puts it? Are we going to work off this clause in the bill or the new clause on the supplementary notice paper? I am a bit confused about which clause we are going to work with. Is it the current one in the bill? Will we oppose the one in the bill and work on the new clause that the government puts forward? I would like some clarification about what we are working on.

The DEPUTY CHAIR: I am happy to continue hearing from members, but the mover of this amendment could answer that question. The minister seeks the call, so I give the call to the minister.

Hon ALANNAH MacTIERNAN: I think there is a difficulty in considering this new clause that the member is about to move. I understand that the amendment really depends on clause 31. This is very complex. The member has a clause 31 that will be considered. We have an alternative clause 31.

Point of Order

Hon MICHAEL MISCHIN: It seems to me that the problem has arisen because we once again seem to have missed out the proposed amendment at 60/31 on the supplementary notice paper, to oppose the clause. If that succeeds, there is no clause 31 until another one is put in its place. If it fails, we then move to Hon Nick Goiran's amendment to the existing clause 31 at 5/31. Perhaps we could just dispose of clause 31 before —

Hon Alannah MacTiernan: Yes, the member's right —

The DEPUTY CHAIR (Hon Adele Farina): Order, members! I have a point of order before the chamber, and I would like to make a ruling on it. I think we can call this one. Hon Michael Mischin was correct last time he raised the issue with me, but in this case the amendment at 60/31 is not formally an amendment; it is simply an opportunity for the government to indicate that it will oppose the clause. It is not an amendment that is actually moved. We are dealing with the amendment currently before the chamber, which is the amendment at 5/31 in the name of Hon Nick Goiran.

Committee Resumed

The DEPUTY CHAIR: Members, noting the time, it is time to take questions, so I ask that the advisers leave the chamber so we can move into question time.

Committee interrupted, pursuant to standing orders.

[Continued on page 6210.]