RAIL SAFETY BILL 2009

Second Reading

Resumed from 24 November 2009.

HON KEN TRAVERS (North Metropolitan) [7.42 pm]: The Rail Safety Bill 2009 makes provision for rail safety and other matters that form part of a system of nationally consistent rail safety laws and, as a consequence, repeals the Rail Safety Act 1998. It amends some other acts and, according to the long title, is also for some other purposes. Essentially this bill will provide some national uniformity to the way in which we apply rail safety. As is clear from the long title of the bill, the Rail Safety Act 1998 is already in force in Western Australia. This will replace that legislation with uniform legislation that, although not identical in each state, will have a large degree of national conformity. It is interesting to note that this has come out of a fairly long COAG process of seeking to improve rail safety across Australia and to create uniformity where possible, so that operators who operate between states—there are some—can operate within relatively consistent frameworks. I also noticed that the government has signed up to a further COAG agreement that will eventually result in a single national rail regulator, based in South Australia and operating under legislation that will be passed in the South Australian Parliament. I hope that we get to that point sooner rather than later, but we nonetheless need to pass this bill first; it will be replaced in the long term. That should certainly colour some of our comments in this debate, but it is also important that, as a Parliament, we put on the record the general direction in which we would like rail safety to move.

It is a bill that is designed to achieve conformity in the many separate jurisdictions throughout the country that have separately operating rail safety regimes. Like a lot of things in life, there are elements of compromise within the legislation to try to achieve uniformity. Some will say that this bill does not go far enough in some areas, and others will say that it goes too far in other areas. There are questions that we need to keep asking ourselves. Does it advance and improve rail safety as a total package? In my analysis of the bill, it does. Does it bring in new, improved safety provisions to certain areas of the legislation, such as consultation with employees and their representatives on occupational health and safety matters, and a hierarchy of enforcement and sanctions? Yes, it does. We have to recognise that there needs to be balance. I understand that not everyone will be satisfied with this legislation, but I think it is about looking at it on balance. In noting that, it is interesting that although it is very technical and complex legislation, a number of people have nonetheless taken a keen interest in it during its passage through this Parliament. The Joint Standing Committee on Uniform Legislation has conducted an inquiry and has presented an extensive report. I expect members of that committee will probably speak about that report during the course of this debate and will make a number of comments and recommendations during the committee stage.

In a number of areas this legislation will be different to the uniform legislation. One of the main areas concerns provisions for no-blame independent investigations. That recognises some of the existing provisions we have in the current Western Australian Rail Safety Act. Provisions relating to periodic returns and the installation of safety or protective devices also pick up on the existing framework we have in Western Australia and allow for safety concerns to be addressed through independent investigations. I could go through all the others, of which there are quite few, but the Minister for Transport has already covered most of them in his second reading speech.

There is a long history behind our arrival at this point, and to my way of thinking, it would be productive to spend most of our time on this legislation in the committee stage, as we can go through the individual clauses about the concerns that have been raised and seek to have the government explain why it has adopted the approach it has.

With those general comments about the policy of the bill, I indicate that the opposition will support the Rail Safety Bill 2009. As I say, we will ask a range of questions, and it will provide an opportunity for those issues to be put on the record in this Parliament as we travel through the legislation. There are a range of issues that this house should consider as we go through the passage of the bill in detail.

HON ALISON XAMON (East Metropolitan) [7.48 pm]: The Greens (WA) will also be supporting this legislation. I understand that the Council of Australian Governments agreement on this legislation, as mentioned by Hon Ken Travers, has been several years in the making. The initial motivator for change was in response to a number of rail accidents and the recognition of a more coordinated response to rail safety legislation across jurisdictions. Clearly, this is something that the Greens will be supportive of. Our commitment to rail as a mode of transport is not secret, so any moves that will improve its success, particularly in relation to safety, should also be supported.

We also note that a number of other motivators to this legislation have emerged such as removing impediments to economic activity. The Standing Committee on Uniform Legislation and Statutes Review noted in its report

that safety and removal of economic impediments became the main drivers for the uniform legislation. Having said that, I note that some amendments have been proposed by the legislation committee. The Minister for Transport and the Greens suggested picking up one of those amendments from the legislation committee, which we believe would tighten up the success of this legislation further. Obviously, we will discuss this more when we go into committee.

A number of important points were raised by the legislation committee to which I am sure we will be getting a reply from the minister on the record. I note that Hon Adele Farina is in the chamber and is likely to speak to that committee report so I will not go into too much detail other than to make a few points about the report. BHP Billiton is currently outside the Rail Safety Act and the Department of Transport is trying to bring it in. This would be a good move. Some questions were raised, such as: if accreditation is applied for in other jurisdictions, are fees to be applied and collected by the WA regulator, particularly from operators who work in multiple jurisdictions and how will the fees be distributed? The concept of a principal regulator was raised but is not expressly covered in the bill. I would appreciate the minister commenting on that.

The committee's report also states —

> …the absence of formal recognition of the roles of the rail safety regulator panel and the principal regulator does not give sufficient regard to the institution of Parliament.
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> …
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> …the ability of the Rail Safety Regulator Panel and the Principal Regulator to direct the Western Australian regulator on accreditation matters has the potential to derogate from State sovereignty.

These are obviously important points. I am hoping that we can have some discussion about that. Has any regulatory impact statement been prepared for the predicted revenues and budgets for the office of rail safety or the WA rail safety regulator; and, if not, why not? Given that the bill permits one jurisdiction to demand additional conditions over another jurisdiction, how does this introduce consistency across jurisdictions and reduce red tape and compliance costs? Co-regulation will continue to be the basis upon which rail safety regulation will proceed. The office of rail safety will continue to operate on a full cost recovery basis with revenue coming from rail safety accreditation fees. The Greens certainly support a co-regulatory system and are firmly of the view that responsibility for workplace and public safety cannot be contracted out. We are on the record as supporting cost recovery mechanisms. This is a positive. However, we also note the comments in the report from Mr Bruce Chan from the Department of Transport who said in March this year —

> *I think there is always the risk of a national regime being implemented where it ends up it is easier to go down to the lowest common denominator than aiming for, say, best practice.*

Clearly, when we are talking about issues of safety, we need to ensure that that will not be the outcome in adopting this uniform legislation.

Lastly, I note that in the second reading speech the parliamentary secretary clarified that where a conflict arises, the Occupational Health and Safety Act will prevail. However, I also note that in the second reading speech it was identified that a memorandum of understanding would need to be developed between the office of rail safety and the Department of Commerce to ensure effective coordination and cooperation. I am hopeful that in his reply the minister will advise the house of the expected time frame for the creation of this MOU—perhaps it has already commenced—as it is obviously quite important. I will speak more during the committee stage.

HON ADELE FARINA (South West) [7.54 pm]: I rise to speak to the committee report as chair of the committee. I would like to begin by thanking my colleagues on the committee. We expected this to be a fairly easy review of uniform legislation; however, as it transpired during the course of the hearing we identified issues that caused the committee to have some concern, which are detailed in the report. I would also like to take this opportunity, before I go into the detail of the report, to acknowledge the work of the staff who supported the committee during the inquiry and review into this piece of legislation, particularly Anne Turner, Mark Warner and Grant Hitchcock, who did research work for the committee as the committee was busy dealing with a number of bills at that time and we were under the pump. Special thanks to Grant Hitchcock for his assistance and research on this report.

This bill was referred to the committee pursuant to standing order 230A and the committee conducted its hearing on 3 March with representatives of the Department of Transport. The transcript of that hearing is provided as an appendix to the report. The committee also went through its normal process of advertising in *The West Australian* asking for submissions on the bill. As members are aware, the establishment of the committee to scrutinise uniform legislation arose from the concern that the executive is in effect exercising supremacy over the state Parliament when it enters into agreements that have the practical effect of binding the state Parliament to enact legislation that gives effect to a uniform scheme or an intergovernmental agreement. The committee's role is to scrutinise the extent to which the uniform bill impinges on the sovereignty of the state Parliament and

to ensure that the uniform bill meets the objectives of the national scheme, and the intergovernmental agreement, and does not go beyond what was intended in the intergovernmental agreement. We also look at applying the scrutiny principles to the bill and to inquire into matters that are raised in submissions. Obviously, when matters are raised in submissions from members of the public, in undertaking its inquiry and review into the legislation, it is imperative that the committee look at those issues.

The background to this bill is that it arose out of safety concerns in the rail industry due to a number of accidents. The transport ministers decided to bring about a uniform scheme that would provide a nationally consistent approach to rail safety regulation across the country. However, what became apparent to the committee in reviewing the Council of Australian Governments documentation was that, although the initial objective was rail safety, during the course of those negotiations, the focus of COAG seemed to move a little bit away from rail safety and more to other issues, which is of concern to the committee. It is clear from the supporting documentation to the legislative proposal that Western Australia took exception to this shift from rail safety to rail productivity. I would like to commend the role of the former Minister for Planning and Infrastructure in particular throughout those COAG negotiations in trying to keep the focus on the initial intent of this uniform scheme; that is, rail safety. It was through her efforts and tenacity that a lot of the debate and content of this bill was able to be refocused back onto rail safety issues. She was also able to secure a number of concessions for Western Australia. I think it is important to acknowledge those efforts by the former minister. In particular, the Western Australian government was able to retain the right to —

> provide legislative coverage "in any way considered appropriate for its own situation" for:
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> - sections 28 and 29 in the Model Bill - the general duties provisions applicable to rail operations; and
> - section 112 on restoring rail infrastructure and rolling stock to original condition after action has been taken.

Various sections from the Rail Safety Act 1998 which are not in the model bill but which are necessary to give the Office of Rail Safety sufficient power to secure safety are included. A range of definitions have been incorporated to ensure that that high safety hurdle is maintained. Also, power of entry clauses are aligned to occupational health and safety legislation in this state. Of Western Australia's 12 proposed variations, the National Transport Commission accepted nine, which was an excellent success for the former minister. The three areas that were not approved as variations by the national transport commission were interim accreditation, rolling stock lights and directions to provide a program of remedial safety work. That third variation was dismissed as it was already in the NTSC's rail safety bill, which is the model bill. To that extent, it can be argued that the state's sovereignty is being upheld because we were able to achieve nine of the 12 variations sought by the state. However, it can also be argued that to the extent that three of the 12 variations were not supported, the sovereignty of the state Parliament has been abrogated because the state was unable to succeed in getting approval by the Council of Australian Governments transport ministers' meeting variations that the state considered to be important safety issues. On balance, the committee found that, substantially, the bill is consistent with the supporting documentation.

At the hearing with the departmental officers, the departmental officers informed the committee of the intention to establish a rail safety regulators' panel, which would be tasked with ensuring the uniformity of the regulations across the nation. That was a surprise to the committee because it had not received any information about that in any of the supporting documentation that had been provided to the committee at that point. The committee noted also that a panel of rail safety regulators is not expressly established or defined in the bill, yet the panel will meet and decide upon what is not a notifiable occurrence under clause 3(a)(i) of the bill and part of its job would be to take such occurrences to the Australian Transport Council for endorsement and then from the ATC to the National Transport Commission to be drafted as regulations or as additions to the current model regulations. In further correspondence, the department expanded on the role of the rail safety regulators' panel, saying that it has undertaken work to see how it can better achieve a one-stop-shop arrangement; that is, a single entry point to rail safety regulators—the national operators—for managing regulatory issues such as accreditation and auditing. Further, we heard that the intention was to establish principal regulators who would become the first points of call and coordinators for regulatory activities for multijurisdictional rail transport operators. The principal regulator for a particular rail transport operator will be the regulator of the jurisdiction in which the rail transport operator is principally based; typically, that is the jurisdiction in which the corporate management of the safety management system is undertaken. The principal regulator's role will cover accreditation issues, audits, consistency in approach to audit and compliance activity findings and the exchange of information.

It was curious to the committee that, given the integral and important role of the rail safety regulators' panel and that the bill before us establishes a national scheme, the whole structure of the rail safety regulators' panel did not rate a mention in the bill. There is no legislative framework for the authority of either the panel or the

proposed principal regulators. This was a concern to the committee. The bill purports to establish a national scheme yet it seems that the very components of the national scheme which make it function as a national scheme and which try to ensure that there is consistency in the conditions imposed across the states at the point of registration are not incorporated in the bill. It seems very odd to me. This is an issue that we are seeing more and more frequently in the Standing Committee on Uniform Legislation and Statutes Review, where what would normally be in a bill we are now finding is not even in regulations. We have seen a move where a lot of the structural content was being moved from the legislation to the regulations because it is a lot easier to change in the regulations than having to bring legislative amendments back to Parliament. What we are now seeing is that these structures that make the scheme work are being defined as administrative in nature only, and they are not included in the legislation at all. This raises grave concerns for the Parliament with principles of scrutiny and parliamentary sovereignty. The position of this Parliament is that we have supremacy over the executive. The role of the Parliament is to be able to monitor and to influence any decisions that are being made by the executive on legislation. What we are seeing with this move to not include structural detail in the legislation and to include it as an administrative process and structure is that we are actually removing the ability of the Parliament to scrutinise that structure and also to amend that structure in the event that it is not operating as it was intended to operate. It is really important that members in this house understand that this is what is happening more and more with uniform legislation. It is a matter of great concern. Obviously, while things are going well, no-one worries too much about the fact that the structure that is managing and guiding this whole process is not in the bill, but when things start to go wrong and members of Parliament are held to account, and the government is held to account, and if they are ask why a better job is not being done in a particular area, the government and the Parliament are greatly restricted in saying that they will change it, end it or make it better. The content is not in the legislation. The Parliament has no capacity to scrutinise and to make changes as may be necessary over time.

It is also the case that what we are told today about the intent of the administrative arrangement is not necessarily what will be carried out. We have no capacity to guide, influence or control that, because it is an administrative process in which this Parliament has no role to play and of which it is completely unaware. I just raise that for the attention of members because it is a really critical issue that we are seeing here. A lot of the content about what is really part of this national scheme is not in the bill. I understand from the subsequent evidence that was provided by the departmental officers that these matters are still being considered by the ministerial council, that the panel is not yet in place and that the concept of principal regulators is not yet in place. However, the whole scheme that is proposed by this national bill that is before us is very much dependent on those matters being put in place. The aim of this bill is to ensure that rail operators do not need to go through a regulation process in each state, which might impose different conditions. The aim is to ensure that similar conditions are imposed in all states and that there might be one port of call where people go to one state and once it has been approved by that state, it is really just a tick off by the other states, because the intention is that the conditions are all the same. If that is the case, then the role of the panel and the principal rail regulators becomes very important, because it is that panel where those negotiations and discussions will occur about which conditions will be imposed and which ones will drop away because there has not been a majority consensus. Members need to be aware of that concern.

The committee also raised the concern that if this whole administrative structure did not form part of the bill and there was no guideline for how it was going to operate and what influence it would have over the process, we might see a situation in which legal issues arise because the principal regulator in a particular state might be unduly influenced to drop certain conditions in order to meet the requirements of conformity that form part of this national scheme. The committee was assured by the departmental officers in information provided subsequent to the hearings that that was not the intention and that each of the state regulators would have the authority to impose whatever conditions they thought were necessary, and that the intention of the panel was just an administrative process by which they would talk and seek to reach agreement, and that no directions would be given by the principal regulator to any of the state regulators that they must not impose a particular condition because the rest of the states do not agree. It is fine to say that, but it would become a real issue in a legal situation if a state regulator did not impose a condition on the basis of the discussions that occurred in this administrative body, which felt that a particular condition was not really necessary, and that condition became a critical factor in a rail incident. I can tell members now that with all of that detail lacking in the legislation, I do not want to be the state rail regulator.

Hon Simon O'Brien: I have no intention of appointing you as the state rail regulator!

Hon ADELE FARINA: That is good! The state rail regulator could find himself greatly exposed because of the legislation's lack of information and structure and the legislative protection that I think the state regulator should have, which should all be in the legislation. That is an issue of concern.

Fundamentally, the committee saw that there was a tension in the national scheme that was quite contradictory. On the one hand, the bill seeks to ensure uniform accreditation conditions in each jurisdiction, yet the mechanism for achieving this—the panel and the principal regulators—do not form part of the bill. There is an inherent tension in the bill before the house. To add to this, the later advice of the department that the jurisdictional regulators will act independently under the legislation further raises a question about the extent to which the legislation will achieve the objective of common accreditation across the nation, because if the regulators act independently and do not agree on a set of conditions, we will not achieve the whole purpose for which this uniform scheme is being put forward to the Parliament—that is, common conditions across jurisdictions.

The committee found a real concern about the absence of formal recognition of the roles of the rail safety regulator panel and the principal regulator, and that the absence of this information from the bill does not give sufficient regard to the institution of Parliament. The first recommendation of the committee is that the minister advise the Legislative Council whether it is intended that the roles of the rail safety regulators' panel and the principal regulator will be given statutory recognition in regulations; and, if so, identify the regulation head of power in the bill in order to effect that. It is clearly not in the bill. At the very least, the administrative arrangement needs to be in the regulations so that there is some capacity for Parliament to scrutinise how those bodies will operate and to disallow regulations if it has any concerns.

The committee also recommends that the responsible minister advise the Legislative Council how the objective of discontinuing different accreditation conditions in each jurisdiction will be achieved by the bill, because if the regulators in each of the states are authorised to make their own independent decisions about which conditions should be attached, clearly the objective of the bill to ensure that common conditions apply across all the states falls away. There are real questions about whether the bill as it is currently drafted will actually achieve what is intended. The proposed accreditation process provides for rail operators to comply with a set of conditions across all jurisdictions. However, those rail operators need to be accredited in each jurisdiction. From the evidence at the hearing, the committee was informed that for Western Australia the proposed accreditation process may result in three operators—Rio Tinto, Robe River and BHP Billiton—being accredited in the eastern states and not in Western Australia; thereby impacting on the financial viability of the office of the Rail Safety Regulator in Western Australia and its current level of service. The committee heard at the hearings that the office of the Rail Safety Regulator is not funded out of consolidated revenue; it is funded fully from the recovery of fees from industry. It therefore raises serious concerns that if, through this process of accreditation, those companies can be accredited in the eastern states rather than in Western Australia through the WA office of the Rail Safety Regulator, that might impact on the revenue of that office to conduct the duties for which it has responsibility.

The committee heard evidence from the department's officers—following the committee raising that concern—that they did not think that was likely to happen because registration would still be required in WA and a fee would be paid, even though all the assessment work could be done in the eastern states. At the end of that hearing process the committee was still very unclear on exactly how this proposed new process will operate. I am sure that members of the house will be very interested to hear the minister detail how that process will operate and also to hear him provide some comfort to the house and to members that the effect of passing this legislation will not be a decrease in revenue for the office of the Rail Safety Regulator in Western Australia and, therefore, an incapacity for that office to conduct its duties and responsibilities under its legislation.

The committee was of the view that the bill remains unclear on what happens if one jurisdiction has additional conditions to another jurisdiction; and, given that there is flexibility for the regulator to require additional conditions, how the bill then introduces consistency. I trust that the minister will address this when he addresses the Parliament on the bill.

The committee looked at a number of issues relating to the clauses of the bill. I do not intend to refer to all of them; I will address the key clauses only. As I indicated earlier, the committee always looks at the question of whether a bill derogates from state sovereignty. As explained earlier, in relation to this bill it was a difficult issue to decide because the state looked for 12 variations from the national committee. The state achieved nine of those 12; therefore, from that point of view the committee felt that by and large the state sovereignty had been protected to that extent. However, one could equally argue that, given that three of those requirements of the state were not been given the okay, state sovereignty has been derogated to that extent.

Interestingly in the bill there is a provision at clause 5(2) to (6) that is not in the model bill, which provides for the minister to exempt specified persons or railways from the bill on certain conditions, and that the person must not contravene a condition imposed on the person. This was a curious provision on which the committee sought to get some clarification. It is the committee's understanding that a number of operators and rail lines were in place before the Rail Safety Act 1998 came into being and they sit outside that act; therefore this provision seeks to ensure that the minister can continue to impose conditions when necessary on those bodies until such time as they are brought into compliance with the current scheme. On balance the committee felt that that was a

delegation that was probably necessary under the circumstances. We took heart from the fact that all indications were that this would be a very short-term application of this provision and that the matters would be resolved to bring all the groups within the provision of the bill.

The other issue I would like to talk to relates to clause 78. Clause 78 is copied from the model bill. It requires rail safety workers to produce a form of identification when requested to do so by a rail safety officer. The penalty for not doing so is $2 000. The committee observed that proposed clause 26(4) requires rail safety officers to carry an identification card but allows them to produce it as soon as practicable, which is different to the requirement for rail safety workers. Proposed clause 140(3) allows an independent investigator or authorised officer to produce his or her certificate of appointment as soon as practicable after a request. Again, this standard is very different to that imposed on the rail safety worker. Under this bill the rail safety worker has to present their ID on request.

The committee tried to understand why this was necessary. The advice that we received from departmental officers is that in a situation involving a rail safety incident, it is important that the rail safety officer and other authorised persons on site know what qualifications the rail safety workers possess in directing them to do certain tasks in relation to correcting the rail safety issue. On the face of it, that seems fine. However, I still do not quite understand why their qualifications would not be known if they have employed those workers. One would think that would be something within the employer's knowledge at the point of employing those rail safety workers. I accept what the department says, that it is sometimes a very confused and high pressured situation. Maybe people have been injured and they need to get the rail up and the safety hazard resolved as quickly as possible. There may be a situation where it is necessary to have ID on the workers. However, the department has not yet resolved how all the skills information that a worker possesses will be placed onto this ID card, or the form that the ID card will take. The committee raised with departmental officers some other methods that might be more useful, such as electronic communication of that information so the onus was on the employer to ensure that the people who had responsibility on site knew the skill sets of the individual workers rather than placing that onus on the individual workers. If a worker had accidentally left his or her ID card at home as he or she raced out the door to attend to an emergency, that worker could be stopped from doing whatever it was that they were needed to do on site. It seems very odd that such a high burden is being placed on rail safety workers to have ID cards with them at all times and that the impost for not doing so is a fine of up to $2 000. It is interesting to note, however, that rail safety officers, independent investigators and authorised persons can produce their ID card at some later date. They do not have to have it on them at all times. It is rail safety officers who direct rail safety workers to do certain tasks. I would have thought in those circumstances the rail safety worker would want to ensure that the person directing him or her to do a specific task had the authority to do so.

Members of the committee felt there was good argument in why people in higher authority should have ID on them as well. The committee does not quite understand why different standards are being applied to the worker as opposed to more senior officers. The minister should explain to the house why there is this distinction and why it is that rail safety officers, independent investigators and authorised officers are allowed to produce their ID at a later time, yet rail safety workers are given no such opportunity and have the impost of a $2 000 penalty in the event the ID is not on their person at the time they are asked to produce it. I would be interested to hear the minister's comments on that issue and the justification for that disparity of approach. The committee has made a recommendation that clause 78 be amended to make the impost on rail safety workers consistent with rail safety officers, independent investigators and the like, and that the same rule applies to everyone. It is difficult to understand why workers employed because of their special skill set to undertake rail safety work need to carry their ID card with them at all times, yet people who are directing them and giving them orders do not need to have an ID card on them all the time. If it is the case that the rail safety officers, independent investigators and authorised officers do not know the workers, hence necessitating the need for the workers to carry an ID at all times, it would follow that the rail safety workers would not necessarily know the rail safety officers, independent investigators and authorised officers and whether they have the authority to give directions. Nevertheless, they are expected to follow directions by these officers without even being able to ascertain whether the unknown person issuing the directions has the authority to issue directions that the rail safety worker must follow. An explanation on why this inconsistency applies is required from the government. The government has foreshadowed, through the supplementary notice paper, its intention to move an amendment to clause 78, and that the government does not support the amendment proposed by the committee. When one looks at the reasons that are being offered for the government's amendment, as opposed to the committees' amendment, if it were not so serious, one would find it quite funny. In any event, I will address this later when the minister moves his amendment. I will provide more detail then. It is really important that a very clear reason be given why we should impose an impost on workers that is not being required of other people on the scene who have greater authority and are directing those workers. It seems incredibly inequitable to put an impost on workers that does not apply across the board.

The other issue relates to clause 83(2), which is a unique provision to include in a bill, which attracted the attention of the committee. The subclause states that the level of investigation a rail transport operator undertakes must be determined by the severity and potential consequences of a notifiable occurrence, as well as by other similar occurrences, and its focus should be to determine the cause and contributing factors, rather than to apportion blame. The committee noted this subclause is copied from the model bill, but the statement, "its focus should be to determine the cause and contributing factors, rather than to apportion blame", has the character of a policy statement, not an enforceable law. The committee is of the view that to say that the focus of an investigation "should be determined" rather than "must be determined" leaves blame open, and that such a policy statement is better suited to an objects clause in the bill rather than as a provision. The department agreed that this clause is an advisory or guidance clause and not substantive. The rationale for its conclusion is that it is a model bill, and that object clauses are no longer a preferred drafting practice in Western Australia. The committee remains unconvinced that this is a reasonable explanation for including this clause in the way that it has been drafted in the bill, particularly as the clause is not enforceable. I would be interested to hear from the minister how this provision can be enforced and by whom.

Clause 88 allows a rail safety officer to search and inspect places and things at railway premises. It is copied from the model bill and the clause does not provide for the occupier to observe the search and inspection. When comparing this with clause 146 of the bill, in which situation the occupier is entitled to be present during an inspection by an independent investigator, the committee felt that there was an inconsistency in approach. Therefore, if the occupier, by law, could be present under clause 146, then clause 88 should be amended to also provide the same ability for an occupier to be present during a search. The committee has made a recommendation to amend clause 88 to bring that into effect. I note that the government has indicated support of the proposed amendment, and I welcome that position.

In relation to clause 96, the committee noted that the model bill expressly provides for magistrates to issue search warrants, yet the bill uses the term "justice", meaning justices of the peace. That term has been carried over from the Rail Safety Act 1998 and the committee queried the significant variation from the model bill. Members will remember that in this instance we are dealing with a national scheme. We are being asked to pass legislation that is consistent with the model bill. In this instance, the bill before the house is not consistent with the model bill. It is actually proposing that we use justices of the peace rather than magistrates to authorise search warrants. The model bill requires magistrates to give that approval.

The committee noted that the 2004 Kennedy royal commission recommended that applications for search warrants be made to magistrates and other designated persons rather than justices of the peace. It cited incidents of search warrants being forged, obtained on false and misleading information and blank warrants being signed by obliging JPs. It described JPs as invariably laypeople with no particular legal skills, who often seem to achieve a state of inappropriate familiarity with police officers with whom they deal regularly. The question of who should issue search warrants was raised by the former Standing Committee on Legislation during its inquiry into the Criminal Investigation Bill 2005, the Criminal Investigation (Consequential Provisions) Bill 2005 and the Criminal and Found Property Disposal Bill 2005. Those committee reports make reference to a range of evidence that supports the proposition that magistrates should issue search warrants, not JPs. I will not detail all those items of evidence, but they are detailed on pages 22 and 23 of the report and I recommend that members of the house read those pages to understand the issue.

During the debate on the Criminal Investigation Bill the then former government indicated that it would not be looking at magistrates as opposed to JPs issuing search warrants, because of the additional resources that would be required. It is reported in the committee's report that the then former opposition, the now government, in the debate on the Criminal Investigation Bill 2006 made the following comments —

> *That the opposition —*

The now government —

> *— will make moves in due course to tighten up the issuing of search warrants by JPs, and if it is at all feasible, we will move all the way, as proposed by Hon Giz Watson, to require magistrates to issue such search warrants.*

The committee draws to the attention of the house that retaining the current practice of JPs rather than magistrates issuing search warrants fails to give statutory effect to the recommendations of the Kennedy royal commission and it does not meet the standard set by the commission, which is to minimise corruption opportunity between JPs and those who apply for warrants. This is an important issue that warrants the attention of the house.

The committee acknowledges that the decision to retain JPs is a policy decision of the government's and to use magistrates may have resourcing implications. Although an agreed local variation, the use of JPs is contrary to the model bill. The Standing Committee on Uniform Legislation and Statutes Review did not feel that it could take it any further than that because it is largely a policy issue; however, I do think that given the very strong views expressed by the then opposition—the now government—to that bill that I referred to on the issue of who should be issuing search warrants, an explanation from the government is warranted on why it has varied the approach from the model bill and has not been consistent with the undertaking that it previously gave to ensure that search warrants are issued by magistrates, not justices of the peace.

Hon Ken Travers: It will be an interesting explanation.

Hon ADELE FARINA: Clause 118 again raises a very interesting situation, whereby a rail safety officer can give an oral direction instead of a written notice about a safety matter to a rail safety worker. The clause requires the rail safety officer to tell the person to cease and desist from doing an act and the reason why that person must do so. If the person does not comply with that direction, the person could face a penalty of up to $28 000. That is a substantial fine in anyone's language, and the substantial nature of that fine attracted the attention of the committee. The report states —

> The Committee noted that the rail safety officer is neither compelled to advise that non compliance is an offence, nor that the fine at the time of the oral direction is $28,000. This is in contrast to the prohibition notice in subclause 116(4)(e) which sets out that the notice must contain the penalty. So too with an improvement notice in subclause 111(4)(e).

The committee questioned why, when a written notice is issued, the written notice is required to specify that it is an offence not to comply with that direction, with a penalty of X amount of dollars, yet when providing an oral direction to the same effect there is no requirement for the rail safety officer to indicate the amount of the fine to be imposed. Given the amount of the penalty that could be imposed for noncompliance, the committee really felt that it would provide greater gravitas and focus to rail safety workers if they understood that if they did not follow the direction and were potentially in default of the legislation—an offence—the nature and size of the penalty that could be imposed would definitely focus their minds. The committee was of the view that it would be appropriate for the rail safety officer to inform the rail safety worker of the penalty as well.

The advice from the departmental officers was that to require a rail safety officer to detail the nature of the penalty was too big an impost, which seems to me to be completely contradictory to the situation in which a notice is issued. If that detail can be provided in a written notice, I find it difficult to understand why it cannot be provided orally. Given that I am running out of time, I might need to leave it there and actually explore this issue further during the Committee of the Whole stage. I wanted to address a number of other matters, but I need to leave those to the committee stage.

Hon Ken Travers: There is always the short title debate.

Hon ADELE FARINA: I did not intend to subject members to this twice!

Another issue I need to highlight is the issue that this legislation is supposed to be a no-blame legislation under the objects, yet it has a cost-recovery provision, which suggests that if costs are able to be recovered, blame needs to be apportioned. That was an issue that resulted in some debate by the committee and is covered in the report. I hope that the minister will explain how those two can live in parallel and how clause 127(6) can be reconciled with the no-blame policy objective of the bill. With those words, I will sit and await the minister's response on those issues that have been raised. I will raise the other issues with the minister during the committee stage.

HON SIMON O'BRIEN (South Metropolitan — Minister for Transport) [8.39 pm] — in reply: I thank members for their contributions to the second reading debate and their support for the proposition that the Rail Safety Bill 2009 be read a second time. Contributions made by several members are helpful to the house in working through the many and varied issues that are encountered in the bill.

As has been observed, this regime will replace an existing regime. In many ways, in fact, it adopts the current act and simply adds some other provisions to it. It was observed by the previous speaker, for example, that the minister responsible for the genesis of this bill and indeed her successor—bless him—have been absolutely certain about rejecting what I think Hon Alison Xamon referred to as the danger of applying the lowest common denominator. Where we believe that we have rail safety provisions that are superior to another jurisdiction's, ours will be the ones that prevail in this state. That has been recognised in not only the bill that is before us but also the contributions made by previous speakers and I thank them for that.

The Rail Safety Bill is subject to standing order 230A and our Chairman of the Standing Committee on Uniform Legislation and Statutes Review tabled the forty-sixth report accordingly. As usual it is a very comprehensive report by that committee. A very high standard was set by this committee in the previous Parliament —

Several members interjected.

Hon SIMON O'BRIEN: That is what you get, Mr Deputy President, with some decent chairmanship! I am glad to see that those standards have endured, although I might add that reports are a bit more fun to advance in opposition than they are to receive in government. However, that is something I will leave to the Leader of the House to offer some observations about because he has certainly told me a few behind closed doors.

I received the Standing Committee on Uniform Legislation and Statutes Review's forty-sixth report with all the respect that is due to the committee and its report. Once again, it has done a thorough job and it has raised some useful matters of interest for discussion, consideration and debate and we will do all those things through a couple of mechanisms that are available to us in the house. Hon Adele Farina indicated in her concluding remarks that there were some further elements that she had not had the chance to canvass just now because of the matter of time, but we will no doubt get on to those in the committee stage when we go through the bill clause by clause.

Hon Ljiljanna Ravlich: Aren't you going to respond to anything she has raised?

Hon SIMON O'BRIEN: I am responding to the second reading debate, if the member will allow me to do so, and we can do that using a number of frameworks. Firstly, we can go through each clause, as members in the house know, plus we have a supplementary notice paper that contains some particular amendments that will form the basis of debate and inquiry at that time. Also, we have the committee's report that I was trying to refer to just now, which highlights a number of matters that the committee wishes to bring to the house's attention, to challenge or to deal with in some other way. The government is also required to give a response to that report. By letter dated 21 April 2010, under a covering letter to the Clerk, I provided the government's response to report 46. That tabled paper will also form part of our considerations. Contained in that letter are many of the matters that have been identified in terms of picking them out and providing the explanations. As has been observed, it is probably better to deal with many of those issues as we go through the individual clauses, just to put the explanations in context. But I will just touch on some matters that were raised so that a response that is appropriate for a second reading debate can be given—although I notice that the second reading has the support of both sides of the house and will inevitably pass, or will indicatively pass—and we can deal with matters of detail at a further stage.

Hon Ken Travers: You know that there have been ministers who have talked oppositions out of supporting bills, though!

Hon SIMON O'BRIEN: That is why I am keen to complete my remarks. I want you to stick with me, Ken!

Hon Ken Travers: I am trying!

Hon Ljiljanna Ravlich: It is not hard! You are so light on!

Hon SIMON O'BRIEN: May it please gracious members opposite —

Hon Ken Travers: Just remember, minister; pick on Ljil and you pick on us all! That is except for Peter, of course; he has got special dispensation!

Hon SIMON O'BRIEN: Observation has been made by a number of members, and also by the committee, about variations to the model bill. Frankly, I am sure that my predecessor and I would make no apologies for that, because those variations are made for very good reasons—either to exclude some bits of the model bill or to include some extra bits that we felt would enhance and preserve the system in Western Australia. Those variations have been discussed in a number of places, and we will, no doubt, come to a number of them. I would point out, though, that some of the variations have come about as a result of extensive consultation over a very long period of time. There was genuine engagement with the sector in Western Australia. It is the case that this has been a work in progress over successive governments. When Hon Anthony Albanese was in Perth last Friday for the Australian Transport Council meeting, which I hosted, he made the very good point to those of us who were around the table as ministers from the various jurisdictions—the states and the territories, and New Zealand, were all represented—that at any given ATC meeting, which are generally held about six months apart, some of the faces are going to change. I have found that to be very true. It was quite alarming, actually. I have been around for about 18 or 20 months as part of this government, and I have gone from being the new kid on the block to the old boy uncomfortably quickly, because of course everyone gets a turn, not only to arrive but to depart. That makes it a bit difficult, however, when we have a matter that endures over several years and needs the concerted drive of a ministerial council to make sure that it gets there in the end. This matter has endured for quite a few years. One of the hurdles that can be encountered is a change of government. I was keen to ensure

that there was some further consultation directed by me in the second quarter of 2009, because I wanted to revisit with affected parties in Western Australia some of the concerns they had previously identified. I am very glad that we did, because we came up with some good submissions. We held a couple of public forums and received seven submissions from a range of groups, some that one would expect—such as the Public Transport Authority, the Australasian Railway Association and operators like Asciano Limited—but also some from smaller, tourist and heritage-type operators, who were understandably a bit concerned about being caught up in a legislative regime that was tailored more for national level operators than for little tourist railroads that run limited operations on either their own railway lines or on part of our network here in Western Australia.

We reviewed a number of issues that had been raised and as a consequence of that made some further final amendments to the bill. I was confident by the time I had to take it through cabinet that it did, in fact, represent the best interests of the sector. It was something that the incoming government could faithfully pick up from the previous government's time and I could approach the house with confidence that we had attended to some matters that were of genuine concern and recognised as such. I will not spend too much time on these, as they are matters that have already been dealt with, but there were provisions within the bill for terms of imprisonment as penalties; frankly, I concurred with the view that emerged during the consultation process that such penalties were inappropriate for the sorts of offences that we were talking about. There was an amendment to clause 188 to reinstate a national model bill exemption for volunteers, which was a major concern. It is one thing to have professional rail operators working for a big national rail company, but what about volunteers working, for example, on the Hotham Valley Tourist Railway, or some other group that clearly could not meet the requirements that were being contemplated in clause 188. Indeed, there were a number of other alterations to the bill—for example, to make more decisions reviewable when operators have concerns about decisions that have been made.

I am fairly confident in approaching the committee stage—we will not get to it now, because I am going to move to go to another item of business—that we will be able to address those considerations clause by clause, including a discussion of clause 5 and the need for ministerial capacity to provide exemptions from the regime. That is perhaps, with respect, a discussion that is best reserved for clause 5 during the committee stage, if that is all right; I see the member indicating that it is. A similar situation applies to clause 78. According to the response that I have tabled, we will go along with the suggested amendment, although we propose to change the wording slightly to achieve what we believe is the outcome that the opposition wants. We will have a discussion about justices versus magistrates approving search warrants. I notice that a number of identical amendments on the notice paper deal with that.

Hon Alison Xamon: It is the same issue.

Hon SIMON O'BRIEN: Yes, it is the same issue recurring. No doubt we will have that debate in sufficient detail to satisfy everyone.

Hon Ken Travers: It's a shame you don't get onto it today; it could be your second backflip for today!

Hon SIMON O'BRIEN: There have not been any backflips.

Hon Ken Travers: There will be, once we get onto that.

Hon SIMON O'BRIEN: We will see.

Another specific question asked by Hon Alison Xamon related to the time frame for the memorandum of understanding between the Office of Rail Safety and the workplace safety authorities. The development of a revised MOU to reflect this regime as opposed to the current regime is in progress. It has not been completed yet. It will be premature to complete that before the bill is passed.

I am aware of the time and a desire to move to another order of the day. If the house will indulge me, I propose to conclude my remarks on the second reading at this stage, without in any sense taking for granted the views that have been expressed by members. I assure the house that we will take as long as anyone requires in the committee stage to address those matters of details that have been raised and all the rest. I thank the house in anticipation for its support of the second reading and commend the bill to the house.

Question put and passed.

Bill read a second time.