RAIL SAFETY BILL 2009

Committee

Resumed from an earlier stage of the sitting. The Deputy Chairman of Committees (Hon Helen Morton) in the chair; Hon Simon O'Brien (Minister for Transport) in charge of the bill.

Clause 118: Oral direction before prohibition notice served —

Committee was interrupted after the amendment moved by Hon Adele Farina had been partly considered.

Amendment put and negatived.

Clause put and passed.

Clauses 119 to 126 put and passed.

Clause 127: Appointment of independent investigator —

Hon ADELE FARINA: I move —

Page 103, lines 4 and 5 — To delete "are recoverable" and insert —

may be recovered

This amendment has been proposed by the committee, after careful consideration of subclauses (6) and (7) of clause 127, which state —

(6) The reasonable costs of conducting the investigation are recoverable jointly or severally from any one or more rail transport operators responsible for the railway operations concerned.

(7) The CEO may, in a court of competent jurisdiction, recover the costs that are recoverable under subsection (6) as a debt due to the Crown.

The committee received a submission that raised some concerns about how this provision will be applied. The submission also raised the question of whether the cost of an investigation should be borne by the government, rather than by the rail operator, because it is in the public interest that an incident be investigated. At the committee's hearing with the departmental officers, we raised our concern that it is very clear from the words "are recoverable" that any costs will be recovered from the railway operators. That is inconsistent with the stated objective of the bill, which is a no-blame policy position. The departmental officers advised the committee that parliamentary counsel was of the view that the words "are recoverable" are akin to "may be recovered"; in other words, the money does not have to be recovered. The committee considered this matter long and hard, and it disagrees with the advice that was received from the department. The committee looked at the first principles of statutory interpretation, which clearly state that if a different word is used in a provision, it means something different. Therefore, the committee was of the view that because clause 127(6) does not use the word "may"—which under section 56(1) of the Interpretation Act 1994 is an important discretion—but rather states that costs "are recoverable', whether jointly or severally, and not any other option, the only discretion that is available under these subclauses is that the CEO may recover any costs that are recoverable in a court. Therefore, if an incident occurs and an investigation is held, the costs are recoverable from the operators. There is no discretion there. The discretion lies only in whether the CEO chooses or elects to go to a court to recover any costs that are not paid by the rail operators.

The departmental officer who attended the committee hearing provided some comments to the committee on this matter. Those comments can be found at page 29 of the report. I will read them out, because it is important for members to understand why this amendment has been moved by the committee. He stated —

> *When this clause was taken to public consultation, the industry did object. We wrote to parliamentary counsel and said, "In view of industry's objections, we are happy to remove that clause." He refused. His answer was, "If the cost is recoverable and subsection (7) says the CEO 'may' recover it, the word 'may' in legislation gives him the option of not recovering. Therefore, it is better to leave it there to give the option of recovering if you want to recover, but if you decide as a matter of policy that you will not recover, that is okay." That is where that stood. We had a stand-off. We really wanted to take that out.*
>
> *Parliamentary counsel suggested it was in everybody's interests that it be left there—or not in everybody's interests; obviously not the rail operators. We agreed there could be cases in which a significant rail accident might be caused by somebody who was not a rail operator; for instance, a person driving a car across a level crossing, causing one train to brake savagely, derail and hit another train. That could all be the cause of somebody who has got nothing to do with the railways. That is where that ended.*

> *We gave way because parliamentary counsel just simply refused to take that out on those grounds—that it is not actually necessary to recover.* [7]

The committee considered those comments from the departmental officer. It also considered the fact that the department had clearly given a lot of consideration to removing this provision in light of the public submissions that had been received. Having regard to that, and having regard also to the first principles of statutory interpretation, the committee states in its report —

> 9.50 The Committee is of the view that subclause 127(6) mandates cost recovery yet this is contrary to the 'no blame' policy objective of the Bill. If the intention is to exercise a discretion about whether or not to charge the rail transport operators, then subclause (6) should say "*the reasonable costs of conducting the investigation may be recoverable*" rather than "*are recoverable*". …

For this reason, the committee has made the recommendation that is now being considered by the chamber.

Hon SIMON O'BRIEN: I also am inclined to the view that the term "may be recovered" is a term that provides a discretion without doubt, rather than relying on an examination of the term "are recoverable" to find some discretion that it has been argued may lie within it. With that in mind, the government will agree to this amendment.

Hon KEN TRAVERS: I thank the minister for his comments. This is probably one of the clauses in which we are moving away from the model legislation. There is probably some opposition within the industry in Western Australia to the inclusion of this clause. It has been put to me that, if this legislation is about no-blame investigations, it would be inappropriate to charge someone for the cost of an investigation. The words proposed in this amendment may give some comfort to people that that is not the intention.

With the indulgence of the house, I want to make some general comments about some of the other clauses that are dealt with in part 6 of the bill. Part 6 deals with the conduct of investigations and the reporting of investigations. I am concerned in particular about draft reports. Clause 132 provides that draft reports can be provided to people on a confidential basis. In my view, one of the groups that should be provided with a draft report for comment is the rail union that represent the workers in this area. That would certainly be good practice. I want to put that on the record and make it very clear so that anyone who may read *Hansard* in the future will see what our intent was with these investigations. It is very important that the representatives of the employees in the rail safety industry are given a draft report and are able to put their perspective on any issues that are raised. The employees are the people who are on the ground, and it is often their lives that are at risk. They will, therefore, have the best understanding of safety issues.

Therefore, with those comments I appreciate the minister's comments and reiterate that, although I do not know whether it will satisfy all the concerns of industry, I think it will certainly go some way to satisfying them. It indicates a clear intent not to recover the cost of the investigations, at least on every occasion, from the respective rail transport operators that are concerned.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 128 put and passed.

Clause 129: Advise as to immediate action that is required —

Hon ADELE FARINA: I move —

> Page 104, lines 5 to 13 — To delete the lines and insert —
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> If, in the course of an investigation, an independent investigator reasonably believes that immediate action is required to prevent an occurrence involving the rolling stock or rail infrastructure of a rail transport operator that could result in, or that has the potential to result in —
>
> (a) the death of, or injury to, any person; or
>
> (b) damage to any property or equipment,
>
> the independent investigator may, in writing, advise the CEO, the Rail Safety Regulator and the rail transport operator that that action is required.

One of the fundamental legislative principles that the committee routinely considers is whether the bill is ambiguous or drafted in a sufficiently clear and precise way. In this amendment we will not change any of the wording or the intent of the provision; we are simply restructuring the provision so that it reads a lot more

clearly. The provision as it currently stands in the bill is one sentence of 84 words. It is difficult to read and has a minor grammatical error in line 9 where the word "in" is unnecessarily repeated at the end of that line. Fundamentally, the committee makes this recommendation on the basis that it is a local administrative variation and does not impact on the uniformity of the bill because the essence of the clause remains exactly the same, only it is easier to read.

Hon SIMON O'BRIEN: The government supports this amendment, which is in effect a change in the layout or the structure of the clause. I think it goes a bit beyond what we would dismiss as a Clerk's amendment. Quite frankly, I am of the view that the proposed construction is far preferable to what was drafted, so we will support the amendment.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 130 to 152 put and passed.

Clause 153: Medical examination —

Hon KEN TRAVERS: I just want to briefly ask whether the minister can give us an explanation of why the government believes that clause 153 is necessary. As I understand it, there is already a significant medical regime for employees within companies. There is drug and alcohol testing and a range of methods whereby staff can be reassessed at any time. I wonder whether the minister can give an explanation why the government feels it is necessary that employees involved in an accident be subjected to a further medical examination.

Hon SIMON O'BRIEN: I think it is highly likely that it is the case that the employer will have a medical regime in place, as the member says. Indeed, these provisions are in addition to anything else that already exists. As with much else in this bill, the purpose is to enhance rail safety through a variety of ways and means. We have discussed, for example, powers of direction and prohibition notices. This clause contemplates the need for our independent investigator to get access to information. That is something that I do not think is already in existence within the operator's own procedures for its staff's medical condition or the records that are kept. This provision is deemed necessary to ensure explicitly that the sort of information, such as medical information, that led to a rail safety incident can be investigated by our independent investigator. I think that the answer should satisfactorily address the member's question. For a little further discussion on it, I would refer members to the explanatory memorandum, which has also been made available. Hopefully, that will satisfy the Committee of the Whole as to the need for the existence of this clause.

Hon KEN TRAVERS: I have one other quick question to ask the minister. I note that the cost of the examination will be picked up on behalf of an employee, but the clause does not mention whether it is envisaged that the examination will be done during the employee's time or the employer's time. Does the minister have any view as to which one it should be?

Hon SIMON O'BRIEN: I am not sure whether I can provide the member with the ultimate answer to his question. Circumstances may show otherwise in practice. Firstly, a rail employee the subject of a serious investigation may well be stood down from duty at the time of a medical examination. Aside from that, I would have thought that a rail operator cooperating with an independent investigator would make the employee available during the operator's time, because the examination would be in connection with the course of employment. That is my gut feeling.

Hon Ken Travers: I do not disagree with that.

Hon SIMON O'BRIEN: Although, obviously, there is always the capacity for some different arrangement to be reached by agreement or possibly through the necessity of other circumstances that may present. One that occurs to me would be—again I hypothesise—an employee who might be off on some extended period of leave, possibly sick leave in connection with stress or injury or some other form of extended leave, at a time when it is necessary for the matters contemplated in clause 153 to be progressed. I guess what I am saying is that there is no definitive answer, but I think the member agrees with me that that is a fair assessment of the situation.

The other matter that we have not contemplated in our brief exchange so far is, of course, that we are making an assumption here that we are talking about a rail operator's employee. It could be someone quite independent. It might be, for example, a truck driver who is not employed by a railway but who is involved in a smash at a level crossing. Aside from that discussion, therefore, the true answer is that the circumstances will dictate —

Hon Ken Travers: Primarily, you wouldn't see it as an employee during ordinary work hours.

Hon SIMON O'BRIEN: This deals with employees.

Hon Ken Travers: Yes.

Hon SIMON O'BRIEN: The employees would come into contact with the matters that this bill touches on in the course of their employment by definition. The other matters that flow from it, such as medical examinations and related considerations, would also be something that could reasonably be expected to be carried on during the operator's time.

Clause put and passed.

Clause 154: Analysis —

Hon ADELE FARINA: I move —

Page 119, after line 31 — To insert —

Penalty: a fine of $28 000.

The arguments for the committee moving this amendment are similar to ones we have already considered this afternoon on the requirement for a rail safety officer to specify the quantum of the penalty. It is again about a direction being made to a person under this clause 154(10) on analysis, which states —

…an authorised person must —

(a) warn the person it is an offence to fail to comply with the direction unless the person has a reasonable excuse; and

(b) advise the person that —

(i) it is not a reasonable excuse that complying with the direction might tend to incriminate the person or make the person liable to a penalty; and

(ii) the results of a breath test or an analysis under this section are not admissible in evidence against the person in any civil or criminal proceeding.

The committee is of the view that there should also be a requirement for the person making the direction to specify that there is a penalty for the offence, and that is a fine of up to $28 000. It is therefore the same argument we have made previously. I will not labour the point.

Hon SIMON O'BRIEN: I would never labour a point! In responding briefly, I will therefore adopt the demeanour that the mover has. As she pointed out, much of the spirit behind the proposed amendment has already been considered by the Committee of the Whole in much of the argument raised. My advice is that it is not usual legislative practice to include a requirement stating the quantum of the penalty in such situations. We discussed that at length when we debated clause 118, which does actually enact the national model bill clause 107 in the same drafting style. We did consider a similar amendment earlier; therefore, for the sake of consistency, I do not propose that we do anything other than retain the view that prevailed then. I am indicating that the government will not be supporting the proposed amendment, and do so thinking that the legislation will not be any the poorer for not having done so.

Hon LIZ BEHJAT: I have a question on that clause. I understand in the government's response that the minister said that it is not usual for quantum to be put in these clauses. Perhaps the minister could say, by way of explanation for me as a relatively new member of the house, why the quantum of the penalty is mentioned in clause 154(7), which reads —

A person must comply with a direction under this section, unless the person has a reasonable excuse.

Penalty: a fine of $28 000.

I am a bit confused as to why the minister said quantum would be mentioned in one clause but not in another clause.

Hon SIMON O'BRIEN: The member has pointed out that in subclause (7) an offence is created, which states —

A person must comply with a direction under this section, unless the person has a reasonable excuse.

Penalty: a fine of $28 000.

Whereas apparently the proposed amendment to subclause (10) basically does the same sort of thing. I am not so sure, but from looking at this a little closer, I think there might be another unintended consequence of putting in "the penalty is a fine of $28 000" or words to that effect. If we were to proceed as proposed, the construction might indicate that the authorised person might be at risk of a penalty of $28 000 rather than the person failing to comply with the direction. Be that as it may, I think we have been through the arguments already. I guess the simple answer to the member's question, which is quite pertinent, is that subclause (7) creates the offence. The

other clauses—there is more than just subclause (10)—relate to the guidelines for such directions rather than the actual offences themselves, so that is why we would not put the penalty wording in each of them.

Hon ADELE FARINA: I did not intend to labour this point but I feel I need to respond to correct the record in relation to a statement made by the minister. The minister suggested that if we were to move the amendment to insert the words after line 31 "(iii) the penalty for an offence is a fine of $28 000", that would result in an implication that the authorised person was subject to a penalty for an offence and that the fine was $28 000. I draw to the minister's attention that that is not the case because at (10)(b) it reads —

> advise the person that —

And it lists them from (i) to (ii). This amendment would therefore fit in under that. The authorised person would be required to advise the person of a third point, not that the authorised person would be subject to a penalty. I think it is important that we clarify that so that members do not think the ramifications the minister suggested would eventuate if we were to make this amendment, because they would not.

Hon SIMON O'BRIEN: I think we have found some common ground here, which is a good thing. It is something I can support the honourable member on. That being that we do not want to labour this clause all night. We are as one on this. The honourable member might very well be right. Perhaps my supplementary notice paper is faulty, but I would have expected that if the amendment were introducing a subparagraph (iii), "penalty or fine of $28 000", the words proposed to be inserted would be preceded by "(iii)". As they are not, at least on my version of the supplementary notice paper, one could only assume they are standalone words that simply attach themselves to the body of the whole subclause (10).

Hon ADELE FARINA: Thank you; I take the minister's point. The committee recommendation has been transcribed incorrectly onto the notice paper. I was reading from the "bible", the committee report, and he was reading from the supplementary notice paper, which is why we were somewhat confused. I do apologise and note that the minister is correct in his view in relation to the wording as it appears on the supplementary notice paper. I also therefore would like to move the recommendation that is contained in the committee report and that is —

> Page 119 after line 31 — To insert —
>
> (iii) The penalty for an offence is a fine of $28 000.

I do apologise if we were looking at different wording.

Hon SIMON O'BRIEN: I am pleased to accept the honourable member's apology, though it is not necessary. But I must pay her a tribute: when she thinks about who put the supplementary notice paper together, she is gamer than I am if she wants to attach a public mistake to the Clerk's party! May providence preserve her! Now that we have clarified that—we will still not support the amendment.

The DEPUTY CHAIRMAN (**Hon Helen Morton**): It is accepted as a clerical error and the committee's recommendation will be taken as the amendment.

Amendment put and negatived.

Clause put and passed.

Clause 155: Regulations relating to medical examinations and analysis —

Hon ADELE FARINA: I move —

> Page 120, lines 25 to 27 — To delete the lines.

Clause 155(k) deals with regulations relating to medical examinations and analysis. The committee report states —

> 9.60 The Committee noted that subclause (k) is part of a clause that sets out what is intended to be in the regulations in terms of administrative processes. It sits oddly in this particular part of the Bill titled "*Part 6, Investigations, Division 2, Investigation Powers*", whereas the subject matter of the subclause is liability. It is unusual to have the issue of liability addressed in a regulation rather than in the principal Act, especially when an entire Division 2 in Part 9 of the Bill is devoted to the subject matter of "*Civil Liability*". The Committee is concerned that Part 9, Division 2 applies to rail safety regulators, officers, investigators, authorised persons and those *reporting* results of tests and examinations but does not extend to persons *administering* those tests or taking samples.
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> 9.61 The Committee is of the view that the subject matter of liability, (criminal or civil) be it a limitation, exemption or protection is arguably better suited to primary legislation rather than

delegated legislation. This raises that fundamental legislative principle the Committee routinely considers - *Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?* That is, the matters to be dealt with by regulations should not contain matters that should be in the Act, not subsidiary legislation. The risk is that the content of the regulations is unknown and may erode or diminish protection. The question of parity for persons *administering* those tests or taking samples with rail safety regulators, officers, investigators, authorised persons and those *reporting* results of tests and examinations also arises.

9.62 The Committee noted that one of the Terms of Reference of the Joint Standing Committee on Delegated Legislation [which will be scrutinising regulations made under subclause 155(k) if the Bill is passed] is to "*inquire whether the instrument - contains provisions that, for any reason, would be more appropriately contained in an Act*." In 2001, that committee tabled a report indicating that the subject matter of liability is of such fundamental importance it should be dealt with expressly in the primary Act, not by regulation.

9.63 In further correspondence, the Department advised that the Parliamentary Counsel said:

> *Part 6 of the Bill which contains clause 155(k) is a Part that applies only in Western Australia and does not enact in this State provisions of the Model Bill. I think that Part 6 should be as self contained as possible. Clause 217* [in Part 9] *is a local variation to adopt the effect of a clause in the Model Bill (clause 151).*
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> *Clause 155(k) was drafted as a result of instructions to adopt something along the lines of the* Rail Safety Act 2001 (NSW) *(which has since been repealed) section 42(5) and Schedule 1 despite advice that I had previously given to the effect that the scheme should be set up in the Act. However, it should be noted that it is up to Parliament to decide whether or not such powers should be delegated to the Governor and any regulations made by the Governor under the power can be disallowed by Parliament.*

The committee found that it was not appropriate that the delegation be made to the Governor and that the liability of persons administering tests or taking samples should be in the bill, not subsidiary legislation. Before going on to detail the proposed amendments, I would like to hear the minister respond to the question of why the government is of the view that these powers should be in regulations rather than in the act, in view of the advice and previous decisions of the Standing Committee on Delegated Legislation and standard practice in these sorts of matters.

Hon SIMON O'BRIEN: I honestly cannot answer the question about the impacts or otherwise of the findings of a former Standing Committee on Delegated Legislation and those who drafted this provision. I agree with what the member has been proposing and the government will agree to the amendment, which in effect deletes subclause (k). The government will also agree to new section 218A as per the supplementary notice paper, because it is its view that the matters of protection against liability reside more properly in the principal act than in subsidiary legislation.

I note, too, in looking at the construction of other parts of the clauses, that all the things that have to do with the manner in which samples are taken and the like are properly mentioned and are delegated to subsidiary legislation. That should take care of it. The member is quite right about the matter of protection against liability and that is why it should go into new section 218A.

Hon KEN TRAVERS: I thank the minister for his comments on that matter. I have no problems with the argument that it should be taken out of the regulation-making power. Again, with the indulgence of the house, it makes sense to have a debate on this issue in totality rather than wait until we get to the new clause because the two are related. I do not have a problem with taking it out. The amendment to clause 155 would suggest that the government is going to make regulations regarding the protection. I would not have necessarily thought that that was a complete prohibition on any liability for a person acting in good faith. If that was the government's original intention, I am surprised that it was not written into the act, as we are now proposing to do. I am looking for an answer from the minister. If someone is required to give blood or someone administers a test in some way and, as a result of administering that test, causes harm to the person such that someone might want to take some sort of civil action against them, if we eventually pass new section 218A, it would suggest that that person has no recourse to any civil action for any harm that has been done to them, which is a critically harsh measure for this Parliament to be putting into legislation. I wonder if the minister could explain to us whether it was always the intent under clause 155(k) to give a complete blanket prohibition on the ability of people to take action against someone who has taken it in good faith or whether it was originally intended to be a lesser process. Why does

the minister believe that someone should not have the right to take action, if we are going to go down that path, if they are harmed as a result of taking that blood or urine test? I can imagine the horror circumstances if it is taken in the wrong way or at the wrong time or in the wrong place. It could cause significant damage to people and we would have written off their ability to get any compensation. I have some concerns about that. I would appreciate the minister answering those questions.

Hon SIMON O'BRIEN: If members have those concerns, it is absolutely essential that we discuss them. In doing so, we have to canvass a potential new clause, and it is alluded to in the report and it is on the supplementary notice paper. It would be in the interests of the Committee of the Whole if we refer to its terms in passing. After removing clause 155(k), we are contemplating inserting a clause that says that no action may be taken against a person who, in good faith, administers the test or takes a sample of blood or urine or other body tissues or fluids carried out under this act. We are doing a number of things by those twin actions. Firstly, by removing the lines that we are removing, we are acknowledging that those things should not be reserved for regulation.

Hon Ken Travers: We all agree on that.

Hon SIMON O'BRIEN: We all agree on that. Secondly, we also anticipate under the other subclauses of clause 155 that there will be a range of matters prescribed in regulation in due course that will touch on the manner in which these tests and so on are to be carried out. We all note that.

The head of power contained in proposed section 218A provides protection for a person acting in good faith who administers those tests. I do not believe that it abrogates in any way the rights of a person who is harmed in the course of those tests from taking some sort of action for compensation or other redress against, for example, the department or the office of the independent investigator or the rail safety regulator or whoever it may be. It excuses the individual conducting the test from liability if that individual has acted in good faith. That would include following the various guidelines and being suitably qualified et cetera. The important thing about the point that Hon Ken Travers raised is that there is no intention whatsoever to take away anybody's right that if they are submitting to a blood test or whatever in accordance with the law and something awful goes wrong and they get an infection or worse, they have no recourse.

Hon Ken Travers: Are you sure that that new clause won't do that?

Hon SIMON O'BRIEN: The advice that is available to me now is that it does not.

Hon KEN TRAVERS: In light of the time, I suspect that we are about to suspend the sitting. I would not mind if the minister can get some further advice during the break so he can inform the house exactly what the implications are. We can pass clause 155 because I think we all agree on that. When we come to proposed section 218A, we can have the debate and the minister can provide the more detailed answer on what the government believes are the implications of 218A.

Amendment put and passed.

Sitting suspended from 6.00 to 7.30 pm

Clause, as amended, put and passed.

Clauses 156 to 164 put and passed.

Clause 165: Manner in which independent investigator may give directions under this Division —

Hon ADELE FARINA: I move —

Page 126, line 11 — To delete "." and insert —

; and

(c) must advise that the penalty for an offence is a fine of $11 000.

Page 126, line 17 — To delete "." and insert —

; and

(c) states that the penalty for an offence is a fine of $11 000.

I moved the amendments concurrently because they are identical. The reason the committee has recommended these amendments is that clause 165 provides for an independent investigator to give oral or written directions under division 4, which is titled "Seized things and samples taken". The direction in clause 165(2) requires that the independent investigator warn the person that non-compliance with a direction is an offence. However, it does not require advising the person of the amount of fine. This is a similar issue to one we debated earlier today. Similar to other clauses in the bill, the committee is of the view that the independent investigator should advise of the $11 000 fine. Clause 165(3) provides for a written direction and requires the independent investigator to

state that it is an offence to refuse or to fail to comply with a direction. However, the written notice is silent on the amount of the fine. During the committee's consideration of this bill, we were advised in further correspondence that the Parliamentary Counsel's Office said that it had not been able to find a similar provision in our legislation that requires the amount of the fine to be so stated. It would have probably helped parliamentary counsel to look at clause 116(4), in which it would have been found quite easily, because in clause 116(4) of this bill there is a requirement, as we debated earlier this evening, for the amount to be stated. The committee is therefore of the view that if a penalty is stated in the pro forma written direction for noncompliant behaviour, the committee should make these two recommendations, where again there is a lack of consistency in this bill with written versus oral direction, and also now between two different forms of written direction. Whereas on the prohibition notice a penalty is stated, on the written direction, pursuant to clause 165(3), there is no requirement to state the penalty. The committee is of the view that we should be consistent in the application throughout the bill, and has made the recommendation that in each case, whether an oral direction issues or a written direction issues, the quantity of the penalty should also be stated.

Hon SIMON O'BRIEN: Mr Deputy Chairman, if you are entertaining both amendments in one go, I will address them in one go.

The DEPUTY CHAIRMAN (Hon Michael Mischin): We will do that.

Hon SIMON O'BRIEN: Without in any sense wanting to be contrary or difficult, though, I fear you may have to put them as separate questions. I have listened closely to what the mover has had to say. The points that are made have been canvassed previously in this committee stage. I think Hon Adele Farina made some points about consistency, as indeed I have made points about consistency. With that in mind, and in connection with the first amendment, which is 8/165, to be consistent with what we have done in constructing or reconstructing this bill so far, the government will be opposing any changes to clause 165(2). Therefore, we will be voting against the first amendment. That is consistent with our previous attitude towards an oral direction having a reference to a penalty. You can probably see where this is heading, Mr Deputy Chairman. Just to get it on the record, amendment 9/165 proposes to add a paragraph (c) to clause 165(3). The government will support the proposition that we do that, because that would make it consistent with clause 116(4), in that the notice should carry an advice as to what the penalty is when advising that there is an offence involved in disregarding the notice. The only question that raises is the question of the amount being recorded in that time, because the amount might change from time to time, and it may be more convenient to have the written direction not contain that information. Just bear with me for a moment.

If I may continue my remarks, I was indicating to the Committee of the Whole that the government accepts in principle to put in a subparagraph (c) at this point—that is, at line 17—that provides a requirement that the direction in writing should, amongst other things, state the penalty for the offence. I rather hold to the view that it should read, "states the penalty for the offence" rather than saying that the penalty for the offence is such-and-such, because I believe that there could be a range of offences that could be the subject of a written direction and various penalties would apply, so it might be better. I should think also that, unlike the prohibition notice we discussed under clause 116, this would not be a printed form; it would be an individual letter or some other instrument in writing, constructed for the purpose. I accept the view that has been advanced by the mover that, for the sake of consistency, the direction in writing should require that the penalty be stated, but not that we should actually cite an amount in the principal act. With that in mind I will quickly draft a preferred amendment, which might be taken as an amendment to the amendment.

Hon Adele Farina: I am happy to withdraw the proposed committee amendment so that we can just move the minister's amendment, which would delete the full stop and insert "states that the penalty be stated". Does that concur with the minister's wishes?

The DEPUTY CHAIRMAN (Hon Michael Mischin): Since the minister is drafting an amendment to the second of the proposed committee amendments, perhaps we should deal with them separately and dispose of the first one first—that is, 8/165. There are two and I do not believe that the first one has been withdrawn.

Amendment put and negatived.

The DEPUTY CHAIRMAN: Moving on to clause 165(3), at the moment we have a motion moved by Hon Adele Farina that the full stop be deleted and certain words be inserted.

Hon ADELE FARINA: May I suggest that the words for proposed clause 165(3)(c) set out the penalty for the offence by borrowing from the words in clause 116.

The DEPUTY CHAIRMAN: Does Hon Adele Farina withdraw the amendment proposed at 9/165?

Hon ADELE FARINA: I thought I already had, but I am happy to do so again!

Amendment, by leave, withdrawn.

Hon SIMON O'BRIEN: I move —

Page 126, line 17 — To delete "." and insert —

; and

(c) sets out the penalty for the offence.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 166 to 270 put and passed.

New clause 218A —

Hon ADELE FARINA: I move —

Page 168, after line 14 — To insert —

218A. Immunity for administering a test or taking a sample

No action may be taken against a person who, in good faith, administers a test or takes a sample of blood or urine or other body tissues or fluids carried out under this Act.

Members will recall that essentially we discussed the reason for this amendment during our consideration of clause 155. I do not propose to repeat what was said then because I am sure members understand the intent of the new provision. I remind members that Hon Ken Travers raised concerns about this provision. I understand that the minister was going to consider those during the break.

Hon SIMON O'BRIEN: On behalf of the Standing Committee on Uniform Legislation and Statutes Review, Hon Adele Farina raised the need for a new clause 218A to provide an immunity for those administering a test or taking a sample pursuant to the various provisions in the bill. The government agrees that there is a need for this provision. Members will recall that in an earlier stage of these proceedings, we supported the view that the protection from liability provision should not reside in the regulation-making power and be fulfilled through subsidiary legislation; rather, it should be extracted and placed in its own clause in the principal act. This is what new clause 218A seeks to do. The government supports the proposed new clause.

Hon Ken Travers raised some matters before we broke for our evening meal. I was asked to seek advice about the impacts of an immunity clause on a person potentially suffering harm as a result of a test that involves taking a sample of blood, urine or other body tissues or fluids carried out under this legislation. I have done so. I provide the following advice to the Committee of the Whole. Firstly, I remind members that immunity is granted to many persons acting in good faith under many different acts of Parliament. It is not an unusual protection and, indeed, I assert that it is a necessary protection. Such a regime as this would not work if we did not have it, because if we did not have immunity for those who are required to do the tasks that need to be done, I suggest that we would not have anyone willing to conduct the tests. In relation to the impacts of this clause, it is the case that this focuses on providing a protection to the tester. It provides that no action may be taken against that person, and that is what it means; it is an immunity. The only caveat is that a person acts in good faith. If the person deliberately does something that he should not do or if he behaves recklessly or fails to display due diligence or professional skill, action might be brought against him, and rightly so. If he conducts his test in the normal course of events in good faith and in a professional way, he would have nothing to fear. Hon Ken Travers asked me to consider the question of what would happen if there was a negative impact on the person tested and what recourse he would have if he could not take action against the person who performed the test. I do not know whether there are definitive answers in the law of tort. I am certainly not qualified to suggest what any of those elusive answers might be. I do not know whether anybody is without a specific case before a court. I think that is the answer; each case would have to be judged on its own facts in a court competent to deal with the issue. A person suffering a negative impact from a government-ordered test might succeed in taking some action—not, of course, against the individual tester who is protected, but potentially against the department or the office that orders the test. Again, I cannot provide a definitive answer as to how that might happen because it would rest on the facts of the case. I am not put off by any of that, because the fact of the matter is that similar immunity is granted under so many different acts that provide for compulsory testing and a range of other things. It is necessary to have, and that is why the government supports the inclusion of this provision.

New clause put and passed.

Title put and passed.

Bill reported, with amendments.