OCCUPATIONAL SAFETY AND HEALTH AMENDMENT BILL 2010

Second Reading

Resumed from 1 July 2010.

HON JON FORD (Mining and Pastoral) [10.04 am]: In the opening remarks of her second reading speech, Hon Alison Xamon stated that the Occupational Safety and Health Amendment Bill 2010 seeks to introduce important reforms to increase the safety of workplaces in Western Australia and includes the principle of corporate criminal responsibility. The primary issue that the bill seeks to address is to ensure that culpable employers are held responsible for workers. The Labor Party supports the principle of the bill and I would suspect that most people in this house support the principle of this bill. However, we are not convinced on a number of issues regarding the policies and mechanics of the bill in trying to effect that outcome. That is because this is a very complex matter. We fully support the strengthening of the sanctions—fines and the like—but we are not convinced about some of the mechanisms of the criminal sanction for industrial manslaughter. There are a couple of reasons for that. One is that we are exploring why current criminal law cannot be applied in an industrial context. We are looking at that because it was not that many years ago—maybe it was, but certainly when I was a child—that not only did people not talk about domestic violence, but also police, the community and the courts did not view assault between a man and woman in their home as common assault; they simply saw a dispute between a man and a woman. Therefore, we have written to a number of legal bodies seeking a view on whether current criminal law can be applied in an industrial context. I understand that there are some complexities in corporations law in this country regarding limited liability. Some of the limited liability provisions tend to favour the employee and some provisions the employer; therefore, we have to be very careful.

But we will be supporting the second reading, and we will wait to see what Hon Alison Xamon's comments are in regards to the Greens (WA) policies in response to some of the issues that I will raise. As the bill stands in its current form, the Australian Labor Party will not be able to support the third reading, but we support the second reading. Later on I will try to refer the bill to the Standing Committee on Legislation, because that is a great mechanism to explore those particular issues. When giving her second reading speech, Hon Alison Xamon said that on average one person is killed every 17 days in WA from traumatic work-related incidents. I am not sure whether it is the case today, but at one stage that figure was one person killed about every nine days; therefore, the numbers are quite fluid. I am not quite sure why we find ourselves in this position. Successive governments of all persuasions have continued to fail working men and women in this state and, in some cases, children. Children have been severely burnt in fast-food outlets and there have been other accidents of that type.

Last week, a guy who was standing in a work yard, probably waiting for his mate to knock off work so that they could go out for a beer, was crushed to death by a pole that fell on him. We read in the newspaper this week about a diver whose arm had been ripped apart, while he was at extreme depth, by an exploding hose. It is extraordinary that that man survived. I do not think the newspaper really dealt with how lucky that man was to survive that accident. This guy had to transition into the diving bell, he was then taken into the decompression chamber, and he then had to wait there while they brought him to the surface, and all the time his arm was being subjected to increasing threat from infection. They eventually got him back to the beach, and he was taken to hospital, and that is where he remains today. That accident raises a lot of questions about why, in the pursuit of capital, people need to be injured. We have heard the arguments in this house that accidents such as that are caused by a technical failure. I can tell members that technical failures happen because people have stuffed up in their risk analysis of a particular piece of kit. They have weighed the technical specifications of a piece of equipment—in this case a hose—and the risk of explosion, against the cost of the engineering that would be required to ensure that that hose would not explode, and they have taken the view that it is not worth the cost. They have taken the view that the likelihood of the hose exploding and injuring a person is so low that they should not spend the extra bit of money to ensure that an explosion would not occur. How do I know that that is what happens? It is because I have been involved in these types of discussions in the various projects that I have worked on over time.

Another example is the engine that exploded on a Qantas A380 plane when it was on its way back to Australia. What is emerging from the reports is that the specifications for that engine indicated that it had the capacity to be run at a certain percentage thrust of power for 90 to 100 per cent of the time. Indeed, Qantas needed, on its flights between Australia and the United States, to run that engine at that power setting 100 per cent of the time in order to make a dollar. The argument that was put by the manufacturer of that engine, Rolls Royce, was that, yes, that is the specification, but it never intended that that engine would be run at 90 to 100 per cent of power for the duration of the flight. I need to explain that Rolls Royce had made the judgement that the risk of a catastrophic failure of that engine was so low that it did not need to tell its customers that the engine should not be run at that 90 to 100 per cent setting all of the time. There will be many years of court action as a consequence of that explosion. The net result of that catastrophic failure from an engineering perspective was a huge

economic loss to a great Australian company at a very difficult time of operation. That explosion put at risk the lives of all the people on that plane. It was only due to pure luck that the debris from that engine explosion did not kill or maim anyone on the ground, or anyone in the aircraft. That is a big-end example. The explosion of the hose is a small-end example.

We have had debates in this house about how risk-based analysis is the way forward for occupational safety and health. Labor recognises that successive governments have failed in their duty to protect workers in this state. That is why a future Labor government is committed to holding a royal commission into occupational safety and health laws. People have argued that we have had report after report after report into occupational safety and health, and that is true. Yet as governments and as regulators, we have failed to make significant changes in this area. People are entitled to expect that they can go to work and be safe. We want to have a third party—as they do in the commercial sector—do an audit of the way this state does business with regard to occupational health and safety. We are committed to that. There needs to be a major cultural change in the way the community, particularly the industrial resource community, deals with workplace safety.

There also needs to be a change in the way governments and regulators deal with workplace safety. We had an example of that yesterday—it is a light-on example—when the Minister for Mines and Petroleum, in his frustration with Magellan Metals, said that the hysteria around Magellan meeting its obligations under its environmental guidelines and rules means that probably 300 people will lose their jobs. That is a classic indication of a cultural issue, because that says to me that what is at the forefront of the minister's mind is that jobs come first. Of course that should be a consideration. But the most important consideration should be safety. Another failure by Magellan resulted in my asking the Minister for Mines and Petroleum a question without notice yesterday about how many safety inspections had been undertaken of Magellan's operations at Wiluna. In the scheme of things, five safety breaches last year is not too bad, but we will need to get some details of those breaches.

One of the great difficulties that I had as a safety representative on-site was convincing people to look after themselves and their comrades in the workplace. I remember one incident in which there had been a high-intensity, flash fire caused by a propane explosion. After that fire, I walked past a colleague who had been burnt so badly that his skin was running down his arms and dripping off his fingers like plastic, and he was saying, "Look at me; am I all right?", and I said, "Yes, you're all right, mate", and we took him to hospital. The very next day, the company determined, as a precautionary matter, that everybody on-site had to wear long-sleeved shirts, and cotton underwear and socks, rather than nylon. Another guy who had been involved in that fire had had his nylon underwear melt onto his body, through his overalls, and also his socks. So I had to stand up at union meetings and explain to my comrades on that worksite why they should abide by the rules set by the company. Up until that point, everyone had been wearing shorts—we were working up on the North West Shelf, and it was stinking hot—and short-sleeved shirts, and whatever type of underwear and socks they wanted to wear. That story gives members an idea about what it takes to bring about cultural change.

Production levels must not take priority over safety; safety must come first. Also, the workforce must feel that it is in a no-blame culture—that is, an environment where people who make innocent mistakes that may result in a near miss or somebody being injured feel safe enough to report the incident without fear of being beaten around the head or losing their jobs. Time and again we have heard employers—it goes on to this day—saying that safety issues are used as tools by unions and employees to achieve "another outcome". I do not know what the other outcome is.

Hon Alison Xamon interjected.

Hon JON FORD: I have never been involved in a situation in which workers have used safety issues to gain fair wages and conditions, as is claimed from time to time by employers to this day. I have a mate who was a senior safety representative in the Newman and Whaleback operations. He is a great guy and a great asset to his company and the community of Newman. After years and years and years of being put under stress by his company when he raised safety matters, he nearly had a breakdown. As a result of that, the company has lost a great safety representative. The reasons for the near-breakdown were twofold: firstly, there was the pressure placed on him by family responsibilities; and, secondly, when fatalities and serious injuries occurred, he saw that as a personal failure. That is a bad indictment of workplaces that employ people who are just striving to support their families.

I will use BHP to demonstrate the complexity of these challenges. BHP, as we all know, had an atrocious run of a whole bunch of fatalities over a short period. It tried all sorts of methods to stop them happening, including constant dismissals of supervisors, employees and contractors, yet the fatalities kept on happening. It is my opinion that that was because it was failing to address the issue of cultural change. It is doing a lot better now, but it has taken a long time. BHP was not helped in trying to address those issues because of the Department of Mines and Petroleum's refusal to release the section 45 report into those failings, based on the grounds that it

was a commercial-in-confidence document. I do not accept that to be the case. I talked to BHP only two weeks ago, and it does not see a problem with that being done. I think the minister's answer was that the chief mining engineer said that because the report was created under the coercive powers of the act, it could not be released to the public. Labor will address that when next it is on the Treasury bench.

We cannot obtain an asbestos management report. Every mining company in Western Australia that undertakes work in areas with levels of asbestos deemed to be dangerous, or where there is a likelihood of that occurring, is required to put together an asbestos management plan. I asked for one in this place and was told that I could not have it. I then applied to the Information Commissioner for the same report, and he stated two reasons for not providing the report. Firstly, it contained people's names, and therefore their permission would have to be obtained to release the report. I do not care about all those names; I would have scrubbed that bit out. I am interested in the plan. Secondly, the company I had sought to get the plan from had argued that the release of the asbestos management plan would have damaged the reputation and/or economic viability of the company. I was astonished that the company would actually argue that, and I found it even more astonishing that the Information Commissioner would accept that argument. When Labor is in government, it will address that issue, too. That gives members an idea of the community acceptance of the placement of workers in a situation in which their long-term health may possibly be endangered. The regulations that companies and workers work under to mitigate those risks and ensure that they live long and healthy lives should not be contained in secretive documents. That brings me back to what I said at the very start about supporting, in principle, what Hon Alison Xamon is trying to achieve by way of the Occupational Safety and Health Amendment Bill 2010.

The question we have for Hon Alison Xamon is how high the bar should be set so that people who are grossly negligent can be successfully prosecuted for criminal negligence under this code. I will give an example so that Hon Alison Xamon can try to answer it in her second reading response. I had the unfortunate job of representing a constituent whose husband had been killed in a truck accident that occurred in the Argyle diamond operations in the north of this state. Interestingly enough, the company wanted to resolve the issue—that is, it wanted to ensure that the financial future of the young woman and her two small children was secure—but it could not do that because there were, I think, seven other interested parties, all of them acting under the guidance of their insurers. What had happened was that an Argyle supervisor—somebody who actually worked for the company—had directed the driver of the truck that caused the accident to get out of his cab, so the driver did that even though all the procedural rules said not to get out of the cab. Was that criminally negligent? The supervisor had not sighted the vehicle. I understand that it was normal practice to call for a dozer or a grader to put a windrow behind the truck to ensure that it did not roll back; however, that did not occur. The shovel driver was the person who should have controlled the operation, but he did not. Was he responsible for the accident?

The supervisor told the driver to get out of his truck to reset the braking system—by switching the system off and then on—because he had determined that the truck had been driven through some water and the brake control system had short-circuited. The truck hydraulic design was an open-centred system; that is, when the power is off, everything everywhere else can flow freely. Therefore, when the driver got out of his truck and flicked the switch, the truck, with a full load of ore, ran backwards down the hill, leaving the driver standing halfway up the hill without a truck. Who is responsible? Is it the driver? Perhaps. He was responsible for the control of the truck and he should have understood the manuals outlining the truck's operating procedure, which clearly state that he was not to do what he did when operating the truck. The manual requires the operator of the truck to ensure that it is parked on flat ground and chocked before switching off the brake system. However, that instruction is not in the operating manual; it is in the maintenance manual. So who is responsible? Is it criminal negligence? Of course that instruction should have been contained in the driver's or operator's manual. In this example, an experienced driver appears to have not understood how to reset the brake system resulting in a truck rolling down a hill and cutting a man in two. Who is responsible? Is it the designers of the system? As a result of that accident, the design was changed to a closed or fail-safe system; that is, if the electrical power fails or is switched off, the brakes will engage. That was an engineering fix for an unforseen circumstance. Is there any liability shared for the poor design? Should the designer have foreseen the possibility of such an accident? Of course he should have! In hindsight, knowing trucks carry large amounts of ore up and down hills, who would design a vehicle that carries hundreds of tonnes of ore such that an electrical short circuit leading to battery failure results in the truck running away with no way of stopping it? Who would design that? Is the designer of the truck criminally at fault? Is the company that built the truck another party to the complaint?

My point is: where do we set the bar? Who was criminally negligent in the previously mentioned example? All those involved should have known the risks. But how do we prove what people knew? How do we prove what was going on inside their head at the time they made a decision? It could be argued that it was just an oversight or that it was the experience of the guy who designed the truck's braking system. Was the design fault an accident? Should the designer have known it was a design fault at the time of design? Or did he know that it was a fault, but went ahead because of some other pressure in the office—for example, the office had an oversupply

of open-centred valves, was in partnership with a supplier of the valves, or had decided it was cost effective to use open-centred valves? Had the company decided that such an event was unlikely to occur, so drivers and other people were put at risk? We have to go to court to prove the case. Is that going to achieve the ultimate goal of protecting workers?

My concern, given the bill's current draft, is that the only people who will make anything out of this will be the lawyers, who will make a lot of money. In the meantime, the workers will still be exposed. The focus will be about backside covering rather than about ensuring the safe operation of a plant.

Interestingly, the young Aboriginal man who was killed had obeyed company procedures to the letter of the law when he saw the truck rolling down the hill towards him. The rules of operation required him to not leave the truck cab; the same rule that the guy in the truck at the top of the hill should have obeyed. The young fellow stayed in the cab right to the end and the truck tray came through his cab and cut him in two. He could have jumped out of the truck at any time to save his life and nobody would have held him to account for leaving his cab. But his training was such that he refused to jump out of the truck. Sadly, the end result was his death.

Should there have been a clause in the operating manual, a procedure, that stated that the operator was to stay in the cab unless, for example, the truck was parked on flat ground and chocked with a windrow behind the vehicle and/or there was 250 tonnes of ore rolling down the road towards the operator's vehicle and/or the operator was in danger from a washout and the truck might go over the edge and/or the truck was too close to the ore dump and might go over? I make the point that at the level of trying to demonstrate criminal negligence, how do we address those issues? Where do we set the bar? We need an answer. The opposition has written to a number of groups, including the Law Society, for an answer.

Can existing law be used to achieve the same end? If somebody has acted in a grossly negligent manner, can manslaughter provisions be applied? It does not have to be industrial manslaughter; tell it like it is—it is manslaughter. Or can assault or assault occasioning grievous bodily harm or even murder provisions be applied? I am advised that one impediment to that is the Corporations Act provisions around company liability. Another impediment is that the circumstances were never envisaged. Criminal law, in many aspects, is not perceived by the community or the courts to apply to industrial settings. Perhaps that is cultural; for years and years, we have sorted out these issues in industrial commissions. Perhaps that is a way forward. I am yet to receive a response from the Law Society. I have a couple of lawyers looking at this bill, and I will wait to see what their response is. However, these are the complex arguments that need to be addressed to ensure that we are not just applying another law that will, in the end, achieve nothing more than a focus on litigation rather than an improvement in the workplace. The opposition absolutely supports the principle of this legislation; it is the mechanism that we have trouble with. My argument is that we should be doing things that result in a cultural change not just in the workplace, but also in the industrial community, the resource sector and the community at large. Does a blame or no-blame culture assist? The argument—it is a valid argument—is that if somebody is blamed, people hide the reports. We have heard these arguments on all sorts of other matters. If there is no blame, does that allow people to raise safety issues that they may have caused themselves, provided that it is not gross negligence? If they are repeat offenders, should that result in some sort of punitive measure against that person? They are long and difficult arguments. What is the best way to protect working men, women and children? What criminal sanctions need to be applied to someone who puts people's lives at risk?

I think the only way that those questions will be answered is to have a royal commission. A royal commission would have the power to compel people to give evidence and present documents, and it would demonstrate to people that they understand their business and we understand their mitigations. From a regulatory perspective, the same information would be gained from a regulatory body. People often tell me that the problem arises because the site manager is given 24 hours' notice of a safety inspector coming on-site and by that time the area is cleaned up. That is a policy issue. That is anecdotal, but I hear it often enough to believe that it is true. That shows us that there is an issue with compliance. The industry says that the problem with the regulatory authorities is that it is a tick-a-box issue. Indeed, we have heard the Leader of the House talk about that and about his desire for the department to move away from that assessment system to a risk-based assessment system. With a risk-based assessment system, there must be a strong compliance auditing team with very high skill levels to ensure that that system does the job. Of course, there are changing community attitudes to self-regulation. We have recently seen the unfortunate example of the worst excesses of self-regulation with the terrible tragedy in Japan. We have seen examples of problems with self-regulation in this state. Certainly, alarm bells are ringing about what could happen. As I have said in this place on many occasions, I do not hold the oil and gas industry up as an example of a sector with the best possible practices, but it is certainly years ahead of the mining sector. That sector has examples of failures in self-regulation. It works with a risk-based assessment system, yet incidents such as the Montara oil spill still arise. Notwithstanding the environmental issues caused by that incident, it is an absolute miracle that none of those workers was injured. The same thing applies to the problems on Varanus Island. It is another miracle that those people were not injured. Everything that I have

heard and read about the Varanus Island incident indicates that there was a failure by the regulatory body. That is another complexity in how high the bar goes. At what level does culpability start and finish? Is it the law-makers' liability? Are we in this place responsible for passing laws that fail workers? I know that we operate under privilege, but I am talking about the executive government. Where do the arguments start and finish?

I would like this bill to be referred to a committee—I guess that the government will oppose the bill, but it will probably oppose the bill for the same reasons that I have just outlined, and I look forward to hearing its response—to determine whether those issues will be addressed by the bill. The important question is: will this bill result in a better outcome for working men and women? I have to be convinced of that; my party has to be convinced of that. Is this bill the result of the frustration of working men, women and children with the community, the regulatory bodies and the culture we share failing to protect those people? Is there an element of revenge and punitive desire in this bill rather than a desire for an outcome specifically designed to protect people in the workplace? One aspect that I will look at is the interaction with other laws. Why can we not apply current criminal laws? If we could apply criminal laws and all the other laws, there would be no need for this legislation. What we need to do is amend the different laws and statutes to allow criminal laws to be applied in an industrial sense.

Discharge of Order and Referral to Standing Committee on Legislation — Motion

HON JON FORD (Mining and Pastoral) [10.48 am] — without notice: I move —

(1) The Occupational Safety and Health Amendment Bill 2010 be discharged and referred to the Standing Committee on Legislation for consideration and report.

(2) The committee is to inquire into and report on the policy of the bill.

I have specifically not put a time frame on the committee's report, because it takes a lot of time for many of the people involved to reply. With the authority of this house, the committee would have the ability to call before it a range of people—regulators and businesses alike. In many cases, if it so wished, it could compel those people to present evidence and documents that would help the committee and this house determine whether this bill is the best way to go. I urge the house to support the motion.

HON SIMON O'BRIEN (South Metropolitan — Minister for Commerce) [10.49 am]: I have the honour of responding on behalf of the government. I will make my contribution to the second reading debate on the Occupational Safety and Health Amendment Bill 2010 while also addressing the motion that was just moved, as is normal practice. I will make reference at the end of my contribution to the question of whether this bill needs to be examined by the Standing Committee on Legislation. In the way that I will describe it, we will find that we will achieve the outcome and, in fact, probably do it even better than the prospect that is now before the Chair. We will come to that in due course.

In addressing the questions before the Chair, it might be of assistance to the house if I couch my remarks in reference to other initiatives that are being undertaken by government in relation to the questions before the house. I might add that these actions are being prosecuted by successive governments. Members will see how that comes to be in a moment.

The bill before the house, presented by Hon Alison Xamon, proposes to amend the Occupational Safety and Health Act 1984, which is a Western Australian act that has been amended many times over the years to deal with issues that are very, very important. Whether in my current capacity as minister with some responsibilities in this area or as a minister or member of Parliament with other duties representing Western Australians, I have said publicly on occasion that it is fundamentally important that when Western Australians go to work, they and their families, loved ones, friends and associates should have every confidence that they will come home to their families safely at the end of their working day. That is the sort of measure that I place above other considerations about what is happening in the workplace, whether in a recent portfolio responsibility—for example, in road building—or, as Hon Jon Ford made reference to, in relation to people involved in the sometimes hazardous occupation of mining. I think that getting the road built, getting the ore extracted, treating the patients in an emergency room, or performing a function at any worksite or workplace are secondary to that basic principle of keeping our people safe and well. At the outset, let me say that the government views all these matters with the utmost gravity and does not place higher importance upon anything else.

Hon Alison Xamon is very well motivated in bringing forward this bill. All the matters that I now intend to introduce into the debate recognise that and are part of a search to make sure that we have the legislation available to Western Australia that best meets everybody's needs. Virtually everyone is a stakeholder in this, whether they are individuals in their various capacities, employee representative bodies, employer bodies or industry associations. We all have a stake in making sure that we have the laws that best meet the needs of Western Australia.

Turning to the Occupational Safety and Health Amendment Bill 2010, the specific purpose of this bill is to amend the Occupational Safety and Health Act 1984, which I will hereafter refer to as "the act", to impose additional compliance and notification obligations, to increase penalties and to prescribe new offences under the Criminal Code for duty of care breaches. In her second reading speech, Hon Alison Xamon stated that the bill contains several reforms based on provisions in the model Occupational Health and Safety Bill. I will call that the model bill. The bill is developed to harmonise the occupational safety and health law of the states and territories and seeks to capture the minority of culpable employers and ensure that they are held responsible for workers' deaths, as the current penalties are woefully inadequate.

The specific amendments that are based on that model bill, which amendments Hon Alison Xamon has brought forward for our attention are: an increase in the penalties under the act for duty of care breaches; the introduction of an offence of failing to notify WorkSafe Western Australia of dangerous incidents; the provision for a variety of sentencing options, including adverse publicity orders and occupational safety and health undertakings; and the insertion of a definition of "consultation" to ensure that employees' views are considered in the decision-making process and to guide employers.

Some of the amendments are not presently dealt with in the act, the Criminal Code or the model bill. Those amendments are the introduction of industrial manslaughter provisions under the Criminal Code; the insertion of a provision into the act to provide for the offence of negligent or reckless endangerment; and provision for interested persons—that is, trade unions, people who are physically affected or relatives—to bring legal proceedings under the act for alleged offences. There is also an amendment to a provision for continuing offences under the act, which is not based on the model bill.

Turning to each of these themes in turn, I firstly want to deal with the question of harmonisation. Members will then understand what is in train at the moment and what has been in train for several years in relation to harmonised laws. The second reading speech notes that the reforms proposed in this bill go further than those in the model bill to ensure that important aspects are enshrined. Hon Alison Xamon says that no clear indication has come from the state government about when the model bill will be implemented apart from an intent to deviate in favour of weaker provisions. I advise the house that the government is working towards implementing the model bill as a Western Australian statute by 1 January 2012, and cabinet recently endorsed the drafting of legislation for general industry and for the mining industry, both of which will mirror the model bill.

In July 2008 the then state government signed the intergovernmental agreement for regulatory and operational reform in occupational safety and health. Under this agreement, the Workplace Relations Ministers' Council is committed to working cooperatively to harmonise OSH laws. On 11 December 2008, when the ministers' council approved the model bill, subject to some technical amendments, the then Minister for Commerce advised that WA supported the principle of harmonisation, but would retain its own settings in some areas. The subsequent media statement stated that WA would adopt the bulk of the proposed model laws, but it was unlikely to adopt the provisions on —

> level of penalties and right of entry; power for health and safety representatives to stop work; and reverse onus of proof for discrimination issues.

The Western Australian government has consistently publicly stated that it does not accept that these issues relate to improving safety in the workplace, but that they simply revolve around process. It is also our position that we will continue to participate in the national harmonisation of occupational health and safety laws through the ministerial council and through Safe Work Australia, despite that some elements of the draft legislation may reduce existing state standards in some discrete areas. There is always a balancing act, of course, in the adoption of any form of harmonised system over jurisdictions, as this house has seen on many occasions.

The tripartite Commission for Occupational Safety and Health, which I will refer to as the commission, has advised government on the model bill and will continue to do so as the process of drafting the mirror legislation for Western Australia continues. Furthermore, draft model regulations to support the bill—that is, our bill—have been released for a four-month public comment period. The commission, which is a tripartite commission involving unions, employers and government, is reviewing submissions and will provide advice on their contents to the state government.

I turn now to some of the specific provisions in the bill before us now and firstly to the increased penalties in clauses 4, 6 and 17 of the bill. The second reading speech refers to the current penalties in the Occupational Safety and Health Act being too low and failing to reflect the seriousness of the matter. The bill proposes to increase the penalties, in many cases very significantly. The current penalty regime was introduced in 2005. It is structured and it provides a clear indication to the courts that the penalties should escalate in accordance with the seriousness of any offence. There is recognition in the act of the seriousness of some offences, with a penalty for causing death or serious harm through gross negligence described as a level 4, the top level, which attracts high penalties including the option of imprisonment. Those are the current legislative provisions.

The amendments to the current levels 3 and 4 offences are aligned with those proposed under the model bill for the equivalent offences. They are referred to as category level 1 and category level 2 general duty offences. However, the model bill does not provide penalties for subsequent offences. In November 2009 cabinet provided in-principle support for harmonisation and adoption of the model bill, but did not support the proposed penalties for category level 1 and category level 2 offences in support of a reduction of the quantum in the vicinity of 50 per cent for the proposed monetary penalties. As members will see when I bring a bill forward in due course, we will debate those issues again.

The bill before us also seeks to amend provisions under the act for contraventions of the Occupational Safety and Health Regulations 1996. Indeed, some quite significant increases in penalties are proposed by the proponent. The proponent has brought forward clauses 7 and 10 of her bill for the notification of dangerous incidents. The bill introduces a new offence of failing to notify a dangerous incident to the WorkSafe Western Australia Commissioner. A "dangerous incident" is defined to include a range of things, including an uncontrolled explosion and the partial collapse of a structure. Hon Alison Xamon's second reading speech claims that there is a gap in the current law, as the requirement is for only deaths and certain prescribed injuries and diseases to be reported to the WorkSafe WA Commissioner. The aim of the reform is to ensure that WorkSafe can investigate dangerous incidents as well, and inform its inspectorate and conduct educational campaigns. The model bill contains a similar provision with a smaller number of items listed in the definition of "dangerous incident". Cabinet has already provided in-principle support for that provision in the model bill.

The bill before us also provides for a variety of sentencing options for offenders that can be awarded in addition to any other penalty under the OSH act. These include penalties such as adverse publicity orders; orders for restoration; work health and safety project orders; occupational safety and health undertakings; injunctions; and training orders. The second reading speech claims that the purpose of these sentencing options is not only to ensure employers are accountable via penalties, but also to potentially require employers by court order to put in place changes to make their workplaces safer. For example, a court can order that an employer undertake a specified project for the general improvement of occupational safety and health within a specified time frame. The Western Australian act already contains, in part, a similar provision, and this provides that the court may make an order—an enforceable undertaking—in lieu of a fine, not in addition to it. That could require an offender to take specified steps for the improvement of occupational safety and health, publicise details, remedy any consequence of the specified offence, or carry out a specified project or activity for the improvement of occupational safety and health. The proposed amendments replicate the corresponding provisions in the model bill, and although they are still subject to cabinet approval, the government has not indicated publicly that it will not adopt these aspects of the model bill in the mirror laws of the state. I predict that when I bring my bill forward, that will be an appropriate time to revisit this question, and I am sure members will do so with enthusiasm.

The proposed amendments in this bill also insert some new provisions identical to those in the model bill for the regulator to accept written occupational safety and health undertakings and for enforcement, withdrawal or variation of them as well as contraventions.

Clause 11 of this bill also seeks to introduce a new duty to preserve an incident site where a person was injured or affected by a disease until an inspector arrives or at any earlier time that an inspector directs. I indicate to members who are not familiar with the provision that the model bill contains an almost identical provision and that cabinet has previously provided in-principle support for that provision.

Clause 3 of the bill also provides a definition of "consult". As the proponent of the bill felt it was important to provide a definition of "consult", I will now take a moment to discuss the government's response to that proposal. I firstly point out that the act itself as it stands does not contain a definition of "consult", but it does clearly set out the requirements for employers to consult workers under their general duty of care for safety. The model bill similarly does not include a definition of "consult" but it does expand the requirements for consultation, and there are some similarities to the definition contained in the bill before us now. However, the model bill is based around giving workers a reasonable opportunity to express views and to contribute to decision making, and around views being taken into account in decision making; whereas the bill before us now requires that workers must have their views considered before a decision is made that affects work safety. We prefer and have indicated in-principle support for the relevant provision in the model bill rather than the one before us now.

The bill before us also provides in clause 13 for additional limitation periods for prosecutions. Specifically, I note that the current act provides for a three-year period to institute legal proceedings; whereas the bill here seeks an amendment to align the act with the provisions that are in the model bill, for which again cabinet has indicated its in-principle support. I think a theme is emerging here. A number of things have been anticipated in

this bill that I think can be accommodated. In due course, I will wrap up by indicating what I think is the best way ahead. Before I do that, I must have regard to the other provisions in this bill.

I turn now to some quite new provisions, not varied provisions of our laws, that Hon Alison Xamon proposes should be inserted. I turn firstly to a new offence to be called industrial manslaughter, which is contained in clauses 18 and 19 of the bill. Under those provisions a new offence of industrial manslaughter is proposed to be inserted into our Criminal Code. It relates to a workplace death in which the employer's conduct or omission has caused a death due to recklessness or negligence. This would apply to individual employers, who may be imprisoned for a term of up to 20 years, or if the offender is a corporation, a penalty of $3 million, and senior officers, who may be imprisoned for up to 20 years. These people are defined as officers of corporations, and in relation to government agencies, ministers, chief executive officers and persons in executive positions. I am glad to say that it is no more prescriptive than that. The second reading speech refers to the fact that the bill will introduce the principle of corporate criminal responsibility to ensure that culpable employers are held responsible for workers' deaths. There is also a reference from the bill's sponsor that it is extremely difficult to prosecute a company for manslaughter and that as it is unlikely that these prosecutions will occur under the model bill, this bill introduces the concept of industrial manslaughter.

It is appropriate that prosecutions in relation to occupational safety and health sit under the framework established by our act and, in due course, when implemented, the model bill that I have referred to rather than the Criminal Code. That is the government's view. That does not preclude prosecution of an individual for manslaughter under the Criminal Code should the circumstances warrant such charges. That was a view expressed by Hon Jon Ford earlier. Industrial manslaughter offences for culpable behaviour causing death or serious injury have previously been called for, specifically under the statutory review of our act back in 2002. That review led to the introduction in 2005 of the level 4 penalty for gross negligence that I referred to earlier in my speech. That term is defined as a situation in which the offender knew the contravention would likely cause death or serious harm and acted or failed to act in disregard of the likelihood and the contravention caused death or serious harm. The general view was that provision for gross negligence would achieve the desired policy outcome but also leave the option to pursue manslaughter charges under the Criminal Code because the concepts are very similar. We felt then while in opposition and the government feels now that that is the right balance. The penalties suggested for gross negligence are: for employers, a fine of $250 000 and a jail term of two years for a first offence and a fine of $312 500 and a jail term of two years for a subsequent offence; and for a body corporate, a fine of $500 000 for a first offence and $625 000 for a subsequent offence.

The model bill—the harmonised bill that I have been referring to during my contribution—does not provide for industrial manslaughter. We would be unique among jurisdictions if we were to go down that path.

Hon Kate Doust: There is nothing wrong with that, is there?

Hon SIMON O'BRIEN: No. I simply pointed out that if there is an enthusiasm for harmonised laws in this area, which has been present under successive governments, it is a point worth noting as we deal with it. What is in the model bill is a graduated scale of offences based on culpability in relation to failure to meet the duty of care for safety in a systemic way rather than in an outcome sense. Again, I think this is a theme that Hon Jon Ford expanded upon in his remarks, specifically that in pursuit of our overall goal that I referred to at the start of my speech, we need to be not only capable of responding to individual incidents when they occur, but also ensure that we have systems in place that, to the greatest extent possible, mitigate such incidents from occurring in the first place.

The model bill provides for a graduated scale of offences based on culpability. As I have already indicated, that aligns it with the current structure of penalties in our present OHS act and its general emphasis on the duties of care for safety. Of course, any injury or death would be part of the evidence of a failure to meet a duty of care. I also point out to the house that the insertion of provisions into the Criminal Code in the manner that is proposed could have implications for the thoroughness of investigations into workplace deaths as police officers would become the investigators. They are not likely to have the necessary expertise in workplace safety issues—for example, in safe construction work methods. Additionally, investigations and prosecutions by the police and WorkSafe could be seriously hindered as there would be legal limitations on the sharing of evidence.

Clause 6 of the bill refers to reckless endangerment. The second reading speech refers to there being no offence provision for negligent and reckless behaviour when neither injury nor death occurs. The speech claims that in situations in which an employee is exposed to substantial risk or harm but they are not injured, the act has inadequate recourse. In view of this, the bill before us proposes to introduce an offence of reckless endangerment—that is, negligent and reckless behaviour—into the act with some quite substantial penalties. That provision applies to contraventions of general duties for safety by employees, employers, self-employed people, manufacturers, importers, erectors, installers and suppliers of plant, manufacturers, importers and suppliers of hazardous substances, designers and constructors of buildings for use as workplaces and employers

who provide accommodation in certain cases. The penalties for the offence are $150 000 for employees, a fine of $400 000 and imprisonment for two years for employers or a fine of $2 million for a body corporate. I advise the house that the general duty offence provisions under the act do not preclude such a prosecution as the one proposed. With level 2 general duty breaches, parties may already be prosecuted for dangerous incidents. There are no specifications in relation to injury or death. Instead, as with all the general duty provisions, the focus is on a systemic failure to ensure safety in relation to control of hazards and risks and culpability. Of course, a dangerous incident would form part of a prosecution case as evidence of systemic failure. That is how the matter is dealt with under the current legislation.

In the 2002 and 2006 statutory reviews of the act, no recommendations came forward for the introduction of the offence of reckless endangerment. No gap in the act was identified by either of those reviews. However, leading on from the 2002 review, the current penalty regime was introduced for the offence of gross negligence, which I explained earlier in my remarks. As negligence is a serious allegation, it is appropriate that it applies only for circumstances of serious injury or death, as currently provided for in the act under the level 4 penalty regime. That relates to a general duty of care breach that involves gross negligence resulting in serious harm or death. The model bill contains a provision relating to gross negligence that is comparable with the one that exists in our act. It provides for an offence of reckless conduct as a category 1 offence. The government and the Parliament will decide on a penalty for that offence when we consider the legislation that I have foreshadowed.

The bill also contains a power for legal proceedings to be instituted by what are defined as "interested persons". This is contained in clauses 12 and 13 of the bill. Under the bill, it is proposed that interested persons be given the ability to pursue prosecutions for most offences under the OSH act, if the regulator has not done so. Interested persons are those affected physically by alleged offence, or their union or a close relative, or close relatives of those who have died in a workplace accident.

It is proposed that for offences involving gross negligence, or the offence I have just mentioned of negligence or reckless endangerment, interested persons may request the WorkSafe Western Australia Commissioner to bring a prosecution. The commissioner must then inform the interested person about whether a prosecution will commence, and provide reasons. If a prosecution does not proceed or is not instituted by the commissioner, an interested person may institute prosecution proceedings. The act currently provides that the WorkSafe WA Commissioner may institute legal proceedings. Under the model bill that I have referred to, the regulator, or an inspector with the written authorisation of the regulator, may institute legal proceedings.

Therefore, what Hon Alison Xamon is proposing in her bill is a radical departure from the law as it currently stands, and, indeed, many other laws—virtually all other laws. It is also a radical departure from what is proposed to be introduced, on a harmonised basis, after consultation with affected parties over some time.

The capacity for people other than the WorkSafe WA Commissioner to bring a prosecution for offences under the act was considered in the 2005 statutory review of the act. The review at that time expressed the view that the arguments against any expansion of the power to bring a prosecution would fairly strongly outweigh those arguments in favour. It was concluded that to expand the category of persons empowered to bring prosecutions is unnecessary in furtherance of the statutory objects of the legislation. The government holds the very strong view that that advice, previously received and endorsed by the Gallop government, is also advice that we should endorse; that is, this provision is not required, would be extraordinary, and for a range of reasons is highly undesirable.

Debate adjourned, pursuant to temporary orders.