

PHARMACY BILL 2010

Committee

Resumed from 12 August. The Deputy Chairman of Committees (Hon Jon Ford) in the chair; Hon Simon O'Brien (Minister for Transport) in charge of the bill.

Clause 71: Liability of certain officers of body corporate: offences —

Progress was reported after the following amendment had been moved by Hon Giz Watson —

Page 41, line 4 — To delete “, subject to subsection (5)” and insert —

if the officer knowingly authorised or permitted the contravention

The DEPUTY CHAIRMAN: If I remember rightly, before progress was reported on this clause, the minister had been giving his response.

Hon GIZ WATSON: I think that is correct. I will take my seat in anticipation of the minister continuing his response very shortly.

Hon SIMON O'BRIEN: When we last considered clause 71 we had only a few moments before the proceedings were interrupted. We were dealing with the amendment moved by Hon Giz Watson that will delete from the fourth line on page 41 the words “subject to subsection (5)” and insert the words “if the officer knowingly authorised or permitted the contravention”. I think we need to read this amendment into the record in context so that it makes sense. Clause 71 deals generally with the liability of certain officers of bodies corporate in relation to offences. Clause 71(2), which we are immediately dealing with, if amended would read —

If a body corporate and an officer are charged as permitted by subsection (1) and the body corporate is convicted of the offence, the officer is to be taken to have also committed the offence if the officer knowingly authorised or permitted the contravention.

That is the proposition advanced by Hon Giz Watson. As the provision stands, it would read the same until we got to the end, whereby instead of stating “if the officer knowingly authorised or permitted the contravention” the words are “subject to subsection (5)”. Clause 71(5) carries a defence for an officer who has offended against the provisions of clause 71. If this amendment were to succeed, I notice that Hon Giz Watson also proposes further consequential amendments, notably to delete clause 71(5) as it stands, which is obviously sensible. Those are the two sides that we have to consider at the moment. Apart from extending liability for offences to officers of the body corporate, clause 71 also creates a rebuttable presumption that an officer of a company is criminally liable for conduct of the company if that company is in breach of the legislation. That rebuttable presumption should be seen in the context that from a policy perspective it can be regarded as entirely appropriate that an officer of a company accept responsibility for the actions of his or her company, other than in the limited circumstances that are set out in clause 71(5).

I will make a couple of other general points about this provision and then we will no doubt get into an exchange of views as to whether there should be a liability for officers. Upon examination of the relevant parts of the Standing Committee on Uniform Legislation and Statutes Review's report on the Pharmacy Bill 2010, we see that this clause is seen as the removal of the presumption of innocence. I am sure that those words were carefully selected by the committee in framing its recommendation and particularly in writing its report.

The amendments are not supported by the government. Although a company is an entity that is legally distinct from its officers, it can only act through its officers; it needs people to cause things to happen or for omissions of action to occur. Therefore, it is necessary in the context of clause 71 that action can be taken against officers as a way to ensure the integrity of the larger regime that is proposed and implemented through this bill. However, it is necessary that this not be an absolute offence, perhaps what the committee has referred to as “the removal of the presumption of innocence”. That is why clause 71(5) was included in the bill; namely, to provide an appropriate defence given the policy context that I have just mentioned. It is the government's view that the provision is required to ensure that corporate entities comply with the requirements of the proposed legislation and we can do that only by putting a strict onus or compulsion upon the officers who will suffer a sanction if their corporate entity under their control fails to meet the requirements of the regime proposed by this bill. Therefore, we need to have some imperative requirement in place, which clause 71 seeks to deliver. However, it should not be the case that people will be automatically convicted of an offence levelled against a company if they in fact had nothing to do with the offence, even if they do have responsibility for things that the company does. Therefore, clause 71 creates a rebuttal presumption that is balanced in this case by subclause (5) providing a defence. We submit that clause 71(5) is adequate for the situation at hand and I remind members that clause 71(5) states —

It is a defence to a prosecution for an offence against this section for the officer charged to prove —

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- (a) that the offence was committed without the officer's consent or connivance; and
- (b) that the officer took all the measures to prevent the commission of the offence that he or she could reasonably be expected to have taken having regard to the officer's functions and to all the circumstances.

There will probably be a bit more exchange on this clause, but the government's response is that we believe it is a necessary provision and we will oppose this amendment.

Hon GIZ WATSON: I appreciate the minister's explanation. This is, in essence, the same debate that we had on a similar clause in a bill that we debated in this place—that is, the Major Events (Aerial Advertising) Bill. I understand the position that is reflected in the legislation. However, what this deletion and the other amendments in my name on the supplementary notice paper seek to do is to reinstate the presumption of innocence and to say that it is the responsibility of the state to prove whether any particular officer was knowingly involved or had a particular onus to have acted. That is, I guess, the gold standard in protection of individuals, and we think it is one that should remain. I understand that this bill provides a defence for individual officers of a corporate body, but that is a defence rather than the state having to make the case in the circumstance of each individual. For those reasons, we think that the bill should be amended to maintain that principle. I guess that will depend on how the numbers go in this place. I thank the minister for the explanation, but it does not change our view about the principle; hence we would encourage the committee to support the amendments.

Hon SUE ELLERY: I indicate that the opposition will not support the amendment. I understand the argument about gold-standard level of presumption of innocence. These things are always a question of balance. In views put to us by stakeholders, for example, this matter was not raised in particular. I am not saying that, for example, the guild might not have a view about it, but I met with representatives of the guild, and they did not put this view to me specifically. Although it might seem a simplistic notion, bodies corporate cannot do things themselves. They are an artificial construct, if one likes. Bodies corporate can do things only if officers of bodies corporate do or do not take certain action. It is a question of balance. I think the protections are in the defences set out in subclause (5). This matter has not been put to me at all by the stakeholders. It is not a matter that I will pursue with any great strength of passion, but I think on balance, in the absence of someone from the industry saying to me that this is a make it or break it-type clause, I am going to err on the side of accepting that the defences that are set out in existing subclause (5) get the balance about right.

Hon GIZ WATSON: As I said, principles are just that. The argument is that the government has the resources of the state to bring a case. Organisations and bodies corporate are made up of a range of people, and it is the state's obligation to make the case that X or Y should be charged with the offence. The way in which this provision is worded means that people are assumed to have been responsible unless they can prove otherwise. I think the balance has been pitched too far against individual members of bodies corporate, and we would argue that the status quo—what has long been a tradition in law, that a person is innocent until proven guilty—is the principle that should persist. I suggest that it might be that the stakeholders have not looked at this very closely.

My other comment is that given that this is the second bill that we have dealt with in this place in recent times that contains the same provision, I am concerned that it might become a pattern that we are going to see in all future legislation, in which case I am even more concerned. We will continue to raise this issue, because we think it is an erosion of that fundamental principle and one that should be upheld, not eroded.

Hon ADELE FARINA: I want to ask the minister to consider the implications of the provision and the amendment that has been proposed by Hon Giz Watson. The problem with the arrangement as it is written in the bill is that it is a rebuttable defence, which means that people have to present to the courts and defend themselves, when there may not have been reasonable grounds to make the charge in the first place, simply because of the way in which the provision is written in the bill. Given that at a time when our courts are overworked there are long delay times, and given the principle that has been espoused about people being innocent until proven guilty, I would like to know what consideration the government has given to the additional onus and workload that this provision may place on our already overstretched courts.

Hon SIMON O'BRIEN: There are a number of threads that I am sure the committee and others would like me to follow, but I will deal with the specific one raised just now. I want to make it clear that the government has the view that there is a reason—a rationale—for the rebuttable presumption construction of this clause, and that is that a person should not be able to hide behind a corporate veil and, in particular, to escape criminal liability for the actions of a company that that person is involved in running. It may not be only specific actions that are direct and link directly the officer with an action that is later found to be criminal. This is a matter that is bound up in the systems that companies run for which officers must ultimately take responsibility, whether they are systems that encourage or permit actions that are seen to breach other laws or allow breaches to go uncorrected when someone—it should be the officers, because they are the only ones with the executive capacity—should

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take action to repair the systems that are allowing breaches, or perhaps the cultural demeanour of a corporate entity that allows breaches of laws to go on and to carry on uncorrected. Either we are going to be serious about doing that or we are not. When there is a situation in which it can be demonstrated that a corporate entity is guilty of some breach or offence, it may not be within the capacity of a prosecution to identify precisely the internal management arrangements of the company that should have corrected or not allowed or disallowed whatever the breach was. Nonetheless, individuals still have to be held to account. Without that regime, we would find that individuals in any area of activity—this bill deals with pharmacies—could go on doing what they wanted to do and could hide behind the so-called corporate veil without fear that they individually would be held to account. Provisions such as this encourage or force officers to be accountable and to do the things that they otherwise might not want to do.

Amendment put and negatived.

The DEPUTY CHAIRMAN (Hon Jon Ford): As a consequence of that, I think amendments 6/71 and 7/71 drop away. We will move on to amendment 1/71, which is a committee recommendation to delete “body corporate commits an offence” and insert “body corporate is suspected, on reasonable grounds, to have committed an offence”, at line 5 on page 41. Is any member going to move that?

Hon LINDA SAVAGE: Yes. I should just say a few words first, and perhaps the minister would like to respond. The committee looked very carefully at this clause of the Pharmacy Bill, as I said when we were considering it last week. The concern of the committee is that clause 71(3) allows for a situation in which a body corporate can be regarded as having committed an offence, even though there has been no charge laid against the body corporate and no conviction. On the basis of an offence having been committed despite no charge or conviction, that flows into subclause (4) in that if an officer is charged and it is proved that the body corporate committed an offence, the officer would also be taken to have committed the offence unless the officer could establish one of the defences in subclause (5).

Although subclause (2) uses the words “is convicted”, the body corporate itself is not charged under subclauses (3) and (4), which is of concern to the committee. The committee was left then trying to understand the meaning of the words “was committed” and “proved”. On that basis, amendments were recommended to provide a level of safeguard in terms of the effect that would have on the officer of the corporation. That is because, as we noted in the report, there is no guidance in the bill on the meaning of the words “committed the offence” and “proved”. It was therefore of real concern to the committee that the effect of subclauses (3) and (4) together was that a corporation could be found to have committed an offence in the course of proceedings to which it was not a party; then, by extension, an officer could be deemed to be guilty of the offence although, as far as the committee could ascertain, there had been no testing of the evidence. Given the effect, therefore, of those two subclauses, the committee recommends that the amendment on the notice paper relating to line 5 on page 41 be inserted.

The DEPUTY CHAIRMAN: Is the member going to move the amendment?

Hon LINDA SAVAGE: I am. I move the committee’s recommendation —

Page 41, line 5 — To delete “body corporate commits an offence” and insert —
body corporate is suspected, on reasonable grounds, to have committed an offence

Hon SIMON O'BRIEN: We have now moved to a detailed consideration of clause 71(3). There is a difference between what we have just looked at and what we have now proceeded to. The concerns of the Standing Committee on Uniform Legislation and Statutes Review—the honourable member having just moved an amendment on behalf of the committee—are ones that I respect. I note that the committee has gone to some trouble to examine this bill. In particular it has spent time on this clause, researched it, contemplated it and ultimately come up with not only the amendment that has now been moved, but also the discussion and the expression of concerns that are contained on pages 27 to 29 of its fifty-third report into the Pharmacy Bill 2010. Members are no doubt examining that part of the report, even as I speak. I have examined it also and I think the best way to respond to the concerns of the committee are in these terms. Firstly, having dealt with the previous matter—which was also touched upon just now in the debate on the amendment that was put to the vote and decided—we now move on to a matter that is similar in many respects, but the point of potential disagreement here is rather different. If the committee and those who want to explore this amendment hold concerns, I think I have good news for them, as I think their concerns are probably misplaced.

Hon Giz Watson interjected.

Hon SIMON O'BRIEN: Yes.

The assertion implicit in the amendment is that under clause 71(3) a body corporate could simply be said to have committed an offence and that, in itself, would be enough to convict the officer. At face value, I do not blame members for raising their eyebrows and for wanting to examine that further. But the good news is that I believe

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their conclusions are misplaced. That is a good thing, because if I can remove that element of doubt, then I think the committee and those in the house who are concerned about this matter can then support the clause as printed with confidence.

Subclause (3) states —

If a body corporate commits an offence under this Act, then, although the body corporate is not charged with the offence, every person who was an officer of the body corporate at the time the offence was committed may be charged with the offence.

I invite members, particularly members of the committee, to consider what would happen if a charge against an officer were proceeded with in the circumstances contemplated by subclause (3). What would be necessary to prove to the court? One of the things that would be necessary to prove to the court would be the element that the company would, if charged, have been guilty of the breach. Just because the clause, as written, states that the body corporate is not charged with the offence, it does not mean that a case could automatically be brought against the officer. It would still have to be proven in a court that if there had been a proceeding against the body corporate, the case would have been made. There is still that protection from the officer's perspective.

Hon Sue Ellery: Can you contemplate the kind of example where a decision might be made not to charge a body corporate but to charge the officer?

Hon SIMON O'BRIEN: Very simply. Hon Sue Ellery's interjection is very helpful because the obvious example would be where the corporate entity has ceased to exist or is wound up but there are still offences to be followed up and individual officers may have to go to court to face up to those offences. That is exactly the sort of situation that is contemplated by clause 71(3). I hope that reassures the Committee of the Whole. If any member wishes me to discuss it further, I can.

Hon ADELE FARINA: Can the minister please clarify something? Is he saying that an officer charged under this clause is required to make two defences; firstly, that the body corporate did not commit the offence; and, secondly, that the officer of the body corporate did not commit the offence? Are we asking the officer to fund two defences?

Hon SIMON O'BRIEN: The member will be glad to know that we are not suggesting that. I have indicated that the prosecution would be required to prove beyond reasonable doubt that the company would, if charged, have been guilty of that breach. The onus is clearly on the prosecution. There is still the rebuttable presumption aspect of this clause, which is obviously available to the officer, if charged, as a defence.

Hon ADELE FARINA: Perhaps the minister could explain to members how the prosecution goes about proving beyond reasonable doubt that the company, if charged, would have been found guilty when there has not been a hearing, a trial or an opportunity for the company to present a defence. There is no way that a prosecution could show to the court that, in the absence of a trial, the corporation would have been found guilty.

Hon SIMON O'BRIEN: The key question is not the one that has been asked. It needs to be recognised that clause 71 states that the liability of the company and the liability of that company's officers are synonymous. Therefore, if the situation as contemplated in clause 71(3) applied, the court would need to be able to conclude beyond reasonable doubt that those elements of the offence, whatever it was, were found against the officer. In so doing, it must also be established that those elements are found against the corporate entity that define the officer as well. It is not as if there is twice as much to be proved; it is just that both the company and the officer are seen as the same entity with respect to any one offence for these purposes.

Hon LINDA SAVAGE: In my earlier comments I attempted to differentiate clause 71(2) from clause 71(3) on the basis that there is a conviction in clause 71(2)—the body corporate is convicted. While the explanation the minister gave of a company having been wound up does make sense—I can understand that example—the entire point of clause 71(3) is that the body corporate is not charged. It flows from the assumption that the company has committed an offence, which clause 71 (3) states, even though it is not charged, and that then flows on to the officer of the body corporate. That is the concern that the committee is raising with the minister. It is putting the officer in the position based on the deemed committing of the offence by the body corporate, even though the evidence has not even been tested, let alone a charge laid against the body corporate.

Hon SIMON O'BRIEN: I invite the member to read subclauses (3) and (4) together. That is what is intended. I think that provides the answer to the question. That, in effect, is the distinction between what we are now contemplating and the issue that was raised in clause 71(2). Subclauses (3) and (4) are intended to operate together. If the member now contemplates the further subclause (4) and reads that in that context, that will give her the understanding she requires. Clause 71 (3) permits an officer to be charged with an offence when the company has committed the offence. This is a theme that we have already explored this afternoon. Whether the charges in that regard were properly laid will be determined by whether, in the course of the prosecution proceedings, it is proved as required by clause 71(4) that the company would, if charged, have been convicted. In

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other words, the outcome of the prosecution determines whether charges could have been brought against the company if that entity had endured. Be that as it may, I urge the member to read subclause (3) again in the context of subclause (4) which follows it and she will find that it achieves the outcome that we claim it will.

Hon ADELE FARINA: The issue I have with what the minister is saying is that it assumes that the officer will have access to all the material that is needed to mount a defence, and for the body corporate. If the body corporate has been wound up, subject to what position that officer actually held within the body corporate, he or she may not be in a position to mount a defence for the body corporate. It seems we are putting an unreasonable burden on the officer in those circumstances. I would like the minister to explain how an officer is supposed to mount a defence for a corporation, particularly one that has been wound up, and that person may not be the key officer making the decisions, as well as mount a defence for themselves.

Hon SIMON O'BRIEN: In the event that a company had been wound up and the officer has to create his own defence in the circumstances that the member contemplates, the first thing he would do is make that known to the court—the fact that he did not have access or was being obstructed, or there was some other deficiency in his capacity to mount the defence that he is entitled to mount. The honourable member asked me to contemplate the situation in which the officer charged was not responsible for the decisions being made. Indeed, that would be a defence as contemplated under subclause (5). Be that as it may, the hypothetical situation that the member raised—which I have entertained—is a matter for the courts. The challenge would still be there, as it would in any eventuality, for the defendant to prove his case. That in itself is not what is contemplated by this clause or, indeed, by the amendment.

Hon ADELE FARINA: Could the minister inform the house who determines whether the body corporate has committed an offence?

Hon SIMON O'BRIEN: That would be a court of competent jurisdiction.

Hon ADELE FARINA: But the corporation has not been charged, so a court is not actually considering the question about whether the body corporate committed the offence because there is no charge before the court against the body corporate.

Hon SIMON O'BRIEN: With respect, I think it is required under this clause. Again, I invite members to contemplate subclause (3) together with subclause (4). Subclause (3) has caused some questions to be asked by the committee. At face value, as I have already said, I do not blame them—rightly so. Clause 71(3) states —

If a body corporate commits an offence under this Act, then, although the body corporate is not charged with the offence, every person who was an officer of the body corporate at the time the offence was committed may be charged with the offence.

Now the question is being asked: how is it determined that an officer has committed an offence when the body corporate is not charged with an offence? How can it be determined? That is the question being asked. If we turn to subclause (4), it states —

If an officer is charged as permitted by subsection (3) and it is proved that the body corporate committed the offence, the officer is to be taken to have also committed the offence, subject to subsection (5).

There we have it. That is the element that needs to be established in court; that is, that the body corporate did in fact commit an offence. It is almost proving it to the court's satisfaction after the event that the company could have been successfully prosecuted for the offence. But this clause contemplates a situation in which there is no corporation as such available to prosecute because it has been wound up or is otherwise not available. Nonetheless, this is what we need to capture—those individuals who, as officers, were responsible for the offence, whatever it may have been.

Hon LINDA SAVAGE: Is clause 71(3) only limited in its application to corporations that have been wound up or no longer exist? In that case, when the minister used that as an example—and has done so on a number of occasions—it makes more sense than perhaps what was intended by the clause. That is not what the clause says. That is the first part of my question.

Hon SIMON O'BRIEN: The specific example that I used a couple of times was for illustrative purposes; but no, there could be a range of other circumstances. For example, the company might have been deregistered, it could be in liquidation, it could be impecunious and therefore unavailable to pay a fine, it could have been taken over by third parties, or it could have had a change of officers. There is a string of reasons why a prosecution might not have gone ahead against the corporate entity but it still might be appropriate to bring charges against those who have offended.

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Hon LINDA SAVAGE: Is it correct then to understand that a corporation existing or operating as well would be caught under this clause? There is no qualification to what state a corporation is to be caught under this clause.

Hon SIMON O'BRIEN: I ask the member to be patient with me because I have perhaps misunderstood the question. No; it does not necessarily follow that clause 71(3) applies to a company that ceased to exist. There could be other reasons; I have mentioned just one or two. It might have been taken over by a third party, so in that sense its corporate identity will have changed. The officers might be quite different—their fundamental DNA might have changed or there might be some other reason. I do not think it is exclusively that the company ceases to exist; I think it is a broader application.

Hon SUE ELLERY: I do not particularly want to drag out this debate but I think what is being argued about is the construction of those first seven words: "If a body corporate commits an offence". As I hear members, their questions go to who is deemed to have determined that an offence has been committed. As I read the bill before us, under division 2, the functions of the Pharmacy Board of WA include "to monitor, and enforce, compliance with this Act." The way I read this subclause is that, if the board is of the view that a body corporate has committed an offence under this act, although the board might take the view for some reason, including the many variations that the minister has set out, that the body corporate ought not be charged with the offence, every person who was an officer of the body corporate at the time may be charged. If those officers are charged and it is proved that the board's original view that an offence had been committed under the act is correct, the officers will also be taken to have committed the offence. That is how I read this, and I ask the minister to satisfy me that that is indeed what was intended when the clause at the beginning of the bill about the functions, and these two subclauses, were drafted.

Hon SIMON O'BRIEN: I thank the Leader of the Opposition for her contribution. The simple answer is yes. I believe that is what is intended, and what the government intended with this legislation. I would like to reassure members and assure the Leader of the Opposition, who has asked for the assurance, that far from eroding the individual officers' rights, these two subclauses require that, to find an officer guilty of a breach of the bill, the court must, among other things, conclude beyond reasonable doubt that the company would, if charged, have been found guilty of that breach as well. It is an extra protection for the officer in that sense rather than a double liability. It is necessary to contemplate these subclauses as well as to have subclause (2), which we have already dealt with.

Hon ADELE FARINA: What I am having difficulty with is how the court can find that the body corporate has been proved to have committed the offence. The body corporate is not a party to the action; it is not represented in the action; and it does not have an opportunity to present a defence. How, therefore, can the court form an opinion beyond reasonable doubt that it would have been proved that the body corporate would have been convicted if it had been charged?

Hon SIMON O'BRIEN: I come back to the theme I introduced a little while ago; that is, that the body corporate or the company is seen by clause 71 as synonymous with the officers, and vice versa—the officers are synonymous with the company. In that sense, the actions of the company in relation to offences and the actions of the officers of that company are one and the same thing. The effect of clause 71 is that in order to convict a company of an offence against the bill, or, in this case, to prove that if the company had been charged it would have been convicted, it remains necessary for the prosecution to prove the material conduct by an officer, which is characterised also as the conduct of the company. Any officer can be charged with or convicted of the offence by virtue of his or her being an officer. That is the question. The further question, if there is an aspect to it that has been asked of me by Hon Adele Farina for the purposes of subclause (4), is: how does a court determine that it is proved that the body corporate committed the offence? That is something that the court will have to be satisfied about. It is for the court to answer that question. I cannot.

Hon ADELE FARINA: With respect, if the minister cannot answer that question, what situation do we find ourselves in if the court cannot answer it because the body corporate is not a party to the action?

Hon SIMON O'BRIEN: The court is the entity that has to conclude that a matter is proved beyond reasonable doubt. It is not me. I am not a court; I am simply the minister at the table. I think the way the member characterised the question reflects a misunderstanding on her part. I do not agree that the deficiency exists that the member's question implies. Hon Adele Farina did not ask me to say what I would be satisfied by. I did not say that I do not know what it would take to satisfy a court. I said that the court has to be satisfied as to any case being proved in this sort of matter or any other case to be argued before it.

Hon GIZ WATSON: This is of interest to the discussion on this clause and is part of the reason I have raised issues about this clause in this area of trying to capture something that is difficult. It is certainly clear from the Standing Committee on Uniform Legislation and Statutes Review's conclusion and from the debate today that the wording, on its face, is hard to follow. I agree that it is almost as though it is trying to be too clever by half in

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terms of a pre-emptive capture. I was not talking about the minister being too clever by half, if that was his inference!

Hon Simon O'Brien: It is a nervous twitch that I have.

Hon GIZ WATSON: Yes. I can see that we are not going to win this argument. However, we might have rung a few alarm bells in terms of how these subclauses will be interpreted. Some good points have been raised by the committee. Even if members do agree with the intention of capturing individual officers—which I understand, judging from the fact that my amendment was not supported, is the view of the majority of the members in this place—I suggest that the way these subclauses are worded will cause considerable problems. I therefore suggest that the minister have another look at this matter to see whether there is another way of achieving what the minister wants to achieve. I now understand what the minister wants to achieve. However, I respectfully suggest that the words that are currently in the bill will not achieve that.

Hon LINDA SAVAGE: The amendments that have been put forward by the committee attempt to provide some basis—in the absence of a judicial procedure and a testing of the evidence—for reaching the conclusion that an offence has been committed. Given the difficulty that we have had in understanding the meaning of the words in these two subclauses, my fear is that this will create an enormous amount of work for lawyers! The committee felt that these two subclauses should be read together, and it was in the reading of these two subclauses together that our concerns arose with regard to an officer of a corporation.

Hon ADELE FARINA: I think members need to understand that we have now gone full circle in our discussion about these two subclauses. The onus will now be placed on the officer to prove not only that the officer did not commit the offence, but also that the body corporate did not commit the offence. That is because the body corporate, which is not a party to the action, will not be represented in the court. Therefore, the onus will now be placed on the officer to prove both those facts. Also, if the body corporate has been wound up, the officer may not have access to those documents that would be relevant to mount a defence. That would place the officer in an even more difficult position.

Hon SIMON O'BRIEN: As we draw the debate on this matter I think to a close, I want to thank members for their contribution. It has been a useful discussion. I do not accept the tenor of the remarks of Hon Adele Farina as being a representation of what the government is seeking to do through this clause. But that is her interpretation, and I thank her for the opportunity to clarify the government's view.

I also want to thank Hon Giz Watson for her contribution. I take this opportunity to reassure her that her proposed amendment, together with the committee's observations and suggestions on this matter, has caused the government to re-evaluate these matters. In the course of doing that, I have sought officer advice, both independent of these proceedings in the chamber and at the table today and the other day. I have also obtained advice from the State Solicitor's Office on this matter. Although it is not the practice, of course, to table advice, I can tell members that I have made a lot of use of that advice in framing my responses on this matter. So I have shared that advice in that way for the benefit of members of the chamber. I assure members that we have looked again at these provisions, and we are confident that they will achieve what we intend them to achieve. We do not believe, having honestly weighed up the matter, that the answer will be found in the amendments that have been proposed by the committee. In saying that, I am in no way seeking to be disrespectful to the committee. The government is saying quite definitely that we believe that what we want to achieve will be achieved by the wording that is currently in the bill before us. I suggest, Mr Deputy Chairman, that the clause now be put to the Committee of the Whole.

Amendment put and negatived.

The DEPUTY CHAIRMAN (Hon Jon Ford): We now move to amendment 2/71, which is also a committee recommendation. Does any member wish to move that amendment?

Hon Adele Farina: No.

The DEPUTY CHAIRMAN: So that amendment will drop away. I presume that the same applies to amendment 3/71. That amendment will drop away also. Does Hon Giz Watson wish to move her amendments 6/71 and 7/71?

Hon GIZ WATSON: Mr Deputy Chairman, having failed in the first of the amendments that I have placed on the supplementary notice paper, I will not be pursuing my amendments 6/71 and 7/71.

The DEPUTY CHAIRMAN: So those amendments will fall away also.

Clause put and passed.

Clauses 72 to 76 put and passed.

Clause 77: Terms used —

Deputy Chairman; Hon Giz Watson; Hon Simon O'Brien; Hon Sue Ellery; Hon Adele Farina; Hon Linda Savage

The DEPUTY CHAIRMAN: We now have on the supplementary notice paper another committee recommendation, amendment 4/77. Does any member wish to move that amendment?

Hon ADELE FARINA: Yes. I move —

Page 44, line 17 — To delete “15(j)” and insert —
14(j)

This amendment is simply a correction. The wrong reference has been made, and the committee simply seeks to correct that.

Hon SIMON O'BRIEN: A couple of things need to be said here. I understand that this might actually be an important matter for members to contemplate generally. Under standing orders—I think standing order 247(c) is the reference—if there is a change of reference to a section in another act, that can be done simply by way of a Clerk's amendment. I am not sure when a change becomes so substantive that it needs to be dealt with by way of a substantial amendment such as this, or whether it can be referred to the more powerful party in the place for its attention. I am referring of course to the “Clerk at the Table Party”!

The DEPUTY CHAIRMAN: After consulting that very powerful person, I am advised that normally a clerical change would be made had there been some amendments; that does not apply in this case. However, the Clerk is prepared, if the chamber has that will, to make that amendment as a clerical change. Is the committee of that view? Does anybody object?

Hon SIMON O'BRIEN: It was just a matter of interest for the point at which an administrative correction is made. We often have amendments moved for commas and semicolons and things, which are probably —

The DEPUTY CHAIRMAN: The point that was made to me was that this is one of those borderline things, but the Clerk is willing to accept that onerous responsibility, if that is the will of the Committee of the Whole. I will take it that that is the will of the chamber, unless the member —

Hon Adele Farina: What is the will of the chamber? Is it to let the Clerk decide that?

Hon Sue Ellery: To let the Clerk make the change.

The DEPUTY CHAIRMAN: That being the case, the amendment drops away.

Amendment thus withdrawn.

Hon SIMON O'BRIEN: I therefore presume that when another place gets a message from us in due course, assuming all goes well from hereon in, there will be a further reprint of the Pharmacy Bill 2010, which will then be 128-3 and that will carry this amendment. Is that how it works?

The DEPUTY CHAIRMAN: I am advised that the amendment will be made to the assent version of the bill that is sent to the Governor.

Hon Adele Farina: So how does the other place know that we have approved the amendment?

The DEPUTY CHAIRMAN: I am advised that the Clerk makes these clerical changes all the time and the other place is never advised of those changes!

Several members interjected.

The DEPUTY CHAIRMAN: Neither is this house!

Hon SIMON O'BRIEN: Is this some ancient secret that goes back to the days of de Montfort; and, if so, shall we get it expunged from *Hansard*? I did not want to blow a secret. When I said that the Clerk's party was powerful indeed, I did not think it was quite that powerful that it could make the law!

The DEPUTY CHAIRMAN: I will move on once I have made this clarification. It is actually completed by the Clerk under the joint standing rules and orders. The Clerks are the humble servants of the houses. I am sure that the minister was glad he raised that point.

Clause put and passed.

Clauses 78 to 94 put and passed.

Title put and passed.