

## WORK HEALTH AND SAFETY BILL 2019

### *Committee*

Resumed from 22 September. The Deputy Chair of Committees (Hon Martin Aldridge) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

#### **Clause 34: Volunteers and unincorporated associations —**

Progress was reported after the clause had been partly considered.

**The DEPUTY CHAIR:** I draw members' attention to supplementary notice paper 105, issue 8.

**Hon NICK GOIRAN:** Yesterday evening, we were considering clause 34 and my question to the minister was about the deviations from the model law. The minister was seeking advice before we were interrupted.

**Hon ALANNAH MacTIERNAN:** As per the documents, there are two changes. One change is to the heading to more accurately reflect the content and the second is the removal of references to civil penalties because those provisions are in our Industrial Relations Act rather being included in our Work Health and Safety Act.

**Hon RICK MAZZA:** How will this affect volunteer organisations like the State Emergency Service or the bush fire brigades? In many circumstances, local governments are in control of those volunteer groups. Under this clause of the bill, will local government be responsible for the health and safety of those volunteer brigades? Has the government considered that some local governments may abrogate that responsibility and say that they do not want to have control of the bush fire brigade any longer because of the duty-of-care responsibilities and then move that to the Department of Fire and Emergency Services?

**Hon ALANNAH MacTIERNAN:** This clause does not refer to local government. Obviously, local governments are incorporated entities, so they would fall under the definition of a person conducting a business or undertaking and when there is only volunteer labour, this, as I understand it, does not apply. But when there is both volunteer labour and paid employees, or people who are classified as employees, the volunteers who are working in the same place are also covered.

**Hon RICK MAZZA:** I want to be clear on this. Obviously, volunteering as a bush fire fighter or as a State Emergency Service volunteer will put a person, on occasion, into very dangerous situations in which no-one has any idea what the consequences may entail. It is impossible to perceive what may happen. Is the minister saying that the local government authority is a person conducting a business or undertaking and would therefore be responsible should a volunteer be injured or die as a result of the service that they are providing?

**Hon ALANNAH MacTIERNAN:** A local government is an incorporated entity and the definition of a PCBU says that when an entity has employed staff and volunteers working side by side, the volunteers will be covered, but if it is purely a volunteer arrangement, it does not invoke the liability. That is my understanding. I have answered that question as far as I can.

**Hon RICK MAZZA:** I have a question about this. There seems to be a little confusion here. Where my concern lies with this is that the local government authority, which the minister has pointed out is a PCBU, has control of the volunteer bush fire brigades. However, much of the training and many procedures are undertaken by the Department of Fire and Emergency Services. If a volunteer firefighter was hurt while volunteering, or, if the worst happened and they were killed while volunteering, how would this legislation apply? Would the local government be responsible if it were found to have breached its duty of care, or would it be the Department of Fire and Emergency Services if its procedures and training were found to have been deficient? How would this play out in that scenario?

**Hon ALANNAH MacTIERNAN:** Sometimes there will be multiple responsibilities. As members will have seen in various notorious cases of late in which charges have been laid, different people may share the liability. It may well be that if the Department of Fire and Emergency Services had control of the site and did not discharge its obligation to a duty of care, it could be liable. However, there could be several layers of responsibility. As I understand it, liability will not extend to the volunteer association. In the bill, the definition of a PCBU excludes a volunteer association. The definition of "volunteer association" is —

... a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

I understand that this will not change the current law; it will clarify it.

#### **Clause put and passed.**

#### **Postponed clause 4: Definitions —**

The clause was postponed on 17 September after it had been partly considered.

**The DEPUTY CHAIR:** I understand the committee decided earlier to now return to clause 4, which had been postponed until after clause 34. We now return to clause 4. The question is that clause 4 stand as printed, and I draw members' attention to the supplementary notice paper.

**Hon ALANNAH MacTIERNAN:** I just want to check whether the amendments on the supplementary notice paper have been moved. I do not think they have been.

**The DEPUTY CHAIR:** Minister, my advice is that the amendments to clause 4 listed on the supplementary notice paper have not been moved.

**Hon ALANNAH MacTIERNAN:** I have been advised that it is not appropriate to move amendment 46/4 because, effectively, the amendments that were made to clause 31 render that amendment unnecessary. I proceed to move —

Page 7, lines 11 and 12 — To delete the lines and substitute —

*industrial manslaughter* — see section 30A;

We have a slight problem here, now that I think about it, because we have not dealt with clause 30A yet.

**The DEPUTY CHAIR:** The minister has indicated that it is not her intention to move amendment 46/4, but she has moved amendment 47/4.

Minister, the advice I have received is that not only amendment 46/4, which you have just moved, but also the amendment of Hon Alison Xamon at 38/4 depend on decisions of the committee at a later stage of consideration of the bill. Is it your intention to further postpone consideration of clause 4 until after new clause 230A?

**Hon ALANNAH MacTIERNAN:** Could my amendment not be considered after postponed clause 30A?

**The DEPUTY CHAIR:** If you proceed with the amendment that you have moved and a future decision of the chamber is inconsistent with that amendment, you will have to recommit the bill to amend clause 4 again; or you could seek leave to withdraw your amendment and postpone clause 4 to a later stage.

**Hon ALANNAH MacTIERNAN:** Yes. I will withdraw that amendment and seek to recommit that at a later stage.

**Amendment, by leave, withdrawn.**

**The DEPUTY CHAIR:** Now, minister, you will need to move a postponement motion.

**Hon ALANNAH MacTIERNAN:** This is slightly complex because the amendment I seek to move requires only the resolution of postponed clause 30A. My intention would be to postpone this clause until after consideration of postponed clause 30A.

**The DEPUTY CHAIR:** The minister moved that clause 4 be postponed and considered after clause 30A. Is that correct, minister?

**Hon Alannah MacTiernan:** Yes.

**Hon ALISON XAMON:** Hon Nick Goiran tried to resolve this issue much earlier on in the piece by drawing attention to the fact that a series of amendments to clause 4 have been proposed. In order to avoid having to continually come back to clause 4 and postpone it, I thought the eminently reasonable suggestion was to postpone it until much later in the debate, so we would know exactly which amendments are going to fall away and which ones will need to be considered consequentially as a result of other amendments. I suggest that we look at postponing all of clause 4 until after consideration of new clause 230A.

**Hon ALANNAH MacTIERNAN:** I accept that. I am happy to amend my motion, so clause 4 can be considered after new clause 230A.

**The DEPUTY CHAIR:** Members, the minister seeks leave to amend her motion so that it shall read that clause 4 be postponed until after the consideration of clause 230A.

Leave granted.

**Further consideration of the clause postponed until after consideration of new clause 230A, on motion by Hon Alannah MacTiernan (Minister for Regional Development).**

**The DEPUTY CHAIR:** That now takes us to amendment 51/P2D5H standing in the name of the Minister for Regional Development.

**Hon ALANNAH MacTIERNAN:** I move —

Page 35, line 1 — To delete the line and substitute —

**Subdivision 2 — Industrial manslaughter and other offences**

I believe this just changes the heading.

**Hon NICK GOIRAN:** I do not think that this amendment is appropriate. If members have a look at the subdivision at the moment, it is entitled “Subdivision 2 — Industrial manslaughter”. As the subdivision currently reads, it includes postponed clause 30A, which is nearing completion and we will hopefully get to it very shortly. We no longer have clause 30B because the Committee of the Whole House decided to delete it. At the moment, if the bill were to pass without any further amendments, and we assume that clause 30A will pass, we would have “Subdivision 2 — Industrial manslaughter” with one clause under it, clause 30A, which is entitled “Industrial manslaughter”. We would then go to subdivision 3, which lists other offences and penalties. That seems to me to be entirely appropriate. I do not think that what is being proposed is either appropriate or necessary. Minister, my respectful submission is that it might be better if this amendment was withdrawn and we move on to the substantive matter of postponed clause 30A.

**Hon Alannah MacTiernan:** Let’s just put the motion.

**Hon MICHAEL MISCHIN:** The minister is saying we should put the vote, but perhaps she could explain what other offences are going to be under subdivision 2 now that we have dubbed all the substantive offences in clause 30A as industrial manslaughter?

**Hon ALANNAH MacTIERNAN:** We will concede the point.

**Amendment, by leave, withdrawn.**

**Postponed clause 30A: Industrial manslaughter — crime —**

The clause, as amended, was postponed on 22 September.

**Hon NICK GOIRAN:** I move —

Page 35, line 19 — To delete “an offence under section 30B(1).” and substitute —  
a Category 1 offence, a Category 2 offence or a Category 3 offence.

Briefly, by way of explanation to members, this is a consequential amendment upon the Committee of the Whole House’s decision to remove clause 30B. Members will see that that is precisely what is to be deleted. In substitution, it is intended that the other category 1 offences be allowed. This was recommended to me by parliamentary counsel. Members will also note there is an amendment on the supplementary notice paper in the minister’s name at 54/30A. The only difference between these two amendments is that mine refers to a “Category 1 offence” and the minister’s amendment refers to a “Category 1 crime”. That amendment will now fall away because what was intended to be new clause 31 was not proceeded with. For those reasons, I recommend the passage of this amendment.

**Amendment put and passed.**

**Hon NICK GOIRAN:** On the assumption that there will be no movement of amendment 54/30A for the reasons I just mentioned, I will move the amendment standing in my name. To save time, I indicate that the same reasons apply. I move —

Page 36, line 12 — To delete “an offence under section 30B(3).” and substitute —  
a Category 1 offence, a Category 2 offence or a Category 3 offence.

**Amendment put and passed.**

**Hon ALANNAH MacTIERNAN:** I do not propose move any further amendments to this clause.

**Hon MICHAEL MISCHIN:** Minister, we touched on this during debate on clause 1 and we have come back to it on a couple of occasions since. I want to explore it further, as I think it is important that the information provided to this chamber in support of this legislation be accurate and complete.

On 16 September when the minister commenced her second reading reply, she said, and I quote from the uncorrected *Hansard*, but I have no doubt if there is an error it can be drawn to my attention —

I think there has also been majority support for the introduction of industrial manslaughter provisions. I am conscious that this is a big step, but I think it is a very important step.

The minister then referred to a document entitled “Families Left Behind: Taking Action for Workplace Safety Reform” and hoped that all members would get a copy of it. Those members who have read it will know that it is very moving. It contains the accounts of bereaved families of victims and their feelings about the loss of someone about whom they cared. In each of the examples that are cited—it is tabled paper 4235—there is a heading to the effect of “Why industrial manslaughter is important”. I presume that is the reason the minister cited the facts of the Paspaley Pearls case; is that right?

**Hon ALANNAH MacTIERNAN:** My second reading reply dealt with the bill as a whole. I reflected on the fact that we are very conscious that many families, including the family of Wesley Ballantine, are deeply aggrieved by the penalties that people who have been found to have failed their duty of care have received. I cited the case of Regan Ballantine’s son. In fact, in all those cases in that document, people had died in circumstances in which it

was acknowledged that there had been a failure of a duty of care. I talked about all the provisions of the bill, but in particular those between clauses 30A and 31, which are doing a number of things, including very significantly increasing the monetary penalties and also the terms of imprisonment consequential upon various offences. There will be a very significant increase in the terms of imprisonment under the provisions of clause 30A, in which a failure of a duty of care is accompanied by death and gross negligence, and the provisions of clause 31, in which there is a failure of a duty of care and a death or serious injury. We think that is appropriate and we believe that that is going to have an impact on the work health and safety culture. We have made this point over and again. It is now possible that under clause 30A, instead of the penalty for a major offence by an individual being five years' imprisonment and a fine of \$550 000, the maximum penalties will be a term of imprisonment of 20 years' imprisonment and a fine of \$5 million. The penalties for offences by bodies corporate and officers, of course, will also increase significantly.

The member made the point over and again that the cases that I cited had not been prosecuted in circumstances in which there had been gross negligence. I completely understand that. I agree with that. We acknowledge that there will not be many cases in which we are going to be able to prosecute industrial manslaughter per se, because establishing that bar is very significant.

I think that words matter. From time to time the member has said that these are just words, but I think that the words matter here. A deeply important message is being sent by labelling these circumstances when there has been "gross negligence"—I am using the language of the old act—and a death as industrial manslaughter. I think that sends a message about the gravity of the offence. We have repeated over and again that parents, family members and partners are concerned that somehow or other the lives of their loved ones are being treated as though they were meaningless.

**Hon Michael Mischin:** Why do you say that?

**Hon ALANNAH MacTIERNAN:** I say that because it has been difficult to get a penalty that is considered to be commensurate with the loss and travesty. Family after family is telling us that. Their struggle for justice has created an environment in which they felt that their child's or their partner's life has been absolutely undervalued—that it was considered to be something trivial. We say that there is a symbolic aspect to using the words "industrial manslaughter". That symbolism is important. It says that this is something that takes away a person's life. It references a concept that is in the Criminal Code. It is well entrenched and well understood in the community that this is about taking someone's life unlawfully. It seeks to, in a sense, make less bland the consequence of what happens when there has been a failure of a duty of care in a circumstance of gross negligence. This must be called out for what it is—that is, industrial manslaughter. As I said, our aim in all this is to create a greater sense of urgency and need for care amongst employers to really engage and understand that they have to give more primacy to and detailed engagement on the whole question of ensuring as far as is reasonably practicable a safe working environment for the people who work for them.

I am not sure where this is going. We, and I am sure the families, many whom are listening in, are highly perplexed by this because we know that in the other place, the shadow minister and spokesman for the Liberal Party, Mr Peter Katsambanis, indicated that he has no difficulty with clause 30A and that he strongly supports it. Person after person in the other place had no objection to this clause. I am not sure what we are doing here or where we are going, Hon Michael Mischin. But we are proud to stand behind the fact that we are enhancing the penalties. There are greater penalties now, a consequence upon this offence, and we have renamed it so that we can give further strength to calling the consequences of this behaviour for what they really are. That type of failure of a duty of care and the circumstances of gross negligence that leads to a death of a person must be called out for what it is—that is, industrial manslaughter.

**Hon MICHAEL MISCHIN:** Thank you, minister, for that speech. What I got from that is that the minister does not quite know what we are doing here. I did not raise the Paspaley Pearls case as an example of anything; the minister did at the beginning of her second reading reply to urge us to support the provisions and to somehow justify what the government is doing. The minister has just told us that it is the same offence that was previously there, but that the government has symbolically renamed it as industrial manslaughter—that is all. The other thing that the minister has done is to increase the penalty for that offence from five years to 20 years' imprisonment, and that will change workplace culture. What was Paspaley Pearls charged with? Was it charged with a section 19A(1) offence, which was gross negligence? Would it have been subject to that penalty of five years' imprisonment; and, if not, why not?

**Hon ALANNAH MacTIERNAN:** I have explained this to the member over and over again and this will be the last time. When I mentioned that example and others, it was in reference to the package of legislation. I sought to illustrate why it was important that we did more, and that these were examples in which people had died and the penalties that had accrued were seen to be woefully inadequate. All the examples that I quoted would be captured more under clause 31, in which we have also increased the penalties. As I said before, when I used those examples I was addressing the entire bill, not a single clause.

The member has been flogging this horse for a long time. He is trying to say that I raised those as examples and if we introduce industrial manslaughter, these people would get a higher penalty. That is not what I said, and I have

explained this to the member five or six times. We believe that this suite of measures, including the industrial manslaughter measures and the increased penalties under section 31, will create an improved step change in the attention given to occupational health and safety, just as the introduction of this style of legislation in the first instance in the 1980s created a step change in the way in which industry focused on these issues. Member, I am not saying in that particular case there would have been an industrial manslaughter conviction. Quite clearly there would not have been. But I am saying that by putting in this suite of measures, which includes greater personal liability, we believe it will engage with and improve the focus of managers and directors on these occupational health and safety issues and will lead to far fewer situations in which young men are killed and a failed duty of care has been acknowledged.

**Hon MICHAEL MISCHIN:** Plainly we are not going to get much further with that, but the minister thought fit to state in this chamber —

I think there is very strong support for the principle of harmonisation of our work health and safety laws, and I think there has also been majority support for the introduction of industrial manslaughter provisions. I am conscious that this is a big step, but I think it is a very important step.

Today, I have received a copy of this document, “Families Left Behind: Taking Action for Workplace Safety Reform”.

As I mentioned, the theme in that is industrial manslaughter and why it is important to create such an offence. It also complains about the penalties being handed down in those individual cases, some of them dating back to 2006. The minister continues —

The document sets out the situations of a range of overwhelmingly young Western Australians who have died in the workplace, and the consequences for their employers have seemed very, very minor compared with the extraordinary loss that has been suffered by the families and friends of the person who lost their life.

I will reflect on the case of Jarrod Hampton, a 22-year-old who was working as a drift diver for Paspaley Pearls back in April 2012. When he surfaced midway through a dive and alerted the boat that he was in distress, —

I digress for a moment to say that they are not the facts that appeared on the WorkSafe website that goes through the facts of that particular incident. He came to the surface. One person thought that he heard a shout, but no-one noticed much. The diver disappeared below the surface. They thought he was continuing the dive. However, I think it was the skipper of the boat who, when he was told that, said “We’d better go and have a look.” The minister continues —

it took the crew approximately 20 minutes to retrieve him from the water.

They are not the facts of the case on the website. In fact, the estimate given by the witnesses was that it was five to 10 minutes. She continues —

The company had no rescue procedure, —

I think the report states “written rescue emergency procedure” —

although it was a requirement of its own code of practice. The company’s attempts to save Jarrod were chaotic, disorganised and ultimately fatal.

The suggestion being that that is what caused his death, but that is not what the company was charged with—quite the contrary. No allegation was made that the company failed to take all reasonable steps, which would have been in breach of section 19 of the Occupational Safety and Health Act, which states —

An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer ... are not exposed to hazards ...

It then particularises certain things. The company was not charged with having caused the death, so there was a limit on the penalty that could be imposed. It is wrong for the minister to suggest that the company was somehow charged with that or that there was an evidential causation. Tragic though it was, that is not what WorkSafe charged, so it would never have come to industrial manslaughter if that is the case.

**Hon Alannah MacTiernan** interjected.

**Hon MICHAEL MISCHIN:** As the minister is now explaining to get around the fact —

**Hon Alannah MacTiernan** interjected.

**The CHAIR:** Order! When I am speaking, no other member will speak. I am interrupting debate to remind you at this late stage on a Wednesday that Hon Michael Mischin has the call and he is addressing the Chair.

**Hon MICHAEL MISCHIN:** Thank you, Mr Chairman. The findings of the report on the website do not state “chaotic, disorganised and ultimately fatal”. It does not say anything about a connection between the failing of the

company on this occasion and that it in any way caused this unfortunate tragedy and the death. In fact, he was unconscious when he was pulled from the water. The minister continues —

Paspaley Pearls was charged with not providing a safe place for work.

That is not quite what the duty is, but we will leave that lie. The minister continues —

Some 13 months after these charges were laid, the company pleaded guilty.

I take it there is nothing in the procedures that are set out in this legislation that will in any way expedite the time from a charge to a resolution of a case. That is not being dealt with. The ordinary court processes will apply, will they not? It would be even more difficult, if charged on indictment before the District Court where it could take several years for a prosecution to find its way to a conclusion rather than before a Magistrates Court, but that is what the government is telling the families referred to and future families: “If you want industrial manslaughter, it’s not going to be before a magistrate; it’s going to the District Court and there’ll be a jury empanelled and all the usual processes that might take years to get to a trial or a plea of guilty.” Be that as it may. The minister’s second reading reply continues —

This case resulted in the death of a young man in a situation in which there was no rescue procedure.

It did not result in his death. That is not what the company was charged with. If it did, surely it would have been charged under section 19A(1) or 19A(2), not 19A(3) of the Occupational Safety and Health Act, and that means the company would not be charged under any different offence in this particular case. Although, possibly it could be charged under clause 31(3) of the Work Health and Safety Bill, but we do not know because the minister will not clarify that. The minister’s second reading reply continues —

The company was fined \$60 000. The maximum fine was \$200 000, but the Broome magistrate reduced the fine payable by 70 per cent on the basis that the company was a good corporate citizen and made an early guilty plea.

Where did the minister get that information from? There is nothing on the report on the WorkSafe site to say that the fine was reduced on the basis of the company being a good corporate citizen. What is the source of that information that the minister presented to Parliament to say that it was an appallingly low penalty, when the company was not responsible for or connected with the death itself but had a breach of a duty, although the minister will not tell us precisely what particulars there were for the unsafe workplace? I presume, from reading the report, that it was because the company did not have a written emergency procedure. The minister’s second reading reply continues —

Those who have been left behind, his parents ...

The minister goes through that; I do not want to diminish the tragedy of what happened. The minister then said that the family —

feel that this is not a result that reflects the travesty —

They are the minister’s words, by the look of it —

in the way that Jarrod was treated and the consequences for the family.

Yet it appears that there is no evidence to support a connection between the failing and the fact that he died. The minister goes on —

I think it is always important to frame what we are dealing with here and question whether we have adequate responses in place.

The minister is saying that this is an adequate response: to redub an existing offence by increasing the penalty to 20 years, knowing full well that it would not have made the slightest difference in this case. The minister says that the penalty was too low—\$60 000 out of a maximum of \$200 000. Did the government appeal the penalty? Did WorkSafe appeal the penalty? If not, why not?

**Hon ALANNAH MacTIERNAN:** That case is not relevant to the clause that we are considering.

**Hon MICHAEL MISCHIN:** That is a good one. Whenever I raised the subject, the minister said that this matter would have to wait until the industrial manslaughter clause, and now that we have got to it, she is saying that it is not relevant. Of course it is not relevant. It is not relevant because the minister has thrown it in there as being a justification and relevance for the industrial manslaughter provision, but now that it is being tested in the cold light of day against the facts, it is another one of those inappropriate examples.

Several members interjected.

**The CHAIR:** Order! One at a time. Everyone who wants the call will get it.

**Hon MICHAEL MISCHIN:** For accuracy and for the record, for anyone who is interested in these things, the minister might learn something if she bothers to read the facts, I seek leave to table the extract from the prosecution summaries on the WorkSafe website: summaries of successful prosecutions, prosecution details for Paspaley Pearling Company Pty Ltd case, and the charges that were laid. It says that it was section 19(1); it was a breach of duty. It does not provide the particulars of how the duty was breached, but 19A(3) was the relevant offence.

Leave granted. [See paper [4320](#).]

**Hon MICHAEL MISCHIN:** Another tragic case that the minister cited was that of Jayden Zappelli. Once again, that was not an accurate reflection of the facts on the WorkSafe website. I will not go into the detail of it, suffice to say that it is not quite right to say that he was doing work experience to secure an apprenticeship. He was a trades assistant. I would have thought that his job in assisting an electrician would be more than just digging trenches and passing tools, but would involve participating in the work. The failing in that case was the failure to isolate a circuit. It was entirely due to the mismanagement of the electrician concerned, who did some checks but failed to ensure that one of the circuits was isolated. In the course of that, while Jayden was pulling up a cable into a roof space, some of the tape that was supposed to isolate that cable got stripped off and came into contact with a copper pipe. The company, JCW Electrical Pty Ltd, was prosecuted and fined, but, again, under section 19A(3) of the Occupational Safety and Health Act.

The reason that it was prosecuted was not for causing the death of that young man, but because it had not instructed and implemented a formal safety system in a variety of respects. But the main culprit was a fellow worker who had used a piece of equipment that was not issued to him by his employer and who did not follow usual practice by using a multimeter rather than a volt stick, in one case, and took a shortcut assuming that a circuit was isolated without using appropriate means to confirm it. Part of the difficulty—the minister might reflect on this—is that the then standards did not require the total isolation of every circuit in the house, but only those that were being worked on. The electrician made the mistake of assuming that he had done so without doing the proper checks to ensure it. Nevertheless, suggesting that the employer's fine is paltry and low suggests that the employer has a causal link with that particular tragedy—that death—but that is not the case. The person who may have caused it—even he was not charged with causing the death—was one Mr Mortley, who was charged for a breach of duty as an employee, as a fellow worker. He was charged under section 20A(2) of the Occupational Safety and Health Act. That is a charge that a person commits an offence —

If —

(a) an employee —

(i) contravenes section 20(1) or (3); and

(ii) by the contravention causes the death of, or serious harm to, a person;

Again, that was not gross negligence, which the minister has now redubbed as industrial manslaughter, but that was a serious offence because there was a cause—the cause was his negligence. The employer was not charged with causing death, and the employee, Mr Mortley, quite apart from being fined, had to have his competency retested before he was allowed to continue his work as an electrician. It is all very well for the minister to go on about how appallingly low the penalty was for the employer without actually identifying what the breach of duty was that the employer was charged with and without connecting it to the death in any way, which certainly WorkSafe was not able to do; otherwise the company would have been charged accordingly. Once again, the minister is misrepresenting things in order to achieve a political end. It is a disgrace.

For the reference of the chamber, and for those who want to know what the facts of that case were, I seek leave to table the prosecution details for JCW Electrical Pty Ltd from the summary of prosecution from the website, and that for Dale Francis Mortley, who was charged with two offences—in the first instance, of being an employee who failed to take reasonable care to ensure his own safety and health at work; and in the second case, of being an employee who failed to take reasonable care to avoid adversely affecting the safety and health of his colleague through act or omission at work, and thereby causing the death of his colleague. It is all very well to rail about sending messages out to employers, but it is not going to make the slightest bit of difference if their conduct will not be culpable under the provisions that the minister asserts will fix the problem. I seek leave to table those two cases.

**The CHAIR:** Member, are they public documents?

**Hon MICHAEL MISCHIN:** They are public documents.

**The CHAIR:** It is a matter for the chamber, but I am not sure that it is always necessary to table large numbers of papers; it is a logistical question that has been raised by presiding officers from time to time. That is why I asked the question, but if the member wishes to proceed to seek leave of the chamber.

**Hon MICHAEL MISCHIN:** I suppose for completeness I should, having done the other one, but they can be found online. Perhaps I can substitute the one I handed up on Paspaley Pearling Company, which has notes on it.

This one is a clean copy. It does not matter if it is not going to be accepted and tabled, but they can be found on the WorkSafe website; it was then the Department of Commerce, but it can still be found under the Department of Mines, Industry Regulation and Safety, or whatever iteration it is this week.

Those three cases are not appropriate as a justification for the points that the minister and government seek to make. I suggest that it is intended to pretend to these families that calling something industrial manslaughter, which is no different to what was there before, will meet their very real emotional need to think that justice will be done in the future, but without regard to the detail; and, as they say, the devil is in the detail. The minister will not want to engage in any further debate on the subject because she knows she is wrong and she has tried to misuse these cases on an emotive level without any practical consequences except sending messages and the like. Despite her comment, “Yes, we believe there will be very few prosecutions under proposed section 30A”, I would venture to suggest that in five years’ time, after this bill has received royal assent, there will not have been any.

**Hon ALANNAH MacTIERNAN:** This is very much a case of “They Were All Out of Step But Jim”. No wonder the member has been demoted to number six on the ticket. I refer the member to the Leader of the Opposition’s contribution to the second reading debate on this very bill. The Leader of the Opposition is obviously a person who is a little more in contact with the electorate and with the people of Western Australia than Hon Michael Mischin is. The Leader of the Opposition went into some detail on precisely those cases. She spoke very powerfully about her conversation with Regan Ballantine, and how appalled she was that that situation could have been allowed to occur. She said in the other place, on 18 February —

The courts are very clear in saying that that is not how they impose the penalty—it is not based on the value of a human life—but when someone has lost a loved one in those circumstances, that is how it feels ...

She then went on to talk about a second case. She did not actually name the case, but as far as I can tell, she did not name it out of respect because she had not obtained the permission of the parents involved, but I am almost 100 per cent certain that it is the case of Jayden Zappelli, because it is exactly the same circumstances. She goes on to talk about the findings that were made against the company and the statements of the magistrate. The magistrate said that the company —

... failed to provide a work environment where employees were safe by not ensuring employees turned off the mains power before entering a roof space.

The magistrate went on to say that although the company —

... was not intentionally risky but complacent to follow an industry standard practice which has been identified as not-sufficient.”

The WorkSafe WA Commissioner at the time said —

... the case was a stark reminder of the dangers of working with electricity.

The Leader of the Opposition also reflected that the circumstances of the case were astonishing, given that the penalty was only \$38 000, when the maximum was \$200 000. The Leader of the Opposition thought that these cases, and the concerns of the families involved—the same families that I talked about—were important and relevant to the package of legislation that we have before us.

We could go on and on; I do not know what the purpose is. I do not know whether the member is trying to prevent this legislation getting through, but we have here the Leader of the Opposition and the shadow minister supporting this legislation. We thought the member was supporting it, but we are going to go on and on and on. The member’s real problem is that he was Attorney General for a number of years and was unable to make progress on these matters.

Several members interjected.

**The CHAIR:** Order! Hon Alison Xamon.

**Hon ALISON XAMON:** Obviously, I have only a couple of minutes before we report progress. I want to apologise to the families who will find this debate very distressing at the moment; I am aware that there are families watching us in this chamber, and I would really like people to be mindful of that.

I do not know whether any of the cases cited would have resulted in industrial manslaughter legislation being enacted. I have always maintained that one of the reasons we need industrial manslaughter legislation is that it changes the way that even investigators approach worksites. We know that there is a recurrent problem of police, in particular, turning up to worksites and simply walking away once they see that it is a workplace death. They are looking for overt and obvious signs of criminality—whether someone has been murdered at a site. If they deem that that has not happened, they walk away. That has often meant a scarcity of evidence being picked up at the point of someone dying in the workplace that would have facilitated the capacity for a prosecution to proceed.

It is really important to note that just because a prosecution has not been pursued, it does not mean that criminality has not occurred at some point; it simply means the evidence was not adequately compiled for whatever reason and hence a case could not be made. It behoves all of us to remember that just because a lesser charge is pursued, it does not mean that a greater offence was not committed.



**Extract from *Hansard***

[COUNCIL — Wednesday, 23 September 2020]

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Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon Alison Xamon; Hon Michael Mischin

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**Progress reported and leave granted to sit again, pursuant to standing orders.**