WORK HEALTH AND SAFETY BILL 2019

Committee

Resumed from 24 September. The Deputy Chair of Committees (Hon Robin Chapple) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

Progress was reported on the following amendment to clause 272A moved by Hon Rick Mazza —

Page 177, line 21 — To delete "an offence against this Act." and substitute —

a crime under section 30A or a Category 1 offence.

Clause 155A: Supplementary provisions relating to appearances —

The DEPUTY CHAIR: Members, before we continue, if I may, we have been advised by the procedure office that we have skipped the agreement on three clauses—clauses 155A, 155B and 155C. Therefore, I will now put those three clauses. The question is that clause 155A be agreed to. All of that opinion say aye.

Hon NICK GOIRAN: Mr Deputy Chair, the question you are putting before the chamber is about clause 115A; in the bill I have, there is no clause 115A.

The DEPUTY CHAIR: It is clause 155A.

Hon NICK GOIRAN: Thank you, Mr Deputy Chair. My question to the minister then is: why was clause 155A previously deferred?

The DEPUTY CHAIR: My understanding is that it was not deferred. We have been advised that we did not vote on it.

Several members interjected.

The DEPUTY CHAIR: I will now move that clause 155A stand as printed.

Hon NICK GOIRAN: I stand to ask for clarification because this is irregular and I want to be sure that I understand exactly what has transpired. It appears that when we were dealing with part 8, which is entitled "The regulator", we would have, as I recall, been dealing with several questions. It certainly was my custom and practice during the consideration of this bill to ask questions, when possible, about the first clause that appears in each part, unless there was a particular reason to ask questions on a particular clause. As I go back to my notes, I see that part 8 consisted of clauses 152 to 155C and that I did ask some questions on clause 155. That said, I do not have before me a copy of the *Hansard* that deals with that part of the debate. It seems irregular that, for reasons that are not immediately apparent, we would not have dealt with clauses 155A, 155B and 155C. Nevertheless, if the minutes of the house reflect that we have not yet done that, I should indicate —

The DEPUTY CHAIR: Member, if I may, we did deal with those clauses. They were debated but there was a failure to put them. We failed to put them; it was never brought to the chamber that those clauses be agreed to.

Hon SUE ELLERY: If I may, Mr Deputy Chair, I think we are all hearing this for the first time. The government was certainly not advised of this and it is clear that neither was the opposition. That is probably not the most helpful way to do something like this, but we are all hearing this at the same time.

Hon NICK GOIRAN: In terms of the position of the opposition, I indicate that this seems somewhat irregular. I agree with the Leader of the House that this process is less than desirable. Nevertheless, if it is the case that there is some deficiency in the minutes of the house, or for any other reason it is not clear that the chamber has passed and approved clauses 155A, 155B and 155C unamended, I simply indicate that the opposition has no objection to that.

The DEPUTY CHAIR: Thank you. Therefore, I move that clauses 155A, 155B and 155C stand as printed.

Clause put and passed.

Clauses 155B and 155C put and passed.

The DEPUTY CHAIR: That takes us back to the position we were in on 24 September when we were dealing with the amendment moved by Hon Rick Mazza.

Clause 272A: No insurance or other indemnities against fines —

Progress was reported on the following amendment moved by Hon Rick Mazza —

Page 177, line 21 — To delete "an offence against this Act." and substitute —

a crime under section 30A or a Category 1 offence.

Hon RICK MAZZA: Before we rose on the last September Thursday that we sat, I spoke about the fact that under the provisions of this bill, there is a blanket prohibition of having insurance cover. The Chamber of Commerce

and Industry of Western Australia, in its submission to the Standing Committee on Legislation in June this year, has a section on the prohibition of insurance. The submission states —

> 118. The common law currently takes a balanced approach to cases involving this matter, with the general rule being that a contract of insurance is not enforceable in respect of criminal acts. This rule reflects the long-held principle that the availability of such insurance is contrary to public policy.
>
> 119. Whilst the common law prohibits insurance for intentional criminal acts, it recognises that there are occasions where a person may unintentionally commit a criminal offence in the course of their duties.

Further into the submission, it states —

> 122. It is therefore clear that there is currently no universal ability for PCBUs or officers to indemnify their liability for penalties. Rather, the courts have taken a balanced approach in considering whether it is acceptable in some circumstances.

It also states —

> 125. Take for example the case of a not for profit organisation which relies on their capacity to attract board members who are prepared to volunteer their time to support the running of organisations providing services for the community. There is a serious question to be asked about the capacity of these organisations to attract suitably qualified board members who in addition to being asked to volunteer their time are now being asked to risk their financial security.

There are some concerns around the inability to insure under any part of this act. The amendment I have on the supplementary notice paper basically makes the prohibition specific to "a crime under section 30A or a Category 1 offence". As I said the last time that we were considering this bill, in most circumstances, contracts of insurance will not cover a criminal offence. The Zappelli case is the one example I am aware of in which there was a fine. The magistrate handed down a $38 000 fine, which the insurance company did cover. It was mainly to do with the fact that it was a new group insurance policy for the electrical industry. The underwriters decided, for whatever commercial reason, they would cover it. It was very unusual in that circumstance.

There will be other matters within this bill that do not have in them an accident or a death but they may attract a substantial fine. I feel that, under those circumstances, it should be a commercial arrangement between the insurer and the person with the cover, other than a crime under section 30A or a category 1 offence.

Hon ALANNAH MacTIERNAN: The government will not be supporting this amendment. Can I start this conversation by saying that today we had a very tragic accident on a building site at Curtin University where a young man died and another two young men are in hospital. It is quite clear that we have some way to go to ensure that we have the right occupational health and safety in our workplaces. I will just say that I do think we are getting to a point when we really have to get on with this bill. Whilst I am not —

Hon Nick Goiran interjected.

Hon ALANNAH MacTIERNAN: No, sorry; I want to make this point because I think that the public and, in particular, the families —

Hon Nick Goiran interjected.

The DEPUTY CHAIR: Members!

Hon ALANNAH MacTIERNAN: I am sorry; I am going to say this because we have had weeks of debate. This debate has gone on much longer than —

The DEPUTY CHAIR: Members! Order! Could everybody just resume their seats for a minute, please? We have a lot to deal with in this piece of legislation. I would like to see the debate conducted with some decorum. Ribald interjections are not suitable in this debate.

Hon ALANNAH MacTIERNAN: I make that point, and I know the Premier and the minister feel very strongly about this. The leader of government business in the other place expressed his concern on behalf of the opposition about the tragic incident at Curtin University. We all know where we stand on these things and these issues. We are going to have the debate, but we all know where we stand. I ask that tonight we make our point of view known and then get on with the vote.

I understand Hon Rick Mazza's concerns, but we are trying to create a culture, which is really important. If a person can simply insure and absolve themselves of the penalties that would apply, which are fundamentally aimed at ensuring that there is a management focus, that would not happen. Members should remember that this is not a strict liability. This is not about anyone having to prove their innocence. This is about a failure to take proper regard.

Whatever a person's role, if they operate a workplace, they need to take proper regard. If they take responsibility, they have to show reasonable regard. The member mentioned a volunteer on a board. Obviously, the expectation of what would be a reasonable degree of inquiry for a volunteer on a board will be very different from the expectation of a CEO of a large corporation who is being paid millions of dollars. Those sorts of issues will be taken into account in determining a penalty. If a person conducted themselves as a volunteer member on a community board and had not acted in a negligent way, a penalty would not accrue to them. The whole thrust of this legislation is to create that management focus and to put work health and safety matters at the forefront of people's minds.

I felt it today. My son works at Curtin University. As soon as I heard the news, my first thought was: is it my son? I can imagine that other families probably had exactly the same reaction. Unfortunately, for three of those families, it was their child who was affected by that accident. This cultural change is hugely significant. If we allow this provision and allow this to be something a person can insure their way out of, we will not achieve that in any way. The Boland review considered this and, indeed, made a very clear recommendation that the model Work Health and Safety Bill be amended to make it an offence to enter into a contract of insurance or other arrangement under which a person or another person is covered for the liability for monetary penalty under the model WHS bill.

I note that this is not just a Labor thing. Recently, New South Wales reviewed its legislation, taking the Boland review into account, and has included that provision in its legislation. This is really important. I think this amendment would undermine the whole scheme that we are trying to put in place. We are not trying to catch people out. We are trying to get people to make this their central focus.

Hon RICK MAZZA: With respect, I do not know how the minister can extrapolate the tragic events of today to this debate right now. We do not know the circumstances of what took place there. We have no idea what took place there. Section 30A or category 1 offences may have occurred, which would not have been insurable. We do not know the circumstances of what took place there today. The minister made a comment that the book would be thrown at a high-paid executive being paid millions of dollars, but not at a voluntary not-for-profit director. We do not know that either. That is for the courts to decide, so we do not know what sort of penalty or judgement they may receive or whether the courts will differentiate between a high-paid executive and somebody who is on a not-for-profit board. The minister is making some assumptions there. What I am trying to achieve with this amendment is that for fines, some of which are significant and could bankrupt businesses, if someone is not hurt or killed—there may be some breach that may be unintentional and a fine has been imposed—if an insurance company, on a commercial basis, will respond to that cover, then they can. The prohibition should be on the manslaughter laws that we have before us. That is why I have moved this amendment.

Hon ALANNAH MacTIERNAN: I understand the member's point. I think we always have to look at the practicality of how the law will operate. A person's liability and level of responsibility will be related to the degree of oversight or control that they have over a workplace. I will give the member some examples of some offences that a person would be able to insure for under this amendment. A person would be able to insure against a fine that resulted from an offence against the prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct. If an inspector restricts access to a seized thing, a person must not tamper, or attempt to tamper, with the thing or something restricting access to the thing without an inspector's approval. A person could insure against that and, at their leisure, be able to restrict the operation of an inspector to have access to seized items. A person would be able to insure against an offence under clause 190, under which a person must not directly or indirectly assault, threaten or intimidate, or attempt to assault, threaten or intimidate, an inspector. A person would be able to insure against that. They would be able to insure against a breach of clause 197, under which a person to whom a direction is given under section 195(2) or a prohibition notice is issued must comply with the direction or notice. All those are offences that a person would be able to insure against for any liability. Again, we think that would be very concerning because it would undermine this whole cultural change. We are trying to put carrots and sticks here. This amendment would undermine the whole regime of penalties if a person could just insure their way out of it.

Hon RICK MAZZA: I will make a brief point. If a person assaulted an inspector, that would be a criminal offence. I do not see many insurance underwriters responding to something that was a criminal offence, such as assaulting an inspector. Apart from the prohibition of the manslaughter offences, the rest of it should be on a commercial basis. I do not know any insurer that would cover a criminal offence. I do not want to see a small business that has tripped up and, although no-one has been hurt, is fined such a hefty fine that it goes bankrupt and people lose their jobs over it. What I am trying to achieve here is a commercial arrangement with the insurance companies. I am quite sure that if it were a criminal offence, and it were that serious, very few, if any, underwriters would cover it.

Hon ALANNAH MacTIERNAN: These are all in this legislation. All those provisions in clauses 107, 177, 190 and 197 are offences. We think it would undermine the whole intent of the scheme and attempt to strengthen the focus, management concern and centrality on these issues. This is not something that we have dreamt up; this came out of the Boland review. As I understand it, the equivalent has been implemented in New Zealand and New South Wales.

Hon NICK GOIRAN: The record needs to be corrected here. I know, and the minister knows full well, that a range of interested stakeholders have been following the progress of this bill day by day, hour by hour and minute by minute, and for good reason. It is simply unconscionable for the minister to stand in this place while we are considering Hon Rick Mazza's amendment to clause 272A and raise the case that occurred today at Curtin University and to indicate to members that if any of us had the temerity to ask questions about the amendment that was moved only a matter of minutes ago by Hon Rick Mazza, before any of us had had the opportunity to contribute to the debate—this is my first time on this amendment on behalf of the opposition—we would somehow be lacking in compassion for today's events. On behalf of the opposition, I join with Hon Rick Mazza in saying to the minister that those circumstances today have absolutely nothing to do with the amendment currently before the chamber. When we get to the prosecutions clause, I foreshadow for the minister—maybe she and her advisers will take this on notice—that I will be happy to have a discussion about today's events to understand in greater depth who might have the capacity to prosecute a case as a result of the event that happened today at Curtin University. Indeed, it would be interesting to know from the minister whether today's events could be categorised as a clause 30A offence, a category 1 offence or any other offence under the bill. It is simply unconscionable to raise the case that has happened today and then try to smear members because the government has decided today, 13 October, to bring this bill back on. The last time that the government brought this bill before the chamber was Thursday, 24 September 2020. I would like the interested stakeholders and the people who have been watching this debate day after day, hour after hour and minute after minute to know that this is the first time, at around about eight o'clock this evening, that the government has decided to bring this bill back on.

Hon Alannah MacTiernan: What a lot of rubbish! It's the first opportunity we've had.

Hon NICK GOIRAN: Is that right, minister? Is the minister sure about that?

Hon Alannah MacTiernan: When could we have done it?

Hon NICK GOIRAN: Were we sitting last Thursday?

Several members interjected.

The DEPUTY CHAIR: Members!

Hon NICK GOIRAN: Mr Deputy Chair, you can see how government members can be outraged at a particular assertion that has been made by a member when it suits them. I am not going to criticise the minister for being outraged about what I have just said. She is entitled to be outraged and she is entitled to her view about whether this bill should have been brought on on budget day, and we could have a debate about that and she could be quite fired up about that. There is no problem with that, minister. But I assure the minister that the feeling that she feels right now pales into insignificance compared with the unconscionable remarks she made earlier when she suggested that members need to get on with this bill, when we have had only a matter of micro-minutes to consider the amendment moved by Hon Rick Mazza, and that somehow that reflects on our views on the Curtin University building collapse today. That is why I have raised it. If the minister is offended right now, join the club, because we were offended by her remarks earlier today.

Again I draw to the attention of the stakeholders and people who are interested in this particular debate and have been following it on a day-by-day, hour-by-hour and minute-by-minute basis that they should not be fooled for one moment by the bravado and rhetoric of the minister, because what this minister has not told everybody is that earlier today, the opposition—I cannot speak for other parties—was informed for the first time that this government, which seems to think that this bill should have already passed through both houses of Parliament, has decided to put more amendments on the supplementary notice paper. The government has worked out that there is a problem with the Director of Public Prosecutions. It has decided that it might be a good idea to consult with the director. Is it not a good thing that this bill did not happen to pass through as speedily as the minister would have liked on 24 September so that she and her government have the opportunity to fix up the disasters in this bill—points that I and other members have repeatedly been making to her and the minister she represents in this chamber? I bring to the attention of those interested stakeholders—they are probably unaware—that the opposition and presumably other parties as well were provided with a seven-page memorandum from the government setting out why the government is now opposing some of the provisions in its own bill.

Point of Order

Hon ALANNAH MacTIERNAN: Can I perhaps draw the member's attention to the amendment that we are currently considering, because I think he is roaming at large and not directing himself to the amendment we have before us.

The DEPUTY CHAIR (Hon Robin Chapple): I think there is some merit in what the minister has said. We have an amendment before us. It is an amendment by Hon Rick Mazza and I think we need to discuss that amendment.

Committee Resumed

Hon NICK GOIRAN: I concur wholeheartedly and I was about to say that I am happy to concede the point raised by the minister. I find it very interesting that the moment the opposition would like to draw what the government has been doing today to the attention of the interested stakeholders who have been watching this particular matter day after day, hour after hour and minute after minute, the government chooses to make a point of order. Nevertheless, it is a valid point of order. The minister made the very good point that our concerns with this seven-page memo are not relevant to the amendment moved by Hon Rick Mazza. The minister can rest assured that we will look at the seven-page memo that she provided without notice to members when we get to that particular clause, and it will have nothing whatsoever to do with how members feel about the events at Curtin University earlier today. And if she had any good grace, she would apologise for the remarks she made earlier.

I move to the amendment currently before the chamber moved by Hon Rick Mazza, who we all know is a diligent member who moves amendments with good intent. The opposition has some sympathy for the amendment moved by Hon Rick Mazza but, equally, has some concerns and concedes that some of the responses made by the minister have validity, including the fact that the minister quite correctly pointed out that if an amendment like this were to pass, it would be contrary to the recommendation of the Boland review. Again, we have a very interesting situation whereby the government decides to cherrypick, when it suits it, aspects of the Boland review that it would like us to follow and it pleads with us to make sure that we follow it, but in other circumstances it pleads with us not to follow it. Of course, there was no greater example of that than when Hon Rick Mazza moved an amendment, if I recall correctly, to clause 31 to reinstitute gross negligence as a component of that clause, consistent with the Boland report, yet the minister said that under no circumstances should that be supported. In fact, I recall very vividly the overreaction of the minister with the carriage of this bill when the honourable member moved that motion. The minister will be aware that this issue was touched on ever so briefly by the Standing Committee on Legislation in its forty-third report, which was tabled in August this year. I draw to the minister's attention some of the comments that were transcribed by the committee on page 82 of that report, and she will see that at paragraph 5.45 the committee said —

> A number of stakeholders expressed their support for these provisions while others have expressed their concerns:

The committee's report then quotes three stakeholders who expressed their concerns. The first of those is the Australian Industry Group, the second is the Australian Institute of Company Directors and the third is Northern Star Resources Ltd.

The DEPUTY CHAIR: Hon Nick Goiran.

Hon NICK GOIRAN: The first of those groups was the Australian Industry Group. The committee quoted from pages 11 and 12 of the Australian Industry Group's submission, which is submission 41, dated 26 June 2020. It said —

> There should be an ability to access insurance to support the defence of such actions and we interpret the provision as continuing to allow such cover for legal and other defence costs, and only excluding monetary penalties.

I would like to take the chamber through the other examples from the second and third stakeholders, but for the time being, is the minister able to confirm whether the Australian Industry Group's interpretation of this provision is correct?

Hon ALANNAH MacTIERNAN: My recollection is that when we debated this legislation last time, we discussed this matter. I think we made it clear that we did not believe that our interpretation is not that someone would be precluded from accessing insurance to support the defensive actions, and that the group says that we interpret the provision as continuing to allow such cover for legal and other defence costs. My recollection is that when we started debating this last time, this matter was in fact expressly canvassed, but we agree with that interpretation.

Hon NICK GOIRAN: That takes us to the second group, which is the Australian Institute of Company Directors. Its concern is set out at page 82 of the committee's report, where the committee quotes page 4 of the stakeholder's submission, submission 42, dated 26 June 2020. These remarks were made —

> While the AICD supports strong penalties for directors and officers who fail to exercise their duties under WHS laws, we do not support the proposed blanket prohibition on insurance for fines in a WHS context.
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> …
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> The common law already adopts a carefully balanced approach to cases involving an insured seeking to claim under an insurance policy with respect to any alleged criminal liability, where the general rule is that a contract of insurance is not enforceable in respect of criminal acts.
>
> …

> The Corporations Act 2001 (Cth) (Corporations Act) also attempts to balance these considerations, prohibiting some types of recovery while enabling insurance to be obtained for other activities, such as civil penalty provisions.

Does the government agree with the view of the Australian Institute of Company Directors?

Hon ALANNAH MacTIERNAN: I think we have made it very clear that our view is that offences and breaches of obligation under this legislation should not be insurable.

Hon NICK GOIRAN: The minister will see that the Australian Institute of Company Directors seems to draw a distinction between matters that are enforceable in respect of criminal acts and what it then refers to as civil penalty provisions. Which of the provisions in the bill before us would be described as covering criminal acts, and which ones would be described as civil penalty provisions?

Hon ALANNAH MacTIERNAN: It is important to note that at paragraph 5.46 of the report, the committee said —

> … this issue is closely connected to the offence provisions, it is not included in Part 2 and does not fall within the Committee's terms of reference.

Member, this is the point I was trying to make. I am not trying to stop people moving their amendments, but we are pretty clear on the issues here. As with the Boland review, and as has been embraced in both New Zealand and New South Wales, which have been implementing the Boland review, we believe the offences in the Work Health and Safety Act should not be insurable, and that is a principle that we think is very important. I do not think we can keep arguing and making the point. I cannot put it any clearer that our view is that, all things considered, having looked at the way this legislation will operate and what we are trying to achieve in terms of a change in the management focus on work health and safety, we believe that one should not be able to insure out of the liability. We can go on—I have nothing more to add to that, but the member can continue. The point I was making was not that we should not be raising issues and not that there should not be a dialogue, but that this should not be an opportunity to go on endlessly repeating things. That is our position; we ask members to vote on it.

Hon NICK GOIRAN: If I can get the minister to look at page 82 of the committee's report, the Australian Institute of Company Directors seems to draw a distinction between matters involving criminal acts and those that are civil penalty provisions. My question was: which provisions in the bill before us cover criminal acts and which ones are civil penalty provisions?

Hon ALANNAH MacTIERNAN: The advice that I have received is that there are no civil penalty provisions in the legislation.

Hon NICK GOIRAN: That takes me to the third stakeholder's position, outlined in the Standing Committee on Legislation's report at page 82, which is that of Northern Star Resources Ltd. The committee quoted the fiftieth submission it received, dated 26 June 2020. The committee noted that at paragraph 27 of its submission, Northern Star Resources Ltd said —

> there should be no prohibition on companies and officers from obtaining insurance for health and safety offences and fines included in the bill; and
>
> the current position should be preserved that allows companies and their officers to obtain insurance for health and safety fines and costs other than those involving gross negligence.

It seems to me, minister, that that basically encapsulates what Hon Rick Mazza's amendment seems to seek to do, which is to carve out crimes under section 30A or a category 1 offence; albeit, as we know, a category 1 offence does not require gross negligence. That said, the opposition has some sympathy for the minister's position because in our view, other offences under this Work Health and Safety Bill ought not to be insurable. We also understand and appreciate that Hon Rick Mazza makes a fair point that no insurer is likely to insure for those types of gross offences. Matters in this bill include fraud and the like—that is, when people fraudulently sign documents and so forth or give false or misleading information. For example, I draw to members' attention clause 268, which has recently been passed, under part 14 of the bill. It indicates —

> (1) A person must not give information in complying or purportedly complying with this Act that the person knows —
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> (a) to be false or misleading in a material particular; or
>
> (b) omits any matter or thing without which the information is misleading.

The penalty for an individual is a fine of $12 500 and for a body corporate it is $55 000.

That seems to me to be a good example of an offence under this bill that we have agreed and passed at clause 268 that should not be insurable. If a person gives false and misleading information and knows it is false or misleading,

they should not be able to be covered by insurance. To that extent, we have some sympathy for what the government has said; in other words, the range of offences set out by the honourable member are not sufficiently complete.

However, I draw to the minister's attention another offence set out in the bill before us at clause 44—another clause that we have passed. The minister will be aware that clause 44 creates an offence for a person who effectively allows a worker to undertake work at a workplace despite the fact that the worker was meant to have prescribed qualifications but did not have them. However, unlike the earlier example I gave the minister, it does not insert that element of knowledge. It does not require that the person had to have actual knowledge that the worker they sent to undertake the work at the workplace did not have qualifications and allowed them to go ahead and do it anyway. The minister might recall that I expressed some concerns about the level of strictness of that offence at clause 44. When we were debating clause 44, I invited the government to give consideration to whether an element of knowledge should be inserted into that provision. The minister indicated that the government did not want to do that, as is the government's right. However, it strikes me that at clause 44, for example, potentially the type of offence Hon Rick Mazza is trying to capture is what I would describe as a matter that would be a business risk. A person, through no fault of their own, does not know that the other person does not have the qualifications; in fact, they had even been told by the person that they had the qualifications. They might have even been shown a document to that effect only to find out later that the person does not have the qualifications and that the employer—the person conducting the business or undertaking—is now in breach of clause 44 and, as an individual, is potentially up for a fine of $25 000, or as a body corporate, a fine of $115 000. My question is: is that the type of offence that the government would consider to be fair and reasonable to be insured?

Hon ALANNAH MacTIERNAN: As the member is well aware, the Standing Committee on Legislation agreed that the defences under the Criminal Code will be applicable to offences under the Work Health and Safety Bill 2019, and the Criminal Code also provides for circumstances in which a person acts under an honest and reasonable, but mistaken, belief. It makes it very clear that a person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of the state of things is not criminally responsible. If a person has been honest and reasonable but mistaken, that is a defence and they will not be convicted. They would then not pay a fine. The argument is about having to insure in case an honest but reasonable mistake has been made, but that is already a defence under the Criminal Code.

Hon RICK MAZZA: My understanding of this bill is that if the amendment I put forward is unsuccessful, there will be no insurance cover for the penalties under this bill. The minister just pointed out that if someone had been honest and did not know, they would not be found guilty. They would have a defence, but, of course, to prove their innocence could cost them a lot of money in legal fees. Will this bill prevent employers from insuring against legal costs to defend themselves against a charge?

Hon ALANNAH MacTIERNAN: I made that clear in the last 10 minutes. I expressly said that we agree with the Australian Industry Group's interpretation of the legislation. That group says that there should be an ability to access insurance to support defence of such action. We interpret the provision as continuing to allow such cover for other and legal defence costs, excluding only monetary penalties. Not more than 10 minutes ago, I expressly acknowledged that we agreed with that.

Hon MICHAEL MISCHIN: I understand the government's intention that liability for certain penalties for offences ought not to be insurable. What does that have to do with clause 272A and the penalty provision? Why is the government making it a criminal offence? Why not simply leave it as unenforceable?

Hon Alannah MacTiernan: Sorry, member, I don't understand.

Hon MICHAEL MISCHIN: Is the minister saying these sorts of risks ought not be insurable?

Hon Alannah MacTiernan: Yes.

Hon MICHAEL MISCHIN: Let us accept that as a proposition. That is somewhat different from making it an offence, is it not?

The DEPUTY CHAIR (Hon Matthew Swinbourn): Hon Michael Mischin can you just pause while the minister changes advisers, sorry.

Hon MICHAEL MISCHIN: The government says never mind the degree of the breach of duty, for example; any penalty imposed ought not to be covered by insurance. What does that have to do with creating it as an offence to enter into an agreement to insure? Why is the government making it an offence as opposed to simply unenforceable and uninsurable?

Hon ALANNAH MacTIERNAN: The Boland committee was very clear and recommended that it be made an offence to enter into a contract of insurance. It is not just that it would have no effect. I imagine that the argument would be that the committee wanted it to be very clear and up-front that people could not enter into insurance

policies and then have discussions about those insurance policies. This is to make sure that there is a very clear regime so an insurance company will not offer that range of insurance.

Hon MICHAEL MISCHIN: That is all very well, but, as Hon Nick Goiran pointed out, the government picks and chooses which bits of the Boland review it wants to follow and which bits it wants to disregard. Leaving aside the minister's imagination, why has the government decided to make it an offence punishable with fines of up to $55 000 for an individual and $285 000 for a body corporate to simply have a contract that provides for indemnity in these circumstances when clause 272A(2) makes it quite plain that such an insurance policy is of no effect? Why is the government criminalising people for perhaps inadvertently entering into a contract that may be interpreted as being indemnity for a penalty?

Hon ALANNAH MacTIERNAN: The reason is that the ultimate objective of such a provision is to ensure greater compliance by ensuring that monetary penalties act as an effective deterrent. This applies to the provision of insurance itself. We believe that this will offer greater clarity for insurance companies and it will be very clear that they cannot offer those sorts of policies. We think that attempts to circumvent the regime will be less likely by making this an offence.

Hon MICHAEL MISCHIN: All this is in the interests of workplace safety and ensuring that people cannot avoid personal responsibility for breaches of duty, yet we still have a third party insurance scheme under motor vehicle legislation, do we not? If someone is careless, they are indemnified. If I happen to drive carelessly in a car park and run into the minister's car, my insurance will cover that; or if I drive carelessly and run into the minister's car on the street, my insurance will cover the damage, yet that might also amount to a criminal offence. But in the case of a small business owner trying to do their best to comply with unstated but broad duties, they cannot insure their way out of a penalty for failing to put up a notice, perhaps, that has done no harm but nevertheless is a breach of their duty under clause 33. It does no harm and it has no consequences. It could be a breach of duty such as leaving an extension cable over the passageway from the front door of an office into another office. That could be a breach of a health and safety duty and a failure to comply with a duty to ensure that it was out of the way so that people would not trip over it. They could get fined, but they could not insure against it. Is that the government's idea of how we ensure a culture of workplace safety?

The minister mentioned some of the more egregious offences and why insurance would not be a good idea. Let us take the low level ones under clause 33 of this legislation—the minor breaches, such as, perhaps, failing to tape up the cable for the microphone to the podium in this chamber. That would be a breach of a workplace safety duty. Whoever is responsible for this place could be fined, but they could not insure against it. If they happened to be a member of an incorporated association, they could not insure against it. But, hey, that is the way the government wants to work. Is that going to ensure safety? It is rather heavy-handed, minister. I do not think that we are going to change the government's point of view. It is just typical of the way that this government approaches issues. If something sounds like a good idea, the government trawls up some tragedies and extreme cases to justify it and then says that it is somehow going to change the culture, but it never thinks it through.

The minister said that the Boland report recommended this in other jurisdictions. Which other jurisdictions and for how long have those provisions been in place?

Hon ALANNAH MacTIERNAN: Just to clarify, as I said before, the Boland review was commissioned under a conservative federal government.

Hon Michael Mischin: Who cares?

Hon ALANNAH MacTIERNAN: The member is saying that this is something that we have dreamt up. I am saying that Safe Work Australia made this recommendation and it has been adopted by New South Wales. I make it very clear: the member's analogy with motor vehicle accidents was quite misleading. For example, in a civil complaint in which someone is being sued by the family of someone who has been injured or by a person who has been injured, of course they can insure against that. There is nothing in this bill that prevents them from insuring against that, just as they do with third party motor vehicle insurance. This is simply directed towards those monetary penalties. It is not about not being able to insure against claims that might be made by people who have been injured as a result of an act of negligence.

Hon MICHAEL MISCHIN: I do not care whether it was a conservative government, a Labor government or a communist government. I do not know why that is somehow relevant to the question of why this government —

Hon Alannah MacTiernan: Because you said it was something we had dreamt up and was typical of us. I was simply pointing out that the review committee —

Hon MICHAEL MISCHIN: I understand that, minister. Thank you very much. When the minister gets to her feet, she can respond.

The point I was making was that whatever the review has come up with, the government has chosen bits of that review to incorporate into this bill and rejected other bits. The minister should not say that a conservative government

came up with the Boland review as a justification, because the government has cherrypicked the bits it wants. I want to know the government's reasoning in supporting these particular provisions, because some it has rejected and some it has accepted. Do not start handballing the responsibility to someone else. This is your bill. The minister justified it on the basis of what the Boland report said. I will ask again: which other jurisdictions in Australia or New Zealand have implemented it and how long has a provision been in their legislation that makes not only such an insurance indemnity unenforceable, but also a criminal offence?

Hon ALANNAH MacTIERNAN: A very similar provision was introduced in New Zealand in 2015. The relevant New Zealand provision makes it an offence to offer or enter into a contract, or offer or give indemnity against liability to pay a fine for an infringement under the act. We believed that that was an acceptable approach. We looked at it and we thought that that was a reasonable approach. It has been in place in New Zealand for a number of years and it appears to have worked satisfactorily, and that is why we choose to go down this path.

Hon MICHAEL MISCHIN: Therefore, a conservative government proposed this, or accepted this, or initiated the review that reported on this, and we are looking to New Zealand as the inspiration. The government has picked up a provision from New Zealand or something similar. Have any Australian jurisdictions picked it up?

Hon ALANNAH MacTIERNAN: I believe New South Wales has a provision that restricts, but it has gone down the path of voiding the contract.

Hon MICHAEL MISCHIN: Therefore, the only Australian mainland—I will say Australian jurisdiction, because we will count Tasmania in this, that has chosen to take this path is the minister's government in Western Australia, and it has gone a step further than even New South Wales was prepared to go, and this is meant to somehow be a harmonisation of our system with the rest of this country. We are an exception rather than the rule, are we not, minister? This has nothing to do with harmonisation. This is going beyond harmonisation. How has it been going in New Zealand? The minister keeps saying that it seems to be going all right. What has been the experience for big and small businesses in New Zealand?

Hon ALANNAH MacTIERNAN: I will point out that whether or not we make it void or a penalty, the fundamental issue is one of ensuring that one cannot insure against one's liabilities under this legislation. Quite frankly, I do not think a great deal turns on which way the member may have chosen, but the path that we have chosen is that recommended by the Boland review. The review of the model code looked at this issue and made that recommendation, and it is our view that as different jurisdictions come on board to harmonise their legislation, they will go down that path. I do not necessarily think that a huge amount turns on which way we do it. I think this is probably going to be one that makes it very clear that insurance companies cannot enter into misleading contracts that might give people a reason to believe that they are covered when they are not. To me, this offers much greater clarity than when a person enters into an insurance policy that implies they are covered and they get a false sense of security from that insurance policy. Our view is that this is clearer.

We have made our position very clear. We have made clear the position that we will vote on and I ask for this amendment to now be put.

Amendment put and negatived.

Hon NICK GOIRAN: I move —

Page 178, lines 6 to 8 — To delete the lines.

Briefly, by way of explanation to members, this amendment gives effect to the debate that was just taking place. It was quite revealing that during the consideration of the amendment moved by Hon Rick Mazza the chamber was informed for the first time that no other Australian jurisdiction creates a penalty for a person who enters into one of these insurance contracts. In fact, the only Australian jurisdiction that voids those types of contracts is New South Wales—it is the only one—and New South Wales has expressly decided not to insert the penalty provisions. To the extent that the government is able to provide any precedent whatsoever, it had to go across the Tasman to refer us to the New Zealand precedent. That, with all due respect, members, goes directly against the process of harmonisation that this minister and this government have repeatedly said is one of the policy outcomes of this bill.

I draw to members' attention the conclusion of the Standing Committee on Legislation report, in chapter 7, which sets out its views on the harmonisation element of the policy, and I seek the support of members to remove this penalty provision. All that will happen as a result of this, members, is that it will still be the case that the government's stated position, in accordance with the Boland report, is that an insurance policy cannot be taken out to pay for penalty provisions. But if somebody does do that, there is not going to then be another penalty, which nobody else in Australia does.

Hon ALANNAH MacTIERNAN: I think it is important to understand how these things work. Various jurisdictions, like our jurisdiction, have taken many years to get to this point of embracing the model laws. The Boland review

was completed only in 2018, which is a nanosecond ago in law reform terms. It is our understanding that this provision will now go through the process and be considered by the ministers. In our view, given that we were moving down this path, it was appropriate to include this provision. We believe that the Boland review also recommended that provision. We would anticipate that, over time, as the various jurisdictions do their reviews and embrace the legislation, we will probably find that they go down this path.

Hon RICK MAZZA: I have heard a lot about the Boland review and the fact that it recommended the provisions in this part of the bill. However, as has been pointed out before, we seem to be cherrypicking the Boland review. It also recommended that gross negligence be the test for a category 1 manslaughter offence and, of course, we completely ignored that. That the minister keeps harping on about the Boland review in this section is a little galling because we are cherrypicking it. In saying that, I ask the mover of the motion "to delete the lines" how this might operate? Clause 272A without the penalties would have a prohibition on taking out a policy or for an insurance company to provide the insurance cover. However, if it does so and those words are removed, there is no penalty for doing that. How would that operate practically if someone has taken out an insurance policy and an underwriter has covered them? Will they be able to be paid out? How will this operate without a penalty for doing it?

Hon NICK GOIRAN: In response to the member, clause 272A(2) currently reads —

> An insurance policy is of no effect to the extent that, apart from this subsection, it would indemnify a person for the person's liability to pay a fine for an offence against this Act.

The best way to understand that is that this statute trumps the contract of insurance. The statute would override the contract of insurance and it would be the case that the insurance policy would have no effect. In other words, the provision in clause 272A would be the equivalent of Parliament tearing up the contract of insurance but there would not then also be an additional offence for having entered into such an insurance policy. The penalty for having entered into that policy will be that the contract is torn up. A party then does not have to suffer, as an individual, a fine of up to $55 000 and, as a body corporate, a fine of $285 000. Interestingly, the minister has indicated that New South Wales has indicated that it will not do that. Only New Zealand has decided to go down that path.

Hon ALANNAH MacTIERNAN: Unfortunately, I have been given some inaccurate advice. As I originally thought, New South Wales has gone down exactly the same path that we have. I am sorry; I originally thought that that was the case and I said that. Then I got some advice that New South Wales had taken the other path, but it did not. New South Wales made the decision this year to follow the provisions of the Boland review. It has created a prohibition that is accompanied by penalties in penalty units. I understand that they are roughly in the same order as those in our legislation. There are 200 penalties between $51 000 and $255 000 so they are virtually identical. I do apologise. I had thought that that was the case and it turns out to be the case. We cannot support the member's amendment. We think it would undermine that provision. As New South Wales has done, our determination is to put this rule. We believe it will become the model across Australia.

Hon MICHAEL MISCHIN: This just keeps getting better. We have now established that not only New Zealand has had these provisions since 2015, but also New South Wales has since sometime earlier this year. A little while ago I asked: What was the experience with these provisions? Has the minister any evidence of whether they have been effective? Is there any evidence of complaints about unintended consequences or undesirable consequences as a result of these provisions? Have they been effective in any way? The government has had the chance since 2015—some five years now—to observe how the provisions operate in New Zealand. There has not been much time in New South Wales, but, then again, it is contrary to the concept that we need to update these laws by harmonising them with other jurisdictions, so I will leave that aside. The minister added that this provision is now blazing the path for every other jurisdiction in Australia to follow suit. On what evidence, I have absolutely no idea, but perhaps the minister will be able to help us out as to what makes her think that every other jurisdiction is suddenly going to come across and do what we are doing. The minister said that it is important to understand how these things work but she has given us no evidence how these things work from the experience of other places. Instead, she has made the statement that this is part of the government's idea of how to make this provision effective.

The minister also said earlier that there is really not much of a difference between voiding the contract and making it unenforceable to the extent that it has contravened the prohibition in clause 272A(2). In that case, there seems to be no real harm in adopting Hon Nick Goiran's proposal to remove the penalty provisions and the fact that it also constitutes an offence. I should point out the fact that offences for breaches of duty under section 33 or others will not be without consequences. Insurance involves entering into a contract with someone prepared to accept the risk. If someone is in constant breach of duties under the legislation and is seeking to be reinsured, two things might happen. It may involve, not by way of an offence, but an increase in the penalties to the insurer, which is a problem in itself for a business because it is paying for it, but it also might mean that the insurer decides to draw the line and say, "The number of breaches and the gravity of the breaches concerned means that I'm not going to insure you, so you can't carry on your business." I would have thought that that is a far better way of approaching the problem. After all, insurance companies do not say, "Hey, you've run into the back of someone's car. It's an offence.

We're not going to insure you any more". They take a risk assessment. If someone does it too many times, they will start to smell a rat that the person is not a careful driver. Their premiums will go up, they will not get insurance at all, or they will get a larger excess. It is not as though it is without consequences. The government is taking the step of voiding those provisions in a contract. So be it, but why is it also criminalising not only the insurer, but also, perhaps, the not particularly well informed small business person who has not read the contract carefully enough, or has not understood it, making them an offender?

There seems to be no gain in it, but it seems that there may be unintended and undesirable consequences. I would have thought that we should see how New Zealand and New South Wales go. In the meanwhile, the government will be achieving its end. I think is a little extreme anyway to refuse insurance for any breach under clause 33, no matter how trivial, but if that is what the government wants to do, so be it. However, I think it is contrary to the legislative principles to which our committees of this Parliament ascribe and also rather heavy-handed to make people criminals as a result of it. I support Hon Nick Goiran's motion and I hope other members will do so too, until we can get some more evidence from the government rather than rhetoric.

Hon ALANNAH MacTIERNAN: We would strongly argue against this. No jurisdiction has gone down the path of voiding the insurance policies and then not creating a penalty attached to it. The two jurisdictions that have gone down this path, New Zealand and New South Wales, have both voided the contract—the provision we have in clause 272A(2)—and gone on to create an offence. I think the very practical effect of this will be that insurance companies, those people whose business it is, will have to be very clear about their policies. I think that is the benefit that will come from having not only the voiding provision, but also the offence provision. That will very much focus the minds of insurers that they are not to offer policies that could be ambiguous. We have had the debate again and we know our positions. It is important to understand that those jurisdictions that have gone down the modernisation path have both taken the approach to void it and also make it a penalty.

Hon RICK MAZZA: I hear what the minister has been saying. However, clause 272A, effectively, sterilises any cover an insurance company may offer or provide. I hear the minister saying that she does not want to give people a false sense of security. I am a bit worried that the wording of many insurance policies can be quite universal and some could come from overseas. They may have wording that suggests that there might be some cover that the person taking out the policy may not identify, especially small businesses that are not particularly diligent in reading every word of a policy document, or insurers that might have a policy wording document that might be a broad-spectrum policy that covers all states. I do not want to see someone inadvertently get caught up with a $285 000 fine if they are a body corporate, which in most cases they probably will be. I am inclined to support the amendment that has been put forward by Hon Nick Goiran on the basis that clause 272A, effectively, sterilises any ability for an insurance policy to respond.

Hon ALANNAH MacTIERNAN: I think it would be a very bizarre insurance company that was not conscious of its risk. Being conscious of risk is the business of insurance. A company operating in a particular jurisdiction will be conscious of the need to ensure that its policies are tailored for the jurisdiction. Obviously, New South Wales has gone down this path so there will already be insurers that operate in Australia that are very conscious of this provision. Because it is so fundamental to their business they will, no doubt, be aware of the direction of the Boland review.

Hon NICK GOIRAN: Are the penalty provisions on page 178 at lines 6 to 8, which I am currently seeking to be deleted, intended to apply to both the insurer and the insured?

Hon ALANNAH MacTIERNAN: They are, but I think the practical effect will be that insurers will not offer policies that are encapsulated by this provision because they would be at risk themselves at multiple times—every time they enter into such a policy.

Hon NICK GOIRAN: I am hearing from the minister that the government wants to send that message to insurers. Would the government have any objection to modifying clause 272A(3) so that the penalty provision applied to only insurers rather than also to the insured?

Hon ALANNAH MacTIERNAN: The difficulty with that would be that this provision also attempts to make sure that no informal arrangements might be made between parties. That is not our preference on this one.

Hon NICK GOIRAN: Is it the case that the New South Wales and New Zealand models that the minister has referred us to also ensure that both the insured and the insurer are captured by the penalty provisions?

Hon ALANNAH MacTIERNAN: Sorry. What was the question, member?

Hon NICK GOIRAN: I am seeking confirmation from the minister of whether both the New South Wales and New Zealand models also attach the penalty provisions to the insurer and the insured.

Hon ALANNAH MacTIERNAN: New South Wales does that. We are not sure about the New Zealand model. Of course, it is important to understand that it will be up to the court to determine the penalty on the basis of the liability and the conduct of the parties concerned.

Hon NICK GOIRAN: Is the minister in a position to advise the chamber of what the penalty is under the New Zealand model?

Hon ALANNAH MacTIERNAN: I am not able to do that for the New Zealand model.

It is very similar, again, to New South Wales. It is $50 000 for an individual and $250 000 for a body corporate.

Hon NICK GOIRAN: As I understand it from the debate this evening, the New South Wales penalty provision is in units rather than in dollar amounts, but the minister has informed us that the equivalent dollar amount is $51 000 for an individual and $255 000 for a body corporate. The minister has just informed us that New Zealand has a penalty provision for individuals of $50 000 and for a body corporate of $250 000. Why was the amount of $55 000 chosen for individuals and $285 000 chosen for a body corporate?

Hon ALANNAH MacTIERNAN: They are roughly in the same ballpark. We looked at our penalties in a global sense and compared the various penalties right across the offence regime. It is a difference of $4 000 for an individual and $30 000 for a body corporate. The government had to make a decision. These penalties are very much in the ballpark.

Hon NICK GOIRAN: Earlier in the debate on this bill, the minister tabled for us a document that set out the various provisions and the extent to which they differ from the model law. In that document, page 241 out of 248 indicates that the penalty provision in this instance was inserted consistent with similar offences. What are those similar offences that are being referred to?

Hon ALANNAH MacTIERNAN: We will have to have another swap out of an adviser.

As I said, I am not sure that we will be able to give the member chapter and verse on every figure that was determined. When we considered the penalties in 2018, generally across the board, an inflation element was put in place, but these are roughly in line with the penalties that have been posed in the other two jurisdictions. In New Zealand, they were introduced in 2015, so I think these are probably roughly contemporary when we take into account a five-year inflation. We are not going to be able to elucidate any further on the fact, other than to point out that they are roughly the same as those in the other two jurisdictions that have gone down this path.

Hon NICK GOIRAN: I just find it odd that the government can plead with members to support these penalty provisions on the basis that New Zealand and New South Wales have done it, but then, under examination, it is revealed that the penalties are inconsistent with the penalties in those jurisdictions and the government cannot offer an explanation for it. Somebody in government—I do not know who it was—knew that the penalty in New Zealand was $50 000 and that the penalty in New South Wales was $51 000 and they purposely put $55 000 in this bill. Someone has done that, so somebody needs to be accountable for that; otherwise, what is the point of this whole exercise of scrutiny of legislation? Someone in government needs to explain why they chose $55 000. It is no good saying, "I don't think we're going to be able to help you any further." When else is it going to be done—after the bill has passed through both houses of Parliament? It is now or never, minister. The minister might quite rightly say that $55 000 is not too much different from $50 000 in New Zealand and $51 000 in New South Wales, but there is quite a significant difference in the penalty for a body corporate. In New Zealand, it is $250 000.

Hon Alannah MacTiernan: If you want to change it to $255 000, let's just get on with it. What is important is that we get this legislation through. If you want to amend it to $255 000, we will agree with it so that we can make some progress.

Hon NICK GOIRAN: Because the question currently before the chamber is the amendment to delete the lines, and given what the minister has just indicated, on the basis that the government will move to amend those particular lines to read $51 000 and $255 000, which would be identical to the New South Wales provisions, I seek leave to withdraw my amendment.

Amendment, by leave, withdrawn.

Hon ALANNAH MacTIERNAN: I need to move an amendment.

The DEPUTY CHAIR (Hon Matthew Swinbourn): I will give the minister some moments so that she can perfect her amendment and then we will get on to that.

Hon ALANNAH MacTIERNAN: Can I move my amendment now?

The DEPUTY CHAIR: It has been suggested by the clerks that you move two separate amendments to keep it in order, so I suggest that you move the first amendment to line 7.

Hon ALANNAH MacTIERNAN: I move —

Page 178, line 7 — To delete "$55 000" and substitute —

$51 000

Amendment put and passed.

Hon ALANNAH MacTIERNAN: I move —

Page 178, line 8 — To delete "$285 000" and substitute —

$255 000

Amendment put and passed.

Clause, as amended, put and passed.

Clause 273 put and passed.

Clause 274: Approved codes of practice —

Hon NICK GOIRAN: This clause was identified as concerning in the 126th report of the Standing Committee on Uniform Legislation and Statutes Review, tabled in May this year. I particularly want to draw to members' attention the provisions of the report dealing with this clause, which begin at paragraph 6.39, set out at page 15 of the report. Members will see that the committee is looking at clause 274(3)(b), dealing with approved codes of practice. If members then turn to clause 274(3), they will see that it reads —

> A code of practice may apply, adopt or incorporate any matter contained in a document formulated, issued or published by a person or body whether —
>
> (a) with or without modification; or
>
> (b) as in force at a particular time or from time to time.

Members will see there are two amendments standing in my name on the supplementary notice paper, which I have foreshadowed. The first is at 21/274, which seeks to delete those five lines—in other words, the entire subclause (3). I draw to members' attention the work of the Standing Committee on Uniform Legislation and Statutes Review, which indicates through many paragraphs its view on the lack of justification in the explanatory memorandum and materials for the Work Health and Safety Bill 2019. It concludes, some paragraphs later, at paragraph 6.52, with these two comments by the committee —

> It is unfortunate that the Explanatory Memorandum for the WHS Bill simply paraphrases clause 274 and does not explain or justify why the incorporation of codes of practice into the law of Western Australia by this means is appropriate and necessary in this instance.
>
> The Committee considers that the explanatory materials in support of the WHS Bill ought to have drawn the Parliament's attention to this question, given its impact on Western Australia's Parliament sovereignty, and explained why it was being done.

The committee then makes one finding and two recommendations. Finding 8 reads —

> Clause 274(3)(b) of the Work Health and Safety Bill 2019, by proposing to apply, adopt or incorporate any matter contained in a document formulated, issued or published by a person or body 'as in force at a particular time or from time to time' erodes Western Australia's Parliamentary sovereignty.

The committee goes on to make two recommendations. Firstly, recommendation 6 states —

> The second reading speech or Explanatory Memorandum for a bill should identify any clause that proposes to incorporate into Western Australian law material that is in force at a particular time but may vary 'from time to time', provide a rationale for it and explain its practical effect.

It then concludes by saying in recommendation 7 —

> The Government find an effective alternative to the current incorporation mechanism in clause 274(3)(b) and amend the Work Health and Safety Bill 2019 accordingly.

My question to the minister is: what is the rationale and practical effect of this particular provision?

Hon ALANNAH MacTIERNAN: I think this is to misunderstand the role of the code of practice. The code of practice is not something that is enforced. The code of practice is effectively used as a defence. A code of practice is not a set of regulations whereby if one breaches that code of practice, there is a penalty attached to that breach. It effectively sets out what is acceptable practice, so that it can be used as a defence. We would agree with the member entirely if we were talking about incorporating into a set of regulations some external document for which there was no process for it to be deliberated upon by our state Parliament, but that is not the role of a code of practice. No-one is going out there and enforcing the code of practice. The code of practice is effectively a shield and not

a sword; it is out there to set out what is accepted practice. This would not be well received by industry or any side if we were not able to amend these codes of practice in a way that keeps them contemporary and takes into account what is often quite a changing environment. We would totally agree with the committee if these were regulations that were to be enforced, but that is not the role of the code of practice. As I said, it is fundamentally a shield and not a sword, and this has been the practice that has been in place already in terms of codes of practice, and is in place in a number of other legislative regimes, including in various animal welfare provisions.

Hon NICK GOIRAN: The minister indicated that this is to be used as a shield and not a sword. I will look at that in a moment, but the minister also indicated that it is important that she—she said "we"; that would be the government and, in this instance, the minister—would be able to approve these codes of practice. As I read clause 274(1), it states, "The minister may approve a code of practice", but as I read clause 274(3), that code of practice might vary from time to time without the minister's knowledge or consent and would then be in effect. Is that right?

Hon ALANNAH MacTIERNAN: The advice I have received is that the code of practice must be approved by the minister and the approved code of practice, variation or revocation takes effect when notice of it is published in the *Government Gazette*. I am advised that there will always be a process of ministerial approval for the code of practice or a variation of it.

Hon NICK GOIRAN: If that is the case, minister, it seems to me that clause 274(1) does exactly what the minister just described, which I would support—that is, the minister would have to approve the code of practice from time to time. My question is: why is it necessary to have clause 274(3)?

Hon ALANNAH MacTIERNAN: A code of practice might reference a particular Australian standard that will be amended from time to time. When documents are referenced in a code of practice, this device, which is quite common, will allow those amendments to those external standards to be incorporated. As I say, I think it is really important. Industries change and tripartite agreements come about. We know how difficult it is to get this legislation through. We would not want a code of practice unable to incorporate every time there was, for example, a change in an Australian standard that it was determined would form the basis of that code, and have to be re-gazetted. That is the intention—from time to time external documents or external standards are referenced, so changes to them would automatically change the code of practice.

Hon MICHAEL MISCHIN: The minister has just raised a number of issues that are of moment to this, and that support concerns raised by the Standing Committee on Uniform Legislation and Statutes Review and in other contexts. It is all very well to talk about Australian standards, but clause 274(3) is not limited to Australian standards; in fact, it is quite broad. It is one thing for the minister to prescribe or approve a code of practice, but that code of practice might refer to any document. By reference, that document, changing from time to time, whether it is an Australian standard or a reference to a memo from someone or what a person or organisation has written on the back of a cigarette packet, is from time to time incorporated into that code of practice. Subclause (3) reads —

> A code of practice may apply, adopt or incorporate any matter contained in a document formulated, issued or published by a person or body —

Any person or body —

> whether —
>
> (a) with or without modification; or
>
> (b) as in force at a particular time or from time to time.

There may be a change in this document that not even the minister knows about, and it suddenly becomes part of the code of practice, yet an employer, someone responsible for a place of business, is required to know that. Even the minister might not. That is part of the concern. Even with respect to Australian standards it is problematic.

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