

WORK HEALTH AND SAFETY BILL 2019

Committee

Resumed from 23 September. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Postponed clause 30A: Industrial manslaughter — crime —

Progress was reported after the postponed clause had been amended.

Hon MICHAEL MISCHIN: I welcome the minister to the committee table. Hopefully, we can make some progress because I expect that her answers will be considerably shorter, but, hopefully, more informative than those of her colleague.

On the last occasion, I asked about the relevance of certain cases to the bill. The minister mentioned one further case—the Ballantine case. Perhaps the minister can give us a status report on the prosecutions emerging in that regard, and how this bill will make a difference to that particular tragedy.

Hon SUE ELLERY: With respect to Valmont (WA) Pty Ltd, the head contractor pleaded guilty and was fined \$38 000. Industrial Construction Services pleaded not guilty, and we are awaiting a trial date. Two other directors of ICS have yet to plead.

Hon MICHAEL MISCHIN: What charges have been presented against each of those parties?

Hon SUE ELLERY: Charges were laid under section 55 of the Occupational Safety and Health Act 1984.

Hon MICHAEL MISCHIN: In the case of Valmont, there is a charge under section 55 of the Occupational Safety and Health Act; is that correct?

Hon SUE ELLERY: I make the point that Valmont is a company. Section 55 relates to individuals. We think Valmont was charged under section 19A. I understand the point made by the member. I have been briefed. I listened to the debate yesterday and I re-read the daily *Hansard* this morning. I understand the point that the honourable member is trying to make about the cases and his view that it is not appropriate to rely on those cases as a justification for the government's policy on this part of the bill. That is his view.

The Minister for Agriculture and Food responded to that during the second reading and numerous times during the committee process. Indeed, she acknowledged that few prosecutions may proceed. She also made the point that words matter and that it is just as important to achieve cultural change in how people deal with health and safety in the workplace as it is to rack up, if you like, a number of prosecutions.

When the debate was concluding yesterday, Hon Alison Xamon also made the point that it is about driving cultural change. I am not sure that we can take this argument very much further. The honourable member has made his point and it is understood. It is terribly important, particularly for those families who are watching us right now, that we move on and deal with the detail of the clauses before us. I understand the point that the honourable member is making. He does not believe that it is appropriate for the government to rely on those cases as justification for the policy position the government has taken. Nevertheless, that is the policy position the government has taken, and we would like to move on to the detail of the clauses before us.

Hon MICHAEL MISCHIN: I would certainly like to move on to the detail of the clauses before us, but it would help if, instead of the monologues, we get accurate answers to the questions. Yes, the minister is half right; it has taken a long time to expose that the cases the government has put up are not—what was the word that the previous minister used with respect to the penalty provisions back in 2017?—“appropriate” in hindsight. I am seeking to ensure that the expectations that have been raised by the government that there has been a significant and major reform are not just words but a positive change—a reform for the better—and that a difference will be made by these provisions. The minister is quite right; people may be listening to these debates, and they may find them uncomfortable. It would be most disgraceful if expectations are created that something different is being done here when that is not the case and there is no major change.

The minister said that Valmont has been charged under section 55. Section 55 is not an offence-creating provision. It does not create a breach of duty; it is an extension of responsibility. It refers to extending responsibility to offices, bodies corporate and the like. I want to know what offences have been charged? It is entirely relevant, because if it is no different from what is proposed under the act, people are being led to believe that there is an enormous change, and then it is just words. Let us make it easy: with what offence was Valmont charged?

Hon SUE ELLERY: I did clarify this. Valmont is a company and that was not captured under section 55. I refer to section 19 of the act. I have nothing further to add on this point.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Hon MICHAEL MISCHIN: According to the WorkSafe website, Valmont was charged under section 22A(3) of the Occupational Safety and Health Act. There is another incorrect and inaccurate piece of information from the government about something that the department knows, or at least has told the public because it is on the website. The minister cannot seem to help us out. The company was charged contrary to section 22A(3) for a breach of a duty of a person who has control of a workplace under section 22(1).

Okay; we will let that one go through to the keeper. It is just another piece of unreliable information from the government. Let us hope for this one: what were the two directors of Industrial Construction Services charged with?

The DEPUTY CHAIR: The minister has nothing further to add.

Hon MICHAEL MISCHIN: No, I can imagine not. Either the minister does not know, which is disgraceful in itself, or she just cannot be bothered answering because she knows that if she gives an answer, it is not likely to be correct, or she just does not care. She just cites the cases; never mind about Parliament having to consider the legislation. In a perfect world for the Labor Party, it would be simply a matter of putting the stuff forward, giving a monologue about the importance of it, and presenting inaccurate, incomplete, unreliable information to the Parliament, which has the responsibility for these laws, and then when we examine what the government says and it starts to fall apart at a glance, it would deliver another monologue about how important it is that this legislation is passed because words are important. All we have heard is words—no facts, no substance. Are the directors charged with the equivalent of an offence under section 19A(1) of the Occupational Safety and Health Act—namely, gross negligence causing the death of a worker? It is just a simple yes or no.

Hon SUE ELLERY: I have already indicated that I have nothing further to add on that point.

The DEPUTY CHAIR: Hon Michael Mischin, I will give you some leeway here, but this will have to come to an end.

Hon MICHAEL MISCHIN: Absolutely. I think I have made the point and exposed the government's attitude to this. Those listening can understand that their government is prepared to make noises but it either has not the facts at its disposal or refuses to reveal uncomfortable ones.

Postponed clause, as amended, put and passed.

The DEPUTY CHAIR: Members, that takes us to a potential amendment on supplementary notice paper 155, issue 8, at 59/P2D3H—that is, on page 37, line 11, to delete the line. Does the minister intend to proceed with that amendment?

Hon SUE ELLERY: I am not moving it.

The DEPUTY CHAIR: In that case, we will move to clause 35.

Clause 35: What is a notifiable incident —

Hon NICK GOIRAN: We are now starting part 3 of this 16-part bill. In order to facilitate progress, with the minister's indulgence, I might ask questions on the first clause of each part, unless there is a clause that needs extra examination or has an amendment on the supplementary notice paper.

Part 3 captures clauses 35 to 39. My question pertains to the thirty-first report of the Standing Committee on Public Administration, which was tabled last month. I raised this in my contribution to the second reading debate. This part deals with an incident notification process. The point I raised in the second reading debate is that notifications need to be sent to the regulator. Serious concerns were raised by the Standing Committee on Public Administration about the community's awareness of the regulator. I asked what the government's response was to recommendations 6 and 7 in that report. Recommendation 6 states —

The Committee recommends that the State Government provides an ongoing and adequate advertising and communications budget for WorkSafe ... to enable it to raise public awareness about its existence and functions.

What is the government's response to that recommendation?

Hon SUE ELLERY: I am advised that at the time the government announced putting additional inspectors in place, an additional \$500 000 was announced. Cabinet has not yet considered the thirty-first report, so I am not able to tell members how the government intends to respond to those particular recommendations.

Hon NICK GOIRAN: Is the \$500 000 specifically for that advertising and communications budget?

Hon SUE ELLERY: I am advised yes.

Hon NICK GOIRAN: The minister indicates that she is not in a position to advise—I am paraphrasing—on the government's formal response to recommendation 6 or perhaps any of the recommendations necessarily in the

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

committee's report. I note that under standing order 191(1), there is an expectation that the government would do this within two months of the report being tabled. It was tabled in the past month.

Hon Sue Ellery: In August.

Hon NICK GOIRAN: It was sometime in August; I do not have the date readily to hand. It is difficult for us to examine this matter in the absence of that information. I guess the best question I can simply ask at this point is: does the government contend that it will be able to meet that two-month deadline?

Hon SUE ELLERY: Yes, it will. Occasionally, a government response to a report may be a day or two late and the responsible minister will stand and advise the chamber that that is the case. As a member of cabinet, I am not aware of any obstacle that would prevent us from providing a response within the time line.

Hon NICK GOIRAN: No doubt, in order to meet that time line, without having the date readily to hand, I imagine that —

Hon Sue Ellery interjected.

Hon NICK GOIRAN: I know that it was reported in August this year, but the main point here is that we are well into the two-month process. It is good to hear that there are no obvious obstacles. I take it that active consultation is taking place with WorkSafe to verify the quantum of the advertising and communications budget that might be needed—that deals with recommendation 6—but it is also important to look at recommendation 7, which refers to “additional funding for an extensive advertising campaign to raise public awareness”. I take it that active consultation is taking place with WorkSafe in order to develop that.

Hon SUE ELLERY: I am in a slightly difficult position because the matter is yet to be considered by cabinet. I am not in a position, and these advisers would not be in a position to tell me, to tell the chamber the work they are doing to prepare that for cabinet. It is a legitimate question to ask, but I am not in a position to provide the member with a detailed answer on that.

Hon NICK GOIRAN: One further question on this element is: is it routinely the case that a response to a standing committee's report would be put before cabinet?

Hon SUE ELLERY: Every time.

Hon NICK GOIRAN: My last question to the minister about part 3, “Incident notification”, which captures clauses 35 to 39, is: are there any material deviations from the model law in this part; and, if there are, what are those material deviations and why does the government consider them necessary?

Hon SUE ELLERY: If we go to the table, which I understand the member has been provided with, we see that clause 36(1)(d) is a recommendation from the ministerial advisory panel. That was particularly to accommodate the possible time that is taken to facilitate an evacuation from a regional or remote site. Paragraph (d) deals with a serious illness, referred to in paragraph (c), “that requires the person to have treatment”. Paragraph (d) commences “that occurs in a remote location”—it is the time that is counted. It has to be taken into account that it might be different from someone being picked up in an ambulance in metropolitan Perth and out of hospital within 15 minutes, as opposed to somebody in a remote location having to be evacuated and waiting for the Royal Flying Doctor Service et cetera.

Clause 36(1)(e) was also a recommendation from the ministerial advisory panel that was inserted into the body of the legislation. It is a continuation of the status quo. Those provisions are set out in the current regulations.

In clause 36(2), the definition of “medical practitioner” includes the Western Australian definition of “medical practitioner”, so it is different from the model clause in that sense.

The other changes relate to penalties. The penalties have been increased, consistent with the Occupational Safety and Health Amendment Act 2018. That appears at clause 37(1). Although clause 37(2) is the model clause, it has the preferred WA spelling of “acknowledgment”.

Hon Nick Goiran: It is truly amazing some of the things that come up.

Hon SUE ELLERY: There is that—apparently we spell differently! Otherwise, clause 37(7) is about the increase in penalties in the 2018 OSH penalty amendments. It is the same in clause 39(1)(a); the penalty increase is consistent with the 2018 occupational health and safety penalty amendments. It is the same in clause 41.

Hon NICK GOIRAN: Looking at clause 36(1)(e), which was MAP recommendation 10, it states —

that, in the opinion of a medical practitioner, is likely to prevent the person from being able to do the person's normal work for at least 10 days after the day on which the injury or illness occurs,

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

That is part of the definition of “serious injury or illness”. Did I understand the minister correctly to indicate that that is simply consistent with the existing law of Western Australia by way of a regulation?

Hon Sue Ellery: It is in the regs now.

Hon NICK GOIRAN: Will it now be uplifted into the act?

Hon Sue Ellery: Yes.

Hon NICK GOIRAN: Thank you.

Clause put and passed.

Clauses 36 to 39 put and passed.

Clause 40: Meaning of authorised —

Hon NICK GOIRAN: Part 4, “Authorisations”, captures clauses 40 to 45C. I will ask some questions about clause 44 specifically, but my general question on part 4 is: can the minister again indicate to the chamber whether there have been any material deviations from the model law; and, if so, what are they and what is the justification for them?

Hon SUE ELLERY: As I had started to say and got ahead of myself, the penalty at paragraph (b), below “Penalty”, is consistent. The increase is consistent with the 2018 OSH penalty amendments. Clause 42 is a model clause, except the penalties, which, again, are consistent with the 2018 penalty amendments. When compared with the model law, subclause (2) has a minor grammatical amendment to improve clarity. Still on subclause (2), the increase in penalties is consistent with the 2018 OSH penalty amendments. Clause 43 is the same as the model clause, except at subclauses (1)(b) and (2)(a) and (b)—again, there are changes to the penalties consistent with the 2018 OSH penalty amendments. What was the member capturing through to?

Hon Nick Goiran: Clause 45C.

Hon SUE ELLERY: Clause 44(1) is a model clause, except that the penalties are increased, consistent with the 2018 penalty amendments. Clause 44(2) is also a model clause, except that the penalties are increased, consistent with the 2018 penalty amendments. Does the member want me to talk about clause 45 or stop at clause 44?

Hon Nick Goiran: Just around that part.

Hon SUE ELLERY: Clause 45 is a model clause, except that the penalties are increased, consistent with the 2018 penalty amendments. Clause 45(a) is different.

Clause put and passed.

Clauses 41 to 43 put and passed.

Clause 44: Requirements for prescribed qualifications or experience —

Hon NICK GOIRAN: Clause 44 deals with requirements for prescribed qualifications or experience. I take members to page 47 of the bill. I raised this issue in the second reading debate. In particular, I draw members’ attention to clause 44(2). As I understand it, clause 44(2) provides that a person conducting a business or undertaking is not allowed to direct a worker to carry out work at a workplace if the regulations say that that person must have certain prescribed qualifications but the worker does not have them. That, of course, is quite appropriate. Members will see that there are penalties for that. The penalty is a fine of \$25 000 for an individual and \$115 000 for a body corporate. Clause 44(2) does not contain an element of knowledge on the part of the employer, so there is a certain strictness about 44(2) in that a worker either has the prescribed qualifications or they do not. I think there should be severe penalties for a PCBU who knows the employee does not have the prescribed qualifications but still sends them out to do the job. My concern is when an employer thinks that the employee has the right qualifications but later finds out that they do not have them, not through any fault of the employer.

Let us take, for example, a scenario in which the employee—the worker—has fraudulently told the employer that the worker has those qualifications when in actual fact the worker does not. The employer could be subject to a fine of either \$25 000 or \$115 000. There are two issues here. I said in the second reading debate that either it is fair and reasonable for the government to allow employers to go to an insurance company and say, “If I get pinged for this, I would like my insurer to cover my liability”, or, if the government continues with the policy that there will be no insurance cover for anything, I think it is important to add an element of knowledge here so that the employer must know that the employee did not have the qualifications but still sent out the employee, in which case it is fair enough that they should be pinged and should not be insured for it. I ask the minister to give some consideration to that issue, which, as I said, I raised in the second reading debate.

Hon SUE ELLERY: It is a legitimate question. The assumption in clause 44(2) is that there is a positive duty for employers to inform themselves because there is a serious risk if they do not. The serious risk to them is the

penalties. All the information they need to satisfy themselves is available for them to get from the website. The onus will be put on the PCBU's to satisfy themselves that the employee has the relevant qualification, certificate, training course, licence, or whatever it is.

Hon NICK GOIRAN: I accept that. It does create that positive duty on the part of the employer. I also accept that this is a model clause. Nevertheless, I am concerned about circumstances in which we could reasonably say that the employer has not done anything wrong; the employer exercised their positive duty but they were misled by the worker. What defences would be available to the employer in that situation?

Hon SUE ELLERY: I am advised that the defences would be those that are set out in the Criminal Code. I am trying to get information on whether there is a specific section in the code that I can refer the member to. It is under "statement of fact". We will see whether we can get the member the specific reference in the Criminal Code, but that is what it is.

Hon NICK GOIRAN: While that information is being obtained for the benefit of the chamber, can I just ask the minister whether the test of reasonable practicability, which is set out in clause 18, would intersect with this clause? Would an employer be able to say that they did everything reasonably practicable under clause 18, albeit in part 2, and therefore rely on that, or is that test irrelevant to this offence?

Hon SUE ELLERY: I am advised that we would rely on the provisions in part 1, chapter V of the Criminal Code. I do not have the actual sections. In answer to the second part of the member's question and the catch-all that is set out in clause 18, given the application of the Criminal Code, I think that the provisions of the Criminal Code would override the provisions under clause 18 because what is set out in clause 44 is an absolute requirement. If we need further examination of this, I will need to swap out my advisers again.

Hon NICK GOIRAN: While that advice is being obtained, could the minister point to a specific provision in the Criminal Code? I accept there is a chapter in the Criminal Code that sets out the defences and excuses. I am not disputing that; I am simply asking what an employer could usefully do under those defences in the circumstance in which a worker produces to the employer a qualification that satisfies the employer and the employer believes they have exercised their positive duty —

Hon Sue Ellery: They can take action in the court.

Hon NICK GOIRAN: What defence could they rely on if what the worker provided was fraudulent and a fake? That is the concern I have. The minister can well imagine a scenario in which a person might be desperate for work and be prepared to provide whatever said qualifications are needed despite the fact that they do not have them. We are all familiar, for example, with circumstances of résumé or CV fraud. I would like to know whether there is a specific defence or excuse under the Criminal Code that an employer could rely on in circumstances in which they were charged with a clause 44(2) offence.

I am concerned about the intersection with clause 18, because if there was a nexus between the two, I think it would provide some comfort to employers because they would then be able to launch a defence that they took all reasonably practicable measures. However, I see that clause 18 refers to a duty to ensure health and safety. It is all under part 2, which sets out the health and safety duties. Under part 4, clause 44 seems to provide a different obligation, or, as the minister says, a positive obligation. I am concerned that the test at clause 18 could not be relied on at clause 44. Therefore, as the minister said, we would need to rely on the Criminal Code, and I would like to be satisfied that something of substance would be there that would protect the employer.

Hon SUE ELLERY: With regard to the defences that can be relied upon under the Criminal Code, I am not sure I can take that much further, because it will rely entirely on the circumstances and the evidence. I cannot take that much further. With regard to the relationship with clause 18, clause 18 sets out the meaning of the words "reasonably practicable" wherever they appear. Clause 44 provides for an absolute requirement.

Hon NICK GOIRAN: Again, that is my concern here, minister. There is an absolute requirement for what I referred to. There is a heavy strictness about this provision. If the person conducting the business or undertaking had actual knowledge that the worker did not have the prescribed qualifications, I would have no problems with the suggested penalty. I also would have no problem with that person not being able to insure against that penalty. It is the mischievous worker I am concerned about, not the slack employer. This provision does not provide balance for that. Even if there were a mischievous worker, the employer would be deemed to be a slack employer, and I think that is unfair. We will need to take up this issue again when we get to the later part dealing with the blanket prohibition against insurance. I know other members have some amendments to it on the supplementary notice paper. I encourage the government, between now and when we get to that clause, to make available some supplementary advice, particularly on whether, as I said in my second reading contribution, the government might be inclined to agree that in those circumstances, someone should be able to insure against this kind of penalty.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

I have no further questions unless the minister has any supplementary information on specific defences or excuses under the Criminal Code that an employer might be able to use for a concern like this.

Hon SUE ELLERY: I made my point before. It will depend entirely on the circumstances.

Clause put and passed.

Clauses 45 to 45C put and passed.

Clause 46: Duty to consult with other duty holders —

Hon NICK GOIRAN: We are now moving to part 5 of a 16-part bill. Part 5 captures clauses 46 to 103. The clause in this part that requires some examination is clause 72. The minister will be aware there are amendments on the supplementary notice paper in my name, and we will get to those in a minute.

With regard to this part and the general questions that are applicable, this deals with the issue of some comprehensive duties being established to consult on specified work health and safety matters in the Work Health and Safety Bill 2019. In this part, which goes from clause 46 to clause 103, are there any substantial deviations from the model law? If there are, what are they and what is the justification for them?

Hon SUE ELLERY: With regard to clause 46—as a 20-year legislator, you can learn something new every day—it is the same as the model clause, but the WA-preferred spelling is “cooperate” and “coordinate” and the penalties are consistent with the 2018 occupational safety and health penalty amendments. Clause 47 is the same as the model clause, except the penalties have been increased consistent with the 2018 OSH penalty amendments. In response to public comment, clause 48(2) refers to “consultation must involve the health and safety representative so far as reasonably practicable”. Model clauses 49, 50, 51 and 52 came from ministerial advisory panel recommendation 11, and I can come back to that if the member needs an explanation. Yes; I do know what this is. This is a change in the language. Instead of the heading of clause 52 reading “Negotiations for agreement for work group”, it was changed to “Negotiations for determination of work group”. It is a change in language, not a change in any substance. There is a minor amendment in subclause (1) of model clause 52 for clarity—who knew that WA had preferred grammar—and the penalties have been increased consistent with the 2018 occupational safety and health penalty amendments. Clause 53 is the same as the model clause except for the penalties. Clause 54 is the same as the model clause but there is a minor amendment in subclause (3)(a) for clarity. Clause 55 uses WA-preferred grammar. Clause 56 is the same as the model clause, except for the penalties, which are consistent with the 2018 OSH penalty amendments. Clause 57 is the same as the model clause, except for the penalties. Clause 58 is the same as the model clause. Clause 60 is the same as the model clause, except for the gender-neutral language and the penalties, which are consistent with the occ safety and health penalty amendments. Clause 64 of the model law also uses gender-neutral language. Clause 65, “Disqualification of health and safety representatives”, applies the ministerial advisory panel’s recommendation 44 and uses gender-neutral language. Clause 66 is the same as the model clause. Clause 67 is the same as the model clause and uses gender-neutral language. Clause 68 is the same as the model clause and uses WA-preferred grammar and spelling. Clause 69 is the ministerial advisory panel’s recommendation 12 and applies minor amendments for clarity and WA-preferred grammar. This was put in place as a result of representation from industry. When it was explained to me, the example I was given was at a worksite such as a children’s hospital there might be a range of different contractors and some of them might be very small contractors. When a workgroup is small and its health and safety rep is not available, it allows that workgroup to invite a health and safety rep from another group to participate in the process. This was at industry’s request to give practical effect when dealing with small companies that might not have a health and safety rep at every single job at the same time.

Hon Nick Goiran: Can you take an interjection on that?

Hon SUE ELLERY: Sure.

Hon Nick Goiran: Do we know what defines “small”?

Hon SUE ELLERY: No. This is an enabling provision to allow them to come to a practical solution.

Clause 70 is the model clause with minor amendments for grammar and WA-preferred language—now we have our own language! We have our own language, our own grammar and our own spelling!

Hon Nick Goiran: West Australian dialect.

Hon SUE ELLERY: Who knew!

Clause 71 is the same as the model clause, with WA-preferred grammar. Clause 72(1) is the same as the model clause. Clause 72(1)(a) applies the ministerial advisory panel’s recommendation 13; paragraph (b) applies the ministerial advisory panel’s recommendation 14; and paragraph (c) is the choice of course and was modified in response to public comment. It provides the health and safety rep with the right to choose the training course. The honourable member would be aware that that also applies to clauses 72(5) and (7). Clause 72 also has the increased penalties.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Clause 73 is the same as the model clause. Clause 74 is the same as the model clause except the penalties are consistent with 2018 occupational safety and health penalty amendments. Clause 75 is the same as the model clause except there is a minor amendment for clarity and the penalties are consistent with the 2018 occupational safety and health penalty amendments. Also, some WA-preferred grammar is applied and a word change to create greater clarity in the application of the note. Clause 76 is the same as the model clause with gender-neutral language, and corrects some numbering due to some new subclauses being added. Clause 76(5) applies the ministerial advisory panel's recommendation 15, which ensures that there are people at the table with the capacity to make decisions and speak on behalf of the company. Part of that broader clause also includes some renumbering. Clause 77 is the same as the model clause but has been amended with WA-preferred spelling and grammar. Clause 78 is the same as the model clause. Clause 79 is the same as the model clause with a minor amendment to improve clarity and gender-neutral language, and some changes to make the penalties consistent with 2018 occupational safety and health penalty amendments.

Hon Nick Goiran: Clause 79?

Hon SUE ELLERY: Yes. It turns out we also have a WA-preferred apostrophe!

Hon Nick Goiran: If we had more time, I'd ask more about that.

Hon SUE ELLERY: If we had more time, indeed, so would I!

The modification of the penalties in clause 79(5) applies the ministerial advisory panel's recommendation 15. The modification is in response to public comment on the penalties consistent with the 2018 occupational safety and health penalty amendments. The ministerial advisory panel's recommendation 15 is also captured in clause 79(6) and, again, the penalties are consistent with the 2018 occupational safety and health penalty amendments. Clause 80 is the same as the model clause but is reorganised to improve clarity. Clause 81 is the same as the model clause. Clauses 82 and 82A apply recommendations of the Boland report. Clause 83 is the same as the model clause. Clause 84 is the same as the model clause but it has been reorganised for greater clarity, and subclause (1)(b) applies the ministerial advisory panel's recommendation 16.

The DEPUTY CHAIR: Minister.

Hon SUE ELLERY: Clause 84(2) implements the current section 4A—exclusion for dangerous and covert operations. Clause 85 is the same as the model clause, with the WA-preferred apostrophe.

Hon Nick Goiran: I'll just make an interjection on 84. When it says it implements the current "4A", where did this "4A" come from? Is it the OSH act?

Hon SUE ELLERY: Yes, it is.

Clause 85 is the same as the model clause, again with our parochial apostrophe and grammar, and a note is added to clarify that a single direction may be given to multiple workers. Clause 85(7) implements section 4A of the Occupational Safety and Health Act for dangerous and covert operations, which I just described. Clauses 86, 87 and 88 are the same as the model clauses. Clause 89 applies the ministerial advisory panel's recommendation 25. Clause 89A applies the ministerial advisory panel's recommendation 17. Clause 90 is the same as the model clause, with gender-neutral language. Clause 91 is the same as the model clause. Clause 92 is the same as the model clause with a minor amendment to improve the clarity of timing. Clauses 93 to 97 are the same as the model clauses. In clauses 97 and 98, the penalties are increased consistent with the 2018 OSH penalty amendments. Clause 99 applies the ministerial advisory panel's recommendation 25 and includes penalty increases consistent with the 2018 occupational safety and health penalty amendments.

Clause 100 is the same as the model clause with a minor amendment to improve the clarity of timing. Clause 100(2) applies the ministerial advisory panel's recommendation 18. Clause 101 applies the ministerial advisory panel's recommendation 25 and includes some gender-neutral language. Clause 102 is the same as the model clause with some gender-neutral language, and if the member wanted clause 103 included, it is the ministerial advisory panel's preferred response to the jurisdictional note further modified for greater consistency. That takes us to clause 103.

Hon NICK GOIRAN: To facilitate debate, I do not have a question until clause 48.

Clause put and passed.

Clause 47 put and passed.

Clause 48: Nature of consultation —

Hon NICK GOIRAN: I refer to clause 48(2). In the minister's response at the start of this part, she indicated that clause 48(2) was changed in response to public consultation. Who requested that change in the public consultation process?

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Hon SUE ELLERY: It was raised by the mining companies. They raised with government that they were concerned, given the remoteness of sites and different shifts and swing arrangements, for example, that it might not always be possible to have a health and safety rep present at that time. The language has changed so that the rep must be involved when it is reasonably practicable.

Hon NICK GOIRAN: After it was raised and there was a preliminary decision by government to take on board the feedback, was there an additional round of consultation with anyone else who might have been affected by the change?

Hon SUE ELLERY: I am advised that the government did not specifically ask, but the member would be aware that industry is well across the provisions set out in this bill, and no industry representatives have raised any concerns.

Clause put and passed.

Clauses 49 to 64 put and passed.

Clause 65: Disqualification of health and safety representatives —

Hon NICK GOIRAN: The minister indicated that this clause is a result of ministerial advisory panel recommendation 44. Was that a unanimous recommendation of the ministerial advisory panel?

Hon SUE ELLERY: I am not in a position to tell the member who voted for what and what the numbers were inside the ministerial advisory panel. I can tell the member that it made recommendations that were then put out for public consultation. I am advised that there were more than 60 responses to that public consultation. Drafting then occurred accordingly.

Hon NICK GOIRAN: By way of explanation, earlier in the consideration of the bill, a matter was included because of a MAP recommendation. Although the minister with the carriage of the bill and I had a fairly robust debate about whether we should be told further information about the MAP process and the release of minutes and the like—we will not revisit all that—there was, at the very least, an indication by the minister that the recommendation was unanimous. For consistency, I am asking whether the minister can now indicate whether this recommendation was unanimous.

Hon SUE ELLERY: I am not in a position to do that.

Hon NICK GOIRAN: Is that because the information is not available to the minister at this time or has there been a change in the approach taken by the government in revealing whether recommendations were unanimous?

Hon SUE ELLERY: I am advised that during the previous robust debate that was had, the government indicated that it would not be sharing information for each recommendation about how many people voted, who voted, which way they voted and whether it was unanimous. The government did that for clause 26A, but it will not do it for others.

Hon NICK GOIRAN: For the benefit of the record, from that I interpret that recommendation 44 for clause 65 was not a unanimous recommendation of the MAP. It must be that some concerns were raised. What concerns have been raised with the government about clause 65 at any stage of the consultation process, whether inside or outside the MAP process?

Hon SUE ELLERY: I do not know that I can give the member a precise answer, but he will have noted that in the clause-by-clause information I provided to the chamber before, I said that some things had been changed as a result of public consultation. Some MAP recommendations were put out and the public consultation gave feedback along the lines of what I set out 10 minutes ago; for example, companies said that for remote locations, it would be more practical if they could ensure that a health and safety rep be there when reasonably practicable. When consultation came back that made recommendations to alter or reconsider ministerial advisory panel recommendations, they were considered. Some of them were adopted and appear in the bill before us, and others were not. Given that more than 60 submissions came back, it is too broad a canvas to set out which suggestions from the public consultation were adopted and which were not. I can set it out in broad terms, as I did in the chunk of clauses we did, but I cannot go into more detail than that.

Hon NICK GOIRAN: For clarity, is clause 65 a model clause that has been modified because of MAP recommendation 44, or is it not a model clause and has been brought on simply because of MAP recommendation 44?

Hon SUE ELLERY: The model clause requires us to insert the designated court or tribunal. To that extent, it is a model clause. It uses gender-neutral language. The ministerial advisory panel also made a recommendation. The model clause allowed us to insert the designated tribunal and MAP recommended it.

Hon NICK GOIRAN: To round this out, have no concerns been raised with the government on the drafting of clause 65 that is currently before us?

Hon SUE ELLERY: No, not to the knowledge of the advisers here.

Clause put and passed.

Clauses 66 to 68 put and passed.

Clause 69: Powers and functions generally limited to the particular work group —

Hon NICK GOIRAN: I understand that clause 69 is a model clause but has been amended pursuant to recommendation 12 of the ministerial advisory panel. Is there any point in me asking the minister about any other ministerial advisory panel recommendations and whether they were unanimous?

Hon Sue Ellery: There is not.

Hon NICK GOIRAN: I will not ask that question on this or any other occasion.

Has the government received concerns, whether it be inside the MAP process, outside the MAP process or at any other time, on the drafting of clause 69 that has deviated from the model law to the extent of recommendation 12 of MAP?

Hon SUE ELLERY: I have a document that I could table, if it is helpful. Just so that I am clear, is the member asking about the issues that were raised externally?

Hon Nick Goiran: Yes.

Hon SUE ELLERY: I do not think I can be more specific. I can tell the member the names of the organisations that made submissions, but more than 60 submissions were received.

Hon Nick Goiran: With regard to this?

Hon SUE ELLERY: No, generally. I am not in a position, without someone trolling through all the submissions, which will be not particularly practical, to tell the member what specific concerns were raised. I will see whether I can check one thing for the member.

The practical effect of this provision is that it makes things easier for the parties engaged on a worksite. I was trying to work backwards and make the assumption that because it makes things easier for an employer, for example, maybe it came from an employer. I cannot confirm that. I think it is trying to take account of the fact that there are so many different levels on a worksite. We could use the children's hospital as a good example. There were so many different contractors and subcontractors. This provision is trying to give practical assistance to the parties that if they do not have their health and safety rep on site but another one is on the same site, they can be used to ensure the process is not held up, but only when a serious risk to health or safety emanates from an immediate or imminent exposure. It will ensure that in those circumstances, the process is not unduly held up because the company is so small that it does not have a health and safety rep on site at the time. That is the best I can do.

Clause put and passed.

Clauses 70 and 71 put and passed.

Clause 72: Obligation to train health and safety representatives —

Hon NICK GOIRAN: I move —

Page 71, line 11 — To delete the line and substitute —

- (c) subject to subsection (5), chosen by the health and safety representative, in consultation with the person conducting the business or undertaking.

Again to potentially facilitate the passage of this bill, I indicate to members that this is the first of three amendments to clause 72 on the supplementary notice paper standing in my name. They are identical amendments to those moved by my colleague and learned friend the member for Hillarys, Peter Katsambanis, MLA, in the other place during the debate. Our opposition amendments to clause 72 reinsert model law provisions into the bill. These provisions have been taken out. We are putting them back in. They will ensure that the employer has a say on who trains the health and safety representatives, given that this entire part is about consultation and the employer will ultimately have to pay. I can continue to make the case for this and the other three amendments but perhaps the most expeditious way forward is to get an indication from the government whether it will support, oppose or perhaps not oppose these amendments.

Hon SUE ELLERY: I hate to break the honourable member's heart, but the government will oppose this amendment. Under the current legislation and the model bill, it is understood that the health and safety representative chose the course from the list of authorised courses. A recent New South Wales Industrial Relations Commission decision on Sydney Trains and SafeWork NSW queried whether this settled understanding was correct. The case considered the New South Wales provisions in section 72 of the NSW act. After consideration of that decision, the

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

New South Wales Parliament passed amendments to section 72 to adopt the words proposed in our clause 72(1)(c). The amendment before us would repeat the error that the New South Wales Industrial Relations Commission identified. Clause 72(1)(c) of the bill before us states —

chosen by the health and safety representative.

If we were to add the text proposed in the honourable member's amendment, it would leave us with a problematic provision, given that we already have a decision from the New South Wales Industrial Relations Commission. For those reasons, the government will not support the amendment.

Hon NICK GOIRAN: I find it interesting that the government is now relying on a New South Wales court decision when this has never been raised before. I take the minister to the document that was tabled. It sets out the deviations from the model law. We are dealing with clause 72(1)(c) now. The information that has been provided is that the clause was drafted in response to public comment. It was not suggested that the provision was modified because of some New South Wales decision.

Sitting suspended from 1.00 to 2.00 pm

Hon NICK GOIRAN: Does the government concede that amendment 18/72 standing in my name on the supplementary notice paper is word for word identical to the model law?

Hon ALANNAH MacTIERNAN: Member, that is correct. We have deviated from the model law in this case because of the Sydney Trains v SafeWork NSW case that came forward in New South Wales. That clause from the model law was enshrined in the New South Wales legislation and the matter of the correct construction of the clause came up for consideration. When it was introduced into the model code, it was understood that the provision would not change settled practice that the health and safety representative had the right to choose, provided the cost and the availability were appropriate. The case came forward. Commissioner Newall's decision states —

It can fairly be said that neither s.72 nor Part 12 of the Act are shining examples of the parliamentary draughtsman's art.

The commissioner's view was that the inclusion of the words "consultation with the person conducting the business" created the problem. We wanted to remove the uncertainty created by the construction of that particular provision in the model act so that, effectively, the status quo would remain.

Hon NICK GOIRAN: What weight would the Western Australian courts give to that New South Wales decision?

Hon ALANNAH MacTIERNAN: Obviously, as it is interpreting a model clause provision, one would imagine that the New South Wales court's decision would have some weight. I guess one of the things that comes out of the model code is that the jurisdictions are making decisions on the same wording, so I think there would be some weight. We note that New South Wales has taken steps to amend its legislation to deal with this. I think, member, it would not be wise for us to go down this path when we know that there is a problem with the interpretation of the model clause such that New South Wales has had to change its legislation.

Hon NICK GOIRAN: Does any other jurisdiction in Australia have the same model clause in its legislation?

Hon ALANNAH MacTIERNAN: We presume so, but we have not done that analysis. Suffice it to say, where it has been drawn to a jurisdiction's attention that the lack of clarity has become apparent, as in New South Wales, it has taken steps.

Hon NICK GOIRAN: I take it then, minister, that that means every other jurisdiction in Australia has the model law clause that the opposition is trying to insert back into this bill, and the only exception to that is New South Wales, based on the decision of one judge or magistrate or commissioner. Who made the decision that that was the genesis of the New South Wales Parliament changing its provision, when no other jurisdiction is doing likewise?

Hon ALANNAH MacTIERNAN: We cannot say that no other jurisdiction is doing likewise. We are sure that this matter would have had consequences in other jurisdictions that may well be proposing to make similar changes; we just do not know. But we do know that there has been litigation on the model clause as it was enshrined in the New South Wales legislation and the court reported on the fact that it lacked clarity and disturbed what was settled practice. We note that recommendation 10 of the Boland review was to amend the model WHS act to make it clear that for the purposes of section 2 of the act, the health and safety rep is entitled to choose the course of training. The Boland review recommended that the model act be changed in the way that we are changing the legislation. Honestly, member, in light of what happened in New South Wales and the action taken by the New South Wales Parliament, and the recommendation by the Boland review, it would be quite perverse if we were to, notwithstanding that, go back to the model law, which the Boland review recommended be changed to overcome that problem.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Hon NICK GOIRAN: The minister says that, but she is not able to tell us whether any other jurisdiction has done that. In the absence of that, given how insistent the government has been about the need for the model law, it is reasonable for us to assume, particularly given the resources of government, that every other jurisdiction has this model clause. The government has gone out of its way to say, “Hang on a second, members, New South Wales is doing something different.” I find it almost amusing that the government can exercise its resources to find out what New South Wales is doing, but it has no idea what Queensland, Victoria, South Australia or anyone else is doing. The government is expert because of one decision in New South Wales. Be that as it may, the minister talked about perversion of the legislation. Part 5 of the bill is indeed titled “Consultation, representation and participation”. The point of part 5 is consultation. If we agree with the government’s proposal, there will be no consultation, because clause 72 will read “chosen by the health and safety representative”. There has to be a training course chosen by the health and safety representative. Minister, who will pay for the training chosen by the health and safety representative?

Hon ALANNAH MacTIERNAN: The established practice is that the course is paid for by the employer. I hope that my advisers can point me to the sections, but I understand that there still needs to be consultation. I understand that the provision provides for consultation.

There will be a time frame for the training to be delivered and, obviously, there will be consultation about that. The employer will be required to pay the course fees and other reasonable costs. The clause then provides that if agreement cannot be reached with the person conducting the business or undertaking within the time frames set out in clause 72(2), either party may ask the regulator to appoint an inspector to decide the matter. The framework is set up so that discussions can take place on those matters. If there is no agreement, there is a mechanism to call in the inspector. It is not the case that we are giving the health and safety rep an absolute right to do whatever they want. Built into the structure is —

Hon Nick Goiran: But only about the time when the course is undertaken, not about the cost or who does it.

Hon ALANNAH MacTIERNAN: No; it is to pay the course fees.

Hon Nick Goiran: They have to pay it, no matter what it is. It could be a million dollars and they have to pay it, because it is only about paying the course and reasonable costs; it is not the reasonable course fees. You’ve got to pay for the course and reasonable costs. They are two different elements.

Hon ALANNAH MacTIERNAN: That is not how it will be interpreted in practice. The explanatory memorandum says that if agreement cannot be reached between the person conducting the business and the safety rep on the matters set out in subclause (2)—some of the matters set out are the course fees—“either party may ask the regulator to appoint an inspector”. That could be interpreted as though the course fees are matters that could be the subject of dispute.

Hon Nick Goiran: That is not what the clause says. Have a look at clause 72(5).

Hon ALANNAH MacTIERNAN: It is important to understand that all courses must be authorised by the Work Health and Safety Commission. People cannot just go and pick a course that has not been approved. The explanatory memorandum states —

In some circumstances, costs associated with the course ... including course fees, may be significantly higher than other courses that are conveniently available to the HSR ... If this is a factor in the dispute, the inspector may apportion reasonable costs to the PCBU and residual costs to the HSR. The inspector cannot require the HSR to change their choice of course.

However, if the cost of the course that is chosen is higher than what is reasonable or generally available, the PCBU may apportion reasonable costs. It is a package. The PCBU can look at all elements of the package, including the course fees. The inspector may decide that because a particular course is more expensive than another equivalent course that is available, the PCBU is required to pay only the proportion of the cost that is the equivalent of the alternative available course. The health and safety rep has the right to choose, but they will not have the right to unilaterally determine how much will be paid for that course, because if an employer believes it is unreasonable, they can ask for an inspector to adjudicate. One technique that the adjudicator will have available to them is to require the employer to pay only a proportion of the cost. That is included in the explanatory memorandum, which will of course be part of the provisions that go towards interpreting the bill. If there is any dispute about this clause, the fact that this has been set out clearly in the explanatory memorandum puts beyond doubt that that is how this clause will operate.

Hon RICK MAZZA: This clause seems terribly one-sided. Part 5 is titled “Consultation, representation and participation” for health and safety representatives. The PCBU will really not have much of a say, if any, on what courses the health and safety representative takes. The model bill does. Hon Nick Goiran’s amendment basically

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

mirrors the model bill and provides for a consultation process on what courses the health and safety representative could undertake. My understanding is that workplace health and safety should really be a coordinated approach by the employer and the employee. In fact, at the end of the day, the PCBU is responsible for the work health and safety systems and the model that is used to make sure that health and safety exists within the business. If something goes wrong, they are the ones who will be liable for it, yet no consultation process will be available to them to determine what courses should be undertaken by the health and safety representative when it comes to instituting those systems in their workplace. The minister has referred to the New South Wales court precedent. That is the case in one state, but it is not the case in other states. We have kind of cherry-picked this a bit along the way, too, because we are saying that we are doing it differently in this state from other states. Just because New South Wales has gone down this path, does not mean that Western Australia should. The model bill is quite clear. I am very concerned that this is extraordinarily one-sided because the PCBU will not have an opportunity to have some input into what the courses will entail. I am therefore inclined to support this amendment.

Hon ALANNAH MacTIERNAN: I really urge members not to support this amendment; it would actually be a backwards step. The current situation is very clear. The intention of the current law, as proposed by the model law, was always to reflect what has been a long-established practice; that is, workplace safety and health representatives can choose the course provider. That has been a really essential part of this process. The representatives cannot choose just any provider; they can choose a provider from only the list of approved and accredited training providers on the WorkSafe website. This does not give a person carte blanche to attend a course when they have no idea whether the training provider will be relevant. The choice of course will continue to exist, but the course will have to be run by an accredited provider. A workplace health and safety representative cannot do some Mickey Mouse training; it has to be a properly accredited course. If there is a dispute and the employer is unhappy with the associated travel costs or the course fees, the employer has the right to arbitration and to call in an inspector to adjudicate on this. This has been the practice and this will continue. We believe that that practice was meant to be enshrined in the model law. After the model laws were adopted, the Sydney Trains case came up and there has been a review of the law. We are not just saying that this is New South Wales responding to that decision. The Boland review of the model workplace health and safety law said that the model code needed to be amended in order to make it clear that the health and safety representative was entitled to choose the course of training. It would be quite perverse if we were to ignore not only what happened in that case and the New South Wales response to it, but also, more importantly, the fact that Boland said that we need to amend the model code. Effectively, we are embracing the change that was recommended by the Boland review.

Hon NICK GOIRAN: For what it is worth, I think that we are both trying to achieve the same outcome. I accept what the minister has said about the explanatory memorandum. I have perused the explanatory memorandum on this point and it does indeed clarify exactly what the minister said, which is also what the opposition wants to see; that is, if there is a dispute about the cost, the course or its timing, all those matters can be brought to the inspector for a decision. I accept that that is what the explanatory memorandum states and it is what the government wants to happen. I accept the minister's information to the chamber that that is the ordinary practice that has been undertaken for some time and that this divergence has emerged in New South Wales. My only concern is whether the clause reflects what both the government and the opposition want to happen. It is certainly our view that the preferred approach is to proceed with the amendment, which is consistent with the model law, because it makes the provision very clear rather than leaving it with a shade of grey.

There is nothing more I can add. I accept that the government is not in agreement. I have nothing further to add on this point other than to say that it is regrettable that we cannot agree on the form of words. Irrespective of the outcome, for the purposes of the record, I want to add my weight to what the minister has said and say for anyone who interprets this provision, whether it be in the current form or an amended version of clause 72, that what the chamber and the parties want is exactly what is set out in the explanatory memorandum. From the opposition's perspective, this clause is better with the amendment than without.

Hon ALANNAH MacTIERNAN: I appreciate those comments, but I urge other members who are listening to not support this amendment because we have a case in which, clearly, this point has been litigated. It has been found to be unclear and to have an unintended impact, and the Boland review recommended that we not go down that path.

Hon NICK GOIRAN: Minister, when was this decision made by the New South Wales court?

Hon ALANNAH MacTIERNAN: In 2017.

Hon NICK GOIRAN: I will make a final point to the minister and to members. I find it interesting that this particular case happened in 2017, yet when the member for Hillarys and I were discussing the amendments, it was put to us by the government that if the opposition were minded to agree with the proposals by the government for clauses 30B and 31, which clearly we did not agree to, it would agree to what I have referred to as the "Katsambanis amendments" at clause 72. I find it odd that the government was agreeable and offering that as a solution to all this as recently as

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

the last few weeks, yet apparently this court case from 2017 makes it impossible for the government to agree to this amendment. I will leave it at that. I have nothing further to add.

Division

Amendment put and a division taken, the Deputy Chair (Hon Martin Aldridge) casting his vote with the ayes, with the following result —

Ayes (15)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Simon O'Brien	Hon Dr Steve Thomas
Hon Jacqui Boydell	Hon Nick Goiran	Hon Robin Scott	Hon Colin Tincknell
Hon Jim Chown	Hon Rick Mazza	Hon Tjorn Sibma	Hon Ken Baston (<i>Teller</i>)
Hon Peter Collier	Hon Michael Mischin	Hon Aaron Stonehouse	

Noes (17)

Hon Robin Chapple	Hon Diane Evers	Hon Martin Pritchard	Hon Alison Xamon
Hon Tim Clifford	Hon Adele Farina	Hon Samantha Rowe	Hon Pierre Yang (<i>Teller</i>)
Hon Alanna Clohesy	Hon Laurie Graham	Hon Charles Smith	
Hon Stephen Dawson	Hon Alannah MacTiernan	Hon Matthew Swinbourn	
Hon Sue Ellery	Hon Kyle McGinn	Hon Dr Sally Talbot	

Pair

Hon Donna Faragher

Hon Darren West

Amendment thus negated.

Hon NICK GOIRAN: I indicate to the chamber that the next amendment standing in my name at 19/72 will not be moved, because it is consequential upon the amendment that was just lost.

Minister, before I give consideration to moving the next amendment standing in my name at 20/72, the minister will see that the wording is substantially similar to what currently appears at clause 72(7), which reads —

The person conducting the business or undertaking must then —

- (a) allow the health and safety representative to attend the course of training at the time decided by the inspector; and
- (b) pay the costs decided by the inspector.

My amendment on the supplementary notice paper, which seeks to reinsert the model law, reads —

A person conducting a business or undertaking must allow a health and safety representative to attend a course decided by the inspector and pay the costs decided by the inspector under subsection (6).

Not much seems to turn on this, other than it is very specific, because it connects it with subclause (6), which reads —

The inspector may decide the matter in accordance with this section.

It does seem to be a drafting improvement. I ask for clarification of the government's position on this matter.

Hon ALANNAH MacTIERNAN: My advice on this note is to oppose it, but I want to take some further advice on that.

The problem with the member's proposed amendment is that it deletes reference to the time. Honestly, member, I think it is very clear from the way in which the legislation is set out that subclause (7) follows on from subclause (6). Subclause (6) provides that the inspector may make a decision. Subclause (7) provides that the person must then do the following things: allow the representative to attend the course at the time decided by the inspector, and pay the costs decided by the inspector. The member's proposed subclause is less clear because, as far as I can see, it does not reference the time. Time is one of the issues that the inspector can deliberate upon; therefore, it loses one of those critical elements. To be honest, member, I do not think it does improve the drafting. It is very clear that subclause (7) is referring to the decision that is made in subclause (6). This just sets out the logical sequence of the decision-making. There is a dispute, an inspector is called, the inspector makes the decision, and then the PCBU is required to allow the person to attend the course at the time decided by the inspector, and pay the costs decided by the inspector.

Hon NICK GOIRAN: Does the government agree that the amendment at 20/72 is identical to the clause in the model bill?

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Hon ALANNAH MacTIERNAN: I did ask whether we can have that document. The member can see that there is a problem with the formulation that he has put before us, regardless of whether it is a clause in the model bill. That is because it does not deal with the issue of the time of the course, and that would create a lot of difficulty. The provision indicates that, yes, this is the course that the person could go on—actually, it is not the course, because the representative will have the ability to choose the course. The two issues that are for determination are the time and the cost. We are seeking to make it clear that those two issues are critical. Therefore, we have changed the provision in the model code and are going with a different provision. If we think it through logically, the only matters about which there could be a dispute are the time and the cost. Therefore, it does not make sense for us to take out a reference to the time.

Clause put and passed.

Clauses 73 to 75 put and passed.

Clause 76: Constitution of committee —

Hon NICK GOIRAN: I ask this question on clause 76, but, with the minister's indulgence, I also ask it on clause 79. I understand that these clauses deviate from the model law, because of recommendation 15 from the ministerial advisory panel. Is the minister in a position to advise whether that recommendation from the MAP was unanimous?

Hon ALANNAH MacTIERNAN: As I think Minister Ellery indicated earlier today, we do not intend to be drawn on the number of people who approved or disapproved any particular recommendation.

Hon NICK GOIRAN: I will just make the obvious observation that that is a different approach from the approach the minister took earlier on in this bill, but it is her right to change the approach she is going to take. I ask —

Hon Alannah MacTiernan: I did indicate at the time, I think, that I did that because it was a clause of particular moment. I thought I had indicated that this might not be an approach that would be appropriate to take for every clause.

Hon NICK GOIRAN: The minister did. I guess what follows from that is to find out where it would and would not be appropriate. The minister is saying that it is not appropriate with recommendation 15, as is her right. Clauses 76 and 79 both turn on recommendation 15. Has the government heard from anyone, whether inside or outside the ministerial advisory panel process, identifying concerns about the drafting of clauses 76 or 79?

Hon ALANNAH MacTIERNAN: We might call this the Homer Simpson clause. The idea here was to ensure that there was at least one person on the health and safety committee representing the person conducting a business or undertaking who had sufficient authority to implement the decisions and recommendations that came out of it. The idea is that, preferably, we do not necessarily have the tea lady as the representative. This is about having a representative of the boss who has sufficient seniority in the organisation to ensure that they can properly give effect to the operation of the relevant provisions. It is complex, because we are looking at two clauses at once—clauses 76 and 79. Clause 76 provides for there to be a reasonably senior person involved. The provisions under clause 79(5) came out of the public submissions, and I understand they were designed to ensure that the PCBU did not have an absolute obligation to embrace the recommendations. The person conducting the business must, without unreasonable delay, consider any recommendation and provide a response to the committee to the extent that the person agrees to the implementation of the recommendation. If the person agrees to the implementation of the recommendation, they must take any action required for the purposes of implementation. Clause 79(6) states, in part —

The person conducting a business or undertaking must not unreasonably withhold the person's agreement to the implementation ...

It is my understanding that there were submissions; we do not have access here to identify whom they were from, but they were motivated by the desire to make sure that following the recommendations of the committee would not be an absolute duty. This provides for a decision to consider the recommendations and not unreasonably reject them.

Clause put and passed.

Clauses 77 to 83 put and passed.

Clause 84: Right of worker to cease unsafe work —

Hon NICK GOIRAN: This clause deviates from the model law because of recommendation 16 from the ministerial advisory panel. To facilitate the passage of further clauses, could the minister indicate whether it is the position of the government this afternoon that it will not advise whether any of the recommendations by the ministerial advisory panel were unanimous or otherwise?

Hon ALANNAH MacTIERNAN: Yes, member, that is correct.

Hon NICK GOIRAN: Has the government received any concerns about the drafting of clause 84?

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Hon ALANNAH MacTIERNAN: This clause picks up a set of circumstances that is currently reflected in our occupational safety and health legislation but was not included in the model law. We think the model law fails to take into account circumstances in which a risk could be created to people other than employees—for example, if an employee is on a building site and is doing something that might lead to a beam dropping on a member of the public and killing them. I do not think these are particularly fanciful instances in the construction industry. In fact, we believe there may have been a case concerning Grocon in which serious harm was caused to a member of the public by noncompliance with these provisions. We thought this would be a step backwards, and we needed to ensure that we kept that capability.

Hon NICK GOIRAN: I understand the justification for the clause. I am just asking whether the government has received any concerns about the drafting of clause 84, as recommended by the ministerial advisory panel at recommendation 16.

Hon ALANNAH MacTIERNAN: We are not aware of any.

Clause put and passed.

Clauses 85 to 88 put and passed.

Clause 89: Request to regulator to appoint inspector to assist —

Hon NICK GOIRAN: Clause 89 is a deviation from the model law courtesy of the twenty-fifth recommendation of the ministerial advisory panel. I note that it is also the recommendation that creates the deviation at clauses 99 and 101, so to expedite proceedings I will ask this question with the minister's indulgence: has the government received any concerns about the drafting of clauses 89, 99 and 101, which deviate from the model law because of the twenty-fifth recommendation from the MAP?

Hon ALANNAH MacTIERNAN: No, we are certainly not aware of any concern about clause 89. This was just in recognition of the size of the state and, often, the inability to get an inspector out to a Granny Smith mine or whatever other place it might be where a dispute or an issue might have arisen. Often these things can be dealt with over the phone, so this is just recognition of the reality of the environment in Western Australia.

Hon NICK GOIRAN: Does that also apply to clauses 99 and 101?

Hon ALANNAH MacTIERNAN: Yes; they are both provisions in which we are deleting the requirement to attend at the workplace.

Hon Nick Goiran: No concerns have been raised about the drafting?

Hon ALANNAH MacTIERNAN: Not that we are aware of. This does not appear to have been a matter of any contention.

Clause put and passed.

Clause 89A: Referral of issue about application of section 88 to Tribunal —

Hon NICK GOIRAN: I indicate that I have two further questions about this part of the bill. One is at clause 89A and one is at clause 100, and we will have to deal with them separately.

Clause 89A is a deviation from the model law because of the seventeenth recommendation from the ministerial advisory panel. Has anyone raised any concerns with the government about this deviation?

Hon ALANNAH MacTIERNAN: This happens in a few places in our legislation when matters are considered to be industrial relations issues. This is a question about whether there are issues of continuity of employment, so whether a worker is captured under clause 88. That is considered to be an industrial relations issue, so the matter will be referred to the Work Health and Safety Tribunal. This is probably because in our legislation we have recognised that certain things will be determined through the industrial relations apparatus, and this is one of those. This reflects current practice.

Clause put and passed.

Clauses 90 to 99 put and passed.

Clause 100: Request for review of provisional improvement notice —

Hon NICK GOIRAN: Clause 100 deals with the request for a review of a provisional improvement notice, and it is under division 7 of this part. I know it is a deviation from the model law caused by the eighteenth recommendation of the ministerial advisory panel. Has anyone raised any concerns with the government about the drafting of clause 100?

Hon ALANNAH MacTIERNAN: We are not aware of any problem or anything that has been raised about this. It requires that if an employer is seeking a review of a provisional improvement notice, the health and safety representative must be informed, so it applies to the person who has made a request, and the other person has to be informed that a review has been requested. It seems perfectly reasonable to maximise transparency of the situation.

Clause put and passed.

Clauses 101 to 154 put and passed.

Clause 155: Powers of regulator to obtain information —

Hon NICK GOIRAN: We have rapidly passed through part 6 and the not-to-be-used part 7 of this 16-part bill, and we are now into part 8, which captures clauses 152 to 155C. The reason I have asked us to pause for a moment at clause 155 is it appears that clause 155 allows or empowers the regulator to compel people to take information. Is that consistent with existing Western Australian law?

Hon ALANNAH MacTIERNAN: I understand that that is for consistency with the current law.

Hon NICK GOIRAN: Is it also a model clause?

Hon ALANNAH MacTIERNAN: As the member can see from the document that we provided earlier, subclauses (1) and (2) in this bill are similar to those in the model bill. They are based on the model clause, but amendments have been made to improve clarity, in particular to make it clear to whom the power to set the time, place and duty to be reasonable is prescribed. This clause is setting out the powers. The powers that are being given to the regulator are similar to those set out in the model clause, but we have made some amendments to clarify in particular to whom the power to set the time, place and duty to be reasonable is prescribed. We have added “determined by that person and do whichever of the following is specified in the notice”. The fundamental provisions follow from the model clause, but they have been redrafted to provide greater clarity and certainty and consistency with the current law. Commissioner Newall said that some of the drafting in the model law is not always of the highest standard of clarity. We have made those amendments, we believe, to give greater clarity, but they also accord with the current Occupational Safety and Health Act.

Hon NICK GOIRAN: By way of summary, this power to compel people to provide information that will be given to WorkSafe is substantially consistent with the model law and with existing Western Australian law.

Hon ALANNAH MacTIERNAN: Yes. We have given the member the document with the track changes, and he can see that the substance of those powers are the same as in the model code. The changes that have been made are drafting changes to give greater certainty as to with whom these various obligations lie, and my advice is that this is consistent with the current law.

While I am standing, at some point we undertook to give the member some further information on clause 231. As we are motoring along, we wanted to make sure that we were able to get this to the member. I table this document and ask that a copy be given forthwith to Hon Nick Goiran.

[See paper 4389.]

Hon NICK GOIRAN: I have that anyway, but that is good.

Clause put and passed.

Clauses 156 to 171 put and passed.

Clause 172: Abrogation of privilege against self-incrimination —

Hon NICK GOIRAN: We are now in part 9 of the bill, “Securing compliance”. It captures clauses 156 to 190. The clause I am specifically drawing to members’ attention at this time is found in division 4, “Powers relating to documents and information”. This clause is titled “Abrogation of privilege against self-incrimination”. This goes to my earlier question on clause 155. The minister indicated that the regulator will have the power to compel Western Australians to provide information and that that is consistent with existing Western Australian law and substantially consistent with the model law provisions. But, of course, this triggers fundamental legislative principle 6, which reads —

Does the Bill provide appropriate protection against self-incrimination?

This clause abrogates the privilege against self-incrimination. I draw to the minister’s attention that I said during my second reading contribution that the Law Society of Western Australia provided a submission to the Standing Committee on Legislation on 6 July this year, in which it stated —

There are concerns about privilege against self-incrimination and admissibility of statements to WorkSafe where a person can be charged as an individual (where their statements are not admissible) and as a PCBU (where their statements may be admissible against them). This is a concern across jurisdictions where industrial manslaughter laws have been introduced.

What is the government’s response to this concern?

Hon ALANNAH MacTIERNAN: Clause 172 is unamended from the model WHS act and is consistent with the privilege against self-incrimination in a prosecution provided under section 47 of the Occupational Safety and Health Act and section 29 of the Mines Safety Inspection Act. Protection from self-incrimination does not apply

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

to bodies corporate, but it does apply to sole traders who run their own business. There may be concerns about the fundamental right against self-incrimination. The compulsion to provide answers under clause 172(1) is in line with the public interest in ensuring safe working environments and provides clear and unambiguous powers for a person to investigate matters. In that regard, some protection is offered, because the information cannot be used against the individual who provided the information. I believe we discussed that at some length earlier. This is the law at present in the Occupational Safety and Health Act and it will be repeated in the WHS act. It seems that has been the practice for some time. I guess the essence of the provision is that inspectors can compel persons to provide answers and produce documents; however, the answers and documents provided are not admissible in proceedings against the person.

Hon NICK GOIRAN: The Law Society of Western Australia says that there are concerns about this provision, because although statements cannot be used against an individual, as the minister outlined, they could be used against an individual when charges are laid against that person in their capacity as a person conducting a business or undertaking. I want confirmation on whether the government agrees that is the case, as outlined by the Law Society, or whether its concerns are misconceived in any way.

Hon ALANNAH MacTIERNAN: I do not think its concerns are misconceived. But just to make it clear: it is true that the protection from self-incrimination does not apply to bodies corporate, because one might argue it is a separate person. Under the concept of a natural person or an incorporated entity, the body corporate is separate from the individuals. But the protection from self-incrimination applies to those businesses that are not bodies corporate.

Hon NICK GOIRAN: Under the provisions of this bill, what would be the maximum penalty against a body corporate that could arise from an individual's capacity to use evidence against the body corporate?

Hon ALANNAH MacTIERNAN: It would be all the penalties —

Hon Nick Goiran: What's the maximum penalty that could occur?

Hon ALANNAH MacTIERNAN: The maximum penalty under this legislation is in the industrial manslaughter provisions in clause 30A that we passed earlier.

Hon Nick Goiran: Clause 30A has been amended, so we want to make sure that everyone's clear on what the maximum penalty is that could apply to a person as a result of evidence that they were compelled to give up being used against them.

Hon ALANNAH MacTIERNAN: The maximum penalty that can apply to a non-natural person as a result of documents that have been provided to the inspector is \$5 million.

Hon Nick Goiran: It's not \$10 million?

Hon ALANNAH MacTIERNAN: The member is correct; for a body corporate, it is a fine of \$10 million.

Hon NICK GOIRAN: To be clear: if a person is investigated by the regulator and the regulator compels the person to provide information, is it possible for a person to be imprisoned for up to 20 years based on information that they had to give under compulsion?

Hon ALANNAH MacTIERNAN: Member, it is difficult to see how that would happen. I do not know how we could jail an incorporated body. Bear in mind, an individual, a natural person, who has provided documents and information cannot have that evidence used against them in a proceeding. That information can be used only on an unnatural person, a body corporate. As it is not possible to imprison a body corporate—we can arrest a ship, but we cannot imprison a body corporate—there is no potential for imprisonment following that self-incrimination.

Hon NICK GOIRAN: When charges are laid against an officer of a person that is a PCBU, does the same principle apply?

Hon ALANNAH MacTIERNAN: The member's question was: if person A gives evidence against a body corporate, could an individual then be charged and imprisoned as a result of that evidence?

Hon Nick Goiran: On the basis that the officer was person A; yes, that's exactly what I'm asking.

Hon ALANNAH MacTIERNAN: My advice is that person A, the person giving the evidence, could not be charged. If an individual—a director—provides that material, that material could not be used against them if they are charged in their own right because it would be a charge against them. They are an officer; the charge would be against them. I am advised that protection against the production of the availability of material would apply to that director because they would have that natural person protection.

Hon NICK GOIRAN: I am teasing out the notion of whether this all hinges on that person being a natural person. Two scenarios arise under clause 30A(1). If a person who is charged is an individual, they could be imprisoned for up to 20 years or receive a fine of up to \$5 million. I understand from the exchange that we have just had that it would be impossible for that person to receive that penalty—in fact, even to be convicted—on the basis of information that they were compelled to provide, because it could not be used against them. That is my understanding.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

However, if the person charged under clause 30A(1) is a body corporate, the body corporate could well be convicted on the basis of information that had been obtained under compulsion. I think that is sufficiently clear. My question regarding clause 30A(3) concerns a natural person when there is this notion of an officer of a person—the PCBU—committing a crime. In that case the penalty is 20 years’ imprisonment and a fine of \$5 million. I want to get on the record an absolute confirmation that that person could not be convicted under clause 30A(3) with information that they have provided under compulsion.

Hon ALANNAH MacTIERNAN: The advice that I am being given, and I believe that it is the case, is that they would be considered to be an individual; therefore, they would be protected by clause 172(2), which provides —

... the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

I understand that that reference to an individual would be a reference to an officer.

Hon NICK GOIRAN: Just to round this out, minister: would be it be possible that if a husband and wife were officers of the PCBU, the regulator could compel one of those people to provide information to the regulator, which the regulator could then use against the spouse?

Hon ALANNAH MacTIERNAN: I believe that that is the case.

Hon NICK GOIRAN: That might cause a fair chilling effect for lots of small businesses in Western Australia.

Hon ALANNAH MacTIERNAN: Member, this is not a change from the current situation. This does not introduce any new liability, as I understand it. The same powers exist.

Hon Nick Goiran: For compulsion—I can see that with regard to the ability of the regulator to compel.

Hon ALANNAH MacTIERNAN: That is right.

Hon Nick Goiran: But we’re introducing for the first time this notion of a PCBU.

Hon ALANNAH MacTIERNAN: Yes. It could be that one person does not provide the information, but that information is provided by another person and that could be used in evidence, I am advised.

Clause put and passed.

Clauses 173 to 190 put and passed.

Clause 191: Issue of improvement notices —

Hon NICK GOIRAN: We are now on part 10 of this 16-part bill. Part 10, “Enforcement measures”, captures clauses 191 to 215. With the minister’s indulgence, I propose to ask my questions under this first clause of part 10.

I raised some of these matters in my contribution in the second reading debate to give the minister and her advisers as much notice as possible. In particular, I draw to the minister’s attention some of the findings and recommendations of the thirty-first report of the Standing Committee on Public Administration. Finding 47 states —

Safety and health representatives currently have no role in the verification of the implementation of improvement notices.

Does the government agree with finding 47 of that report?

Hon ALANNAH MacTIERNAN: With respect, that very voluminous report was handed down only in recent weeks. We have not prepared a response to that report. I will not answer questions in the context of a report that has only been recently handed down. I take it that the member is asking a general question about the current role of health and safety representatives.

Hon Nick Goiran: Then the committee is saying that they have no role.

Hon ALANNAH MacTIERNAN: Sorry, member, but the government has not responded to this report. It has been a number of years in the making and it has only just been brought out, so I am not referencing that report. If the member has a more general question, I am happy to take it. Mr Chairman, can I ask for another swap out of advisers?

The DEPUTY CHAIR (Hon Matthew Swinbourn): Yes.

Hon NICK GOIRAN: We are dealing with clause 191, which is at the start of part 10, “Enforcement measures”, and division 1, “Improvement notices”. Do safety and health representatives currently have a role in the verification of the implementation of improvement notices?

Hon ALANNAH MacTIERNAN: At the moment, there is no statutory role for them.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Hon NICK GOIRAN: Is the WorkSafe Western Australia Commissioner and/or the director general of the department currently consulting with stakeholders to explore ways in which safety and health representatives might be employed in the process of the verification of the implementation of these improvement notices?

Hon ALANNAH MacTIERNAN: We have no knowledge of that. Quite aside from the bill, is the member is interested in knowing whether we are looking at doing that in the future?

Hon NICK GOIRAN: Under part 10, “Enforcement Measures” are four clauses that deal with improvement notices. The minister just indicated to me to that safety and health representatives do not have a statutory role in the verification of the implementation of improvement notices. Is the WorkSafe WA Commissioner or the director general of the department currently consulting with relevant stakeholders to explore ways in which this might be the case?

Hon ALANNAH MacTIERNAN: We do not know, but we are certainly not seeking to enshrine that in the legislation. It is probably better that we confine ourselves to those matters contained in the legislation.

Hon NICK GOIRAN: Is the minister telling us that at the moment, under Western Australian law, the safety and health representatives do not have a statutory role in the verification of the implementation of improvement notices and that that will remain the case if this bill is passed unamended?

Hon ALANNAH MacTIERNAN: I am advised that nothing in this legislation would give a statutory role to a health and safety representative in the verification of an improvement notice.

Hon NICK GOIRAN: With regard to issuing improvement notices and the process that will be set out in clauses 191, 192, 193 and 194, what is the prevalence of improvement notices being verified for compliance by WorkSafe?

Hon ALANNAH MacTIERNAN: When the member says “what is the prevalence”, is he talking about the rate? What exactly does the member mean? Is he asking how often do they enforce or check —

Hon Nick Goiran: That is right. How often do they verify it?

Hon ALANNAH MacTIERNAN: How often do they verify whether an improvement notice has been adhered to?

Hon Nick Goiran: That is right.

Hon ALANNAH MacTIERNAN: I do not think we have that information on hand, but we will provide some information on that before the close of business today. Obviously, when prioritising the work, an assessment is made of the level of risk of noncompliance and the potential hazard that noncompliance would create. We are not seeking to change anything of significance here, so I am not sure which clause would turn on it. If we can get some information on the percentage of cases in which verification is undertaken, we will let the member know.

Hon NICK GOIRAN: Is the minister in a position to advise whether the verification of these improvement notices for compliance involves a workplace visit?

Hon ALANNAH MacTIERNAN: It does not always require an inspection of the workplace.

Hon NICK GOIRAN: Of the proportion of improvement notices that will take place under division 1, not all of them will require a workplace visit. Will the minister provide us with information on the prevalence—the minister might say “frequency”—with which these are verified for compliance by WorkSafe?

Hon ALANNAH MacTIERNAN: Sometimes, for example, an improvement notice might require someone to develop a policy. In that case it is not always necessary to attend a workplace to ensure that that policy has been developed and adopted.

Hon NICK GOIRAN: I take it that WorkSafe issues these improvement notices. Going to the heart of my question, I want to ensure that if we are going to continue to empower WorkSafe to issue these improvement notices, they are followed up to make sure that people comply with them; otherwise, it is really just a piece of paper.

Hon ALANNAH MacTIERNAN: The member would no doubt be aware that it is often a question of resourcing and the availability of inspectors. We have added 21 inspectors to improve the ability to ensure that these improvement notices are followed and to raise the level of compliance.

Hon NICK GOIRAN: If I compare and contrast that with the prohibition notices set out in clauses 195 to 197 in division 2, would the minister be in a position to also provide us with some information about the prevalence with which WorkSafe attends a workplace to check on compliance of prohibition notices?

Hon ALANNAH MacTIERNAN: We do not have that material available to us at the moment because it is not specifically germane to the changes that we are making, but we will endeavour to get some information for the member.

Hon NICK GOIRAN: I know the minister said it is not germane to the issue, but we are about to agree to four clauses that will allow for the statutory process of improvement notices to continue, and to another three clauses that will

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

allow for the statutory process of prohibition notices to continue. We support that. I just want to make sure that this does happen and we do not spend our time here just agreeing to things.

Hon Alannah MacTiernan: Member, we have put on an additional 21 inspectors to boost this, so we are not relying just on legislation. We did acknowledge that there needs to be a new resource, and we have provided that resource to do that.

Hon NICK GOIRAN: Yes, and in due course the government will respond to the various findings and recommendations from the Standing Committee on Public Administration.

Clause put and passed.

Clauses 192 to 215 put and passed.

Clause 216: Regulator may accept WHS undertakings —

Hon ALANNAH MacTIERNAN: I will not be proceeding with the amendment standing in my name on the supplementary notice paper because it is consequential upon an earlier amendment that was not successful.

Hon NICK GOIRAN: Minister, does the Occupational Safety and Health Act 1984, which is the current Western Australian law, provide authority for WorkSafe to accept enforceable undertakings?

Hon ALANNAH MacTIERNAN: No, it does not. Mr Chair, I am trying to catch the attendant's eye because I was hoping to get copies of the document that we tabled earlier. Member, this is a change.

Hon NICK GOIRAN: The current Western Australian law does not provide authority for WorkSafe to accept enforceable undertakings. This is a change to allow WorkSafe to accept enforceable undertakings. Is this another one of the model law provisions?

Hon ALANNAH MacTIERNAN: It is the model clause. The provision has been introduced to reflect the model scheme. There are some minor changes, some associated with our preferred apostrophe, and others more importantly because we have instituted the industrial manslaughter offence.

Hon NICK GOIRAN: One of the recommendations from the Standing Committee on Public Administration in its thirty-first report is recommendation 38. I know that the minister said that the government has not had the opportunity to provide a response to this, and I am not asking for a response. I ask the minister to look at recommendation 38. It states —

The Committee recommends that the Minister for Industrial Relations brings to the Parliament of Western Australia an amendment to the *Occupational Safety and Health Act 1984* providing for the entering into of enforceable undertakings.

The minister has just explained that that is exactly what the government is doing, albeit we are not making an amendment to the OHS act but, rather, enacting our own new act. The recommendation goes on to say —

Further, this authority should clearly prohibit the entering into of enforceable undertakings for offences involving gross negligence, or where the 'act' or 'omission' causes the death of, or serious injury to, another person.

Does this bill do that?

Hon ALANNAH MacTIERNAN: The provision makes it clear that the giving of a WHS undertaking cannot be accepted for a contravention or alleged contravention that is an industrial manslaughter offence or a category 1 offence.

Hon NICK GOIRAN: I take it the answer is yes—it is doing that, albeit with different language. That is substantively how I understand that. The committee recommendation also states that if this power, which we are about to give to WorkSafe, is granted, WorkSafe should be required to issue on its website two things —

- general guidelines in relation to the acceptance of enforceable undertakings.
- notice of a decision to accept an enforceable undertaking and the reasons for that decision.

Will that be done?

Hon ALANNAH MacTIERNAN: I believe that it will. Clause 217(2) provides —

The regulator must publish, on the regulator's website, notice of a decision to accept a WHS undertaking and the reasons for that decision.

I presume that a lot of this information was available prior to the publication of that report. These provisions are contained in the model clause and in this legislation.

Clause put and passed.

Clauses 217 to 222 put and passed.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Clause 223: Which decisions are reviewable —

Hon ALISON XAMON: I move —

Page 146, after line 9, the table after item 5 — To insert —

5A.	Section 155A(6)(b) (decision to withhold approval of legal practitioner on other reasonable grounds)	The witness.
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This is a sensible amendment. It will ensure that if a regulator deprives a witness of their choice of lawyer, this is one of the matters that will be reviewable.

Hon ALANNAH MacTIERNAN: We think that this amendment does identify a need, and we are happy to support it.

Hon NICK GOIRAN: The opposition agrees. We thank Hon Alison Xamon for moving this amendment.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 224 to 229 put and passed.

The DEPUTY CHAIR: Members, we may not deal with clause 230 now because the amendment —

Point of Order

Hon NICK GOIRAN: I believe we have just put and passed clauses up to clause 229, but I note there are also clauses 229A, 229B and 229C.

The DEPUTY CHAIR (Hon Matthew Swinbourn): My apologies, members.

Committee Resumed

Clauses 229A to 229C put and passed.

Clause 230: Prosecutions —

The DEPUTY CHAIR: We have now reached clause 230 and there is an amendment at 41/230 in the name of Hon Alison Xamon; however, that deals with a new clause 230A. Member, would you like to move that we postpone consideration of your amendment until after clause 230A?

Hon ALISON XAMON: Yes, thank you, Mr Deputy Chair.

The DEPUTY CHAIR: Hon Alison Xamon has moved that consideration of her amendment at 41/230 be postponed until after consideration of clause 230A.

Amendment postponed, on motion by Hon Alison Xamon.

The DEPUTY CHAIR: Perhaps the minister might move that we postpone consideration of clause 230 until we have considered new clause 230A.

Hon ALANNAH MacTIERNAN: I move that consideration of clause 230 be postponed until we have considered new clause 230A.

Hon NICK GOIRAN: Before the Deputy Chair puts that, can I get confirmation on what the last resolution of the chamber was?

The DEPUTY CHAIR: It was to postpone Hon Alison Xamon's amendment on the supplementary notice paper, rather than the entire clause. The question now before the chamber is that clause 230 be postponed until after new clause 230A.

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: Hon Rick Mazza, you have an amendment on the supplementary notice paper for a new clause 230. Would you like to put that amendment now, or would you like to postpone it until after we have dealt with new clause 230A?

Hon RICK MAZZA: Mr Deputy Chair, if it assists, I will not move the amendment in my name at 84/230. Just for the information of the chamber, I will not be moving the corresponding amendments I have in relation to the Director of Public Prosecutions. The first amendment is at 84/230, which is to oppose the clause, and I will not be moving that. Obviously, I will not be moving a replacement clause or the consequential amendment.

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

The DEPUTY CHAIR: Thank you, member. Just to confirm, Hon Rick Mazza is also not moving 85/NC230.

Hon NICK GOIRAN: I would like to move a new clause 230A, given that Hon Rick Mazza has indicated that it is not his intention to move the one that is currently on the supplementary notice paper in his name. I move, page 159, after line 23, to insert “230. Prosecutions” —

Point of Order

Hon ALANNAH MacTIERNAN: I thought we had resolved that we were going to deal with clause 230 after we considered new clause 230A. If new clause 230A is successful, there is a consequential amendment to clause 230, which is why we were going to deal with new clause 230A first, because that would also have a consequential impact on clause 230. We will not be able to make the final determination on clause 230 until we have a determination on new clause 230A.

The DEPUTY CHAIR (Hon Matthew Swinbourn): Minister, this will be the new clause 230A. Then Hon Alison Xamon’s new clause 230A will be a new clause 230B, if it is successful. I suspect that Hon Nick Goiran will oppose the existing clause 230, given the amendment that he proposes to put. Hon Alison Xamon’s other amendment will then fall away, because clause 230 as it currently sits in the bill will no longer be there, presuming the new clause 230A is successful; if not, we will get back to it. I appreciate that it is very confusing, but we will proceed with the amendment Hon Nick Goiran is proposing from the floor.

Committee Resumed

New clause 230A —

Hon NICK GOIRAN: I will just move the amendment I am proposing and sign it, and then I will give some further explanation. I move —

Page 159, after line 23 — To insert —

230. Prosecutions

- (1) Proceedings for an offence under section 30A or section 31 against this Act may only be brought by —
 - (a) the DPP; or
 - (b) a member of the DPP’s staff with the written authorisation of the DPP (either generally or in a particular case).
- (2) The regulator must issue, and publish on the regulator’s website, general guidelines for or in relation to the acceptance of WHS undertakings under this Act.
- (3) The DPP must issue, and publish on the DPP’s website, general guidelines for or in relation to the prosecution of offences under this Act.

I appreciate that this has become a little convoluted at this point, because there are a number of competing prosecution-type arrangements in place. There is the existing provision under the bill, which the Standing Committee on Legislation indicated lacks clarity and which it drew to the attention of the government. The government conceded that and said it would propose some amendments. That is one issue.

The second issue is the one that has been foreshadowed by the opposition as set out in my amendment 6/230 to clause 230; that is, it is our view that the regulator should not be able to initiate proceedings for industrial manslaughter, which at the time was limited to clause 30A, albeit that the opposition has always had concerns about clause 30B, which no longer exists and has now in effect been collapsed into clause 31. In addition, we have the prospective prosecution arrangement proposed by Hon Alison Xamon that would include authorised officers of unions. Members will also see that Hon Rick Mazza foreshadowed that he would oppose current clause 230 and move his new clause 230. When the opposition saw the new clause proposed by Hon Rick Mazza, we had some sympathy for it, albeit, with the greatest respect to the honourable member, we thought it went too far. The reason we said that is that there are a number of low-level offences in this legislation, including the one I raised with the minister earlier, which one might argue could possibly be an insurable type risk. Those types of things are beyond the necessity and resources of the Director of Public Prosecutions. However, the most serious offences under this bill are clearly under clause 30A and now clause 31, and we say that they only ought to be prosecuted by the DPP. Irrespective of what we do today, the DPP is already the only one who can prosecute under clause 30A, which will proceed in the higher jurisdictions and be an indictable offence, but what will happen with a clause 31 offence that remains open? We think it would be an improvement to put beyond doubt rather than leave in doubt who has responsibility for prosecuting these types of matters. We seek the support of members.

Hon ALANNAH MacTIERNAN: I understand the intent here, but it appears to fundamentally misunderstand how the legal regime works in this state. The DPP does not commence any charges. I am advised that under the

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Criminal Procedure Act all charges are referred either by a regulator or the police. The matter commences. I understand then at some stage during that charge process that matter goes before the Magistrates Court. If it is an indictable offence, obviously it is considered by the DPP, and only then it can proceed with the DPP's approval. Matters that are indictable offences can only be prosecuted by the DPP, but I am advised that the DPP does not lay charges even in the case of manslaughter or murder. The DPP does not initiate —

Hon Nick Goiran: That would not change in my new clause.

Hon ALANNAH MacTIERNAN: The member's new clause says that proceedings for an offence may only be brought by the DPP.

Hon Nick Goiran: Nothing of that effects that Criminal Procedure Act 2004. We do not propose to oppose the minister's amendment at 66/230.

Hon ALANNAH MacTIERNAN: I am only acting on the advice I have here. I will take further advice. I am going to have to get further legal advice here. I think we are going to have to get advice —

The DEPUTY CHAIR (Hon Matthew Swinbourn): Quigley, leave the chamber, please. Out! I am sorry, minister, continue. I do not know what it is about when I am in the chair and people walk in!

Hon ALANNAH MacTIERNAN: The honourable Attorney General was obviously just coming in to seek to give us some further advice!

The member's assertion that this is consistent with the Criminal Procedure Act seems contrary to the advice we have been given here. Does the member accept that at the moment the charges are not commenced by the DPP?

Hon Nick Goiran: Absolutely.

Hon ALANNAH MacTIERNAN: The member does agree with that. When the member says proceedings for an offence against this act may only be brought by the DPP, what does he mean by "proceedings for an offence"?

Hon Nick Goiran: The same as what the government means under clause 230(3) at the moment in its bill.

Hon ALANNAH MacTIERNAN: I do not think that is the same provision. I do not see here that our amendment says —

Hon MICHAEL MISCHIN: If I might assist the minister, clause 230(3) of the bill states —

Nothing in this section affects the ability of the DPP, or any member of the DPP's staff, to bring proceedings for an offence against this Act.

Something is being presumed there.

Hon ALANNAH MacTIERNAN: Obviously, there is not great clarity on this subject. Can I ask that consideration of this new clause be postponed so we can get some proper legal advice on this. We can consider this at the end of the bill. In the meantime, we can get some advice on how these things fit in, because there is an inconsistency with this advice. If we could perhaps defer consideration of new clause 230A.

Hon MICHAEL MISCHIN: Might I suggest this: the new clause and the amendments that are foreshadowed on the supplementary notice paper are very important because, if accepted in the manner in which they are being proposed by other members, they are fundamental to the manner in which a person's reputation and, in some cases, their liberty can be put in jeopardy, and certainly be subject to financial penalties and other consequences. I suggest that we postpone consideration of division 1 to a later time. It is a fairly discrete area that deals only with the bringing of prosecutions, consequences, limitation periods and the admission of evidence. There is no reason that progress of the bill should be stalled to deal with bits piecemeal when that division can be dealt with as a unit.

Hon ALANNAH MacTIERNAN: I am happy with that. I move that we postpone consideration of the remaining parts of division 1.

The DEPUTY CHAIR: As I understand it, the minister is moving that we postpone consideration of clauses 230 to 233 until after consideration of schedule 3.

Point of Order

Hon NICK GOIRAN: Just to confirm, the deferral of that group of remaining clauses under division 1 would include new clause 230A.

The DEPUTY CHAIR (Hon Matthew Swinbourn): The motion before the chamber is that clauses 230 to 233, including the amendments on the supplementary notice paper that relate to those clauses, be deferred until after consideration of schedule 3.

Committee Resumed

Hon Michael Mischin; Hon Sue Ellery; Hon Nick Goiran; Hon Alannah MacTiernan; Hon Rick Mazza; Hon
Alison Xamon; Deputy Chair

Further consideration of new clause 230A postponed until after consideration of schedule 3, on motion by Hon Alannah MacTiernan (Minister for Regional Development).

Clauses 231 to 233 postponed until after consideration of schedule 3, on motion by Hon Alannah MacTiernan (Minister for Regional Development).

The DEPUTY CHAIR: In my haste, I skipped over clause 223A!

Clause 223A put and passed.

Clause 234 put and passed.

Committee interrupted, pursuant to standing orders.

[Continued on page 5457.]

Sitting suspended from 4.15 to 4.30 pm