OCCUPATIONAL SAFETY AND HEALTH LEGISLATION AMENDMENT AND REPEAL BILL 2004

Consideration in Detail

Resumed from 5 May.

Clause 8: Part III Divisions 3, 4 and 5 and heading for Division 6 inserted -

Debate was interrupted after the clause had been partly considered.

Mrs C.L. EDWARDES: Proposed section 23E deals with labour arrangements in general. The questions it raises affects, for example, Main Roads Western Australia letting a contract for roads to be built, the railway line, Homeswest houses and port infrastructure. Does the Government still control such sites as a workplace and is therefore the employer of the successful tenderers? In terms of the minister's example, where is the line drawn in a tender being let? I think the minister indicated yesterday afternoon that an investment company that let a tender for an apartment block would be liable in having control of the worksite. I am not sure whether the minister backtracked a little on that as the debate continued. Can the minister advise us, using the Government's examples, which are very good examples, where the line of control is? After that, we can relate the situation of the investment company accordingly.

Mr J.C. KOBELKE: Proposed section 23D(2) contains the operative element that provides the answer to the question; that is, "in relation to matters over which the principal has the capacity to exercise control". It will come down to the individual judgment in particular circumstances. If, clearly, it did not have the capacity to exercise control, such as the example I gave yesterday in which electrical work was subcontracted from a major contract, there may be issues about general access to the site and the overall safety of the site. When it came to the specific electrical work, it would not have the capacity to exercise control over that. That is just one example to try to show the differentiation between the judgment that would need to be made in each instance whether the principal had the capacity to exercise control.

Mrs C.L. EDWARDES: If we are also looking at the way the courts have interpreted control over worksites, in particular with industrial relations changes and union access to worksites - I know it is a totally different area but it talks about control - it seems to be that the owner of a site can fence off a site. The capacity of a small electrical contractor to exercise control on its own does not stop the entire site from being regarded as under the control of the major contractor on the site or the owner of the site. The reason for raising this again is that the penalties have increased enormously. When there is to be a change to who will be the principal, and therefore to the employer of the contractors and the employer of the employees of the contractor, subcontractors and everyone else on site, it is introducing a major element that may not be reflected just in the capacity to exercise control in the narrow sense that the minister is raising.

Mr J.C. KOBELKE: The complexity of the question raised comes back to sections 19 and 20 of the Act. Section 19 refers to the duties of employers and section 20 refers to the duties of employees. Concerning the proposed sections, we are dealing with the fact that, under the types of employment contracts we now have and their complexity, people are able to argue on technical grounds that they are not the employer or employee. We are simply closing those gaps with proposed section 23D, which contains a contract of work arrangement, proposed section 23F, which contains a labour hire arrangement, and proposed section 23E, which is a bit of a catch-all because some fall between a contract of employment and a labour hire arrangement.

Mrs C.L. Edwardes: Can you give an example?

Mr J.C. KOBELKE: I am trying to answer the question the member asked. The issue then becomes that although those contracts of employment and arrangements are complex and variable, we do not seek to control or corral them. We simply want to make sure that the occupational health and safety requirements are extended over whatever the contract of employment might be. I have already mentioned the capacity to exercise control. That must be referred to what sections 19 and 20 are all about. Section 19 states that an employer "shall, so far as is practicable," do certain things. That is at the start of the section. If someone is a contractor and, because of this provision, is captured as an employer, he will still be governed by the words "so far as is practicable". The standard way in which the industry works is that the person doing the financing has limited control. As far as is practicable, his liability will be limited to that.

The clauses with which we are dealing do not enhance, change, reduce or advance what sections 19 and 20 of the Act require. However, they make sure that people who are caught in new contractual arrangements cannot use a technicality to argue that they are not an employer or employee and therefore no-one is responsible for the site. This issue arose when dealing with the Mines Safety and Inspection Act a year or so ago. A technical issue arose in which no-one was found to be in charge of a mine site because of the way the operation was set up. The definition of "mine manager" had to be redefined to make sure that contractual arrangements were not put in place whereby technically no-one was in control of a site. We are seeking to make sure that people will be in

control. The issue then comes down to what sections 19 and 20 require. If it is not practicable for those provisions to apply to an investor or someone who has minimal contact with the site, that person will not be caught by it.

Mrs C.L. Edwardes: Or Main Roads.

Mr J.C. KOBELKE: Yes.

Mrs C.L. EDWARDES: I will move on to proposed section 23F, which the minister just referred to with regard to labour hire arrangements. Many labour hire companies are essentially the employers of people who work at workplaces at which the labour hire company has not had any form of so-called control. Does this provision pick up the group apprentice schemes?

Mr J.C. Kobelke: It does.

Mrs C.L. EDWARDES: What will be the responsibilities of the group apprentice schemes? They send out employees to another employer to carry out work. The employees might be hired for a day, a week or 12 months. The working arrangements vary but the responsibility for safety in the workplace does not change. All members would assume that the employer at the workplace was responsible for all his workers and, therefore, under the provisions of duties, would be responsible for third persons who work on the site. This has been a grey area and everybody has tried to escape responsibility for that type of employee. Will the minister outline for those group apprentice schemes and also for the labour hire companies their responsibility for their employees who work at another workplace?

Mr J.C. KOBELKE: The issue of labour hire is already covered, but there are some potential gaps and areas of legal uncertainty. We are seeking to make sure that we provide certainty. As the former Minister for Training, I know that previously there was concern about some of the group training schemes because of the uncertainty about who was responsible for those workers. Providing that clarity, which is the intention in the Bill, is very important. Notwithstanding that the client in a labour hire arrangement is in control of the work, there is considerable doubt about the application of existing provisions of the Act under a labour hire arrangement. There currently exists the potential for the client to escape the duties of an employer or, if the host is a corporation without any employees, the corporation could potentially escape any responsibility under the Act. The specific reference to labour hire arrangement in the Bill will put the issue of the application of the provisions beyond doubt and provide an equivalent level of protection to workers engaged in such a way as that applying to other workers. The Bill provides that the agent and the client in a labour hire arrangement have an employer's general duty of care to the worker in relation to matters over which each has control. That is the key point - over which each has control. It will come down to specifics.

I will try to give some specific examples, but there are so many. Under a group training scheme, if an issue such as induction training, basic safety training, provision of necessary equipment such as boots or whatever was something the group training scheme, as a labour hire firm, purported to do, it would have control over and would be responsible for it. Therefore, once the worker went on site, the agreement would be that that matter had been looked after, the labour hire firm had accepted responsibility on site and the host of the client would take on certain responsibilities as the employer. The Bill will make clear demarcations. The alternative might be that an agreement is reached between the group training scheme and the host employer to provide training and equipment. There would then be a duty of care for the host to check that he provided those things and was fulfilling the contract. However, from then on, the matter would pass over. The issue is the matters over which they have control, and it comes back to the wording in section 19 of the Act "so far as is practicable".

Mrs C.L. EDWARDES: I thank the minister for that. Does the hire company and/or the group apprentice scheme have a responsibility to visibly, or in any other way, check out the safety programs that operate on the site?

Mr J.C. KOBELKE: We would expect them to make reasonable inquiries. Obviously, that comes back to things that they can be expected to have knowledge of and to have some control over. Clearly, there would be a responsibility on the labour hire firm. If a particular company had a bad record or if other workers had previously been injured on a site, that would imply some responsibility on the labour hire firm to enter into discussions with the client to make sure that the client abided by acceptable standards of health and safety practices. The control of that on a day-to-day basis would rest with the host.

Mrs C.L. EDWARDES: Proposed section 23G is part of a proposed new division on employment accommodation. I am sure that all members in this House have read stories about workers who have been injured at accommodation that was provided by their employers. In the majority of instances the accommodation provided to employees is particularly good; however, in other instances it is particularly poor. Sometimes employees have lived in nothing more than shipping containers or other similarly poor environments that do not

allow sufficient ventilation, are not hygienic or have bad electrical wiring etc. This proposed section provides that employers must take responsibility for the accommodation in which employees are required to live and ensure that the accommodation is safe. A breach of this proposed section and proposed section 23H provides for penalties, including imprisonment. The breach of this proposed section is regarded as quite a serious matter. Does the minister want to add anything to what I have said about the reasons this provision has been included in the Bill?

Mr J.C. KOBELKE: The department has more knowledge of these matters than I and could provide other examples. I was keen to make sure that something was done in this area because of the accident involving a shearer at the time the member for Kingsley was the responsible minister. A shearer in the north west was electrocuted at the accommodation that was provided for him. It was found that the wiring of the place was totally unsafe and that people should have known about it. The law was inadequate to ensure that proper standards were applied. This provision is in response to that type of incident. As I have suggested, perhaps WorkSafe is aware of other cases of this sort of problem. I was conscious of that case and made it known that I wanted something done about it. Proposed subsection (2)(b) states -

> the occupancy is necessary for the purposes of the employment -

In other words, that the accommodation must be provided for employment -

> because other accommodation is not reasonably available in the area concerned,

Basically, this will apply to remote areas. There might be some unusual examples that are not remote areas. This provision refers to shearers' accommodation, resource developments etc when no other accommodation is available.

Mrs C.L. EDWARDES: Proposed section 23I is under a new division entitled "Other duties" and it relates to the notification of deaths, injuries and diseases. I suspect the reason the minister is introducing this amendment is to provide greater clarity. However, after reading it through and talking to others, my concern, relating to public places, is that it may be too broad and may create not only a greater level of confusion, but also further difficulties. What does the minister expect to achieve from proposed section 23I in relation to the comments I have made about public places, which are also workplaces?

Mr J.C. KOBELKE: The member has sought clarification on quite a good issue. Proposed subsection (2)(a) is the existing requirement and (b) is the new provision which seeks to clarify and make sure there are no gaps in the coverage. The detail is to be put in place by regulation under proposed subsection (3). That is to be done in consultation with key players in the industry to make sure that where there is a real problem it is covered, but not covered in a way that is too heavy-handed or oversteps the mark and, therefore, creates a problem. We are conscious of the concern raised by the member and that is why we think it best that further elaboration on the new aspects be done by regulation.

Mrs C.L. EDWARDES: I am pleased that the minister has already been made aware of some of those concerns. It comes down to proposed subsection (2)(b), which states -

> at a workplace, a person who is not an employee incurs an injury in prescribed circumstances that -
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> (i) results in the death of the person; or
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> (ii) is of a kind that is prescribed,
>
> in connection with -
>
> (iii) the business of an employer; or
>
> (iv) the business of a self-employed person.

I can immediately think of shopping centres as an example of a public place that is also a workplace in which an injury can occur. Breaches under proposed section 23I are quite serious. A huge burden is being placed on the employers, and perhaps self-employed people, who may have no knowledge of the cause of the death of an individual. I am pleased the minister will take up that issue and involve industry in the development of those regulations on the prescribed form for giving details of the injury or disease.

Mr J.C. KOBELKE: I move -

> Page 12, after line 25 - To insert the following -
>
> (4) This section does not apply to the occupation of residential premises by an employee who is employed at a workplace referred to in section 4(2).

It has been found that this provision dealing with work-related accommodation of residential premises has been cast too widely and picks up the mining and petroleum industries, notwithstanding that the work of these industries is excluded from the application of the Occupational Safety and Health Act by virtue of section 4(2) of that Act. This amendment rectifies that concern.

Amendment put and passed.

Mrs C.L. EDWARDES: Proposed section 23K deals with the duty to inform an employee who reports a hazard or injury. This proposed section is quite new, and it will apply when an employer receives from an employee a report of the kind described in proposed section 20(2)(d), which comes up later in the Bill.

Mr J.C. Kobelke: It is in the existing Act, but it is amended.

Mrs C.L. EDWARDES: Can the minister tell me where the amendment is, because I do not think we have dealt with it yet? It relates to clauses 78 and 101. Clause 78 is on page 95 and amends section 22(2)(d) to read "fails to report forthwith to the employee's employer". Section 20 deals with the duties of employees and refers to any situation in the workplace that the employee has reason to believe could constitute a hazard to any person that the employee cannot correct. That is a revised version of the employee's duty to report. It is the duty of the employer to inform the employee who reports a hazard. The employer must, within a reasonable time after receiving the report, investigate the matter that has been reported, determine the action, if any, that the employer intends to take in respect of the matter, and notify the employee of the determination so made. If an employer contravenes subsection (2), the employer commits an offence. The penalty for this would have to be the general penalty for not reporting. My concern is the link with the issuing of PINs.

A safety and health representative will be trained to issue a provisional improvement notice. The employee could also be the safety and health representative, who notifies the employer that there is a hazard. The employer must investigate it and get back to the employee with the determination so made. What if the employer says that he will fix the problem, which I hope would be the case? I hope a PIN would not be issued in that circumstance. We will discuss that at a later stage. In terms of closing the loop and Laing's philosophy for closing of the loop, do we need to break up proposed subsection (2)(d)? What if the employer says he will not do anything about the hazard? All this is doing is saying that the employee must notify, and the employer must investigate and come back to the employee. If he does not do anything about the hazard, where is the closing of the loop in respect of proposed section 23K? What are we expecting to achieve from this amendment?

Mr J.C. KOBELKE: The intent of this proposed section is to make sure that people undertake normal communication. Under proposed section 23K, when an employer receives from an employee a report of the type referred to in section 20 of the Act, that can be a report of something that constitutes a hazard or a report of injury or harm. Proposed section 23K(2) requires that the employer, within reasonable time, investigate the matter and notify the employee. It requires that there be communication. It may be that something has to be dealt with, in which case it will be picked up elsewhere in the legislation. It may be that through that communication the matter is resolved, or, if it is a misunderstanding, the matter is settled. However, it is a requirement on the employer to report back to the employee when such a report has been made, and that simply comes down to communication.

Mrs C.L. Edwardes: So the minister is not expecting to create a greater level of duty in terms of action or otherwise that the employer may take if he says to the employee there is no such hazard. It is appropriately dealt with under this provision. We all expect and hope that an employer would deal with a hazard that was brought to his attention, but it may very well be that it is not a hazard.

Mr J.C. KOBELKE: It is picked up by the Occupational Safety and Health Act in total, and the member might find specific provisions elsewhere that will come into play depending on the circumstances. This provision simply says that there is a requirement on the employer to reply. Normally, in the vast majority of cases, that is done verbally, which is not an issue. It covers the potential circumstance in which an employer refuses to respond to the matter in any way at all. This is a requirement that they must respond.

Mrs C.L. EDWARDES: Proposed section 23L deals with the notification of a hazard to a person having control of the workplace and states -

> "**workplace**" includes the means of access to and egress from the workplace.
>
> (2) If -
>
> (a) the employer of any employee; or
>
> (b) a self-employed person . . .
>
> . . . becomes of the opinion that -

(c) a situation exists at the workplace that could constitute a hazard to any person;

(d) the hazard is one that a person having control of the relevant part of the workplace . . . has a duty to remedy . . .

How far and wide is the scope of access to and egress from the workplace?

Mr J.C. KOBELKE: The two key elements in proposed subsection (2) are the situation that could constitute a hazard and that the person having control of that relevant part of the workplace has a duty to remedy that hazard. It again comes back to what that person has control over and what is practicable, which are the key issues that are dealt with in section 19 and other sections of the Act.

Mrs C.L. EDWARDES: Yesterday, the member for Alfred Cove raised the issue of smoking. We are all very conscious of the fact that many people now go downstairs and outside the door to smoke.

Mr M.J. Birney interjected.

Mrs C.L. EDWARDES: And at workplaces per se. This provision will capture that issue.

Mr J.C. Kobelke: Capture it in what way?

Mrs C.L. EDWARDES: Employers will have control over where the workers smoke. If they allow the workers to smoke, but there is no smoking in the workplace, they have control over where the workers smoke. I seek clarification whether this is a major issue for employers in ensuring that their workers do not smoke outside the door?

Mr J.C. Kobelke: But in the workplace.

Mrs C.L. EDWARDES: What if the employees work in a building on St Georges Terrace and have gone down 12 floors and out the front door to smoke? This provision deals with access to and egress from a workplace. We are talking about a third-party person, not necessarily employees, and the employer has control over where the worker can or cannot smoke etc. Does this provision cover that situation? Does it cover the situation at Parliament House and people smoking in the courtyard, which is a point of egress out of the Chamber?

Mr J.C. KOBELKE: The key intent of proposed section 23L is the reporting process; that is what it is primarily about. Under proposed subsection (2), notice of the situation must be given to the responsible person. It is a requirement to give notice and it only implies to an employer or self-employed person. The issue will not apply to people who are not self-employed or the employer.

Mrs C.L. Edwardes: Sorry?

Mr J.C. KOBELKE: In terms of the offence, it is only the employer or a self-employed person who has to report to the person in control of the workplace.

Mrs C.L. Edwardes: Has a new duty been created here in respect of the example that I have given?

Mr J.C. KOBELKE: Sorry, is the member talking about outside the workplace?

Mrs C.L. Edwardes: The extension of the definition of "workplace" means the access to and egress from the workplace.

Mr J.C. KOBELKE: No, it is my view it does not extend the general duty of care that is required.

Mrs C.L. Edwardes: Why not?

Mr J.C. KOBELKE: Because it is just a reporting process.

Mrs C.L. Edwardes: However, the definition of "workplace" has been extended -

Mr J.C. KOBELKE: For the purposes of reporting. I do not know that it is an extension but, rather, a clarification of the definition. The person having control of the workplace already covers entry and egress under section 22 of the Occupational Safety and Health Act.

Clause, as amended, put and passed.

Clause 9: Section 41A inserted -

Mrs C.L. EDWARDES: This clause comes under a new division titled, "Resolution of workplace issues, and refusal to work on grounds of risk". Proposed section 41A extends the meaning of "employer" and "employee", particularly in respect of proposed sections 23D, 23E and 23F, which we have just dealt with. It picks up the contractor, the labour hire company, the group apprentice scheme and the like. Is there anything else that we need to be aware of in respect of the extension of the definitions of "employer" and "employee"?

Mr J.C. KOBELKE: Clause 9 extends the meaning of "employer" and "employee" to the parties deemed to be employers and employees in sections of the Act dealing with the contract-work arrangements, labour arrangements in general and labour hire, which we have spent time going over. These definitions are extended for the purposes of part V of the Act dealing with inspectors and their powers. They are necessary to provide for the enforcement of the provisions of the Act dealing with these arrangements. This clause does not extend the meaning of "employer" and "employee" more generally.

Clause put and passed.

Clause 10: Section 43 amended -

Mrs C.L. EDWARDES: This again links in with section 43 of the Act, which deals with inspectors and the powers of an inspector. The definition of "workplace" now includes residential premises that an employer is or was under a duty to maintain. Again, the extension to shearers' accommodation, which was used as an example, has now been linked in with the powers of an inspector for the purposes of this Act.

Mr J.C. Kobelke: Correct.

Clause put and passed.

Clause 11: Section 47A inserted -

Mrs C.L. EDWARDES: Proposed section 47A is also important because it links in with the improvement and prohibition notices and extends the meaning of "employer" and "employee", as we have discussed, through the principal contractor and labour hire companies. Therefore, it covers issues of notices by inspectors who have been given the power to go in by virtue of the Act.

Mr J.C. Kobelke: I agree.

Clause put and passed.

Clause 12: Section 49 amended-

Mrs C.L. EDWARDES: This clause again picks up on what we have been talking about with accommodation. It is proposed to insert a new section 49(7), which in part states-

> (a) in this section -
>
> (i) **"workplace"** includes such premises; and
>
> (ii) references to imminent and serious injury to, or imminent and serious harm to the health of, a person are to be read as applying only to an employee;

I ask the minister to advise why the proposed subsection has been worded in that way. The proposed subsection further provides -

> (b) in this section and section 50 **"activity"** includes the occupation of such premises.

I ask the minister to clarify what is intended by that proposed paragraph. I do not know what is intended.

Mr J.C. KOBELKE: I am not exactly sure what the member for Kingsley is getting at, but if I explain what I understand this clause to mean, it may answer her question. This provision deals with residential premises. It is included for the purpose of issuing prohibition notices as they relate to the new provisions on residential premises, which have limited application. We need to make sure that prohibition notices can be issued if necessary. That is the main intent of what we are seeking to do here.

Mrs C.L. Edwardes: It is limited under this proposed subsection to only an employee. What if another party or third person were in that accommodation?

Mr J.C. KOBELKE: The issue is that the employer-employee relationship is central to everything that we are doing. We extend it beyond that in some clauses, but when it comes to this very limited and specialised type of accommodation to which we are extending coverage, we are capturing only the employee. If someone is not an employee, he will not be caught by this provision.

Mrs C.L. Edwardes: So a visitor to shearers' accommodation who is electrocuted while helping a shearer do his washing will not be covered under this provision?

Mr J.C. KOBELKE: Except if there was the potential for the employee to be caught by that hazard. If an accident or incident involved someone who was not an employee, that person would not be caught, but in terms of the potential breach, because an employee was there, the breach would apply to the employee and not to the non-employee.

Mrs C.L. Edwardes: What is meant by the further addition of paragraph (b), which states "in this section and section 50 **"activity"** includes the occupation of such premises"?

Mr J.C. KOBELKE: That paragraph is required because one of the prerequisites for a prohibition notice is that it must be attached to an activity. If we did not define the occupation as an activity, it would not be possible to issue a prohibition notice.

Clause put and passed.

Clause 13 put and passed.

Clause 14: Section 3 amended -

Mrs C.L. EDWARDES: Clause 14 comes under part 3, which is an important aspect of the Bill because it changes the whole way in which penalties to offences are defined. It provides various tiers of penalties. The general tier of penalty is level 1, and then there are levels 2, 3 and 4. I inform the House that my comments are in no way to be read as suggesting that the Opposition does not support tough penalties for breaches of workplace safety. We do. We support tougher penalties for those people who deliberately and wilfully do not accept their responsibility when they have knowledge of a hazard in their workplace, particularly when dealing with level 4 breaches. There are varying grades in levels 2 and 3, which the penalties accordingly reflect. However, serious consequences could arise for employers and employees out of the penalties. Clause 14 amends section 3 by replacing a lot of sections with other sections. Section 3 is the interpretation section. On what basis are the other sections being replaced under this clause?

Mr J.C. KOBELKE: Section 3(3) of the Act currently defines serious harm to a person for the purpose of certain specific offence provisions in the Act. The cited references to which the definition applies are no longer correct, as those sections will be repealed and reinstated in amended form later in the Bill. This amendment replaces the numbers of the repealed sections with the new section numbers. That is what we are doing in this clause.

We have a lot of business today. I have already indicated to the member for Kingsley that we would consider this Bill in detail for about an hour. I do not want to get into the matter of gross negligence, because the member will want to spend a lot of time on that issue. Perhaps we could progress the debate to clause 15, which lays down the penalties. The member for Kingsley has already said in her contribution that she does not mind having stiffer penalties. I would like to go to that clause and to deal with the first and second offences, which is the structure of the penalties that can be awarded. We could then break and come back when we have more time to go into that area, about which I know the member has concerns and for which we will need considerable time to deal with it.

Mrs C.L. Edwardes: I am happy to do that, but I would like an explanation of how the tiers have been classified and the penalties that relate to those tiers.

Mr J.C. KOBELKE: That is clause 15. If we have time, we can deal with clause 15 before upping stumps and leaving clause 16 to a later time. I think I have answered the member's question on clause 14.

Clause put and passed.

Clause 15: Sections 3A and 3B inserted -

Mrs C.L. EDWARDES: Clause 15 is very important as it breaks down the penalty levels under proposed section 3A. It may take some time to deal with proposed subsection (4). I am totally in the minister's hands as far as that is concerned. Proposed section 3A defines the penalty levels. Proposed subsection (1) deals with the level 1 penalty, which is the general penalty. Under this proposed subsection, an employee will be liable for a first offence to a penalty of $5 000, and for a subsequent offence to a fine of $6 250. Proposed subsection (1)(b) states -

> if paragraph (a) does not apply -
>
> (i) in the case of an individual -
>
> (I) for a first offence, to a fine of $25 000; and
>
> (II) for a subsequent offence, to a fine of $31 250;

A worker would receive a far lesser penalty than would an employer under proposed subsection (2). For a company, which in the case of a body corporate could be the local footy club as an incorporated association, a first offence carries a fine of $50 000 and a subsequent offence a fine of $62 500.

The statistics show why many workplace accidents occur. The reason is human error. In the second reading debate I referred to the article by David Uren, in which he stated that 80 to 90 per cent of workplace accidents

are a result of human error. There is no breakdown of the figures to show whether that human error was employer or employee error. The Government is distinguishing in this legislation between employees and employers, and it is also distinguishing between employers and bodies corporate. In some respects, when people are dealing with corporations, they are dealing with extremely large bodies. However, there are also very small organisations, and this legislation refers to bodies corporate, which, as the member for Moore rightly said yesterday, could pick up the local footy club.

This legislation also deals with workers. I told the House yesterday about an instance in which the worker just did not get it. An employer cannot do anything with that sort of worker. He cannot be dismissed; it would be inappropriate for the employer to dismiss him. I know that we are talking about the general tier of penalties. However, if the Government strongly distinguishes between employees and employers, the issue of equal opportunity and the employment of workers who have a disability arises. A higher burden will be placed on employers to ensure their workers are fit enough to carry out their job. This issue arose recently in an inquiry I had from a constituent. Under equal opportunity guidelines, an employer would be damned if he did not employ a certain person. However, the employer may be concerned about employing that person because of his duty of care to other employees and the likelihood of risk to those other employees as a result of employing that person.

The Government is distinguishing between higher penalties for employers, and even higher penalties for footy clubs and/or mum-and-dad-type companies, and those for workers. In fact, some accidents have occurred because of the actions of the worker. I know that the Government perhaps has in mind the capacity to pay. The minister, in his response to the second reading debate, said that courts obviously take into account the capacity to pay in any event. I believe the Government is starting to discriminate greatly between workers and employers and the local footy club in a way that could, because of the higher penalties, impact on the employment of some workers. Employers may not take the risk of employing those workers.

Mr J.C. KOBELKE: Clause 15 has a new and extended penalty structure. One of Laing's recommendations was that we should seek to have sentencing guidelines. This is based on the fact that history shows that the penalties that the courts in this State have awarded have been extremely low. Under the previous Government, Minister Kierath, I think, increased the penalties about fourfold. However, the awards made by the courts did not really change, although they have in the past couple of years. There were still very serious offences, but the penalties for those offences were quite minor. Therefore, Laing's suggestion was that we should have sentencing guidelines. That does not sit well with the Attorney General and the judiciary. Therefore, we did not proceed with it.

The alternative that we have come up with is to provide a graded structure of penalties that is clearly recognised. Therefore, if a case comes forward that is at a higher level, hopefully the determination will follow that. We are dealing only with maximum penalties. It will still be open for a person who commits, say, a level 3 offence to receive a penalty that is about the same as that for a level 1 offence. We hope that in determining penalties the magistrate will look at this clearly established structure and, if it is a level 3 offence, he will decide that the penalty should not be that for a level 1 or low level 2 offence. Rather than adopting the Laing suggestion of sentencing guidelines, this more elaborate and graded structure was seen as a way of trying to make sure that, for very serious offences, a person would be more likely to receive a larger penalty. Within the structure, corporations will have a maximum penalty that is twice that for individuals. That will go through the system. Under the system, a subsequent offence will attract a penalty of 1.25 times that for a first offence. That is standardised throughout the legislation. Hopefully, that will lead to the penalties in the more serious cases being towards the upper end of the scale.

Mrs C.L. EDWARDES: Proposed section 3A(2) deals with a level 2 penalty. However, there is no breakdown of an offence committed by a person as an employee. In the case of an individual, does the Government intend that that can also be an employee?

Mr J.C. KOBELKE: I am told that that is a drafting issue. That is covered in proposed section 20A, not in the structure in this provision.

Mrs C.L. Edwardes: Have we dealt with that yet?

Mr J.C. KOBELKE: No.

Mrs C.L. EDWARDES: I love the drafting process. Nothing is in order. Proposed section 20A deals with the duties of employees. Keeping that in mind, does proposed section 3A(2)(a) incorporate an employee? If it is not intended to incorporate an employee, it gets back to the point that I was making before. There will be a divide between the responsibilities of employees and employers. Although an employer has a greater level of control over the workplace site, a serious issue arises because I suggest there is a level of discrimination against employers. I take on board the point the minister made before. The courts take into account the seriousness or

otherwise of the actions taken or not taken, and the capacity to pay or otherwise of the person who is being prosecuted. Maybe the minister can explain the level 2 penalties and why none of those penalties would apply to an employee.

Mr J.C. KOBELKE: The individual referred to in clause 15 is not an employee; he is the employer. The employee is dealt with in proposed section 20A. Again, the penalties are graduated. We will debate that later. The total penalties that can be awarded are substantially lower, but they are graduated. We will deal with that in proposed section 20A.

Mrs C.L. Edwardes: There are some circumstances in which a level 2 penalty can be applied to an employee.

Mr J.C. KOBELKE: No. I think there is a three-level penalty, and there is also a potential penalty for gross negligence of an employee. However, it does not mirror the level of penalties for employers.

Mrs C.L. EDWARDES: All the comments I have made apply to level 3 as well, which substantially increases the penalties for employees for both first and subsequent offences, and there is a higher penalty for bodies corporate. It would have been really nice to have the definition of "body corporate" here while going through these clauses, particularly when we are considering clause 15(4) which deals with level 4 penalties - the highest level of penalty. For the first time in this State a penalty of imprisonment is being imposed. It is, however, being imposed in a way that is unacceptable. I am not referring to the policy of imprisonment for those people who wilfully and deliberately ignore hazards in the workplace or, when they have knowledge of that hazard, do nothing to correct it. When we deal with clause 16 we will debate further why gross negligence is a major problem and will capture far more people than the Government intended. This clause is not acceptable to the Opposition. We do not accept imprisonment or the penalties imposed because of the way gross negligence has been defined. We will leave the definition of "gross negligence" to be debated on another occasion but I ask the minister to outline the circumstances in which he believes imprisonment will be imposed.

Mr J.C. KOBELKE: The House debated gross negligence both in consideration in detail and in the second reading debate and it will be debated again when we consider clause 16, which defines it. I do not share the member's concerns. It is a very tightly worded definition and it is fairly clear about to whom it will apply. We will deal with that when we come to clause 16. Clause 15 simply indicates that the level 4 penalty leaves open the option of imprisonment for two years in cases of gross negligence.

Mrs C.L. EDWARDES: In the case of an individual, how broad is the intent of this clause in applying to directors? I am talking particularly about the mums and dads in bodies corporate or on the executive committee of a football club.

Mr J.C. KOBELKE: Clause 55 deals with that aspect of corporations and gross negligence.

Mrs C.L. Edwardes: So, what is the answer?

Mr J.C. KOBELKE: When we consider clause 55 we will deal with that.

Mrs C.L. Edwardes: It is very important, if we are to be talking about penalties.

Mr J.C. KOBELKE: We keep coming back to the same issue, and I'm suggesting, procedurally, that when we reach clause 16, which is the heart of it, then the member will be quite within standing orders at that time or during consideration of clause 55, to branch out into matters dealing with the application of gross negligence in a whole range of circumstances. Instead of hitting the subsidiary parts all the time back into the big picture, it would be much more productive if the bigger picture of the member's concerns about gross negligence and potential imprisonment and the way it is picked up in a whole range of clauses, were concentrated in one clause. I am suggesting that clause 16, which defines gross negligence, would be the best place to do that, so that we are not revisiting the same argument every time we pick up just one strand that is connected through to gross negligence and potential jail penalties.

Mrs C.L. EDWARDES: I agree in a procedural sense, but it is quite appropriate for us to discuss who will be captured as an individual when we are discussing the term of imprisonment. The Opposition intends to vote against this clause. At a later time we will debate whether the definition of "gross negligence" that leads to a level 4 penalty, where imprisonment could apply, is far too broad. However, if we are discussing who the individuals are, it is clear we are talking about directors, managers, secretaries or any other office-bearers of a body corporate. The minister can say that he will get to this when he talks about clause 55, but we are talking now about whether the members of the executive committee of a local footy club, if they are subject to a level 4 penalty in the way the minister is defining "gross negligence", will go to jail.

Mr J.C. KOBELKE: The points raised by the member are important and we will cover them, but I am suggesting that the House deal with them during consideration of either clause 16 or clause 55, and follow all the

various strands of gross negligence and potential jail penalties through the various sections in which they apply. The question for which the member is seeking an answer relates to clause 55.

Mrs C.L. EDWARDES: The Opposition will not support this clause, primarily because we cannot even get an answer about whom it is likely to capture, because that will be the subject of a later debate even though it is particularly important that a level 4 penalty will capture far more people than the Government intends it to. The whole credibility of the Government's legislation rests on this. Because imprisonment is a serious penalty and the Opposition believes the provision will capture far more people than is intended, including the mums and dads on executive committees of footy clubs and the like, we do not support this clause.

Clause put and a division taken with the following result -

Ayes (25)

Mr P.W. Andrews	Mr J.N. Hyde	Ms S.M. McHale	Mr D.A. Templeman
Mr J.J.M. Bowler	Mr J.C. Kobelke	Mr A.D. McRae	Mr P.B. Watson
Mr A.J. Carpenter	Mr R.C. Kucera	Mr N.R. Marlborough	Mr M.P. Whitely
Mr J.B. D'Orazio	Mr F.M. Logan	Mr M.P. Murray	Ms M.M. Quirk *(Teller)*
Dr J.M. Edwards	Ms A.J. MacTiernan	Mr A.P. O'Gorman	
Mrs D.J. Guise	Mr J.A. McGinty	Ms J.A. Radisich	
Mr S.R. Hill	Mr M. McGowan	Mrs M.H. Roberts	

Noes (16)

Mr R.A. Ainsworth	Dr E. Constable	Mr B.J. Grylls	Mr P.G. Pendal
Mr D.F. Barron-Sullivan	Mr J.H.D. Day	Ms K. Hodson-Thomas	Mr T.K. Waldron
Mr M.J. Birney	Mrs C.L. Edwardes	Mr R.F. Johnson	Ms S.E. Walker
Mr M.F. Board	Mr J.P.D. Edwards	Mr W.J. McNee	Mr J.L. Bradshaw *(Teller)*

Pairs

Mrs C.A. Martin	Mr A.D. Marshall
Mr E.S. Ripper	Mr P.D. Omodei
Dr G.I. Gallop	Mr M.W. Trenorden

Clause thus passed.

Debate adjourned, on motion by Mr J.C. Kobelke (Minister for Consumer and Employment Protection).