## WORK HEALTH AND SAFETY BILL 2019

*Committee*

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

**Clause 31: Failure to comply with health and safety duty — Category 1 —**

Committee was interrupted after the amendment moved by Hon Nick Goiran had been partly considered.

**Hon NICK GOIRAN**: Just to provide an explanation to members, before the interruption to our business for the taking of questions without notice, we were looking at clause 31. The reason for my amendment is that the chamber has just agreed that clause 30B should be removed from the bill. Clause 30B deals with circumstances in which a person has died on a worksite. If we do nothing at this point, we will be left with a bill that deals only with a death on a worksite in circumstances to which I have referred as reckless negligence. A range of other scenarios might lead to the death of a person on a worksite. I draw to members' attention clause 31(2), which in and of itself brings in the notion of death. It states that a person commits a category 1 offence if the person is a person conducting a business or undertaking and fails to comply with their duty, and the failure causes death or serious harm to an individual. Death is already captured under clause 31 in the government's own bill. The element that is missing is if an individual has breached the duty and it leads to the death of another person. Members will see the distinction between clause 31(1)(c) and clause 31(2)(c). One involves death, and the other does not.

The reason that the government drafted it in that way is that the bill originally contained 30B. However, without clause 30B, we do not want to have the perverse outcome that a person has died on a worksite, and no charge can be brought against the person who caused that death; however, had the person survived, a person could be charged and potentially imprisoned for five years. This proposed amendment is a consequence of the removal of clause 30B. It is one way of doing this. The government obviously has another way, and we can consider that in due course when we get to new clause 31. As far as the opposition is concerned, this is a necessary consequence of the deletion of clause 30B to ensure that the current clause 31 will not have an unintended loophole in it.

**Hon ALANNAH MacTIERNAN**: I accept the member's intent. The proposed amendment would improve clause 31 in the absence of clause 30B. However, we believe that our proposal, which is for an extensive rewrite of clause 31, is a better option. Therefore, although we do not oppose the member's amendment per se, we say it is a rival scheme to the new clause 31 that we are proposing. We think that our amendment to clause 31 will have a number of benefits that will not come from just adding the word "death". We have proposed an extensive rewrite of clause 31 to provide for the collapsing of clause 30B. One of the differences is that we believe the five-year penalty is simply too low. In our proposed substituted clause 31, a 10-year penalty will be available in some instances. Minister Johnston has indicated that he would be prepared to consider a level a little higher than that, but we believe that five years, in circumstances in which a death has been caused, is too low. Therefore, we would be open to some other amendment to our scheme.

Secondly, we also think it is important to have differentiated penalties for a fatality or serious harm. The concern is that if we have a single combined penalty, when the court makes a decision on the penalty, it will look at the fatality as attracting the highest tariff and will discount for serious harm. However, we think that if serious harm has its own category, tariff discounting will not occur. The government understands the concern that has been raised about any penalties of more than five years. We agree that these matters should be dealt with by the Director of Public Prosecutions, as this impacts all investigations. New clause 31 would introduce an each-way jurisdiction, so that matters could be heard in the Magistrates Court or the District Court. This would ensure that all cases could be potentially available to be prosecuted by the DPP. The government obviously will not go to the wall on this amendment, but I think members need to understand that we effectively have two competing schemes here, in that there are competing ways to pick up some of the provisions which were previously in clause 30B and which were deleted in acknowledgement of the concerns raised by members. If Hon Nick Goiran's amendment fails, we will move forward with new clause 31. If his amendment is successful, we will not proceed with new clause 31.

*Division*

Amendment (deletion of words) put and a division taken, the Deputy Chair (Hon Dr Steve Thomas) casting his vote with the ayes, with the following result —

Ayes (15)

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|---|---|---|---|
| Hon Jacqui Boydell | Hon Colin Holt | Hon Robin Scott | Hon Dr Steve Thomas |
| Hon Peter Collier | Hon Rick Mazza | Hon Tjorn Sibma | Hon Colin Tincknell |
| Hon Colin de Grussa | Hon Michael Mischin | Hon Charles Smith | Hon Ken Baston *(Teller)* |
| Hon Nick Goiran | Hon Simon O'Brien | Hon Aaron Stonehouse | |

Noes (14)

| | | | |
|---|---|---|---|
| Hon Robin Chapple | Hon Diane Evers | Hon Martin Pritchard | Hon Alison Xamon |
| Hon Tim Clifford | Hon Adele Farina | Hon Samantha Rowe | Hon Pierre Yang *(Teller)* |
| Hon Alanna Clohesy | Hon Laurie Graham | Hon Matthew Swinbourn | |
| Hon Sue Ellery | Hon Alannah MacTiernan | Hon Dr Sally Talbot | |

Pairs

| | |
|---|---|
| Hon Donna Faragher | Hon Darren West |
| Hon Jim Chown | Hon Stephen Dawson |
| Hon Martin Aldridge | Hon Kyle McGinn |

**Amendment (deletion of words) thus passed.**

**The DEPUTY CHAIR**: The question is that the words to be inserted be inserted.

**Hon ALANNAH MacTIERNAN**: Effectively, amendment 61/NC31 will now fall away.

*Point of Order*

**Hon NICK GOIRAN**: I think the question before the Chair is the insertion of the words that I proposed at amendment 5/31.

**The DEPUTY CHAIR (Hon Dr Steve Thomas)**: That is the question before the chamber; I was giving the minister some largesse to address that.

*Committee Resumed*

**Amendment (insertion of words) put and passed.**

**Hon NICK GOIRAN**: Just on the question that clause 31, as amended, now be agreed to, I have a number of questions for the minister. On the basis that clause 31 has now been amended, I take it that the minister has indicated that the government will no longer pursue new clause 31, under amendment 61/NC31.

**Hon ALANNAH MacTIERNAN**: As I was attempting to say before, I do not propose to now move amendment 61/NC31. Whatever the technicalities, we agreed that if the previous amendment was successful, we would not seek to move new clause 31.

**Hon NICK GOIRAN**: Clause 31 is one of the clauses that was considered by the Standing Committee on Legislation. The minister will be aware that the standing committee was instructed by the house to consider part 2 of the 16-part bill. I want to draw the minister's attention in particular to finding 22, which deals with the legal test for clause 31. It states —

> Clause 31 of the Work Health and Safety Bill 2019 does not incorporate the subjective test of recklessness found in cl 31 of the Model Work Health and Safety Bill or the objective test of gross negligence recommended by the Boland Report but does include an objective test of reasonable practicability.

Does the government concur with finding 22?

**Hon ALANNAH MacTIERNAN**: As far as we can determine, it is factually correct. It does not incorporate the subjective test of recklessness. I understand that is because generally within our schemes we do not have this concept of recklessness—that is not a feature of WA law—nor do we have the subjective test of negligence. We do have an objective test of reasonable practicability.

**Hon NICK GOIRAN**: The first question is: why is the government deviating from the model law at clause 31?

**Hon ALANNAH MacTIERNAN**: I understand that this came after strong advice from the Director of Public Prosecutions that recklessness was not part of the law of Western Australia and that it would have created complications if we had gone down that path.

**Hon NICK GOIRAN**: Minister, that is not acceptable, because at the back of the committee's report is a letter from the DPP, who is absolutely damning of the consultation undertaken by the government.

**Hon Alannah MacTiernan**: Who?

**Hon NICK GOIRAN**: It is the DPP at page 108 of the report. The letter states —

> In the limited consultation conducted with the ODPP regarding this Bill, issues were raised with the Department about disclosure, the quality of investigations and the quality of briefs, as well as how prosecutions could be commenced. These have not been the subject of further discussion and the Department has not sought to engage the ODPP. The ODPP will not prosecute any offence which has been inadequately investigated, or where the disclosure and/or brief materials are not provided in a satisfactory manner. Given the lack of engagement on this point on the part of the Department, the ODPP may not have the capacity or inclination to conduct such a prosecution until those matters are resolved.

That is just one paragraph in this damning letter from the DPP dated 31 July 2020. To now be told that the reason that the government has deviated at clause 31 from the model law is advice from the DPP is certainly not sustained when one considers the evidence provided to the committee. I draw to the minister's attention that the decision to deviate from the model law at this point—the legal test—was made well before the committee engaged with the office of the DPP. There may well be some recent information from the Director of Public Prosecutions and, again, if that is the case, I ask for it to be tabled.

**Hon ALANNAH MacTIERNAN**: I do not know whether the statements made by the member in any way go to undermine what we were saying. There are a couple of things. It was very clear from the time that we were drafting this. This is not subsequent to the findings of the committee. The advice was that we should remove "recklessness" because it is not a feature of WA law and not enshrined in our criminal law system. The advice we received was that "reasonably practical" encompasses the mental elements such as what is known about the hazard. It is not a strict liability offence in the sense that a strict liability offence requires no mental element or mens rea to be proven, aside from the obligation to prove that the accused has not honestly been mistaken. All offences involving a failure to comply with the health and safety duty, including a defence pursuant to clause 30B, which has now been eliminated, must be read in terms of the principle. Therefore, every breach of such a health and safety duty includes a failure to take reasonably practical steps. It seems that there are two elements. One is that it was always understood that there would be changes in the model law as we sought to fit it within the general schema of legislation in the state. Because "recklessness" is apparently not enshrined as a concept in our laws, it was determined to not make recklessness the standard, but rather compliance with what is reasonably practicable. There is also another element. Because we are introducing industrial manslaughter, we certainly did not want to go backwards with the legislation. Clause 31 was crafted to reflect the current occupational health and safety law level 3 provisions. There are a couple of elements here that have come to us with a particular frame around clause 31.

**Hon NICK GOIRAN**: According to the minister, the justification for the standard that is being used is the level 3 offence that is currently in our Western Australian scheme. Does the level 3 offence in current Western Australian law attract a penalty of imprisonment?

**Hon ALANNAH MacTIERNAN**: No, but we have been very clear that part of our proposal is to strengthen the penalties relating to serious harm and death.

**Hon NICK GOIRAN**: It is one thing to say that we are going to strengthen the penalties; it is another thing to say to people that we are going to put them in jail for negligence. Under the existing Western Australian law, if a person is negligent, they do not go to jail, but now the minister is saying that we want them to go to jail. The minister is entitled to hold that view, but we cannot play games with people when we are imposing the possibility of terms of imprisonment. The minister says that the government's intention is to increase the penalties. I draw to the minister's attention finding 23 of the Standing Committee on Legislation's forty-third report, and I seek her response to it. It states —

> The penalties of imprisonment are consistent between cl 31 of the Work Health and Safety Bill 2019 and cl 31 of the Model Work Health and Safety Bill but the monetary penalties are marginally higher.

Recommendation 3 states —

> The Minister for Mines, Petroleum, Energy and Industrial Relations advise the Legislative Council on why the penalties in cl 31 of the Work Health and Safety Bill 2019 are higher than those in cl 31 of the Model Work Health and Safety Bill.

We have a situation in which the government is introducing imprisonment in accordance with the model law. The model law provides that if we are to have category 1 offences, there should be imprisonment, and that is what the government is doing here. The model law also provides that before we send someone to jail, the test should be a subjective test of recklessness, but the government is saying, "No, we're not going to do that. We're just going to have a test of negligence."

**Hon Alannah MacTiernan**: I didn't say negligence.

**Hon NICK GOIRAN**: That is exactly what the minister said. She said the level 3 offence, and I specifically asked her about that, so she will just have to go back to the *Hansard* tomorrow and have a look at what she actually said.

**Hon Alannah MacTiernan**: I don't recall using the word "negligence".

**Hon NICK GOIRAN**: The minister never used the word "negligence" today?

**Hon Alannah MacTiernan**: I don't recall using it in the discussion of this —

**Hon NICK GOIRAN**: Let us introduce the term now, because it is in the Standing Committee on Legislation's report. I draw the minister's attention specifically to the table at page 64. Under the heading "Degree of negligence", one of the examples is "Clause 30B industrial manslaughter" and "Level 3 offence", which is the level 3 offence the minister referred to earlier. The point is that the government is being consistent with the model law by introducing imprisonment for a category 1 offence. The government is being inconsistent with the model law by leaving the test as simple negligence and not the subjective test of recklessness, as is the case in the model law. On the one hand, the government wants to be consistent with the model law and put people in jail, but on the other hand, it does not want to actually meet the test that the model law requires. This is a very, very significant issue. As the minister has already explained, the government has advice to say that the notion of recklessness is not well established in Western Australian law. Okay; let us park that to one side for a moment, and move to the Boland review. What was the test recommended in the Boland review with regard to a clause 31 offence?

**Hon ALANNAH MacTIERNAN**: I am being advised here. I am hoping that someone will have the answer to advise why penalties are higher. I would have thought that we should have that. We are advised that the Boland review was not necessarily using gross negligence in a technical sense. I am seeking some clarification on that. Certainly, the Boland review referred to gross negligence.

**Hon NICK GOIRAN**: This is hopeless.

*Point of Order*

**Hon SUE ELLERY**: The minister is at the table, seeking advice. She should be allowed to do that without the honourable member choosing to grandstand. Let her answer the question or not answer the question, and then raise a point of order, but let her deal with the advisers at the table.

**The DEPUTY CHAIR (Hon Dr Steve Thomas)**: If the honourable member with the call would like to move on to a substantive point, I think that would be useful.

*Committee Resumed*

**Hon NICK GOIRAN**: I think what is happening here is hopeless. I draw to members' attention page 64 of the report.

*Point of Order*

**Hon SUE ELLERY**: The minister is clearly still getting advice. It is perfectly reasonable for the member to seek the call and be given the call in due course. It is clear to everyone here that she is getting advice.

**The DEPUTY CHAIR (Hon Dr Steve Thomas)**: Minister, are you in a position to answer the original question?

*Committee Resumed*

**Hon ALANNAH MacTIERNAN**: I have here at this point the response to the question about recommendation 4. Clause 31 is titled "Failure to comply with health and safety duty — Category 1". As acknowledged in paragraph 2.9 of the Standing Committee on Legislation's forty-third report, in 2018 the Western Australian Parliament passed legislation to increase workplace safety and health offence penalties under the Occupational —

*Point of Order*

**Hon NICK GOIRAN**: The response being provided by the minister is irrelevant. It is in respect of clause 32, but the matter before the Chair is clause 31.

**The DEPUTY CHAIR (Hon Dr Steve Thomas)**: I will allow the minister to complete her answer.

*Committee Resumed*

**Hon ALANNAH MacTIERNAN**: Thank you. Can I just say —

**Hon Nick Goiran**: Recommendation 4 is clause 32. We are on clause 31.

**Hon ALANNAH MacTIERNAN**: Actually, the member was talking about recommendation 3.

**Hon Nick Goiran**: That's right.

**Hon ALANNAH MacTIERNAN**: I am giving the formal response to recommendation 3. Recommendation 3 asked the minister to advise the Legislative Council why the penalties in clause 31 of the Work Health and Safety Bill are higher than those in clause 31 of the model Work Health and Safety Bill, and here is the minister's response.

As acknowledged at paragraph 2.9 of the forty-third report, in 2018 the Western Australian Parliament passed legislation to increase workplace safety and health offence penalties under the Occupational Safety and Health Act and the Mines Safety and Inspection Act. The increased penalties were based on the equivalent offence provisions in the national model of the WHS bill. The penalties were further increased to incorporate the inflation rate since 2010, when drafting of the national model WHS bill was finalised, and some rounding. This approach was taken when drafting monetary penalties in the WHS bill.

**Hon RICK MAZZA**: This clause is one that I have some concerns with. Now we are clear that we are dealing with clause 31 as it appears in the bill, it gives me a little more scope about what we are dealing with. I am concerned that there is no mention of negligence in clause 31. A person will simply have to fail to comply with a duty, so the test to me is quite low. As has been pointed out, in the forty-third report of the Standing Committee on Legislation, finding 19 and finding 22, which were referred to by Hon Nick Goiran, basically say that this clause is not consistent with clause 31 of the model bill or the Boland recommendation. In fact, finding 22 basically says that clause 31 of the Work Health and Safety Bill 2019 does not incorporate the subjective test of recklessness found in clause 31 of the model bill. The model bill requires recklessness as a test. There is a failure of duty test in this bill, which is a very low test. Because I was not sure which version of clause 31 we would be dealing with today—whether it would be the one in the bill, which we are dealing with, or the one on the supplementary notice paper—I did not prepare an amendment for the SNP, so I will have to do one from the floor. I move —

Page 38, after line 14 — To insert —

(5) For the purposes of subsections (1) and (2), a person's failure to comply with a duty must be in circumstances of gross negligence.

**Hon ALANNAH MacTIERNAN**: I understand what the member is trying to achieve, but a problem is that we do not have a definition of "gross negligence" in this bill. This amendment has an undefined term, so I think that is part of the problem. But probably a second and more significant problem is that this is likely to make it more difficult to prosecute people for category 1 offences. We would, in fact, be going backwards if we were to adopt this because it would set a higher bar to achieve a prosecution. As members know, one of the things that we are trying to respond to is the very clear view in the community that there needs to be more consequences for failing in one's duty of care when that failure leads to the death or serious injury of a worker. I do not believe that we will be able to accept this amendment.

**Hon COLIN TINCKNELL**: "Gross negligence" is part of the act currently; it is already a requirement under the Occupational Safety and Health Act. It has also been recommended for inclusion by the Boland review. There are a lot of reasons why "gross negligence" should be in this legislation.

**Hon MICHAEL MISCHIN**: The idea that "recklessness" is not known to our law here in Western Australia, in criminal law in particular, and the idea that "gross negligence" is a concept that will be at large under this amendment surprises me a little. At the moment, under the Occupational Safety and Health Act 1984, as Hon Colin Tincknell has pointed out, section 19A(1) states —

If an employer contravenes section 19(1) —

That is the statement of duties —

in circumstances of gross negligence, the employer commits an offence and is liable to a level 4 penalty.

In the case of an individual for a first offence, a level 4 penalty carries a fine of $550 000 and imprisonment for five years.

What is "gross negligence"? It is defined in the Occupational Safety and Health Act.

*Sitting suspended from 6.00 to 7.30 pm*

**Hon ALANNAH MacTIERNAN**: This is obviously a very complex scheme of legislation and I understand that wrapping one's head around it—as I am finding myself—is quite a complex task. I urge members not to support Hon Rick Mazza's amendment because it fundamentally misunderstands what we are trying to achieve with this scheme of legislation. By introducing a concept of gross negligence into the ability to prefer charges under clause 31, the member is making it more difficult, and less likely, to get an appropriate penalty and effectively puts into clause 31 a standard that is already enshrined in clause 30A.

**Hon Nick Goiran**: That's not true.

**Hon ALANNAH MacTIERNAN**: I believe that it is true. The member might—he will no doubt at great length give us his exegesis on this. But at the moment, I am letting members know what we believe is the case and is supported by the facts. We have enshrined in clause 30A the concepts referred to in the Boland review. Clause 30A requires the element of a mens rea, or knowledge, that a person's conduct was likely to cause at least the serious harm of a person. In one sense, using the terminology, that is roughly equivalent to the concept of gross negligence.

**Hon Nick Goiran**: No, that's wrong.

**Hon ALANNAH MacTIERNAN**: That is the member's view; that is certainly not the view —

**The DEPUTY CHAIR (Hon Robin Chapple)**: Members, just a moment; I am speaking. The process of Committee of the Whole is that a member asks the question and the minister responds. I do not want interjections across the floor. I want this debate to operate in a proper manner.

**Hon ALANNAH MacTIERNAN**: Thank you. This is a really serious point because it gets to the nub of what we are trying to do. Clause 30A introduces the concept of industrial manslaughter, which has enshrined in it what some people might argue is an equivalent of the concept of gross negligence; that is, there has to be a consciousness that what a person does—that mental element—has the possibility of leading to the serious harm to or death of a person. What we are trying to do in clause 31 is entirely different. Clause 31 refers to offences of the type that are equivalent to current level 3 offences under the Occupational Safety and Health Act for which that mental element does not need to be present, but there is a duty of care and a person has failed to satisfy that duty of care. Of course the duty of care is not some absolute or strict standard; the duty of care takes into account all the concepts of what is reasonable—what a person could have reasonably known and done, and what was reasonable in the provision of safety mechanisms considering the scale of the costs and the scale of the risk. It is not as if it is a trap for young players; it is based on, all things considered when weighing up the level of risk and the likelihood of mitigation, what was reasonable under the circumstances. It is about a failure of duty of care. The member's amendment introduces the concept of gross negligence, which would make it harder to prosecute, rather than what we are trying to do, which is to deal with the manifest injustice that has been going on. I think this goes some way to address the issues raised on several occasions by Hon Michael Mischin. He has asked how this legislative regime will increase penalties.

**Hon Michael Mischin**: How's that going to make a difference?

**Hon ALANNAH MacTIERNAN**: How is it going to make a difference to the sorts of cases that we have set out? In our view it will. In many prosecutions, including some of those that I have talked about—the case of the young work experience kid Jayden Zappelli who went onto a site to seek selection for an electrical apprenticeship or the case of 17-year-old trades assistant Wesley Ballantine who fell through an open void in the ceiling of a glass atrium—young people have lost their lives and the penalties imposed were woefully inadequate. We are seeking to deal with that in clause 31 by introducing a regime of higher penalties for failure to act with a duty of care. The member might want to have a debate about whether the penalties we have set are too high. If that is the member's concern, that should probably form the basis of his amendments, but to seek to introduce this standard will, in our view, produce the perverse outcome that we will get fewer prosecutions, lesser penalties and a worse outcome in the situations we are trying to deal with. We understand that employers are concerned about what their liability will be under the legislation, but please understand that the duty of care does not set a strict liability; the assessment of whether a person has failed in their duty of care is very much based on what is reasonable in all the circumstances. I think sometimes some of the narrative coming through is the concern that a person could be prosecuted for something that was a failure of another—the rogue behaviour of another employee or someone who did not obey the established system. Minister Johnston has been very keen for us to make it clear that under these provisions, someone cannot be prosecuted for the failure of others. It is only the failure of the person who is to be charged. I am not at all critical of the member for moving this amendment because it is a very complex and challenging piece of legislation, but it would completely and utterly undermine the schema and the intent of what we are trying to do in this part of the legislation, which is to give us a greater likelihood of changing the culture, and when terrible incidents like this occur, we can do something about it.

I wish to quote Mrs Janice Murrie, whose son Luke was killed at the age of 22. According to my notes, she said —

> In these circumstances, when inexperienced workers were instructed to do an unsafe lift, the unsafe method as quicker and therefore cheaper.

This young man was killed. She continued —

> We never got justice for Luke. He was killed. It wasn't an accident. He was killed. It made us feel that his life was worthless or that he was not important. You have to make the punishment fit the crime. We are living with the fact that we will never see our son again. It is 11 years this October but the directors got off with a piddling fine. They are off with their families. Good on them. I hope they —

She goes on, clearly emotional at the time.

**Hon Michael Mischin**: Go on; read the rest. You started to cite it. I'm going to ask you to table it.

**Hon ALANNAH MacTIERNAN**: I am happy to do it.

**The DEPUTY CHAIR**: Members, I did make a ruling a bit earlier.

**Hon ALANNAH MacTIERNAN**: There is case after case of young men being killed. Clearly, there was a massive failure, and there was a fine of a couple of thousand dollars. Who would not be angry? Which parent would not be angry about this? I will continue quoting Janice, who says —

> They were off with their families. Good on them. I hope they rot in hell because they didn't hurt and they knew it wasn't going to hurt so you have to make the fact that you can go to jail and you can sit in jail every day and remember why you are sitting there—because you killed someone.

Members, please understand that this is really important. This is about ensuring that when a failure to meet a duty of care results in the death or serious injury of someone, it is capable of being properly recognised in the courts. We have seen case after case under the current regime in which the penalties are really an insult to the families.

**Hon NICK GOIRAN**: I have a few things to say at the outset after the interval that we just had. Firstly, I wish to put on the record that I am disappointed that no sooner did the house rise than I was accosted not by the minister with the carriage of the bill in this place, but by the minister responsible for this bill. I am disappointed about that because I have a lot of respect for that minister. I was accused by that minister of being the most dishonest person that he has ever met in his life. I am not one to easily take offence but I take offence at the way I was treated during the dinner interval.

**Hon Alannah MacTiernan**: Imagine how these people feel.

**Hon NICK GOIRAN**: I am getting to that, minister.

**The DEPUTY CHAIR**: Members! I did say earlier that the person asking the question should ask the question. There are to be no interjections. The minister will respond.

**Hon NICK GOIRAN**: I am not one to easily take offence, but I was offended in this particular instance because it was totally uncalled for. The opposition has continued to act with integrity throughout the handling of this bill. It is not the business of the opposition to draw to the government's attention an amendment moved by a member outside of the Liberal Party. I will leave it at that. In other circumstances, I would perhaps have more to say, but out of due deference and respect for the minister, I am going to put it down to an episode that is out of character. I will leave it at that.

With respect to the matter that is currently before the chair, clause 31, and in particular the amendment moved by Hon Rick Mazza, I wish to say that every element of what the minister has said is wrong as a matter of fact. Firstly, the minister said that if we support Hon Rick Mazza, it will lead to fewer prosecutions. That tells us that the minister is unfamiliar with clause 31(4), which states —

> A person charged with a Category 1 offence may be convicted of a Category 2 offence or a Category 3 offence.

In other words, whatever one's view of what the test for category 1 should be, if they cannot make that out, they can still go with a category 2 or 3 offence. That will not lead to any fewer number of prosecutions whatsoever. The minister should correct the record and confirm that she misled the house with her earlier remarks. That is point one.

Point two is that the minister is obviously unfamiliar with the three tests. I draw to members' attention the very conveniently drafted table 12, which is found on page 64 of the report of the Standing Committee on Legislation. I served on the inquiry and I agree with the minister that some of these issues are conflicts. As a member who was sitting on the committee inquiry, it took some time to grapple with the various tests that were suggested and thrown around. Table 12 has been put into the report because it conveniently sets out the three tests. It is wrong to suggest that the gross negligence standard that Hon Rick Mazza is asking us to agree to is the same as the test for a clause 30A prosecution. That is wrong. Table 12 on page 64 confirms that. There are three tests. The highest test is actual knowledge. That is that subjective test that says that the person must have had actual knowledge that what was going to take place was likely to lead to the death or serious harm of the individual. That is the clause 30A test, and it is consistent with the existing law in Western Australia—that is, a level 4 offence. It is also consistent with what has been proposed in the model bill as a category 1 offence, not to be confused with the category 1 offence that we are considering at the moment.

Then we have the second test, which is a gross criminal negligence objective test. That is the test that Hon Rick Mazza is asking us to agree to. This is consistent with the Boland review. During the minister's second reading reply speech, she said that the government was looking to introduce some of the recommendations of the Boland review. I interjected, which perhaps I should not have done during a second reading in reply speech, and said, "Yes, but you're not including all of the Boland review recommendations, are you?" Here is a classic example. Boland suggests that gross negligence be introduced, which is what Hon Rick Mazza is asking us to agree to. Members may say, "Who cares about Boland? Why do we care about the Boland review?" Industrial manslaughter legislation in the ACT, Victoria, the Northern Territory and Queensland includes this test. When we get told by people that what Western Australia is going to do is very strange and what Hon Rick Mazza is going to do is unheard of and unprecedented, that is rubbish. If people are saying that, they do not agree with the unanimous findings and

recommendations of the Standing Committee on Legislation. People are entitled to do that, but then they have to explain why the committee has got it wrong. Does the ACT, Victoria, the Northern Territory or Queensland include this standard? If people are still not satisfied with that, the committee goes on to explain that this is the same test that exists in the Criminal Code. Remember that the minister said earlier, in response to why we should agree to other provisions, that it was about trying to lift it to the same standard as the Criminal Code.

The committee then explained the third test. This is the lowest of all the tests—the test of simple negligence. That can be found in this bill at clause 30B in category 1 offences, category 2 offences and category 3 offences. We have already removed clause 30B. It is consistent with the existing law of Western Australia with regard to a level 3 offence. Again, members might say if it is consistent with the current law in Western Australia, why can we not agree to it now? Under the existing law in Western Australia, we do not imprison people for up to five years in the event that, through simple negligence, they commit a level 3 offence. We do not do that. We will do that now. Why? Because the government says that is what the model law says, and it is right. That is true; the model law says that if a person commits one of these offences, the maximum penalty is that they should go to jail. But the model law also says to do exactly what Hon Rick Mazza has said—lift the test. The government cannot have its cake and eat it too. If it wants to ensure it will be able to imprison someone for one of these things, we have to have the higher test. If we are happy not to have imprisonment, we have to have the lower test. That is the evidence that went before the Standing Committee on Legislation. I would encourage members to be familiar with the committee's findings and recommendations. I would encourage them to be familiar with the evidence that was put. It speaks for itself. For those reasons, the Liberal Party will be supporting the amendment moved by Hon Rick Mazza.

**The DEPUTY CHAIR**: Minister.

**Hon ALANNAH MacTIERNAN**: I think this is —

**Hon Nick Goiran**: Would you like to seek the call first?

**The DEPUTY CHAIR**: I have given the call to the minister.

**Hon ALANNAH MacTIERNAN**: I can understand the anger of the minister with responsibility for this legislation because in all of the discussions that we have had to date, we did not fight hard on opposing the amendment to clause 31. There was a clear understanding in all the discussions that if that were successful, our amendment would fall away and that that would be the accepted regime. I think that was a pretty clear understanding of the negotiations that had taken place. We now find that a radical change is proposed to clause 31. Bearing in mind the Minister for Industrial Relations has been very prepared to compromise, he withdrew clause 30B. He then sought to put the provisions of clause 30B into a combined new clause 31. The opposition then said that it wanted the existing clause 31, with only a small amendment. We were not going to go, and we did not go, to the barricades on it, because it had been clearly understood that having moved that amendment, they would then support the clause as amended. Now, no—we have these new clauses.

I disagree with Hon Rick Mazza's analysis of gross negligence. At section 18A of the Occupational Safety and Health Act, there is a definition of "gross negligence". Section 18A(2) states —

> A contravention of a provision mentioned in subsection (1) is committed in circumstances of gross negligence if —
>
> (a) the offender —
>
> (i) knew that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty is owed under that provision; but
>
> (ii) acted or failed to act in disregard of that likelihood;

That is exactly what is in clause 30A of the bill now. The member will completely and utterly undermine the whole purpose of clause 31 if he puts that standard back into clause 31.

**Hon Nick Goiran**: It is not in clause 30A, minister. Nowhere in clause 30A at the moment does it say "gross negligence".

**Hon ALANNAH MacTIERNAN**: It does not say "gross negligence", but it does give a test that is identical to the test for gross negligence as set out in the Occupational Safety and Health Act. If members look at what we have just introduced, we have said "the person engages in the conduct knowing that the conduct is likely to cause the death or serious injury of an individual and, in disregard of that likelihood, acts". That is identical to this clause. That is the meaning of gross negligence in Western Australian law. This provision, which was designed to capture the failure of a duty of care outside of gross negligence, will be rendered ineffective. It will reintroduce that higher standard that we put in clause 30A. I implore members who have concerns about some of the penalties to move amendments in relation to those penalties, but please do not undermine the whole schema of this legislation. Please do not disappoint all those families who actually thought we had bipartisan support on these principles and would

ensure that in cases in which there had been a failure of duty of care, we would do something to ensure that there is a reasonable penalty that reflects the loss of life or serious injury that occurred.

**Hon RICK MAZZA**: In her first response, the minister said "what Hon Rick Mazza has done". Actually, Hon Rick Mazza has not done anything yet. All I have done is move an amendment. It will be up to the chamber.

**Hon Alannah MacTiernan**: But you moved it.

**Hon RICK MAZZA**: I have moved it, but at the end of the day I was entitled to move it, and it will be up to the vote of the chamber.

**Hon Alannah MacTiernan** interjected.

**The DEPUTY CHAIR**: Members! Hon Rick Mazza is speaking.

**Hon RICK MAZZA**: Clause 30A refers to someone deliberately putting someone at risk of serious injury or death—reckless negligence. They have deliberately done it. All that happened when we opposed clause 30B was that everything was shifted into new clause 31. We are talking about having a higher test of gross negligence. The term "gross negligence" is used in the Model Work Health and Safety Bill. There is a definition of "gross negligence".

**Hon Alannah MacTiernan**: No, there is not, member.

**Hon RICK MAZZA**: Not in this particular bill, but I think it has established what gross negligence is. If someone has been negligent —

Several members interjected.

**The DEPUTY CHAIR**: Members, Hon Rick Mazza has the call and the minister will respond shortly.

**Hon RICK MAZZA**: If someone has been negligent, even though it is unintentional, that is the test for this. The minister referred to the families and read out some circumstances that in some ways is trying to make out that we are heartless brutes in all of this. That is far from the truth. I understand what some of these families are going through. I was on the phone for a lengthy period yesterday with a father of a victim of a workplace accident. It is not easy. We are trying to find some balance between what is right as far as workers are concerned, and also for employers. I think everybody here would agree that the objective is to improve safety holistically between employers improving their safety procedures and performance, and also for workers to improve workplace safety. A lot of ground has been made over the last 20 years as far as that is concerned. We will often hear businesses say that it has been a thousand days since the last workplace accident. Everybody is working towards that outcome. I do not know that using a big stick will improve things that much. Speaking yesterday to the father of a victim of a workplace accident, a lot of his angst was with the penalty that was handed down by the magistrate. Regardless of what we put here, at the end of the day it will be up to the judiciary to make a determination and hand down a penalty. I put up this amendment because I do not want employees, farming families or others to be caught up in something that they have not deliberately done. I think that the test of gross negligence is a sound one. That is why I moved the amendment. I ask members to support it, but I suppose that, at the end of the day, we will have a vote and see how that plays out.

**Hon ALANNAH MacTIERNAN**: I note that this is complex, but I want to make it clear that there is no definition of "gross negligence" in the model Work Health and Safety Act. Let us get that straight.

**Hon Nick Goiran**: No-one has said that.

**Hon ALANNAH MacTIERNAN**: I am not saying that Hon Nick Goiran said it. The planets do not orbit around your sun, member!

I take members to division 5, section 31 of the model code. The concept it uses is "reckless". It says that one of the requirements of an offence is —

> the person is reckless as to the risk to an individual of death or serious injury or illness.

The concept of "gross negligence" is not written into the terms of the model act. However, in the existing occupational safety and health legislation, there is a provision that describes gross negligence. I have read it out and it is identical to what we have enshrined in clause 30A; that is, the offender knew that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty is owed under that provision, but acted or failed to act in disregard of that likelihood. We are holding that standard for clause 30A. For clause 31, we are trying to say something different—that in this clause it is not gross negligence, it is not recklessness; we are talking about a failure of a duty of care when that failure leads to serious injury or the death of a worker. Of course, the magistrate will always be able to determine precisely what the penalty will be and no doubt the magistrate will take into account all the circumstances to make a determination. However, we understand and know that that will be considered by the judicial officers and they will look at the envelope that the Parliament has determined should be the appropriate range of penalties and they will make an assessment within that range. We are saying that we believe very strongly that, given the paltry sentences that have been handed out for deaths, we need to increase that envelope. We need

to set the penalties at a much higher level because, under the existing regime, we are not getting an answer that is commensurate with the travesty that has occurred because of that behaviour. I understand from the minister that this amendment will not be acceptable in the other place. The minister has been very flexible and has given way on many points.

**Hon Nick Goiran**: How? On what point has he given way?

**Hon ALANNAH MacTIERNAN**: He has given way on many points. We have allowed all Hon Nick Goiran's little fantasies about proclamation dates.

**Hon Nick Goiran**: Name one. I am asking you to name one.

**Hon ALANNAH MacTIERNAN**: We have removed clause 30B. We have been cognisant of the concerns about the levels of penalty that could be dealt out by a magistrate and the minister has been prepared to be flexible. But this is one thing that we cannot accept because this will completely and utterly undermine the schema of this legislation.

**Hon Nick Goiran**: Boland recommended it.

**Hon ALANNAH MacTIERNAN**: We do not believe that Boland recommended it. We have put into clause 30A what Boland recommended. This is not a failure of that level in clause 30A—gross negligence, recklessness or whatever members want to call it—we are talking about this lesser order; nevertheless, at the end of the day, we are talking about someone's child or someone's partner who has been killed. There needs to be some prospect of justice. I urge members that if they have problems with specific penalties, we can have a debate about that, but, please, do not undermine this fundamental principle and do not say to these families, "No, sorry. We are just not going to be able to provide any justice into the future for your families. We're going to keep this regime, fundamentally. We are not going to be having greater penalties for failure of duty of care in these instances." This is a really important area. There have been 112 level 3 charges in the last 10 years. We believe that in the cases such as those that have been mentioned, the penalties have been too low. We need to expand that envelope. At the end of the day, it will be up to the magistrate. We all understand the judicial principle—magistrates look at the overall framework that has been set by the Parliament and make their determination within that framework.

**Hon ALISON XAMON**: I rise to indicate that I absolutely will not be supporting the amendment proposed by Hon Rick Mazza. I have a very different idea from what other people have said "gross negligence" means. The key problem here is the inclusion of "gross" in front of "negligence". Gross negligence, as identified by Hon Nick Goiran, is a term of law that is clearly defined within case law. I have a really clear understanding about what "gross negligence" incorporates. It is a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party. By definition, as defined in case law, members have just talked about a standard that has to be met that is the equivalent of clause 30A. The irony of this is that I would have thought that those members who are particularly concerned about harsh penalties for people who engage in terrible acts of recklessness that result in people dying would be opposed to clause 30A. I would have thought that people would have been opposed to that clause. I am concerned that including this amendment as it is written now will effectively turn clause 31 into something akin to clause 30A, which means we will lose that staggered range of penalties we were seeking to have within this bill.

We know the current penalties are inadequate. I think everybody agrees with that. I have not heard anyone in this chamber say otherwise. That has been understood through multiple inquiries. We have seen that through things such as the $38 000 penalty for the death of Wes Ballantine. We know that the penalties at the moment are woefully inadequate. We know that it is already too difficult to ensure that we have penalties that are remotely commensurate to the level of negligence and disregard that has occurred on worksites. But including "gross negligence" in the way that it is proposed in the amendment will make clause 31 completely unworkable. Suddenly, we will have removed the capacity of a whole suite of people who would probably be far more likely to be made accountable for their conduct than they ever would be under clause 30A effectively exempt from any penalties whatsoever. That is going to be the effect of this amendment. There is no way in good conscience that I could ever support doing that. I think it is absolutely critical that if people are making business decisions with a wilful disregard and they are prepared to demonstrate gross negligence towards their workers, the penalty needs to be commensurate. The member's amendment puts in something that is absolutely inadequate. I will not move an amendment; I would like the clause to stand as it is now. We are talking about "gross negligence" as opposed to "negligence". The member has put in his amendment a standard that would make this clause completely unworkable and would result in serious injustices. Again, I remind members that gross negligence, as defined in case law, is a conscious, voluntary act or omission in reckless disregard of the legal duty and of the consequences to another party. It is a really high standard.

*Tabling of Paper*

**Hon MICHAEL MISCHIN**: Firstly, before I proceed, the minister read something out. She stopped short of one particular set of comments but she has not told us what she was quoting from.

**Hon ALANNAH MacTIERNAN**: They were comments from family members given in evidence to the Senate inquiry. I am happy to table the document.

[See paper 4265.]

*Committee Resumed*

**Hon MICHAEL MISCHIN**: What was the name of that particular case, when did the death occur, what was the penalty imposed and what was the charge?

**Hon Sue Ellery**: Seriously?

**Hon MICHAEL MISCHIN**: Yes, seriously.

**The DEPUTY CHAIR (Hon Robin Chapple)**: Members! When I call from the chair, I want everybody to resume their seats, and we will move on. I do not want interjections across the floor. This legislation is going to take a while and I want it conducted in good faith. I want a proper process; I do not want interjections.

**Hon MICHAEL MISCHIN**: This is very important because my understanding throughout the great debate leading up to the introduction of this bill was that it was critical, because of these now three cases that the minister has quoted in support of this, that there be an offence of industrial manslaughter. It was because there were such egregious failures on the part of employers and officers of employer companies that were not satisfactorily dealt with. We have heard about the very sad cases—three in particular—when the penalties handed down were a travesty, according to the government, and obviously were too low. But when we ask what these people were actually charged with, we find that there is a very different story to tell. Now the minister is saying, "Look, we worked out a structure of penalties and offences, and at the top of that is proposed section 30A, and that is industrial manslaughter. It is really important that we have industrial manslaughter to show how terrible some conduct can be and how it ought to be punished." The minister spent the last half an hour telling us that it is no different from what is already in the Occupational Safety and Health Act 1984. I will tell the minister which one it is, to help her out: it is section 19A(1), which states —

> If an employer contravenes section 19(1) —

That is the set of duties that have been translated in a slightly different form in the current bill —

> in circumstances of gross negligence, —

The minister keeps telling us that the concept of gross negligence is not known in Western Australian law —

> the employer commits an offence and is liable to a level 4 penalty.

Subsection (2) states —

> If —
>
> (a) an employer —
>
> (i) contravenes section 19(1); and
>
> (ii) by the contravention causes the death of, or serious harm to, an employee; and
>
> (b) subsection (1) does not apply,
>
> the employer commits an offence and is liable to a level 3 penalty.

Let us look at what "gross negligence" means—this foreign and alien concept to the law of Western Australia. It is not hard; it is in section 18A of the Occupational Safety and Health Act 1984. With respect, there seems to be no problem about clarity and the like to define it in the same way if it achieves exactly the same thing as proposed section 30A is able to achieve. For each of these cases—the Ballantine case that we have heard the minister recently talk about, the Paspaley Pearls diving case and the electrocution case—the suggestion was that the cases showed that there must be an offence of industrial manslaughter. It is already there, so why has it not been charged? It is all very well to whine about how these penalties obviously are not good enough and that the courts got it wrong, but why were they not appealed? Why was a charge of gross negligence not made against the company or that employer? I will tell members why. It is because the elements of the offence could not be met, and that will not be any different under proposed section 30A. Unless each of the elements of the offence can be satisfied beyond reasonable doubt, we will not end up with any penalty at all. Let us get back to basics. It is all very well for the minister to get up and make heart-rending speeches about the tragedy of these cases. That establishes nothing at all except that there was a tragedy. It does not help to prove a single one of these cases, let alone that the words proposed by the government will make the slightest bit of difference.

Hon Alison Xamon interjected and said something about increasing the available penalties, and I entirely agree. We went through this exercise in 2017, as I recall. To get an idea of how much we can rely on what the minister and the government say about any of these tragedies, remember that the second reading speech, no less, contains three examples to show how terrible it was that workers were being killed at workplaces. The implication is that employers were getting away with having disregard for the safety of their employees. However, when we picked through them, we found that in one of the cases, the minister gave the wrong information in the second reading speech. I am not saying that is the minister's fault—the minister who now says that we are being dishonest. All of them, as I recall, involved employees doing stupid things that killed their fellow workmates. It was nothing to do with the employers at all. We went through the exercise of increasing the penalties back then. What we have now revealed is that for all the hype and all the talk about how industrial manslaughter is the key to this reform, the offence is already there, and has been since 1984. So why has it not been prosecuted, minister? I will tell her why.

It is because it is a question of proof and evidence. It will not be any different under this legislation unless the government reverses the onus of proof and changes the elements of the offence. But to have a revelation now that it is no different from what is already there—what a fraud on these families! It is not a question of greasing around it and saying that they will now increase penalties. If the family members look at the document that the minister quoted from and tabled the other day, they will see that every one of these tragedies and cases stresses the need for industrial manslaughter as a means of fixing the problem that they perceive in the way their particular anguished cases and tragedies have been dealt with. We are told that there is no difference. So much for that. That is part of the problem that we have been facing. The government is focused on industrial manslaughter at proposed section 30A. It threw in a totally different offence with different elements to have a summary prosecution under proposed section 30B, and now it will not clarify the means by which there is to be a tiered set of criminal responsibility, which would justify a different set of penalties and one that would involve imprisonment for what was previously, I suggest, a level 3 offence. That is the thing that ought to be focused on, but it gets clouded with an awful lot of rhetoric about things that are not helpful and, in fact, not accurate. The minister says that one of the checks and balances is the question of what is reasonable in the circumstances . Where is that to be found, minister? Where is the "reasonable in the circumstances" bit in proposed section 31? Perhaps the minister can point to the manifest injustice of what is going on. The cases that the minister has cited, one of them dating back to 2006 or something, could well have been cured by additional penalties; we are not given any information on the circumstances of the offence, let alone what were the charges and the particulars of the breach of duty that caused a magistrate to impose a particular penalty. We keep being told that what she is telling us is supported by the facts. I do not see it.

It seems to me that the way this should have been dealt with, instead of trying to hype up industrial manslaughter—the minister is introducing this as a response to calls for all these tragedies—and this being a fix, would have been to be forthright about it.

**The DEPUTY CHAIR**: Hon Michael Mischin.

**Hon MICHAEL MISCHIN**: The minister is just rebadging section 19A(1) of the Occupational Safety and Health Act as industrial manslaughter; that is all she is doing. The minister is trying to increase the penalties for offences that are already capable of dealing with this, but she is not being honest about it and saying, "We are simply increasing the penalties for what's already there." She is complicating it by making them indictable offences, in some cases requiring the Director of Public Prosecutions to prosecute these offences before a jury. According to the DPP—this is my own thought as well, having had something like 24 years' experience as a prosecutor—that would make it very, very difficult to prosecute. The investigations will be carried out by WorkSafe inspectors who, with the best will in the world, are not police officers who are experienced in compiling a brief. The minister is imposing all sorts of responsibilities and it will not make proceedings any quicker or shorter; it will drag them out. None of that is being revealed by the government. That is why we have a regulatory approach under the Occupational Safety and Health Act: it is quicker, it gets the case before the magistrate and it is dealt with. There are other approaches that could have solved all these things, but the government wanted to show that it was being tough and has instead made a mess of it.

I will have questions about each of the cases that the minister has cited, because she is inaccurate. She has either not provided details or has provided incomplete and misleading information in respect of each of the three cases that she has quoted.

**Hon Alannah MacTiernan**: How do you know those three —

**Hon MICHAEL MISCHIN**: Because I have read the stuff on the WorkSafe website and compared it with what the minister has said in this chamber.

**Hon Alannah MacTiernan**: Tell us where they are wrong.

**Hon MICHAEL MISCHIN**: I will get to those when we get to the industrial manslaughter provision that the minister says is going to make such a difference. We will get to those.

I refer to the amendment proposed by Hon Rick Mazza. What is the government's objection to it as a matter of law? We already have a tiered set of offences—level 4, level 3, level 2 and level 1—under the existing legislation. We have already heard that the level 4 tier is no different, in any material way, from what the minister has put into clause 30A. The minister is saying that there is some reasonableness element in what is going to be a category 1 offence under clause 31(1). Perhaps the minister can point to that. Where is the "what is reasonable in the circumstances" bit?

**Hon ALANNAH MacTIERNAN**: I agree with the member that there will probably not be a huge number of prosecutions under the industrial manslaughter clause 30A. I agree with the member that establishing mens rea is always difficult. We know that that is a very high standard.

**Hon Michael Mischin**: There is no concept of mens rea in Western Australia as a matter of law.

**Hon ALANNAH MacTIERNAN**: It is the concept of the knowing element, perhaps, if we translate it.

**Hon Michael Mischin** interjected.

**The DEPUTY CHAIR**: Members!

**Hon ALANNAH MacTIERNAN**: We do not disagree that it is very hard to satisfy the test of establishing that the person who failed in their duty did it with a consciousness that it was likely to cause death or serious harm. Hon Rick Mazza is now seeking to introduce that test. We accept that there are not going to be a lot of prosecutions under proposed section 30A. But in addressing these various cases, a really important part of what we are doing is that for a breach of duty of care when that element of consciousness that the breach was likely to cause death or serious injury is satisfied—in circumstances whereby it can be clearly established that there has been a breach of that duty of care and a consequential death or serious injury has followed from that—there will now be an increased financial penalty and the prospect of a term of imprisonment. That is a change in regime; it is different from what exists now. We believe that that is going to contribute to a culture change, and we believe that, should there be an offence, it is more likely that we will get a penalty that is commensurate with the loss that has occurred. I think it is really important that Parliament communicates with the judiciary via this legislation. The member will know that we say this all the time. We jump up and down and want mandatory penalties for this and that in relation to other criminal law matters. The argument is that if we set these higher penalties, that creates a different frame under which the magistrate or judicial officer makes their determination.

There will probably not be a lot of cases that are prosecuted under proposed section 30A, because we absolutely understand that establishing that knowingness is always a challenge, and most of the prosecutions will continue to be under these sorts of provisions, which are provisions for breaches of duty of care that have led to death or serious injury. As I have said before, the concept of duty of care, as has been developed in this legislation, has embedded into it this concept of what is reasonably practical. That means, at any particular time, what is reasonably able to be done in ensuring health and safety. This includes taking into account and weighing up all the relevant matters, including the likelihood of the hazard or risk occurring; the degree of harm that might result; whether the person concerned knew or ought to have reasonably known about the hazard and the ways of eliminating or minimising it; and then assessing the extent of the risk and the available ways of minimising the risk and the cost associated with the available ways of eliminating or minimising this risk, including whether the cost is grossly disproportionate to the risk. That is a very fair summary and a reasonable set of principles to embed into the concept of duty of care.

**Hon ALISON XAMON**: I want to pare this back to exactly where it fits within the clauses that immediately follow clause 31. Members need to bear in mind that clauses 31, 32 and 33 are meant to be read together. As has just been said, it is about the failure to comply with a health and safety duty. After reading clauses 32 and 33, they are—this is the language I would use—there but for the grace of God go I provisions in which we talk about a health and safety duty having been breached. In one instance, it simply identifies that a breach has occurred, which is in category 3. Category 2 states that the failure exposes an individual to a risk of death or of injury or harm to the individual's health. In both those instances, the penalties will apply because a duty has been breached, but there but for the grace of God the worker or whoever else has been exposed is actually okay.

The reason why there are tougher penalties in category 1 is that we are still talking about a breach of health and safety, but in this instance the failure has caused serious harm to or the death of an individual. It defies belief that, although this is all about breaches of duty, when the worst possible outcome occurs—that is, someone has been either killed or seriously injured—we would suddenly make it harder than ever to prosecute someone for that breach of duty. It defies belief, because when we are talking about gross negligence, it is an extremely high test, as I have said. When the worst possible outcome occurs as a result of a breach of duty and that person has not been able to escape death or serious injury, why would we suddenly make it almost impossible to penalise the person responsible for having committed that breach? As I keep saying, the way that "gross negligence" is defined in case law makes

it quite clear that the standard of proof is intended to replicate what we have in clause 30A, which is also why, interestingly, it is equivalent to the industrial manslaughter laws in the Australian Capital Territory, Victoria, the Northern Territory and Queensland, as was picked up by the Standing Committee on Legislation. People can have arguments about whether they think that it is likely that clause 30A will have an effect if they think that it is ever likely to be able to be prosecuted. That is certainly a valid debate to have about clause 30A. As someone who has been pushing for industrial manslaughter provisions, albeit in the Criminal Code, for more than a decade, I hear that it will be impossible to prosecute and then I hear in the next breath that all these innocent people are apparently going to go prison. People will have to figure out where they stand on that. I think that the worst of the worst will go to prison and I do not feel any sadness about that. Let us have that debate then. But clauses 31, 32 and 33 are meant to be read as a continuum as to the effect of a breach of duty of care, and if someone is killed or seriously harmed as a result of a failure of that duty of care, it does not make sense to make it virtually impossible to pursue the prosecution of their employer, especially when employers can be prosecuted for a breach of duty of care when people have been spared, by the grace of God, from injury or death.

**Hon NICK GOIRAN**: I want to respectfully disagree with the comments made by my learned friend Hon Alison Xamon. I disagree with her for a few reasons. First of all, I go back to my earlier remark and ask members to consider clause 31(4), which states —

> A person charged with a Category 1 offence may be convicted of a Category 2 offence or a Category 3 offence.

If a person does not meet the test for category 1, they could still be charged under category 2 or category 3. The main reason that I disagree with the honourable member is that the Standing Committee on Legislation went to some length to explain the difference in the legal test in the provisions. I ask members to consider the category 2 offences legal test. The honourable member said that they need to be read together, effectively as a package. According to the Standing Committee on Legislation report at page 77, paragraph 5.24 —

> The submission from the Minister for Mines and Petroleum, Commerce and Industrial Relations, Hon Bill Johnston MLA notes that category 2 is 'unmodified' from the offence provided in the Model Bill.

In other words, this bill is doing what the model bill asks us to do at category 2, and the government is saying that that is what we should agree to. The model bill says that this is the test for category 2, and that is what we are doing here. What does the committee say about category 1, which is the offence provision that we are currently considering? At page 73 of its report, the committee states —

> The category 1 offence in the Model Bill requires a standard of 'recklessness' that has been removed from cl 31 of the Bill.

To be clear, the category 2 offence has a standard, which is the lower standard of simple negligence, and that has been repeated in the bill. We the opposition take no issue with the test that has been proposed for category 2 because it is consistent with the model law. Why we take issue and why we support Hon Rick Mazza is that the model law has been deviated from for the category 1 offences. The committee report states —

> The category 1 offence in the Model Bill requires a standard of 'recklessness' that has been removed from cl 31 of the Bill.

The committee then goes on to explain what the Boland report had to say —

> The Boland Report noted there have been few successful prosecutions for category 1 offences due to difficulties in proving recklessness.

Boland said that the model law was asking for this highest possible standard of recklessness and it has been too hard to meet that test. The committee report continues —

> Similarly, there has only been one conviction of a level 4 offence in Western Australia which also requires the prosecution to prove a conscious choice to take an unjustified risk.

We still have this top standard of recklessness—that is what the model law recommended—but Boland said that it has been too hard to get there and the committee says that it has been too hard to get there in Western Australia. The committee report continues —

> The Boland Report recommended including a standard of gross negligence for category 1 offences. It recommends using the following definition of gross negligence applied by the High Court of Australia in *Patel v The Queen*:

It goes on to quote that particular High Court case. The committee report then states —

> This would make it easier to prosecute a case than the standard of recklessness in the Model Bill …

The minister and the honourable member who just spoke said that it will be more difficult, but the committee report states —

> This would make it easier to prosecute a case than the standard of recklessness in the Model Bill because it does not require proof that the relevant act was intentional. Instead it applies an objective standard.

The committee report concludes —

> Clause 31 does not include a standard of gross negligence as recommended by the Boland Report.

Again, the model law states at this point that we should agree to a standard of recklessness. The government does not agree with that and Boland does not agree with that. Boland says, "Let's go down to the next level of gross negligence." But this bill does not include that either. The committee report goes on to state —

> It imports a lower test of negligence by requiring the prosecution to prove the employer has breached their duty of care according to what is reasonably practicable.

There are three tests. Members should not let the minister or any other member convince them that there are only two tests. There are not; there are three tests. It is unequivocally set out in the evidence provided unanimously by the Standing Committee on Legislation that there are three tests. I have not heard one member suggest that the recklessness tests should be put into clause 31.

The option is either to go with the amendment of Hon Rick Mazza, who is simply introducing the test Boland suggested, or to go back down to the absolute lowest standard. Members could do that, but they would have to ask themselves whether it is appropriate to bring in the very lowest standard in circumstances in which it substantially deviates from the model law. Remember, the model law asks for the highest standard and they are going for the bottom standard; is that appropriate? Is it appropriate to deviate to that level? Is it appropriate to deviate to that level when we know there has been no adequate consultation on this issue? Remember, there was the ministerial advisory panel, which the government boasted about. I have said that that has been a corrupted process; other members will disagree. The point is that this issue was never brought before the ministerial advisory panel. The government does not even disagree with that point. The government accepts that and acknowledges that it never brought in this issue. This was introduced at the last minute as an announcement by the Premier at a Labor state conference. That was the first time it was brought to everybody's attention. After that, there was no consultation. What is happening? We are bringing in the lowest possible test, with the maximum possible penalties. It is no wonder that industry is up in arms about that.

What is the current state of the law in Western Australia? What will be different with the law in Western Australia if we agree with Hon Rick Mazza's amendment? The test will be the same. If we do not agree with Hon Rick Mazza and agree with the government, the test will be the same—that is, the lowest possible standard—but the penalty will be high and introduce imprisonment for the first time, including sentences of five years, I might add. We could agree with Hon Rick Mazza and do what the Boland report recommended, and then we would be more in line with the model law by increasing the penalties and increasing the test. I have also heard in the debate members suggest that we are dealing with only the current penalties. No, that is not correct. The committee's report sets out that at the moment a five-year penalty is not applied to one of these types of offences.

For all those reasons, we remain of the view that Hon Rick Mazza's amendment will bring us more into line with the other states. Again, I encourage members to be across table 12. If there is one page of the entire report by the Standing Committee on Legislation members should read, it is table 12 on page 64, which sets out the three tests and very conveniently sets out where it applies in the current law of Western Australia, in the model law and in the bill. Hon Rick Mazza is asking us to agree to the standard being applied in the Australian Capital Territory, Victoria, the Northern Territory and Queensland. I am yet to hear why we should so fundamentally change that in circumstances in which it still remains open to the government at any time after this bill passes to do the consultation that was not done in this particular instance, and come back with another proposal. There is no reason why that could not be done. That has not been done in this instance, which is particularly strange. As I said in my contribution to the second reading debate, the government started out with what I would describe as a gold-standard consultation process. The government is to be commended for the consultation process it undertook at the very beginning. For some reason, when we got to industrial manslaughter, all that consultation process was abandoned, and the government said, "It's my way or the highway." We have heard more of that tonight. I regret, members, that I have not been persuaded by any of the minister's remarks and I support the amendment.

**Hon ALANNAH MacTIERNAN**: As I say, we will stridently oppose that. At the moment, under section 19A, as I understand it, there can be prosecution of an offence liable to a level 3 penalty without the introduction of this concept of gross negligence. It is important to understand that the Boland report was not a Law Reform Commission report and there was a bit of flexibility between the concepts. It was dealing with jurisdictions that have very different concepts woven into the legislation and I think when it was talking about those provisions, it was particularly looking at the ACT and the Northern Territory.

But I think the really clear principle here, the thing that deeply concerns us about this amendment, is that it would actually make it harder to prosecute because we would be in a situation in which previously we would have been able to prosecute the failure of duty of care, but instead we will have imported that concept of gross negligence. Hon Nick Goiran is saying that it is an intermediate thing; it is not the gross negligence that we previously know of in the Occupational Safety and Health Act because it is another thing. It is sort of an intermediate thing that has not been defined anywhere in the legislation. But the fundamental travesty is that this would actually make it harder to get a prosecution and to get a decent and fit penalty in cases in which there is a breach of duty of care. Members, we can go on all night, but this is fundamentally unacceptable. There are many things that we are prepared to move on, but we are absolutely totally opposed to introducing this concept and we will not be accepting it in the other place.

**Hon NICK GOIRAN**: I have been provided with a letter from the Australian Institute of Company Directors dated 17 September 2020. On the issue of clause 31, it says briefly, and I quote —

> The Government has proposed an amendment to clause 31 to refer to 'Category 1' as a 'crime' offence. However, there has been no proposed change to the legal test required in clause 31(1).
>
> As outlined in our previous correspondence, the AICD is concerned with the proposal to apply a test of 'negligence' to the Category 1 offence. As noted by the Standing Committee on Legislation … in its Report:
>
> > ***"Clause 31 does not include a standard of gross negligence as recommended by the Boland Report** … It imports a lower test of negligence by requiring the prosecution to prove the employer has breached their duty of care according to what is reasonably practicable."*
>
> In our view, a test of 'gross negligence', as per the Boland Review definition of the fault threshold should be imported to clause 31. This would still enable a tiered-approach as to the severity between the industrial manslaughter offence in clause 30A relative to the Category 1 offence in clause 31.
>
> Accordingly, we urge the Category 1 offence, as currently drafted, be opposed.

We, the opposition, are not suggesting that the current category 1 offence at clause 31 be opposed. I have moved an amendment that has been agreed to by the chamber and we support the amendment proposed by Hon Rick Mazza.

**Hon RICK MAZZA**: I will sum up on this. One of the reasons I moved this amendment is that clause 31 has jail time and a fine of up to $3.5 million for companies. Currently, the test for a category 2 offence is not dissimilar to that for a category 1 offence, and a category 3 offence is not that dissimilar either. Basically, it is that a person has a health and safety duty and they failed to comply with that duty. Under category 2 and 3 offences, we have a test of failure of duty. We currently have the same test in category 1, yet the penalties are substantially more, carrying jail time and multimillion-dollar fines. That is why I think category 1 offences require a higher test for prosecution.

**Hon ALANNAH MacTIERNAN**: I wish to explain. There is a huge difference. A category 1 offence is committed when there has been a death or a serious injury. The other categories do not require death or serious injury to have occurred. Honestly, I think this is incredibly irresponsible and destructive.

**Hon Nick Goiran**: How can it be irresponsible? Boland recommended it.

**Hon ALANNAH MacTIERNAN**: We have captured the Boland provisions in clause 30A. We are not going to debate this any longer. The member can debate it for as long as he likes. We have made our position very, very clear. The important thing is to get on and make a decision.

*Division*

Amendment put and a division taken, the Deputy Chair (Hon Matthew Swinbourn) casting his vote with the noes, with the following result —

Ayes (11)

| | | | |
|---|---|---|---|
| Hon Peter Collier | Hon Rick Mazza | Hon Tjorn Sibma | Hon Colin Tincknell |
| Hon Donna Faragher | Hon Michael Mischin | Hon Aaron Stonehouse | Hon Ken Baston *(Teller)* |
| Hon Nick Goiran | Hon Robin Scott | Hon Dr Steve Thomas | |

Noes (18)

| | | | |
|---|---|---|---|
| Hon Jacqui Boydell | Hon Sue Ellery | Hon Alannah MacTiernan | Hon Dr Sally Talbot |
| Hon Robin Chapple | Hon Diane Evers | Hon Martin Pritchard | Hon Alison Xamon |
| Hon Tim Clifford | Hon Adele Farina | Hon Samantha Rowe | Hon Pierre Yang *(Teller)* |
| Hon Alanna Clohesy | Hon Laurie Graham | Hon Charles Smith | |
| Hon Colin de Grussa | Hon Colin Holt | Hon Matthew Swinbourn | |

Pairs

| | |
|---|---|
| Hon Simon O'Brien | Hon Stephen Dawson |
| Hon Martin Aldridge | Hon Darren West |
| Hon Jim Chown | Hon Kyle McGinn |

**Amendment thus negatived.**

**The DEPUTY CHAIR**: I note that there is an additional amendment on the supplementary notice paper in the name of Hon Colin Tincknell. Does the member wish to pursue that amendment?

**Hon Colin Tincknell**: No.

**Hon NICK GOIRAN**: I think that the amendment in the name of Hon Colin Tincknell was a new clause 31, but I do not think that there are any further amendments to clause 31. That said, these are competing schemes, as the minister has suggested. As clause 31, as amended, is currently before us, is it the government's preference for clause 31, as amended, or for a new clause 31? I know that the minister said she was not inclined to proceed with new clause 31, but to what extent would there be a difference in the scheme if we were to proceed with the clause 31 that is currently before us, the government's new clause 31 or, for that matter, the third alternative, which is Hon Colin Tincknell's new clause 31?

**Hon ALANNAH MacTIERNAN**: We will not support Hon Colin Tincknell's new clause 31. Minister Johnston, who is a person of his word, has indicated that if the amendment to clause 31 moved by the honourable member was passed, we would take that as an indication that expressed the will of the chamber on clause 31. We will be consistent with what we have said, so we will not move our new clause 31. We will just accept the existing clause 31 as amended by the member.

**Hon NICK GOIRAN**: I understand that, minister. My question is: to what extent would there be a difference in the scheme if we proceed with clause 31, as amended, which is before us at the moment, instead of what was proposed by the government under new clause 31?

**Hon ALANNAH MacTIERNAN**: I do not intend to move that new clause 31. I do not think there is any point in delaying debate to discuss something we will not move.

**Hon NICK GOIRAN**: Earlier today, the minister said that there are different schemes and options. Albeit the minister is indicating that she does not intend to move it, one of those sits on the supplementary notice paper and it deals with the very issue that is before us at the moment, which is a failure to comply with health and safety duties causing death or serious harm. I note that there are a substantial number of elements or provisions in the proposed new clause 31 that are similar to the matter before us. I am simply asking: to what extent is one clause superior to the other? The government must have a view on that. If the view of the government is that it prefers clause 31 as it is currently before us instead of new clause 31, we have no problem with that. We certainly will not stand in the way of that. We are simply asking, for the record: what is the difference between the two; and what, if anything, will be lost or added as a result?

**Hon ALANNAH MacTIERNAN**: We have had these discussions behind the Chair. It was understood that if the member was successful in amending clause 31, that would be taken as the expression of the will of the chamber. That was made very clear before we had the discussion on the member's amendment. We are really keen to make progress on this bill. We are not keen to just satisfy the desire of the member to string this out as long as possible. We are going to stick to our word. We are going to stick by the agreement that was made by Hon Bill Johnston that if that clause was amended, we would take it that that was the preferred scheme and we would then not move our amendment.

**Hon NICK GOIRAN**: It is quite unbelievable because I am not asking the government about so-called deals and the like. Incidentally, the opposition is unaware of the so-called agreements, but nevertheless we will park that to one side. If the government says there are different schemes available, it is right for the chamber to be able to consider it. I draw to the minister's attention that she still has an amendment standing in her name at 60/31, which is to oppose the clause. That is the clause we are debating at the moment. It would be open to the chamber to agree with the minister's foreshadowed amendment to oppose this clause. It is certainly not my view that that should be the case, but it would be open, given that the government has foreshadowed that. I was simply asking what the difference was between the schemes. It seems that the government is either unaware of the differences and unable to provide that information to the chamber or is simply unwilling to do so.

I will take a moment now to compare and contrast. It will only take a moment, minister; it does not need to take a long time at all. This matter has been highly contentious, as demonstrated by the debate that has occurred today. I note that the three key elements in respect of what would define a person committing a crime in these circumstances are identical; that is, a person must have had a health and safety duty; they must have failed to comply with that duty; and the failure has to have caused death or serious harm to an individual. Where it appears that matters are different is that in new clause 31 there is a suggestion that the penalties should be ratcheted up to quite a significant level. The clause before us is clause 31. I draw members' attention in particular to line 19 on page 37, and line 1 on page 38, where the maximum penalty is five years' imprisonment. That would be for what is called a PCBU—a person conducting a business or undertaking—or, alternatively, a person who does not meet that definition. In either instance, the maximum penalty would be five years' imprisonment. If I compare and contrast that with new clause 31, the maximum penalty would be 10 years' imprisonment, at least with respect to an individual, if the crime is committed when they are conducting a business or undertaking. When the individual is not conducting a business or undertaking, it would be a maximum penalty of five years' imprisonment. For a person conducting a business or undertaking, the maximum imprisonment penalty is the same. Sorry, if it is a person conducting a business or undertaking, the penalty is substantially less—in fact it is half; it is five years' imprisonment instead of 10 years' imprisonment. If they do not meet that definition, it is the same.

In respect of the monetary penalties, I note that the maximum for a body corporate under the government's proposed amendment appears to be $5 million, whereas at the moment a body corporate could be fined $3.5 million. The minister can understand why the opposition certainly will not be agreeing with the minister's foreshadowed amendment, which is to oppose clause 34, and to proceed with new clause 31 because that would only exacerbate the problem that has already been debated at some length this evening. For those reasons, we certainly would not oppose the passage of clause 31 as it is currently now amended.

**Clause, as amended, put and passed.**

**Clause 32: Failure to comply with health and safety duty — Category 2 —**

**The DEPUTY CHAIR**: I note that there is an amendment on the supplementary notice paper in the minister's name. Minister, do you want to pursue that amendment at clause 32? I would not have thought you would, given the outcome of the previous answer.

**Hon ALANNAH MacTIERNAN**: I move —

> Page 38, line 16 — To delete "a Category 2 offence" and substitute —
>
> an offence (a ***Category 2 offence***)

I am advised that this is a drafting change.

**Amendment put and passed.**

**Hon NICK GOIRAN**: Clause 32 was considered by the Standing Committee on Legislation. Finding 24 reads —

> Clause 32 of the Work Health and Safety Bill 2019 is inconsistent with cl 32 of the Model Work Health and Safety Bill to the extent that it captures less serious injury. This is inconsistent with the approach in other harmonised jurisdictions.

The committee goes on to say in recommendation 4 —

> The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council whether it is necessary for cl 32 of the Work Health and Safety Bill 2019 to be inconsistent with the Model Work Health and Safety Bill.

What is the government's response to that recommendation?

**Hon ALANNAH MacTIERNAN**: The response of the minister is as follows. Clause 32 is titled "Failure to comply with health and safety duty — Category 2". Category 2 differs from the clause in the national model WHS bill in three elements. One, penalties have been increased—see comments under recommendation 3—and expressed in a manner consistent with the Western Australian parliamentary drafting requirements. Two, consistent with the current approach of Western Australia, alternative convictions for lesser offences are made by the courts. Three, the phrase "or of injury or harm to an individual's health" has been used in place of the term "serious injury or illness". The phrase noted is intended to be synonymous with the phrase it has replaced. The substitution was made to resolve issues identified during drafting to distinguish it from the term defined in part 3, "Incident notification", and the newly defined term "serious harm" in clause 31.

**Clause, as amended, put and passed.**

**Clause 33: Failure to comply with health and safety duty — Category 3 —**

**Hon ALANNAH MacTIERNAN**: I move —

> Page 39, line 2 — To delete "a Category 3 offence" and substitute —
>
> an offence (a ***Category 3 offence***)

This parallels a drafting change that was made in the previous clause.

**Amendment put and passed.**

**Hon NICK GOIRAN**: We are still on part 2, division 5, and the final clause in subdivision 3, "Other offences and penalties". I note again that this clause exercised the mind of the Standing Committee on Legislation. Finding 26 of the committee reads —

> The penalties in cl 33 of the Work Health and Safety Bill 2019 are marginally higher than those in cl 33 of the Model Work Health and Safety Bill.

Recommendation 6 of the committee states —

> The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council why the penalties in cl 33 of the Work Health and Safety Bill 2019 are higher than those in cl 33 of the Model Work Health and Safety Bill.

My question is: what is the government's response to that recommendation?

**Hon ALANNAH MacTIERNAN**: Effectively, the response is similar to, or the same as that for, recommendation 3. As acknowledged in paragraph 2.9 in the forty-third report, the Western Australian Parliament passed legislation to increase workplace safety and health offence penalties under the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994. The increased penalties were based on an equivalent offence provision within the national model. The penalties were further increased to incorporate the inflation rate since 2010 when the drafting of the national Work Health and Safety Bill was finalised and some rounding. It is basically a modernisation of the penalties that were set in 2010 under the model bill.

**Hon NICK GOIRAN**: That brings us to the appropriate time to raise the penalty amounts. I note that at page 80, the Standing Committee on Legislation states —

> The fines that can be imposed for the Category Offences —

This is the last of those category offences —

> are described in dollar amounts rather than penalty units. The experience in other jurisdictions which have taken this approach is that the fines remain at the same level despite inflation. In contrast, the value of penalty units, where they are used, have increased across participating jurisdictions.

The committee goes on at paragraph 5.41 to say —

> The Boland Report recommends that penalties be increased according to the Consumer Price Index and that the value of penalty units in the participating jurisdictions be adjusted as needed. This recommendation is designed to ensure penalties continue to retain their value as a deterrent.

It concludes by saying —

> The approach to the Category Offences in other jurisdictions is set out in Table 17.

Table 17, on page 81 of the committee's report, sets out the various jurisdictions. Interestingly, Western Australia uses a dollar amount approach, as does the Australian Capital Territory, Tasmania and South Australia. The Northern Territory uses the dollar amount, however, it applies penalty units for industrial manslaughter. Of particular relevance is the approach taken in New South Wales and Queensland, where they use penalty units. This all led to the Standing Committee on Legislation in its forty-third report, tabled last month, to make this recommendation —

> RECOMMENDATION 7
>
> The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council whether it is necessary for the penalties in Part 2 of the Work Health and Safety Bill 2019 to be described in dollar amounts instead of penalty units.

My question is: is it necessary for them to be described in dollar amounts?

**Hon ALANNAH MacTIERNAN**: The response provided by the Minister for Industrial Relations is that penalties in the national model WHS bill were expressed in monetary amounts—that is, dollar amounts. The same approach was taken in the Occupational Safety and Health Act and the Mines Safety and Inspection Act. The tripartite Ministerial Advisory Panel on Work Health and Safety Reform, which provided the minister with recommendations

on adopting the national model, made no recommendation for penalties to be expressed in an alternative way to monetary amounts. The default drafting approach of deferring to the model clauses was therefore adopted for monetary penalties. I am not sure that penalty units are widely incorporated in Western Australia.

**Hon MICHAEL MISCHIN**: Clause 33 is essentially about a failure to meet a duty. Am I correct in thinking that it is equivalent, in material terms, to section 19A(3) of the OSH act in the case of an employer?

**Hon ALANNAH MacTIERNAN**: I am advised that that is correct.

**Hon MICHAEL MISCHIN**: Currently under section 19A(3), an employer who commits an offence in contravention of that subsection is liable to a level 2 penalty. A level 2 penalty, in the case of an individual, is a fine of up to $250 000. Would that be right?

**Hon ALANNAH MacTIERNAN**: The member's first question was: what would be the equivalent—sorry, can the member just—was it 19A?

**Hon MICHAEL MISCHIN**: I put to the minister that clause 33 is, effectively, the equivalent of section 19A(3) of the Occupational Safety and Health Act currently, inasmuch as there is a breach of duty of care, yet no consequences flow from it—no harm or death. Currently, a breach of section 19A(3) makes someone liable to a level 2 penalty. I seek confirmation on whether I am correct.

**Hon ALANNAH MacTIERNAN**: As far as I can determine, the level 2 penalty applies to section 19A(3) of the Occupational Safety and Health Act, which seems to be roughly the equivalent of clause 33, which is a breach of duty without there being a consequence of that breach of duty. As I understand it, we have, under this structure, followed the model law. I suspect the member will point out that the penalties for this provision appear to be reduced. That seems to be the case, bearing in mind that this is when there is a breach of duty of care and no consequence has flowed from it.

**Hon MICHAEL MISCHIN**: I was going to get to that and ask why a breach of duty without any consequences flowing from it, having regard to talk about changing workplace cultures, standards and the like, attracts less than half the current penalty prescribed. Is the minister able to help me out there?

**Hon ALANNAH MacTIERNAN**: Under this legislation, we have much higher penalties for consequences that have led to death or serious injuries or when it is possible that they would have led to death or serious injuries. It is true that for breaches from which no consequences occurred, by following the model code, there is a lesser penalty. That is because there is not an exact equivalence in the Occupational Safety and Health Act with the scheme under the model act. We have followed more the scheme of the model act rather than the scheme in the current Occupational Safety and Health Act.

**Hon MICHAEL MISCHIN**: The point is that previously there were three categories of offences, which were very simple. There was gross negligence, as defined, which was the most serious if there was death, serious harm or the like. That was at the top of the hierarchy. It went down to a very broad based section 19A(3) offence. What has been selected in accordance with the model legislation has several levels of offending, with increased penalties, depending on the gravity and whether there is any consequence or risk of consequences. Why is that approach preferable? It is one thing to have model legislation, but it does not necessarily mean that it is easier for the authorities to prosecute. Correct me if I am wrong, but there is no guarantee in this that any of the penalties in the cases that the minister outlined last week and today would have been any different under the penalty regime being contemplated by this legislation. Would that be right?

**Hon ALANNAH MacTIERNAN**: The cases I read out were all cases that had a consequence. They were all cases in which failures caused death or serious harm to an individual, so they were all cases that would fall within clause 31, under which there will be an increased penalty envelope. They were not cases for which there was no consequence. We are strongly of the view that had these matters been prosecuted under this legislation, it is highly likely that a higher penalty would have been imposed and there would have been, for the first time, the possibility of imprisonment as a consequence of having caused death or serious injury because of a failure of duty.

**Hon MICHAEL MISCHIN**: That is not right, minister. I will take the minister to the Paspaley Pearling Company prosecution. That was a charge of a breach of duty under section 19(1) of the Occupational Safety and Health Act 1984.

**Hon ALANNAH MacTIERNAN**: I am sorry; can I just clarify: I was talking about the cases of Zappelli and Ballantine.

**Hon MICHAEL MISCHIN**: That is two cases, not four. Those cases were mentioned today, but the minister mentioned the Paspaley Pearling Company last week, so I assumed she was also including that, because she talked about that being inadequate.

**Hon Alannah MacTiernan**: That was a case that was inadequate, yes.

**Hon MICHAEL MISCHIN**: There were inadequate penalties for that; correct? Last week, the minister called it a travesty and said that it was illustrative of the need to have an industrial manslaughter offence. The charge there was contrary to section 19A(3) of the Occupational Safety and Health Act, under which there were no consequences for a breach of duty on the part of Paspaley Pearling, and the equivalent now of clause 33 of the minister's bill, under which a lower maximum penalty is available. I think the minister can understand my confusion as to, firstly, the relevance of citing that case in the terms that she did, and, secondly, what material difference this legislation would have were those precise circumstances repeated or, indeed, were this legislation in place back then.

**Hon ALANNAH MacTIERNAN**: As I explained before, the member is correct about the charge that was actually laid. I believe that although there was a death consequent on the breach, the person involved was not charged under that provision. Nevertheless, we believe that the existence of the higher level penalties and the possibility of being liable for failure in duty of care that might result in imprisonment is something that will contribute to the culture. Although in that particular instance the charge that was ultimately laid did not include the element that death had occurred, nevertheless, a death had occurred. I am trying to get clarification here, but I believe that the charge was laid under section 19A(3) of the Occupational Safety and Health Act. If we had not changed the culture, we might not have had a different result in that case. We believe that now, because there is the possibility of imprisonment for a failure of duty of care and the possibility of a higher level of penalty, we will see a different workplace culture emerge.

**Hon MICHAEL MISCHIN**: This is part of the problem I have. It is very easy to say that, but the minister has absolutely no basis to support that proposition, having regard to the facts of that case as reported on WorkSafe's website. If Paspaley Pearling had in fact breached a duty under circumstances of gross negligence, it could have been prosecuted under the current legislation. It was not. If Paspaley Pearling had been in breach of a duty and that contravention had in fact caused the death of, or serious harm to, the diver, it could have been prosecuted under section 19A(2) of the Occupational Safety and Health Act, but it was not. Either WorkSafe grossly undercharged, having regard to the evidence, or there was simply not enough of a causal connection to establish that the diver's death was due to a failure on the part of Paspaley Pearling Company to have an emergency rescue procedure. If that were the case, the closest we could come to it under this bill would be a charge under clause 32—failure to comply with a duty, and that failure exposing an individual to a risk of death, injury or harm, and that does not carry a term of imprisonment.

On what basis does the minister say that it would have changed the culture somehow and resulted in either a higher penalty for the employer or a different charge? I am not relying here on the anguished misunderstandings of the next of kin and the like; I am asking the minister to tell me why, on the basis of the evidence that WorkSafe had available to it, it charged under that particular section and why the government is now complaining that the penalty was so egregiously low that it was a travesty? Presumably, WorkSafe was charging based on the evidence available to it, and the magistrate convicted accordingly. If Paspaley had exposed the worker to death or serious injury, but did not cause it, it still would not have resulted in a term of imprisonment, would it?

**The DEPUTY CHAIR (Hon Matthew Swinbourn)**: Member, I have to say, I am struggling to see how this line of questioning relates to clause 33, as amended. Can you just make sure that you tether what you are saying to clause 33? You have mentioned clause 32 and a number of other clauses; I am struggling to see the connection.

**Hon MICHAEL MISCHIN**: It is like this: we have established that clause 33 is the equivalent of section 19A(3) of the Occupational Safety and Health Act 1984. The minister is saying that the Paspaley Pearling Company prosecution is an example of why industrial manslaughter is necessary, but she cannot show that it would have been prosecuted under an industrial manslaughter provision, particularly as such a provision already exists in the Occupational Safety and Health Act. We have heard that clause 30A of this bill is the equivalent of section 19A(1) of the act. The only other offence that could have been charged would be under section 19A(2) of the act, which would still require proof of cause of death or serious harm. That is the equivalent of clause 31. The best that could be done under this bill, other than charging under clause 33, would be to charge under clause 32. The minister is saying that if this legislation had been in place, it would have encouraged a culture of safety by threatening imprisonment for those who breach the duty. Well, that is not the case. Clause 32 does not carry a term of imprisonment. So, two things: what is the Paspaley Pearling Company prosecution relevant to, and how would this legislation—whether under clause 31, 32 or 33—make the slightest bit of difference?

**Hon ALANNAH MacTIERNAN**: There were particular difficulties with that prosecution because there was a 20-minute period during which, unfortunately, the young diver was in the water, so there was some difficulty in actually establishing precisely which element caused his death. I can say that the company pleaded guilty to not providing a safe place of work. I go back to our fundamental premise that the new standards that we are introducing, not just clause 30A but also clauses 31 and 32, are really designed to ensure that companies and employers are more engaged, and more profoundly engaged, in providing safe systems of work. This company acknowledged that and

pleaded guilty to not providing a safe system of work. We believe that this collective of measures will be fundamental to changing that culture so that companies are less likely not to provide a safe system of work.

**Hon MICHAEL MISCHIN**: I am afraid that we are not going to get very far because the minister either cannot or will not understand the point. Companies will be more encouraged to have safe systems of work. The equivalent charge that WorkSafe would have laid is in clause 33 and the maximum penalty is half the one that this company was subject to—is that correct?

**Hon ALANNAH MacTIERNAN**: I go back to the potential for there to be other charges from not providing a safe system of work. I believe that the schema of this legislation will create that change. There might be evidentiary problems in particular cases, but there is no doubt that this company pleaded guilty to not providing a safe system of work. We want to make that less likely and we think that the package of penalties that we are putting in place will make that less likely.

**Hon MICHAEL MISCHIN**: That is what the minister says. Which particular new offence would be materially different in the circumstances that would have encouraged this company—gross negligence?

**Hon ALANNAH MacTIERNAN**: The provisions are in clause 31.

**Hon MICHAEL MISCHIN**: We will get to clause 30A and how it makes no material difference to what is currently in legislation, and how clause 30A carries a term of imprisonment and how gross negligence under section 19A carries a term of imprisonment but made no difference in this case. It is not a question of difficulty in proving; it is a question of WorkSafe or the Director of Public Prosecutions having to prove beyond reasonable doubt the elements of offence. What I will suggest in due course is that clause 30A will make it even more difficult to mount a prosecution that will lead to a term of imprisonment. The reality is that the evidence in the case of Paspaley Pearling supported only a breach of a duty of care, one that had no consequences in that particular tragedy other than a failure to provide a rescue plan, and no evidence to support the assertion that it led to someone's death; otherwise, there would have been a charge or a greater penalty. If the penalty was inadequate, why did the government not appeal it?

**Hon ALANNAH MacTIERNAN**: I have explained our rationale for this. The member will not accept it. I really do not have any more to add.

**Clause, as amended, put and passed.**

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

**Hon NICK GOIRAN**: This is the last clause under part 2 of this 16-part bill. It appears to deviate from the model law. Can the minister explain the rationale for the deviation with respect to volunteers and unincorporated associations?

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