OCCUPATIONAL SAFETY AND HEALTH LEGISLATION AMENDMENT AND REPEAL BILL 2004

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement -

Mrs C.L. EDWARDES: This clause deals with the commencement date of not only the Act, but also the various provisions. Will the minister tell us which sections and/or parts and/or provisions will be proclaimed, and why are different days fixed for the proclamation of different provisions? What work needs to be done before that happens?

Mr J.C. KOBELKE: I think the member would know, as a former minister of some experience, that one cannot normally give a specific answer to that sort of question. A range of things will need to be put in place. Although I am fairly confident that the people from WorkSafe WA and the Department of Consumer and Employment Protection have an indicative list, it will be subject to a range of things that will need to happen. In order for the tribunal to be established, it will be necessary to have someone in the commission who fits the requirements. It may also be necessary for certain procedural matters to be put in place. We also need to consider the fact that training programs will need to be put in place for the provisional improvement notices, and that may be a staged process. The member quite correctly drew attention in the second reading debate to the fact that the Mines Safety and Inspection Act is also being amended. I indicate to the member informally that we are using the same draftsperson for the amendments to that Act, and many of the sections in those two Acts will be the same. There are already some tie-ups between the Mines Safety and Inspection Act and the Occupational Safety and Health Act, and we need to take those into account. It may be necessary to proclaim parts of this Bill at different times to fit in with that. Until we know how quickly the amendments to the Mines Safety and Inspection Act will come on we will not know whether that will be midway through the process or will drag behind the process. We need a commencement clause that provides flexibility so that we can ensure that the two Acts complement each other and we do not run into problems by doing one thing before something that needs to precede it is put in place.

Mrs C.L. EDWARDES: I thank the minister for his answer. It is obvious as we go through the Bill that some clauses will need to follow on from others. It may help if I break it down so that we can talk about what is absolutely necessary. The training for the safety and health representatives cannot take place until the elections have been held. Will it be necessary to hold up the establishment of the tribunal until the training of the safety and health representatives has taken place? That will probably not be necessary, because there will still be other matters that can go to the tribunal. What steps will need to be taken now, and what clauses will need to be held over to allow that to occur?

Mr J.C. KOBELKE: Some of those details are best brought out as we go through the various clauses, because the member may have a pertinent question about what should precede a particular clause, and therefore about the timing, and that will relate to what the commencement date should be. I do not think it will be productive in this debate on the commencement clause to go through the whole Bill and say why we need different clauses to commence at different stages. The member suggested that the establishment of the tribunal is somehow contingent on putting in place the training for the health and safety representatives. That is not the case. A procedure is already in place whereby the health and safety representatives will be able to take disputes to the industrial magistrate. We are putting in place what we believe is a better model. The timing is not conditional upon that. We may, for good management reasons, decide that we want to hold up the commencement of certain clauses, but that will be a management decision made in light of all the facts at the time. It is not something that we can foretell now. The tribunal will replace matters that are currently handled through the Industrial Magistrates Court, and that may raise issues with regard to cases that are already afoot, etc. The example that the member alluded to in her question - that is, the need to train the health and safety representatives - would not be a reason for holding up the appointment of the tribunal.

Mrs C.L. EDWARDES: I take the minister's point that some of these matters may be more adequately dealt with as we go through the various clauses of the Bill. One part of the Bill that is very important, as I alluded to during the second reading debate yesterday, is the proposed amendments to the mining legislation. It is not clear from the discussions that have taken place where the mining industry sits with the transitional provisions and with the implementation of the establishment of the new committee and the abolition of the Mines Occupational Safety and Health Advisory Board contingent upon the amendments to the Mines Safety and Inspection Act going through both Houses of the Parliament. Perhaps the minister could explain that at this time, because some of those issues will not come up during the debate on the respective clauses as they deal specifically with the committee, so it is appropriate that they be dealt with here.

Mr J.C. KOBELKE: As I have indicated to the member, there is a range of complex issues, and it is not possible for me to answer them in a comprehensive way. A lot of work is going on. The kernel of the issue, and the potential sticking point, or the matter that we need to handle very carefully, is that currently the Mines Safety and Inspection Act relies on the Occupational Safety and Health Act to give the safety and health magistrate the power to take action in areas other than prosecutions. Therefore, if we were to remove that section from the Occupational Safety and Health Act, we would leave the Mines Safety and Inspection Act without that reference to the safety and health magistrate. That is one example of a clear constraint - perhaps the major constraint - that we need to manage in working on two amendment Bills at the same time. There are quite adequate solutions to deal with that, but it will depend on the timing of the amendments to the Mines Safety and Inspection Act and what is judged to be the best course of action at the time to ensure that the current provisions that are applied in those areas are not undermined by changes that are brought on before other things have been put in place. Clearly we need a flexible commencement clause to give us the ability to do that.

Mrs C.L. EDWARDES: Perhaps that is creating some confusion in the industry as well, because people do not know what will be in the Mines Safety and Inspection Amendment Bill with regard to the abolition of MOSHAB and the creation of the new committee. Given the fact that the minister is drafting amendments to the Mines Safety and Inspection Act and particular clauses of this Bill cannot be proclaimed -

Mr J.C. Kobelke: Some clauses.

Mrs C.L. EDWARDES: The clauses dealing with MOSHAB and the committee. Will those clauses be proclaimed prior to the introduction of the amendments to the Mines Safety and Inspection Act?

Mr J.C. KOBELKE: The important issue is not to undermine the operation of the Mines Safety and Inspection Act and MOSHAB. There are some complexities in how we will be able to handle that. I am leaving open the possibility that there may be some technical difficulties in the handling of that matter, but my clear expectation is that we will wait until we have dealt with the relevant sections of the Mines Safety and Inspection Act and we will then, in concert, be able to deal with those other sections.

Mrs C.L. EDWARDES: It would make a lot of sense for all of that to be done together. However, the minister has outlined his policy, and regardless of whether we agree with what the minister has outlined, the issue is still that we have not, and neither has the industry, seen the proposed amendments to the Mines Safety and Inspection Act. It may be the case that some unforeseen consequences arise. If the minister cannot tell us which clauses of the Bill will not be able to be proclaimed until the Mines Safety and Inspection Act amendments have gone through both Houses of the Parliament, then it would make a lot of sense to hold over the proclamation of all of these clauses until such time as the minister has brought that amendment Bill into this place.

Mr J.C. KOBELKE: I think the member is really jumping at shadows. The minister responsible for the Mines Safety and Inspection Act and I have worked in concert on these matters. The two agencies had very clear drafting instructions, and to the extent that there appeared to be any conflict, those matters have been resolved. One person has drafted both Bills. I do not envisage that we will face any insurmountable problems. The fact is that we are very keen to have this legislation in place. We do not know how long its passage may take in the other place. Therefore, it is best to bring it on and deal with it, as it is a very important Bill. Although the issues are real, we are quite confident they can be managed.

Mrs C.L. Edwardes: You cannot proclaim those sections until the Mines Safety and Inspection Amendment Bill goes through the House. Therefore, why not leave these proposed sections to go through with that Bill?

Mr J.C. KOBELKE: It is because they sit within this Bill and will sit within the Act. Therefore, it would be somewhat artificial, on the basis that we fear there might be a conflict, to haul them out. It would be much easier to retain them in the Bill, have the Bill passed, and be able to enact a whole range of other provisions that are not caught by these potential problems, and then simply hold back that section with which there must be a clear interplay with another statute.

Mrs C.L. Edwardes: I think the minister is missing the point. He is amending the Mines Safety and Inspection Act in the occupational safety and health Bill. There would therefore be no reason for not amending those sections of the Mines Safety and Inspection Act in the occupational safety and health Bill.

Mr J.C. KOBELKE: This is the basis not merely of a statutory review, which the member kicked off when minister; it has been a review that has looked to far reaching changes. To that extent the changes that affect the Mines Safety and Inspection Act have also been picked up. The Mines Safety and Inspection Act will follow through in the same vein because its review was conducted by former commissioner Bob Laing. The whole process from the start of the review has looked at how the two pieces of legislation might fit together, it being realised that there is a need for a specific jurisdiction for mining and a need to maintain a separate inspectorate and separate Act specifically for mining, but that there needs to be the overarching application of policy through WorkSafe.

Mrs C.L. EDWARDES: I will raise other issues related to that when we get to the relevant clauses, but given that this clause deals with the different days upon which different sections will come into existence, and knowing full well the level of expertise in the department, departmental officers would have prepared such a document because they know exactly what the steps are, what sections must be held over and the reasons for holding them over. It is a bit disappointing that the minister has not come into this House able to provide members with that information.

Clause put and passed.

Clauses 3 and 4 put and passed.

Clause 5: Section 19 amended -

Mrs C.L. EDWARDES: Section 19 is probably the most important section in the Act. It deals with the duties of employers. The clause has been placed in division 2, which deals with general workplace duties. Section 19(3) reads -

> If, at a workplace, an employee incurs an injury, or is affected by a disease, that -
>
> (a) results in the death of the employee; or
>
> (b) is of a kind prescribed in the regulations for the purposes of this subsection,
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> the employer of that employee shall forthwith notify the Commissioner in the prescribed form giving such particulars as may be prescribed.

Section 19(4) reads -

> (4) For the purposes of this section, where, in the course of a trade or business carried on by him, a person (in this section called **"the principal"**) engages another person (in this section called **"the contractor"**) to carry out work for the principal -

It then sets out who will be deemed to be contractors and who will be deemed to be employees. Section 19(5) deals with the principals of the contractor or the duties of the contractor to persons employed or engaged by him. Where have subsections (3), (4) and (5) been replaced and what is the basis on which they have been replaced?

Mr J.C. KOBELKE: The member is correct in clearly pointing to section 19(3), (4) and (5) being repealed. Section 19(3) deals with injury and disease reporting. Section 19(4) and (5) deal with principal and contractor arrangements. They are provided for in proposed sections 23D and 23I.

Mrs C.L. EDWARDES: Why was it decided to take those provisions out of section 19?

Mr J.C. Kobelke: It was a drafting issue.

Clause put and passed.

Clause 6: Section 21 amended -

Mrs C.L. EDWARDES: Section 21 is another of the general duty provisions. It deals with duties of employers and self-employed persons. Some of the provisions have been repeated as opposed to being amended. What is the consequence of the change that is being imported in this clause?

Mr J.C. KOBELKE: The new section 21(1) imposes a duty of care on employers and self-employed persons. Section 21 is amended for clarity and confirmation of the extent of the duty. Proposed subsection (1) is a clear expression of the existing duty at section 21(1)(a) of an employer or self-employed person to look after his or her own safety and health. The reworded duty applies only to self-employed persons; that is, the reference to employer is removed. Given that such a duty cannot by its very nature apply to a corporate employer, an employer who is an individual is by definition under the Occupational Safety and Health Act also a self-employed person.

Mrs C.L. EDWARDES: I refer particularly to the member for Avon's unfortunate story about the gentleman from Pingelly who was a tractor driver. WorkSafe could not prosecute his employer, the farmer on whose property he worked or the machine manufacturer. It ended up prosecuting the man himself. It is a bit difficult for the minister to spell out the public duty, but would it have come down to prosecuting the person who suffered the injury? Yes, he has a responsibility under section 21(1) to take reasonable care to ensure his safety and health at work, but what has that to do with an offence under the Act and action taken against that self-employed person if he fails the rest under section 21(1)?

Mr J.C. KOBELKE: The effect would be the same as that now because this amendment does not change that.

Mrs C.L. Edwardes: Can you tell us what the outcome is?

Mr J.C. KOBELKE: The case history and the way in which it has been interpreted have been built up over the years.

Mrs C.L. Edwardes: Which is?

Mr J.C. KOBELKE: I am not an expert on that. The member may be seeking legal advice.

Mrs C.L. Edwardes: I am not seeking legal advice.

Mr J.C. KOBELKE: The point is that although it is a valid question, the Bill has not changed or impacted upon the criteria.

Mrs C.L. Edwardes: Even if the amendment is a repeat of a provision, it gives an opportunity. Both the member for Murdoch and the member for Avon raised similar sorts of queries in respect of these types of actions being taken by WorkSafe. A self-employed person has a duty to take care of his own health and safety at his workplace. What is the consequence for him of not doing so? What is the public benefit?

Mr J.C. KOBELKE: The member should keep in mind that our amendments do not change the provision. The consequences - that is, what is done or not done - for the self-employed person will to a large extent depend on the particulars of the matter. It is very hard to apply a generality to so many different cases, but, clearly, there is an obligation on the self-employed person. We may find as we go through the Bill that that obligation is extended a bit, but it is not done in this clause.

Mrs C.L. Edwardes: What is the public benefit of that being a duty?

Mr J.C. KOBELKE: The public good is to require the person to be proactive. That very much relates to trying to be preventive; that is, people working to ensure that the workplace is safer by preventing certain things. We are putting in place a well-established public interest test. All those things come into play.

Mr W.J. McNEE: I would like some more detail. It seems that the minister is trying to override my absolute right. I put this to the minister. I am not at all satisfied with his answer. It has not provided any information. Let us say I was straining a piece of old wire on my farm and it broke and took out my eye. What would be the position of the people who would come after me, if anybody did come after me? What would they be entitled to? I was straining my own wire on my own property. I had judged the wire, although it was an old piece of wire, to be quite effective, but it broke.

Mr J.C. KOBELKE: We are considering clause 6, which amends section 21 of the Act. A blue copy of the Act is available. Section 21(1) of the Act states -

> An employer or self-employed person shall -
>
> (a) take reasonable care to ensure his own safety and health at work; and

In this Bill, that has been rewritten to read -

> An individual who is self-employed shall take reasonable care to ensure his or her own safety and health at work.

I will also move to amend that proposed new subsection for clarity. The proposed new subsection is not intended to change the requirement that is already placed on people by the Act. That requirement is that people should be proactive and take care to ensure their own safety and health at work. It is not a change.

The member for Moore's concern is about the operation of the legislation. That goes well beyond the proposed amendments to this section, but I will comment on it briefly. The member's comments go to the professionalism of the department and the professional approach inspectors take in deciding whether they believe a breach of the legislation might be open to prosecution. That also rests on the prosecution policy of the department, which, the member will remember, the last Government changed following the death of the young Thorpe girl in Esperance. That change involved the inclusion of a public interest test. I certainly did not agree with the prosecution resulting from that death, but I was on the outside and did not have all the information before me. I thought that the decision to prosecute a father because his daughter had died sent rural safety backwards. I saw no point in it at all. The prosecution policy has since been changed, and inspectors must take into account what is in the public interest. I certainly would not see any public interest in taking prosecution action against a father on the basis that his daughter had been killed.

Mr W.J. McNee: You saw no public interest in that. Neither did I.

Mr J.C. KOBELKE: Exactly. I did not at the time, and I said so publicly. I was speaking from the point of view of someone who did not have all the data before him. However, nothing has since come to my attention to suggest that my call at the time, which was most probably the same as that of the member opposite, was a bad decision. Since then, the prosecution policy has included a public interest test. There has also been a real

change in the approach of the WorkSafe officers and inspectors to work with industry. That does not mean, as I said to members last night, that sometimes a big stick does not have to come out. That is not the primary issue. The primary issue is engaging with the industry and working with it to make sure it understands how it can improve safety. It is about working on that together. However, that goes well beyond what we are dealing with here.

I move -

Page 3, line 14 - To delete "An individual who is self-employed" and substitute the following -

A self-employed person

This change is being made because "self-employed person" is defined in clause 3 as "an individual who"; therefore, it is considered a matter of simple drafting to tie it to that rather than include the definition in this clause.

Amendment put and passed.

Mrs C.L. EDWARDES: The question the member for Moore was asking is the question to which every farmer who is self-employed and every other self-employed person who operates in the metropolitan area and around the State wants to know the answer: what is the value of the clause? I know that it is a rewrite, but there have been changes of policy and personnel. Those people need to know the value of that particular duty and have an idea of what would be the public good in taking action against a self-employed person. For instance, we are all well aware that the member for Moore suffered a serious injury last year when he fell off a silo and broke both his ankles. Obviously, there was no public benefit in pursuing the member for Moore about it at that time. However, what would be the basis of WorkSafe's decision to pursue a self-employed person who suffered a serious injury?

Mr J.C. KOBELKE: I put to the member a question that she might like to consider and answer by interjection, if she wishes. Does she consider that we should not require self-employed people to look after themselves?

Mrs C.L. Edwardes: The question I am putting to you is the question they have asked me.

Mr J.C. KOBELKE: I will answer that question and we will move on. I am trying to find the limits. The member has some concerns, or wishes to receive some assurances that this does not go too far to one end. Let us look at the other end. I do not think this is the case, but I ask whether the member is saying that we should remove this requirement and not have as a very clear guide the principle that self-employed people should be required to take reasonable care to ensure their own safety and health.

Mrs C.L. Edwardes: No; because there is a valuable link with workers compensation. However, within what parameters is there a public good in WorkSafe taking action against a self-employed person for breach of that duty?

Mr J.C. KOBELKE: That is a subsequent question.

Mrs C.L. Edwardes: It is the same question.

Mr J.C. KOBELKE: It rests on it, but it is a subsequent question. The principle we are dealing with in section 21, which we are amending by clause 6, is that an individual who is self-employed shall take reasonable care to ensure his or her own safety at work. I do not think anyone is suggesting that we should move away from that. That is already in the Act, and we are maintaining it. There is only a minor rewrite for clarity. We are not changing the basis of it. However, people want to build on that and say that it has implications for a lot of other things, and they ask what it means. It has a lot of meanings, and I have tried to cover those. However, they do not specifically relate to this clause. Proposed new subsection (2), which we have not addressed, puts a responsibility - a requirement - on an employer or self-employed person to ensure that someone who is not an employee is not adversely affected, either wholly or partly, as a result of things that the employer or self-employed person does. That is quite important. If someone was digging a trench and left it overnight, that person would have to be wary that members of the public might fall into it.

Mr W.J. McNee: Surely I could dig a trench on my property and leave it overnight.

Mr J.C. KOBELKE: Not necessarily.

Mr W.J. McNee: Come on!

Mr J.C. KOBELKE: Let me address it. This is a real issue, and I think it is worth talking about.

Mr W.J. McNee: It is not a real issue. If you are on my property after dark, you had better look out for yourself.

Mr J.C. KOBELKE: In many farms, there is usually a long driveway to the house.

Mr W.J. McNee: Yes, but you have no right to be there.

Mr J.C. KOBELKE: I do not know whether the member has a fence at the front of his property or a cattle pit.

Mr W.J. McNee: I have both.

Mr J.C. KOBELKE: People have to open a gate and come in?

Mr W.J. McNee: Yes, they do.

Mr J.C. KOBELKE: What if the member did not have a gate and there was just a cattle grid?

Mr W.J. McNee: They would still have no right to come in.

Mr J.C. KOBELKE: What if the member dug a two-metre deep trench just inside the cattle pit and put no warning signs up and someone came along the road, took a wrong turn, pulled onto the member's property and had a major accident because he went into a two-metre deep trench that the member had left unmarked?

Mr W.J. McNee: You're changing the argument.

Mrs C.L. Edwardes: What makes that an issue as against a public liability issue?

Mr J.C. KOBELKE: It could be a public liability issue, but the issue is that there is a requirement not to leave hazards around that could cause an accident or affect in a direct way people's health and safety.

Mrs C.L. Edwardes: What would be the difference between it being a public liability and a WorkSafe issue?

Mr J.C. KOBELKE: The issue is that each case has to be judged on its merits. There are a range of cases and I do not want to go into particulars. A member of this House was involved in an issue that had a direct impact on his or her family. Was it a road accident, was it a WorkSafe accident, or was it a public liability issue? He or she gets mixed up, but there can be judgments that matters are caught by the Occupational Safety and Health Act. Therefore, there is a need to ensure that people accept that they have a responsibility to make sure they do not leave hazards for other people and they also look to their own health and safety in the way they do things. That is not being changed in any real way. We are just looking to have clearer wording. It already exists and it is being reaffirmed by what we are doing here.

Mrs C.L. EDWARDES: This has been amended, it is in the Bill and it is able to be raised appropriately in this House. When the minister is amending the Occupational Safety and Health Act, everybody has questions, such as what it may mean for him or her. The question I have been legitimately asked, not only by the member for Moore but also by others, such as self-employed persons, is: what are the limits? If I am a self-employed roof tiler and I do not have anybody else working with me and I fall off the roof, why is that duty of care in the Bill? First, people must take care of their own health and safety. Everybody knows that. What is the public benefit in having the duty of care there? I agree there are valid links with workers compensation, but where does it lead to the rest of the Act and prosecutions? Penalties have been increased. People are legitimately asking what it means for them?

Mr J.C. KOBELKE: As I said, there are myriad examples and they have to be judged on the particulars of each case. I cannot give a general answer that will apply to a whole group of cases. In another example, a woman was killed by a truck going along the road because a part of the equipment or load on the truck was not properly tied down and it swung out and hit her. The clear issue is that that driver was probably self-employed, but he had a duty of care to make sure that the way he loaded and drove his truck would not be a danger either to his employees or to members of the public. That is what this legislation is about.

The member for Moore and the member for Avon have raised the fact that in the past there was a clear general judgment that things went too far, and changes were then taken administratively to put in a public interest test. We have done a lot to train the staff and the inspectors to get the right approach, to create an atmosphere in which health and safety will be promoted and not to get people offside in an antagonistic way. These things will be continually monitored. At some time in the future a case may come up about which there is general agreement that the law was taken too far. The member cannot give me the number of cases in the past two or three years when there has been an abuse of this law or the law has been applied in too strict a way. That will always be a balancing act. It will be affected by the determinations of the court and how it is judged, but primarily it will be affected by the way WorkSafe does its job and by the guidelines and prosecution policies that apply, together with the professionalism of the staff. That will have to be judged on a case-by-case basis. I have a great deal of respect for the inspectors at WorkSafe because they sometimes have to make the call. They front up and they have the power to decide whether to work with people and talk about the matter or to go beyond that and perhaps look at giving a notice or taking prosecution action. The advice will then come back from senior officers about how the whole thing will be handled. If members have heard of cases in the past two or three years that have not been handled well, I am happy to look at them. I could count on perhaps one finger the cases I am aware of when we could have handled the matter a bit better. There were no prosecutions, but it was the attitude that was taken when addressing people, and we could have done better. We are trying to do better.

Mr W.J. McNEE: I am not suggesting that it has been too hard in the past or anything like that, but we are changing something. That is when I get a bit careful. I can accept change, but I want to be sure, as Joh Bjelke-Petersen said once, that I do not put my foot on the fly tape before I need to. The minister talks about public interest and about the man driving down the road. He is covered by the Road Traffic Act and a lot of other things. As I see it, that does not have a lot to do with WorkSafe.

Mr J.C. Kobelke: It was a health and safety issue. Health and safety inspectors went and investigated.

Mr W.J. McNEE: Perhaps they did. Why would the police not attend? That does not matter. I do not want to argue about that. However, one is on a public road, and it is different on private property. I am already responsible for all sorts of people who come onto my property without any invitation. We carry huge public liability insurance to cover them. They were never invited there. I am sorry to delay the minister, but could he explain this public interest issue?

I referred to someone straining a piece of wire. That is a matter that is dangerous and I am a bit careful about it. Who judges professionalism? People like me have been straining wire for 60 years. Would I be judged as professional? Would my judgment be worth anything? Would the fellow who came to make a judgment about me be able to put up equivalent experience? They are the sorts of things that worry me. He could be some brand new university graduate, with a brand new degree and he thinks he knows it all. That is a bit of a problem. I would like a bit more explanation on that public interest issue. I am not suggesting the inspectors are not skilled.

Mr J.C. KOBELKE: I will address the issue of the public interest test, realising it does not deal specifically with this issue but relates to other matters for which this is the basis.

Mrs C.L. Edwardes: Contravention of this issue can constitute gross negligence.

Mr J.C. KOBELKE: No.

Mrs C.L. Edwardes: Yes, it does.

Mr J.C. KOBELKE: There must be other conditions as well. It is one of the prerequisites.

Mrs C.L. Edwardes: It is one of the prerequisites, so it is very important. It can lead to imprisonment.

Mr J.C. KOBELKE: Referring to the request by the member for Moore, the issue of the public interest test was placed in the prosecution policy following advice from the Director of Public Prosecutions because of the Zara Thorpe case, which involved a prosecution against a farmer over the death of his daughter. The issue of public interest was that even if there was a lay-down case - I am not saying it was in that instance - with the person who caused the death being totally culpable, then the public interest test would be whether it serves the public interest if that person has lost someone close to him or her. How could a greater penalty be put on that person? The issue then is what that will do when it comes to working with that industry sector or that community, which would be up in arms that such a callous action could be taken. Those sorts of factors can be taken into account in a public interest test. Therefore, it may be decided that, in the public interest, the person will not be prosecuted, even if it was a lay-down case and the person was absolutely wrong and was totally culpable. There would be flexibility to ask whether it was in the public interest. That test was introduced when the member for Kingsley was the minister. That is just one aspect of the way the whole issue is handled and one improvement that has been made in the past four or five years.

Clause, as amended, put and passed.

Clause 7: Sections 21B and 21C inserted -

Mrs C.L. EDWARDES: Proposed section 21B identifies the duties of a body corporate that is not an employer. Can the minister explain who and what type of body he is targeting and the sorts of actions that are likely to arise out of proposed subsection (2)?

Mr J.C. KOBELKE: These provisions create a new general duty of care owed to non-employees by corporate entities. They are not employers, but operate for gain or reward. The duties are modelled on those in proposed section 21B(2). This amendment closes a gap in the coverage that arose because of the definition of "self-employed person" that meant the duties of a self-employed person under proposed new section 21, as amended, do not apply to a body corporate. With the continued expansion of labour hire arrangements as a means of engaging workers, an increasing number of corporations are no longer considered employers. Although the duty owed to workers engaged under labour hire arrangements is dealt with elsewhere in the Bill, this additional change is required to ensure that members of the public, work experience students or others present at the workplace are protected when a business is operated by a body corporate that is not an employer.

Mrs C.L. EDWARDES: The term "body corporate" is not defined. Can the minister tell us the definition of or what would constitute a body corporate?

Mr J.C. KOBELKE: I am sure that, as a lawyer, which I am not, the member has a better understanding of the term "body corporate", which goes beyond what we think is just a corporation. There are a number of bases in law. I do not have that information here to be able to give the member that sort of legal background about a body corporate.

Mrs C.L. Edwardes: It is important to have it on the record, again, for the sake of completeness.

Mr J.C. KOBELKE: I am happy to provide that information to the member and ensure that it goes on the record.

Mrs C.L. EDWARDES: Proposed section 21C deals with breaches of proposed section 21B, to which we have just referred and which deals with the duties of a body corporate that is not an employer, work that is being done by the body corporate that may affect a person who is not an employee and the hazards that arise from the work that is being carried out by the body corporate or a person working under the direction of the body corporate. Proposed section 21C is the very first of the provisions that refer to the new tiers of penalties. If a body corporate contravenes proposed section 21B(2) in circumstances of gross negligence, the body corporate commits an offence and is liable to a level 4 penalty. Given that the level 4 penalty can be imprisonment of up to two years, can the minister tell us what is likely to be the contravention of proposed section 21B that would result in a body corporate being liable to a level 4 penalty?

Mr J.C. KOBELKE: Penalties apply in accordance with the new penalty regime, which is referred to later in the Bill, and the member has already alluded to one aspect of that. The penalties in the Bill are set at the same level as those for other duty of care breaches committed by non-employees. As the member has alluded to, under proposed subsection (1), a breach committed in circumstances of gross negligence attracts the highest penalty, a level 4 penalty; that is, a maximum of $500 000 for a first offence and $625 000 for a subsequent offence by a corporation. Clause 16 of the Bill, which inserts proposed section 18A, defines "gross negligence". The definition includes the constraint that it is applied only when the offence has resulted in serious injury or death. Those various parts must be put together; that is, the contravention must meet the definition of "gross negligence" and there must also be the resulting serious injury or death. All factors must be lined up before there is any potential for the penalty of a jail sentence to be given.

Mrs C.L. EDWARDES: I do not want to talk about the penalty itself, other than to say that the contravention attracts a very serious penalty, because we will deal with the penalties when we get to that clause, and I am happy to do that. The very first element that is important is contravention. What is the contravention of proposed section 21B(2) that will attract a level 4 penalty? There is the definition of "gross negligence" and all of that. However, what will be the contravention? Contravention is very important. That is why I think the definition of "gross negligence" is far too broad. The minister needs to be able to tell this House what is the likely contravention of proposed section 21B(2) that will attract a level 4 penalty. What would attract a level 3 penalty? What would attract a level 2 penalty? The minister needs to be able to explain to this House the differences between those contraventions.

Mr J.C. KOBELKE: Proposed section 21B and particularly proposed section 21C seek to ensure that bodies corporate are also picked up by the provisions in clause 6. The member will see that they are very similar, but these provisions deal with a body corporate. That is the difference that we are addressing. There are more fundamental issues that the member is seeking to raise about what will be the interpretation. However, this clause specifically provides that those measures that apply to employers and self-employed people will also apply to bodies corporate.

Mrs C.L. Edwardes: Because you are dealing with proposed section 21C(1), which attracts a level 4 penalty, proposed section 21C(2), which attracts a level 3 penalty, and proposed section 21C(3), which attracts a level 2 penalty, you need to be able to explain to the House the particular contraventions under proposed subsections (1), (2) and (3) that will attract the different penalties.

Mr J.C. KOBELKE: That is a different question.

Mrs C.L. Edwardes: No, it is the same question.

Mr J.C. KOBELKE: The member is now referring to the levels of penalties.

Mrs C.L. Edwardes: No, I do not want to talk about the penalties. I am talking about what will be the contravention of proposed section 21C(1) that will attract a level 4 penalty. The minister needs to be able to explain proposed subsections (2) and (3).

Mr J.C. KOBELKE: That is proposed section 21B(2). The answer to the first part of the question is proposed section 21B(2), which I will read for the record. If a body corporate contravenes proposed section 21B(2), it is liable to a level 4 penalty. Proposed section 21B(2) states -

> A body corporate to which this section applies shall, so far as is practicable, ensure that the safety or health of a person is not adversely affected wholly or in part as a result of -
>
> (a) work that has been or is being undertaken by -
>
> (i) the body corporate; or
>
> (ii) a person carrying out work under the direction of the body corporate;
>
> or
>
> (b) any hazard that arises from or is increased by -
>
> (i) the work referred to in paragraph (a); or
>
> (ii) the system of work that has been or is being operated by the body corporate.

I will compare that proposed section with proposed new section 21(2), which states -

> An employer or self-employed person shall, so far as is practicable, ensure that the safety or health of a person, not being (in the case of an employer) an employee of the employer, is not adversely affected wholly or in part as a result of -
>
> (a) work that has been or is being undertaken by -
>
> (i) the employer or any employee of the employer; . . .

I jump back to what we are dealing with there. The wording is similar, except that the body corporate applies instead of it being an employer. Current section 21B refers to any hazard that arises from or is increased by the work referred to in paragraph (a). That is the same wording. "The system of work that has been or is being operated" by the employer or the self-employed person is the same wording, except that it applies to a body corporate. The issue, in part, relates to the extension to corporations and, in part, deals with the different levels of penalty. The fundamental matter the member was rightly trying to bring in relates to the same issues debated regarding section 21 of the principal Act.

Mrs C.L. Edwardes: That is not the point. You can substitute a self-employed person and body corporate. The self-employed person in terms of the penalties is picked up in the later provisions of the Bill. We will get to them. At this stage, I can only ask you the questions in relation to section 21C and the contravention of section 21B. I will refer to self-employed persons when the House gets to it. Trust me - I will get there! I want to know the contravention of section 21B(2) in section 21C(1) that will attract a level 4 penalty. I will ask the same question concerning sections 21C(2) and 21C(3). What is the contravention?

Mr J.C. KOBELKE: The member's question is mixing up the three intertwined parts, and, in part, relates back to only one section of the matter. The level four penalty requires that the definition of gross negligence be met. The House will debate that matter later. A death or serious injury occurs as a consequence of that action. The prerequisite the member is alluding to is that there must be a breach of the stated general duty of care. This provision contains the general duty of care.

Mrs C.L. Edwardes: What does contravention mean in this Bill? It is not defined. We will reach the definition of gross negligence. This is another indication that the definition of gross negligence is far too broad. If the minister cannot tell us what contravention means, imagine what the courts will do with it.

Mr J.C. KOBELKE: I do not think it is a problem.

Mrs C.L. Edwardes: It is.

Mr J.C. KOBELKE: The courts are already giving determinations based on this general duty of care.

Mrs C.L. Edwardes: They are; is that on "contravention"?

Mr J.C. KOBELKE: It is in the existing section 21(2). That word will not change. It will be removed but put back in.

Mrs C.L. Edwardes: Can the minister table in this House a precedent whereby contravention has been referred to, and a definition has been put?

Mr J.C. KOBELKE: I will certainly have a search done; if it is available, I will have it provided. I presume there is, but I cannot vouch for it.

Mrs C.L. Edwardes: It is vital to have it when we get to the penalties.

Mr J.C. KOBELKE: I give that undertaking.

Mrs C.L. Edwardes: I thank the minister.

Mr W.J. McNEE: When the minister speaks about a corporation, I think of a large corporate company. The minister can correct me as I am most likely incorrect. Everybody these days must be incorporated. Is that anything to do with, say, the local football club putting in a crop, as sometimes happens? Some of them may well be corporate bodies. I am not aware of the precise details of why these things are incorporated these days. Do they fall into that category?

Mr J.C. KOBELKE: There is expanded use of corporate structures, and issues arise concerning labour hire and corporations being employers, but not being judged technically to be the employer. Therefore, the Government is ensuring they are caught. This Bill is not driving change. It is trying to catch up with changes that have taken place. The member alluded to factors that drive the change, and it is not appropriate to enter that debate now. The Bill is trying to recognise the way people do business these days. More people use corporate structures, which have been extended and used in ways not thought of before. Therefore, these structures should have the responsibilities that apply to an individual or a private company. A corporate structure should not be used to avoid those responsibilities.

Mrs C.L. EDWARDES: The reference that the member for Moore made to the local football club as an incorporated association is applicable to the definition of body corporate.

Mr J.C. Kobelke: We will get that answer to you.

Mrs C.L. EDWARDES: The minister will get back to the House the definition of body corporate. Yes, the local footy club could be caught up in this provision.

Clause put and passed.

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

Mrs C.L. EDWARDES: Clause 8 will create a new division headed "Certain workplace situations to be treated as employment". The first provision deals with a public authority. Business is to be defined as including a public authority. A public authority means a minister of the Crown, a state government department and any other body or person carrying on a social service or public utility. Can the minister relay to the House the reasons, apart from his wishes that the public sector be institutions of excellence and leaders in occupation health and safety, for the incorporation of public authorities into the Bill?

Mr J.C. KOBELKE: "Public authority" is defined and an explanation is provided. "Business" includes the operation of a public authority. The only use of a public authority is in this explanation of business. These explanations of terms have been introduced to address concerns that section 19(4) of the Act dealing with principals and contractors may not apply to some government bodies because the work undertaken falls outside the normal meaning of trade or business. New provisions dealing with principal contractor arrangements also use "trade" or "business", and the explanation in section 23C makes it clear that the provisions will apply to public authorities.

Mrs C.L. EDWARDES: The example that I was given was that a grey area arose under the Prisons Act whether operations could be subject to improvement or prohibition notices by WorkSafe. That is a reason for the introduction of the measure. That covers that area.

Mr J.C. Kobelke: That is not the authority, but the contractor who may work for it.

Mrs C.L. EDWARDES: The AIMS Corporation, for example.

Mr J.C. Kobelke: Yes.

Mrs C.L. EDWARDES: That was one of the concerns raised last year. The issue I raised in the second reading debate, and was subsequently raised by the member for Murdoch, is very real. It is not a concern or a criticism; it is to be taken in no other way than explaining for the record the extent of the changes the Government is putting in place for public authorities. It is not only for public authorities, but also for ministers in terms of accountability in occupational health and safety. This change is significant. One could take the example the member for Murdoch raised yesterday concerning WorkSafe improvement notices to a government department or agency. If an order has not been complied with, and for some reason the explanation provided, as identified through internal memos, was that budget funds are not available for that upgrade, change, maintenance etc - I am moving away from the example, and refer to a likelihood - enormous onus would be placed back on the minister, the Treasurer and the departmental CEO. What will the Government do to put in place proper processes so that there will be no toing-and-froing between government departments, agencies and ministers about who will be likely to be sent to jail under a tier 4 penalty? That is an extreme case, but it is a real possibility. Chief executive officers are not always supportive of their ministers. At the end of the day, there could easily be a breakdown in relationships and the like. Covering one's butt, to put it mildly, is well known in the bureaucracy. If people can pass it on to the minister of the day, I have no doubt that they will do so. That is a likelihood.

What process will the Government put in place to ensure that the work gets done, that the government sector takes on the role of dealing seriously with occupational health and safety and that it is not just a case of buck-passing?

Mr J.C. KOBELKE: Public sector employees and management are already caught. The amendments we are making in this legislation do not change the effect of the law and the responsibility that exists. Those problems already exist and are being managed. We need to manage them better. However, that is already an issue. Currently, there is some difficulty in taking a prosecution within the public sector. There is a limited ability to do so. We are making it very clear in this legislation that it will be possible to bring prosecutions against public sector agencies and public sector management, and that can go right through to the minister.

Mrs C.L. Edwardes: I know that that has always been the case to a great degree. However, the issue is that there are now serious consequences. The penalties have been upped. There is imprisonment and gross negligence. There is a likely chance of buck-passing. What requirements will the Government put in place for agencies to meet their occupational health and safety responsibilities?

Mr J.C. KOBELKE: We are already doing that, and it is a task that we must continue.

Mrs C.L. Edwardes: What are you doing?

Mr J.C. KOBELKE: We have a special unit within the Department of Consumer and Employment Protection.

Mrs C.L. Edwardes: Must the CEOs report on it?

Mr J.C. KOBELKE: No. Work is being done with government agencies in which there are designated issues. One of the issues that is being worked on relates to the purchase of cars and whether, in seeking to get cheaper vehicles, the agencies were perhaps getting less safe vehicles. People have been looking at the standard that should apply. Another area relating to vehicles has been raised with me when I have been in regional areas. When people go off road and into areas that are a long way from the nearest settlement, what standards are required for their vehicle and their provisions, and what are the costs associated with making sure that those people are properly equipped for their own safety? There are operational issues in those areas as well. Should a work roster be left for people that means they must drive after dark in an area in which there might be a lot of kangaroos, or should their work be structured so that -

Mrs C.L. Edwardes: Are you going to redo the Parliament House roster accordingly?

Mr J.C. KOBELKE: If the kangaroos become abundant in this area, we might have a problem. They are real issues. They are being dealt with, and we have a lot more work to do in that area. However, that is not being changed in this legislation. The fact that that there is the potential to take prosecutions will help drive it harder and make sure people take it seriously. The State of Western Australia, as a corporate body, and other corporate bodies cannot themselves have imprisonment.

Mrs C.L. Edwardes: No, but the minister or the CEO can.

Mr J.C. KOBELKE: However, there is a further burden of proof for those individuals as opposed to the system being shown to be a vital part of the failure to meet the standards required.

Mrs C.L. Edwardes: If the argument used is budget constraints, what process will the minister put in place - if I were a minister, I would look at it - to ensure that no excuse is made, such as, "Sorry, our budget is set and we cannot spend the money"?

Mr J.C. KOBELKE: We must work that out. The private sector and businesses do that every day. They must work out how they can remain viable and productive, and still give proper attention to occupational health and safety. The overwhelming majority of companies are able to manage that. There might be a bit of pain from time to time when they must make an adjustment and put in new equipment or change around a process, but they manage it. Similarly, in the public sector, with good managers, which we have, they will manage it.

Mrs C.L. EDWARDES: I will come back to this when we deal with the definition of "gross negligence". However, the knowledge does not have to be actual knowledge. A minister of the Crown or a CEO can have imputed knowledge from one of his public servants. I believe that will be a serious issue with the way in which the definition has been drafted. I am sure that it was not intended to mean the knowledge of an employer. As the minister said, in corporations in the private sector, that knowledge is already being used. Knowledge of an employee can be imputed knowledge from the CEO. That will be incorporated in this provision - very much so.

Mr M.F. BOARD: I am interested to hear the shadow minister continue her remarks about this issue.

Mrs C.L. EDWARDES: I am sorry, I resumed my seat before I realised we are still dealing with clause 8 and the rest of the provisions.

Mr J.C. Kobelke: There are other matters.

Mrs C.L. EDWARDES: There are plenty of other matters. I move on to proposed section 23D, which deals with contract work arrangements. It states -

> This section applies where a person . . . in the course of trade or business engages a contractor . . . to carry out work for the principal.

The example the member for Murdoch gave yesterday was that he would be renovating his own home extensively and would be bringing in contractors to carry out work for him. That is the sort of example we are talking about. Proposed subsection (2) states -

> Where this section applies, section 19 has effect -

It must be remembered that section 19 is the general duties section -

> (a) as if the principal were the employer of -
>
> (i) the contractor; -

The householder who will be renovating his home will become the employer of all those people that he brings into his home to do the work -

> and
>
> (ii) any person employed or engaged by the contractor to carry out or assist in carrying out the work concerned, -

Therefore, he will become the employer of not only the contractor but also the contractor's workers -

> in relation to matters over which the principal has the capacity to exercise control;

The householder is not an expert in plumbing or electrical work.

Mr J.C. Kobelke: I draw the member's attention back to the introduction. It states that this section applies where a person in the course of trade or business engages a contractor. I used that term when I spoke previously. If a business engages someone for a personal matter that does not relate to its trade or business, that is not captured by this provision.

Mrs C.L. EDWARDES: Okay. A householder may be doing extensive renovations for a friend, and it is a sideline.

Mr J.C. Kobelke: The issue is that it is not his trade or business. There might be a grey area in between, whereby the person has a second job of renovating houses.

Mrs C.L. EDWARDES: Yes, and he gets money for it. He becomes the employer of the contractors and the contractors' employees. This is getting back to the capacity to exercise control. He is just the person pulling it all together. He is the facilitator or the bloke who is organising the rostering - who will come in and when. He pays all the bills and gets all the licences etc. He is not an electrician, a plumber or a tiler. How would that sort of circumstance apply under this clause when we are talking about the exercise of control?

Mr J.C. KOBELKE: The member has made it difficult for me to answer that question, because she has actually given a very good explanation of the situation herself.

Mrs C.L. EDWARDES: I do not have the answer to it. Is the minister saying that if a contractor does not have the expertise to do the electrical work, the plumbing work or whatever else, he has no control? He does have control. He has control over where the workers work and when they come to work. However, he does not provide the tools, and he does not control how they go about their work. Is the normal control that we understand in master-servant relationships the control that is envisaged here?

Mr J.C. KOBELKE: We are designating a person as the principal if he has a contract to carry out work, in order to pick up situations in which people come in under labour hire arrangements or under contractual arrangements different from those we would normally expect from an employee. We want to cover that type of person so that he cannot opt out by saying that he is a separate company.

Mrs C.L. Edwardes: Is this the proposed labour hire section?

Mr J.C. KOBELKE: No. That is in proposed section 23E.

Mrs C.L. EDWARDES: What does the minister expect to cover by this proposed section?

Mr J.C. KOBELKE: With assistance from my adviser, I will attempt to answer the question. The control of work is a different matter. I will give an example that may help clarify the matter. A person may be the principal in charge of an estate subdivision development and have a range of contractors working for him. He may put out guidelines about the movement of vehicles, for example, which has been the cause of three fatalities in the past three months or so. Different contractors may have control over the particular work that is being done

at the time, but the principal will have overall responsibility in terms of his control over the overall site. He will not be expected to control the contractor who may put the electrical services through the subdivision. However, he will still have responsibility, as the principal, for what is happening on the site.

Mrs C.L. EDWARDES: In the example that I gave of the bloke who is renovating homes, even though he is not an expert, and it is not for his own purposes - it may be for investment, or it may be that he is doing it just as a sideline - he is the one who has employed the contractor and the contractor's staff, so, under this proposed section, he would be the employer.

Mr J.C. Kobelke: He would be the principal.

Mrs C.L. EDWARDES: He would be the employer of the contractor and the contractor's staff, because he has control of the work site.

Mr J.C. KOBELKE: Yes, to the extent that that control extends, which will be judged according to the particular circumstances of the case.

Mrs C.L. EDWARDES: Proposed section 23D(4) states -

> The further duties mentioned in subsection (3) are -
>
> (a) the duties of an employee under section 20; and -

That section deals with reasonable care -

> (b) the duties of an employer under sections 23G(2) -

That section deals with an employee who occupies residential premises that are owned or under the control of the employee's employer, and the occupancy is necessary for the purposes of the employment -

> and 23I(3).

That section provides that the relevant person must notify the commissioner of the injury.

Proposed subsection (3) states -

> Where this section applies, the further duties referred to in subsection (4) apply -
>
> (a) as if the principal were the employer of -
>
> (i) the contractor; and . . .

Therefore the contractor will now have duties, and the contractor's employees will also have duties. Proposed subsection (5) states -

> An agreement or arrangement is void for the purposes of this section if it purports to give control to -
> . . .

Therefore, the principal cannot say to a contractor that he, the contractor, has control of the work site. An investment company may put out for tender a contract to build an apartment block on a particular site, and put in place a contractor to perform that work. Would such a person be caught under this proposed section?

Mr J.C. KOBELKE: Yes, as the principal.

Mrs C.L. EDWARDES: I am trying to determine how far this proposed section will go. If an investment company were to put out for tender a particular job, it would expect the person who won the tender to do the work. It would expect that person to put up the fences and do everything that was necessary on the site. It would not want to know about the job until such time as it had to pay the bills. Why then would the minister regard the investment company as the employer and as being in control of all the work on the site? What situations is the minister trying to cover now that have proved to be a problem in the past?

Mr J.C. KOBELKE: The responsibilities are still there. This is ensuring that people cannot contract out of those responsibilities. It clarifies the issue of control.

Mrs C.L. Edwardes: If Main Roads put out a tender for building a road, is it the employer under this clause?

Mr J.C. KOBELKE: As far as control extends by being the principal, it has responsibilities.

Mrs C.L. Edwardes: I am trying to determine the extent of the control. If a Minister for Housing and Works is building a port or a set of Homeswest units, is he or she the employer under this clause?

Mr J.C. KOBELKE: The liabilities only come back if, for example, it can be shown that matters were set up in such a way that it was an attempt to abrogate their responsibilities.

Debate interrupted, pursuant to standing orders.