

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: Crimes (Industrial Manslaughter) Amendment Bill 2002)

Members:

**MR B STEFANIAK (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS K TUCKER**

TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 4 APRIL 2003

**Secretary to the committee:
Mr D Abbott (Ph: 6205 0199)**

By authority of the Legislative Assembly for the Australian Capital Territory)

Submissions, answers to questions on notice and other documents relevant to this inquiry which have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127).

The committee met at 2.07 pm.

THE CHAIR: Thank you very much for appearing before the committee. Ms Tucker sends her apologies. She'll be here soon. For the purposes of the transcript, would you please identify yourselves.

KATY GALLAGHER,

PENNY SHAKESPEARE and

SHELLEY SCHREINER

were called.

Ms Gallagher: I am Katy Gallagher, Minister for Industrial Relations.

Ms Shakespeare: I am Penny Shakespeare, Director of Work Safety and Labour Policy, Chief Minister's Department.

Ms Schreiner: I am Shelley Schreiner, Work Safety Labour Policy, Chief Minister's Department.

THE CHAIR: Are there any opening statements any of you would like to make? I'm sure John has read the government submission, Katy. If there is anything you'd like to say further to that at this point in time, please do so. I have a series of questions. No doubt John does and I imagine Kerrie would too.

Ms Gallagher: Okay, I will take a brief moment to make a short opening statement. As you can see, I've been joined by Penny Shakespeare and Shelley Schreiner, to assist me to answer any questions that arise.

The Crimes (Industrial Manslaughter) Amendment Bill was an election commitment of the current government prior to the 2001 election. The purpose of the bill is to address the most serious of workplace accidents—those being the ones that result in deaths of workers. In 2003, it's unacceptable that people continue to die at work. We've already had one death in the ACT this year.

This amendment bill has two main purposes. The first is to ensure that corporate employers can be properly prosecuted if their reckless or negligent behaviour results in the death of a worker. The second is to raise awareness of the duty of employers to provide a safe workplace.

At the moment, employers who are natural persons can be charged if their negligent or reckless conduct causes the death of an employee. This bill won't change that or impose any new liabilities on natural persons, although it does create a specific offence under the Crimes Act called industrial manslaughter.

The legislation, however, does make some significant changes about how corporate employers can be prosecuted to the same extent as a natural person. Corporations can commit offences only through directors or employees, as they have no physical presence. Under the common law principle, we have to identify a director or employee who was the directing mind and will of a corporation. This has proven to be difficult to establish. In Australia there's been only one case where a person was found guilty.

We believe this present law isn't acceptable—treating employers differently, depending on whether they're a corporation or a single person. Many jurisdictions around Australia, and internationally, are currently looking at this. This bill applies the corporate responsibility of the nationally agreed criminal code to the offence of industrial manslaughter. So, where a culture of ignoring safety precautions has been allowed to develop within a corporation, and this results in a death in the workplace, the corporation can, if found guilty, be held responsible.

The bill imposes significant fines—and community service projects—of up to \$5 million. The bill also addresses contracting arrangements and the chain of responsibility which we all know, as we increasingly see arrangements where work is contracted out. This bill means that, if you contract your work out, you can't necessarily contract out your responsibility to provide a safe workplace for the workers performing the work.

I think it's important to recognise that this bill is just one part of the overall package towards improving workplace safety for workers in the ACT. There's currently a review of the Occupational Health and Safety Act, to ensure that penalties interact with proposed industrial manslaughter penalties. There will also be stronger penalties under the Occupational Health and Safety Act for serious injuries, and the Occupational Health and Safety Council is currently reviewing the compliance model—established under the Occupational Health and Safety Act—to ensure appropriate prevention compliance mechanisms are in place.

This is in addition to the work being done every day by WorkCover. We will continue to look at all ways to improve preventative mechanisms. We'll continue to look at the ways we can better provide education to employers. WorkCover has been doing some incredible things there. I refer to their newsletter, their visits to workplaces and their small business tool kit. These things have rapidly been taken up by small businesses.

While we'll continue to do all those things, at the end of the day, we believe that workers have a right to return home from work, and workers' families have a right to have them return home from work. We believe that creating a specific offence of industrial manslaughter will go some way to addressing the issues that we see.

We look forward to reading the report of the committee. I think it has been important for the public and the community, or the community and specific businesses and organisations, to have an avenue to raise any concerns they have. We'll be looking at the report of the committee very closely.

THE CHAIR: I have a number of questions. Before I start, though, I think the secretary has given all of you a copy of the normal statement we read out at the start of any committee hearings, in relation to the necessity to tell the truth to the best of your ability—and that the proceedings of this committee are privileged. I think you're well aware of all that and I believe you have that statement there.

Ms Shakespeare: Yes.

THE CHAIR: Thank you. Ms Shakespeare holds it up—so that's been done. I just wanted you to be aware of that.

Having read through the government's document, I note that, in this particular offence, currently there is an offence of manslaughter. The report on page 3 says that it provides for a penalty of imprisonment only. However, it then states that, while section 161 of the Legislation Act provides a formula for the conversion of prison terms into penalty units, it's only 1,500 penalty units if the period of imprisonment is longer than 10 years—and that is arguably too low.

Currently, Minister, under section 15 of the Crimes Act, manslaughter attracts a maximum imprisonment penalty of 20 years—and your bill increases that to 25. Currently, as well as probably section 161 of the Legislation Act, section 347(2)(d) of the Crimes Act provides for a maximum fine of \$30,000 for a private individual, or \$150,000—that is 1,500 penalty units—for a corporation.

You say that's arguably too low. What you're doing here would be increasing this type of manslaughter by close on 10 times the fine. All right, the maximum penalty of imprisonment goes up from 20 to 25 years, but it's a very significant increase in the fine from what is in the Crimes Act at present. Why the difference? Do you intend doing something in relation to normal manslaughter as well? There's a huge difference. If this were to be enacted tomorrow, there would be not only a five-year increase in maximum penalty but also a very significant increase—from \$30,000 to \$250,000—in the fine for an individual, or \$150,000 to \$1,250,000.

Ms Gallagher: I've lost you, Bill.

THE CHAIR: Basically, we have the crime of manslaughter now, at section 15. There is a maximum term of imprisonment of 20 years. We have a formula in the Crimes Act, and also in the Legislation Act, which has a financial penalty for offences of 10 years or more, which is a maximum of \$30,000 for an individual or \$150,000 for a corporation. Your bill increases manslaughter to 25 years. I don't have a problem with that. I'd be hypocritical if I did, because the bill I produced did that.

Ms Gallagher: Yes, we're being consistent.

THE CHAIR: But the fine goes up almost nine times from \$30,000 to \$250,000 for an individual and, for a corporation, from \$150,000 to \$1.25 million.

Ms Gallagher: Do I think that's fair?

THE CHAIR: Why the discrepancy—and can you shed some light on that? Do you intend to bring normal manslaughter into line with this, or is there some specific reason why this particular bill has a very different penalty from the current law for manslaughter?

Ms Gallagher: In relation to your question about whether we would be doing the same thing for manslaughter, I think you'd be best to direct that to the Attorney-General. It's his area rather than mine. But it's important that the fines attached to this bill are seen—and they're the maximum fines. That's certainly something the courts would take into account. I guess you're potentially looking at some corporations at that top end that have significant—

MR HARGREAVES: Serial offenders?

Ms Gallagher: No, I'm not talking about that. In the context of the income those corporations have—the multinationals for example—you're going to have to have some capacity to fine them to a point where it may act as a deterrent.

THE CHAIR: Okay. They can be fined \$150,000, as a corporation, for manslaughter under the current law. I'm not saying you may not have good reasons, but why the very substantial difference? Or is it the case, perhaps, that you're planning to bring the current law for other types of manslaughter into line with this?

I'm just asking you that. I'm interested in the substantial difference. I can see the rationale for your 25 years, because that applies in other states for manslaughter. But regarding the significant difference, in respect of financial penalty, from what there is at present, I just wonder if there's any rationale. There may not be. It may simply be that no-one's thought of that—but has anyone looked at it?

Ms Gallagher: Penny has something to add.

Ms Shakespeare: Perhaps I can add to the answer Katy gave previously. You're right—there will be changes to manslaughter penalties, as part of the broader criminal code review. I know that one of those changes will most likely be bringing the imprisonment up from 20 to 25 years because that's consistent with the national model criminal code and what has been happening in other jurisdictions.

I'm not sure what the financial penalties for manslaughter are under the model criminal code, but there's been a decision by the government to introduce significantly greater penalties for industrial manslaughter through this bill, because of the need to provide a sufficient deterrent for corporate offenders. In combination, there are maximum fines of \$1.25 million, but there's also provision in this legislation for additional financial penalties, in the nature of community service projects, of up to \$5 million.

So it's not just the level of fines that's being increased here. That has been a decision by the government that it's necessary, in the case of workplace deaths, to provide penalties that will act as a sufficiently high deterrence to large corporations. These are maximum penalties though.

THE CHAIR: Yes, I appreciate that. I note that, at the top of page 4 of your submission, it says:

An employer who causes the death of a worker through reckless or negligent conduct could already be charged with manslaughter under the existing provisions of the Crimes Act. As discussed above, however, there are no appropriate penalties to allow prosecution of corporate employers.

I take it from what you're saying that you believe the current maximum of 1,500 penalty units—that is \$150,000—isn't a suitable maximum deterrent for corporate employers, and hence that increase, Ms Shakespeare.

Ms Shakespeare: That's correct. Another aspect to the legislation, that probably isn't amplified properly in that sentence, is the need to change the way corporations can be held responsible for criminal offences.

At the moment, under the Crimes Act, if you had a large corporation where a workplace death had occurred—for instance, a manufacturing corporation where you had safety equipment that was removed from machines because they wanted to increase the speed of productivity on those machines—you'd need to establish that the person who made the decision to take that safety equipment off was the directing mind and will of the corporation. That is very difficult to establish at common law unless you've got the chief executive or very senior manager of a corporation—and that the person who'd made the decision to take off the safety equipment was responsible for the death.

It's very difficult at present, under the common law principles of directing mind and will of a corporation, to have large corporations charged with manslaughter. If you've got a smaller corporation, where there's only one director or one senior manager who's working very closely with their employees, then it's a lot easier to establish that the person who made the decision not to use the safety equipment was the directing mind and will of that corporation. But that's almost impossible for large corporations, because there will be layers of management between the people who do the action that results in the death—taking away the safety equipment—and those people who made the decision and are directing the corporation.

THE CHAIR: Then how could you successfully and fairly, even under this, prosecute in accordance with our law, in the way it's operated for probably hundreds of years, a number of people in a large corporation who might have been responsible for that? Under your legislation, would that mean that the corporation should then receive a whopping big fine, or are you saying that you could perhaps have the whole board of directors up, as individuals, for manslaughter?

Ms Shakespeare: There are two offences that would be established by that.

THE CHAIR: I suggest you could never do that, in a normal court of law, for any other crime under our Crimes Act.

Ms Shakespeare: I probably need to explain the two separate offence provisions. One relates to employers so, if you've got a corporation, the corporation is the employer. You're not talking about directors or managers personally, at that stage, but to sheet home liability to that corporation. How the bill will change things from the current common law principles of directing mind and will is picking up the corporate culture provisions in the ACT Criminal Code, which we've discussed on page 12 of our written submission to the committee.

So, instead of just looking at whether a particular person who's a senior manager of a corporation was directly responsible in an action that led to somebody's death, you can look at whether the corporation expressly, tacitly, or impliedly, authorised or permitted the commission of the offence. The criminal code then sets out a number of ways in which you can establish that authorisation or permission. That includes things like proving that their board of directors intentionally, knowingly or recklessly engaged in that conduct or expressly permitted it; proving that a high managerial agent of the corporation intentionally, knowingly or recklessly did the conduct; and proving that a corporate culture was allowed to develop and let that conduct occur.

So, instead of showing that the chief executive of the corporation came down onto the floor of the factory and said, "Take off those guards from the machinery now," all you'd have to do is show that the chief executive of the company, the board of directors—there would need to be evidence that they had been involved in making this decision—had said, "Look, we need to speed up production. This safety equipment is slowing things down"—that they had made a decision which had then filtered down through the layers of the corporation to the people who actually took the things off the machine.

That's the corporate culture stuff. They had deliberately or intentionally allowed that corporate culture, which meant that, on the floor, you did not use safety equipment to continue—that that went on with the express or implied knowledge of the board of directors and senior managers.

THE CHAIR: The whole board of directors, and senior managers, would then be personally liable under this legislation?

Ms Shakespeare: No, that's not the case. The corporation would be liable then, and could be subject to the financial penalties that can be imposed on corporations.

THE CHAIR: In what circumstances would the individuals be liable or not liable?

Ms Shakespeare: I can explain that. We've got a senior officer offence in the bill that would apply where somebody had direct involvement. Perhaps I can read out the provision to you. There are a number of other things that need to be established as well—you have to have recklessness or negligence as well. But the senior officer offence is in 49D of the proposed bill and it provides that a senior officer of an employer will commit an offence if a worker dies during the course of his or her employment and the senior officer's conduct caused the death of the worker.

We're not proposing vicarious liability for senior managers through this bill, or the other way around. If a senior manager is the only person who has really caused the death, then the employer is not going to be held vicariously liable for that either.

THE CHAIR: With the scenario you have painted, we have a number of occupational health and safety laws now—we have things in place since we introduced the act in 1989—which would make it somewhat difficult for such gross dereliction of duty to workers to occur, in respect of removing safety protections in the way you described—and you described it well—and filtering down. That would be somewhat difficult for any corporation in the ACT to do now. We have a very strong occupational health and safety policy and laws in place already. Isn't that so?

Ms Shakespeare: That's right.

THE CHAIR: There would already be penalties for people doing any of that, even if there were no injuries as a result.

Ms Shakespeare: There are penalties for breach of OHS duties under the Occupational Health and Safety Act. The penalties for those offences are very low, though, in comparison to what we're proposing.

THE CHAIR: Yes, sure, if no-one's injured. What are they? You don't have to answer, you can perhaps get back to us on that.

Ms Shakespeare: I can get back to you on that.

Ms Gallagher: The other thing is that there are all those measures in place, and ideally nobody would ever be charged under what we're proposing here, because all those other preventative measures and occupational health and safety legislation penalties have already come in earlier.

But here we're talking about—and I was talking to Penny earlier on this—a situation where there may have been something criminal and there is the possibility to charge someone for a crime that their behaviour had caused. Or the corporation's behaviour, however it's worked out, has caused the death of a worker. We're talking about something different from just a little occupational health and safety breach.

THE CHAIR: I appreciate that. There are no dramas there. I'm just saying that we do have fairly strong occupational health and safety laws, which I hope would have kicked in already.

Ms Gallagher: Exactly. That is what we all hope.

THE CHAIR: There are penalties there already for the types of actions Ms Shakespeare was describing. You're very much talking of worst-case scenario—someone slipping through all the current checks and balances.

Ms Shakespeare: These laws are designed to be at the extreme end of criminal conduct, as Katy said.

MS TUCKER: When you said that you have to have large maximum penalties to act as a deterrent, is there evidence that this has worked as a deterrent in other places? We don't have this legislation in other places in Australia, as I understand it. Is that correct?

Ms Shakespeare: There was legislation introduced in Victoria in 2001. That legislation provided for very similar penalties to those in this bill. But, as you say, there are no industrial manslaughter laws operating in Australia at the moment. So it's a bit difficult to assess.

MS TUCKER: What about other places?

Ms Shakespeare: There are some in the United States.

Ms Schreiner: In the United States, yes, they do in fact have laws in place.

MS TUCKER: Do you know if there's evidence to show that it changes the behaviour of corporations if there's a large penalty for manslaughter? I'm interested in whether this deterrent effect actually works.

Ms Schreiner: I believe there have been studies in recent years which have suggested that the extreme deterrent measures, in context, have been effective. The US has been the main place those studies have been able to look at because they do quite vigorously prosecute what amounts to industrial manslaughter against corporations.

MS TUCKER: The committee would probably be interested in any references you have on that.

Ms Shakespeare: We've got one reference in our submission, on page 4, which is footnoted at the bottom of the page. This is a UK study, where they were looking at whether this sort of legislation would have an impact on corporate behaviour—particularly of company directors. That's an economic analysis of the proposed reform of the law of involuntary manslaughter, which is in the 1999 UK journal. We can provide that to the committee, if you'd be interested.

MS TUCKER: Is that a spare?

Ms Shakespeare: There is a reference to it, but we could get a copy and forward it to the committee secretary.

MS TUCKER: If it's 100 pages, we won't worry. A summary will do.

THE CHAIR: The United States, of course, has the death penalty for a number of offences. Does it have the death penalty for industrial manslaughter?

MR HARGREAVES: Only in Texas.

THE CHAIR: I know they do it state by state.

Ms Shakespeare: We would have to get back to you on that.

MR HARGREAVES: You might start with Texas, when you're checking it out.

Ms Gallagher: We have to acknowledge that it is difficult to measure, in some ways. You could be raising awareness and there could be measures, such as fines and penalties, in place which cause the corporation to seriously rethink how they operate. Although a death hasn't occurred, it makes them reform the way they operate so that a death would never occur. It would be difficult to measure that.

MS TUCKER: Or you could compare it before the legislation and after, just in general behaviour.

Ms Gallagher: Yes. It would give part of the answer, I think. The other part is that unmeasurable bit about whether corporations and employers change their behaviour because it sits there.

MR HARGREAVES: Mr Chairman, I have a question. I'd like to give you a scenario, because there are three parts of it which I apply. We're talking about the death of, say, a truck driver. This is a long one.

THE CHAIR: I would like to ask one more question in respect of a good, strong, penalty being a deterrent. Do you think that applies for most offences, Ms Gallagher—apart from this? Or is there some specific difference in this particular offence that deters people, rather than strong penalties in other crimes as well?

MR HARGREAVES: Somebody has died.

THE CHAIR: Anyone could answer that—of the three of you.

Ms Gallagher: I don't think there's any doubt that penalties act as a deterrent. At the end of the day, it would be great if we had no crime anywhere on anything—but I have no doubt that penalties act as deterrents.

MR HARGREAVES: This has been an issue of complexity for some time, and I was talking about it before we kicked it off. There is the scenario of a truck driver delivering goods.

Let us suggest, by way of an example, that a major supermarket chain puts a contract out on a transport company; the transport company employs a truck driver; the truck driver drives down to make a delivery and gets killed along the way. When you work out why it happened, some of the contributing or exacerbating factors can be long driving hours and that the contract delivery details are tough—that's a fairly common issue in long distance haulage, but it is a condition around the town as well.

I'm interested in how it would apply in this legislation, in respect of the driver's supervisor, the company employing the driver. This is something that I suspect will be setting a standard—the relationship of the company that awarded the contract to the transport company. If the conditions of contract of the awarding company on the transport company are so tough as to create an environment where somebody is likely to get killed, how will they be affected under the legislation?

Ms Shakespeare: There are quite a few issues tied up in that question. First of all, you'd need to establish who the employer is going to be, for the purposes of the offences. There would need to be some link with the territory, for the territory laws to apply, so presumably the employer of the truck driver would be based in the ACT. Perhaps the truck driver is killed outside the ACT, but the employer is here.

The legislation would apply to cover a truck driver employed directly by that company—they would be covered as a worker of that company; an independent contractor—because worker is defined so as to include independent contractors. So if they engaged a truck driver on a contract, they'd still be covered. If there was another chain—if they had engaged a firm and then they had engaged the truck driver—that would also be covered through the agency provisions in the bill.

There would still need to be, for an offence to have occurred there, evidence that it was the conduct of the employer—something that the employer had done—perhaps saying, “I know that you haven't had sleep for the last three days because you've been on another driving assignment, but you need to get this here within 10 hours, so you've got to drive straight through”—instructing them to break the speed limit. Or, “We don't have time to change your brake pads, even though we know that they're worn and need to be changed, because you've got to do another delivery.”

With that sort of conduct, if it can be proved that the employer knew those risks—that that was a substantial risk to the life of the truck driver—and took those risks anyway, then that would potentially come under this industrial manslaughter offence. The death has to occur in the course of the employment. It doesn't matter that the truck driver, when he died, may have been outside the ACT, as long as it was in the course of his employment for the ACT-based company. Does that cover it?

MR HARGREAVES: That covers almost all of it, but there's still a bit missing—that is the responsibility of the company which awarded the contract in the first place. The conditions of contract are often such that there is pressure put on people to achieve. It's also the relationship, I suppose, with owner-drivers contracting to large companies. Are they covered also by that? I guess there's a double-barrelled part to it. Does that make sense?

Ms Shakespeare: Yes, they would be. Yes, it does. The independent contractors are included in the definition of worker. If you had a corporation, sitting at the top, which awarded a contract, and the terms of that contract were imposing something that was not meeting their occupational health and safety duties—because of something in the contract—then, yes, that could be covered here. But you have to show that there was recklessness or negligence.

That's a particular criminal standard, so there would need to be evidence to that standard—that they knew, or should have known, that what they were doing could have led to the death of a worker. Or a reasonable corporation in that situation would have known that the terms they were imposing could have the effect of killing the truck driver.

MR HARGREAVES: We know the extent to which people are injured on the highway, for example. Maybe with a Canberra contractor delivering to Sydney, it doesn't matter that they're employed here but they're killed on the Hume Highway. But where there is a regularity about accidents involving the pressure of the original contract on the transport company, I'm wondering where we stop—when we go up the chain—in respect of responsibility and culpability under this law.

Ms Shakespeare: The definitions of employer and agent in proposed section 49A have been deliberately drafted to catch right up to head contractors in chains of contracting. That isn't to say that, just because there's been negligence or recklessness further down the chain, that's going to be sheeted home to them. There has to be something where you can show that, while the head contractor wasn't the direct employer of the worker who was eventually killed, they would have had control, or they could have employed that person directly but decided to use the subcontracting chain instead—and, because they still had control over how the work was done, the way they directed the work to be done had an effect on the worker, and the effect was that they died. Then they could be covered.

MR HARGREAVES: That's fabulous. That has addressed most of the things that worry me about long distance transport. In fact, it might be creating a bit of a precedent here, on which workers compensation people can start looking at what they're doing.

How do you get on, for example, if you get a Sydney-based company which awards a contract to a Canberra-based company whose driver gets killed? Do we have to stop with the Canberra-based company, because we don't have jurisdiction over the Sydney people who awarded the contract in the first place?

Ms Shakespeare: There would have to be. For ACT criminal law to apply, there'd have to be some nexus with the jurisdiction here.

MR HARGREAVES: It isn't impossible, for example—we'll quote a name. I'll use a name.

Ms Shakespeare: If you've got contractors involved who are ACT based, then they could be charged.

MR HARGREAVES: I will use a name, and I want the record to show that this is only an example that has been picked out of the air. For example, there is a contract made with Woolworths in Sydney or Dairy Farmers to supply milk, and the milk is actually contracted to be picked up in Wagga and delivered to supermarkets in Canberra by a Canberra-based transport company. But the contract starts in New South Wales and the pressures on the driver are actually the terms of the contract between the Woolies or the Dairy Farmer-type people and the Canberra transport company. And they are passed on down the line. Now, if there is an industrial action where the truck driver is killed, do we have to stop with the Canberra company or do we keep going? Can we go into New South Wales and take them on as well?

Ms Shakespeare: That is something I would like to think about and provide answers to.

MR HARGREAVES: Please do. And if the answer is, “Yes, we have to stop at the border,” so be it. Perhaps something like SCAG ought to address cross-border jurisdictional issues with full legislation like this.

Ms Shakespeare: That is something I would actually like to refer to the Government Solicitor’s Office. That is quite a complicated legal question I think and it is criminal policy.

MR HARGREAVES: Thank you. The Transport Workers Union will be delighted.

THE CHAIR: You have got a number of instances here where manslaughter can be proven. That is basically recklessness. That is fairly well defined and that is fairly normal for this type of offence, I must say. But then you just have a much lower standard of negligence. Why do you actually pick that, especially as some of the jurisdictions, like the United Kingdom, have something similar? They actually have offences of reckless killing and killing by gross carelessness, which is akin to gross negligence, which we have a fair bit of case law on in relation to things like culpable driving occasioning death, for example. But the standard of negligence is a fairly low standard in the criminal law, and I have a concern about that, given that in similar jurisdictions we have a much higher standard of wrongdoing.

Ms Shakespeare: The negligence standard that has been used for this bill is the same negligence standard that applies to manslaughter at the moment—the criminal code provisions. It is based on the national model criminal code. So this is the negligence that is going to apply across the country once that is all implemented.

THE CHAIR: Are you aware where it applies at present? Has any of that part of the criminal code been introduced in any jurisdiction yet?

Ms Schreiner: Those provisions have been in the Commonwealth criminal code since 1995, I believe, and introduced here in December as part of the ACT Criminal Code.

Ms Shakespeare: For other jurisdictions we would have to go and check. We can’t answer that now.

THE CHAIR: If you could, that would be handy. Thanks.

Ms Shakespeare: The standard isn’t low. It is to a criminal standard and it is all defined in the ACT Criminal Code. It is not sort of like a special lower standard we have created for the industrial manslaughter bill. Recklessness and negligence are not defined in this bill. References are made to the ACT Criminal Code so it is the same standard that would apply across all manslaughter.

THE CHAIR: It is the same standard that applies to normal manslaughter in a non-industrial sense. Thank you for that.

I note on page 3 you talk about other jurisdictions, and no other jurisdiction has actually introduced legislation and passed legislation like this. The closest was Victoria, where it

didn't get through its upper house. New South Wales in fact decided not to go down this path and the government's submission says, "New South Wales is pursuing strengthened compliance measures in preference to introducing industrial manslaughter laws." So no-one actually in Australia has laws like this, is that so? All right. That hasn't changed, has it, from the date of this submission?

Ms Gallagher: No, it hasn't. Last week I was at an industrial relations minister's conference in Adelaide and I had some discussions with the Victorian minister and the Queensland minister, and they are both still looking at how they do it. I think the view is that they are going to be doing it through occupational health and safety law reform.

THE CHAIR: What, manslaughter or something different?

Ms Gallagher: Addressing workplace deaths through OH and S. The New South Wales government confirmed that they are not pursuing it at this stage. But certainly I think from the ACT government's point of view, we don't mind leading the way on this one.

THE CHAIR: Well, why? I mean, if no-one else is. There are other Labor states too, minister. Why isn't Queensland? Why is Queensland pursuing it through those reforms and why is New South Wales going down the path it is going down? And, by the way, I would be very interested, and I think the committee would be too, to have copies of any information you have as to what those other states are doing, or what additional compliance measures, for example, New South Wales is taking, especially if they are proposing law changes, or if they have in fact done anything to enhance their occupational health and safety law. But if you can just answer that other part as to why—

Ms Gallagher: About why are we choosing to do that?

THE CHAIR: Why aren't those other jurisdictions doing it?

Ms Gallagher: I think that is something you would have to ask them. I didn't specifically go into that. I was more asking about the ways they were looking at doing it.

THE CHAIR: Right, I am interested in that, too.

Ms Gallagher: And again, the discussions were over lunch and were very brief. They basically said, "We are looking at it through our occupational health and safety reform." Victoria said, to quote them, "Everything is on the cards. We are re-looking at it." Again, we have taken the view here in the ACT that this is the hard end of the activity, I guess. If there is a workplace death that was caused by a situation that can be prosecuted through the Crimes Act, because it was a criminal offence, then that is the way to do it. We still have our range of occupational health and safety compliance and preventative measures in place but this is the way that we have chosen to follow for that end of the—

THE CHAIR: I am just interested (a) why no-one else has done it; and (b) what other states are doing instead of this—and if you do not know the answers, obviously I would be happy if you can get back to me on both (a) and (b).

Ms Shakespeare: The Commonwealth also has some legislation currently before the federal parliament at the moment—that is amendments to the Commonwealth Occupational Health and Safety (Commonwealth Employment) Act, which would introduce criminal penalties for senior managers within the Commonwealth, although because they only regulate the health and safety of their own employees, that doesn't apply to corporations.

I am not sure that we are going to be able to give you too much on New South Wales because they just haven't done a lot of work on this yet. I think they are probably at the stage of starting to look at discussion papers and things.

THE CHAIR: Whatever you can, though.

Ms Shakespeare: We can get copies of discussion papers that have been put out by the Western Australian and the Queensland governments and a review that the Western Australian government has just conducted, and it has reported recently. If we haven't provided them already to the secretariat, we can get copies of those across.

MS TUCKER: Can I ask some questions, Chair?

THE CHAIR: Yes certainly.

MS TUCKER: Thank you. I am interested in the question of the relationship between death and injury, because the point was raised in some submissions that apparently an infinite amount of time can lapse between the injury and the death, and that is of concern to some employer groups; and that it could become quite difficult to make the connection because other things could have happened in that person's life. Can you respond to that concern?

Ms Shakespeare: Yes. Some of the issues that were raised I think in the HIA submission were a bit confused. They thought that because there wasn't anything in the bill that said that you could have an injury at work that later resulted in a death, what if there were intervening circumstances which meant that the death wasn't caused at all by the injury; that you wouldn't have employers being held responsible for those deaths because—

MS TUCKER: But wasn't their concern that it might be hard to establish?

Ms Shakespeare: Well, it may be difficult to establish, but if there is evidence that an injury sustained by an employee in the course of their employment caused their death later—they didn't have to die on that day—then the employer should be able to be prosecuted in those cases. Just because there has been an intervening period of some years or something, if the root cause of the death was a negligent or reckless failure by the employer at work then it is intended that those sorts of things could be prosecuted.

THE CHAIR: Can you do that for a normal manslaughter?

Ms Shakespeare: Again, the same sort of principles apply to normal manslaughter.

THE CHAIR: I thought there was an actual timeframe in which after that timeframe expired the criminal law did not apply?

Ms Shakespeare: I am unaware of any limitation periods on murder or manslaughter.

THE CHAIR: I thought there was one. I might be wrong but I just thought there was a time—one year or something like that—after which you could not be criminally prosecuted. Sure, sue for negligence and all sorts of things civilly, but the causal link which would affect a criminal prosecution under certain sections of the Crimes Act wouldn't apply. Again, I would be interested in getting some information on that.

MR HARGREAVES: Statute of limitations.

THE CHAIR: I am not so much—

Ms Shakespeare: I know there is statute of limitation for civil type but I don't think that applies to criminal.

THE CHAIR: There is. It doesn't happen very often, mind you, or hardly ever. But at the back of my mind I think there was some limitation of that in the general criminal law.

Ms Shakespeare: There was a concern, though, that I did want to address now if I could, raised by the HIA that the deaths need not be related at all to the injury. That is not the case because of paragraph (b) of the description of the offence, which says that you have to establish that the employer's conduct or the senior officer's conduct caused the death. So it isn't the case that under the offences an unrelated death could be blamed on an employer.

THE CHAIR: Perhaps I could formally ask the Minister to clarify the point I raised because I am generally uncertain as to what the situation is in the general criminal law in terms of someone being prosecuted for the death of someone when that death occurs years after the actual incident. Perhaps someone could get back to me on that, Katy.

Ms Gallagher: Yes, sure.

THE CHAIR: Sorry Ms Shakespeare, please continue.

Ms Shakespeare: I have finished, thank you.

THE CHAIR: Kerrie?

MS TUCKER: Just to follow up on that—and I don't know if you are the right people to ask this: if, for example, you come back and say “No, that wouldn't be applicable in normal manslaughter,” is there an issue of concern if we have laws that are that inconsistent? Are you comfortable with that? You said that there is going to be consideration of change to the penalties that Mr Stefaniak raised in the first place that were inconsistent with this. But in this example as well, that would be a problem, wouldn't it—if you had that capacity to go back for this law but not for the other one, and what happens then if you have that situation?

Ms Shakespeare: We haven't looked specifically at this issue ourselves but this legislation was developed jointly with the Department of Justice and Community Safety because it was a major concern to make sure that, aside from the penalties—a decision was made to have different penalty regimes here for particular reasons—the elements of the offence needed to be identical with the rest of the ACT's criminal law, so that you didn't have divergences and different sorts of fault elements and things applying. I will ask the department of justice specifically about this, but they have been involved in drafting this to make sure that it does reflect the general criminal law, and as far as I know they are comfortable that this is entirely consistent with other criminal law.

MS TUCKER: On that specific point it will be an interesting clarification.

THE CHAIR: Yes. It clearly isn't with the penalties, so I and obviously Ms Tucker would be interested in that. Kerrie, do you have some more questions?

MS TUCKER: No, I am right for the moment, thanks.

THE CHAIR: John, do you have any additional ones? Okay. In 49A on page 5 of your submission you refer to who is an employer and it does seem to be quite broad. You have obviously got any series of subcontractors in there and a number of links as to almost a chain of command, I suppose. Just how far removed from an actual incident would someone be liable under this legislation? It seems that you give some scenario in relation to a building contractor and where you might have three or four different sorts of subcontractors, yet the person right at the top would be liable. There might be all sorts of things intervening between that person and the three or four subordinates before it actually gets down to the worker who is actually killed. Where does that sort of chain stop? That seems to me to be—

MR HARGREAVES: Didn't you give the answer to that before?

THE CHAIR: —a very different sort of thing to normal criminal law in terms of the culpability of a person.

Ms Shakespeare: It is not different from normal criminal law in that if there are intervening employers and contractors between the head contractor and the worker that is killed, you still have to show that the head contractor, through their negligence or recklessness, substantially contributed. That is the definition of "cause the death of the worker". So without that link there is no offence committed; you can't make out the offence.

THE CHAIR: Let us say there are five links in the chain in a big building site, for example. Would it be possible that everybody in that chain could be charged with industrial manslaughter?

Ms Shakespeare: That is intended, yes. If all of them substantially contributed, the actions of five different employers substantially caused the death of the worker, then, yes, it is intended that potentially more than one person could be charged.

THE CHAIR: What about the situation of what is directly done at the company level? The CEO, for example, executes that, tells the next person down the chain, who then tells I suppose whoever is running the site, who then tells the main contractor, who then tells the subcontractor to pass it on, and the worker dies. Would everyone in that chain, many of whom are probably just passing down a directive, be liable? Is it intended, for example, that someone should have the gumption to say, “Hold it, that’s wrong. I’m not passing that on?” Is that to get away from sort of a Nuremberg defence or is there any difference simply because you might, somewhere in that chain, simply have someone literally passing it on without thinking?

Ms Shakespeare: “Passing it on without thinking.” To establish recklessness you have to show that there was a substantial risk that then passing on that information would cause the death of the worker and that they were aware of that substantial risk but just went ahead and took that risk anyway. So in that case I think culpability still needs to be established to a high level.

As far as the negligence part goes, the negligence test is looking at whether or not the consequence of their decision to pass on that order or directive was foreseeable, so they could foresee that it was going to result in the death of the worker, and that a reasonable person in that circumstance would have said, “No, I’m not going to pass on that directive because somebody could die as a result.”

So I don’t think it is looking at it in a way of saying everybody who has passed on an order could therefore be held responsible. You have to show mental fault elements to establish manslaughter, and they would have to be established in the case of each person that was charged.

MS TUCKER: This question might have been asked but you might have noticed the Scrutiny of Bills Committee noted that 49E says that the court can decide that the guilty party should perform specified acts or establish and/or carry out a specified project for the public benefit. The scrutiny concern was that it was perhaps impinging on the separation of powers; that it is giving the court, in a way, a capacity to give an administrative order. Where did you get that from in the act? Is there a precedent for that?

Ms Shakespeare: That was in the Victorian bill that we discussed earlier—the one that wasn’t passed in their upper house. So it was modelled on earlier provisions that had been introduced in Victoria. The idea of that provision, though, is to allow community service-type orders for corporations—the same way that a natural person who is found guilty of a criminal offence can, instead of being jailed, be given community service orders. That is the intention here, but for corporations.

The other sort of different penalties that have been introduced under 49E are requirements to publicise the offence. Because corporations value their good name—

MS TUCKER: It is a shaming thing.

Ms Shakespeare: That sort of thing, yes. And notifying shareholders, that sort of thing, which is similar.

MS TUCKER: Does the court decide what individuals do when they are on a community service order? I didn't think they did. I thought they just got—

MR HARGREAVES: Sent off to the community service order people.

Ms Gallagher: They certainly set, I think, the parameters of it—like the duration. “You will do 250 hours community service.”

MS TUCKER: Yes, that's what I thought. But this is slightly different because the court is now saying, “You are doing 250 hours and you will clean the streets with an ‘I've been bad’ sign on you,” or whatever. So I am interested in that particular step and if there is a precedent in other law.

Ms Gallagher: With the words “a stated project”—they are stating what that project should be.

MS TUCKER: Yes. And it doesn't have to be related to the offence either. I am wondering where that came from and if that is stepping in a little bit close to the role of government rather than the courts.

Ms Shakespeare: Our advice so far from the drafters and the criminal law policy area is that it is not impinging on, that it is constitutionally possible, that they have looked at it. We haven't responded to that Scrutiny of Bills report yet, so we need to look at that further.

MS TUCKER: It would be interesting for the committee, I am sure, to just know if there are precedents for that in other areas of the law. So we would like a response. We will get it through the scrutiny report.

THE CHAIR: You are responding to that, okay.

Ms Gallagher: We will be responding to that shortly.

MS TUCKER: Shortly. So that will come into the committee and we can look at it. Okay.

THE CHAIR: Are there any burning questions at this stage? Just further on that chain of command thing; and again, maybe, the minister could take it up with the government law office. I have a bit of an unease about four or five different links in the chain of command where everyone could be perhaps potentially liable for manslaughter. Not that I would necessarily disagree with it, but just in terms of our general law, this would be applying a much easier standard of prosecution, I suppose, than what we have for normal other sorts of laws under the Crimes Act.

A thought comes to mind, for example, of someone who has a very poorly maintained car because they are completely slack. It has got bald tyres and it's a mess; it is a bit of a road hazard. They lend it to a mate who takes it out, who goes off with a couple of other

mates to the pub, for example. Let's say he is about 0.1 per cent. He then decides very stupidly to lairise around and engages in dreadful driving, which results in him pranging the car into a tree and, say, killing two totally innocent friends of his who happen to be in the car. He survives. Obviously I think he would be pinged civilly for the manslaughter. Let's say he was speeding at about 160 kilometres an hour.

I just wonder though, under our current law, whether his mate, who hasn't maintained the car very well—and it would be an argument that that contributed to it substantially—could ever possibly be charged with manslaughter. I would suspect that almost certainly he wouldn't be under the normal laws. That sort of causal chain would be different under this law, in which anyone in that chain, if they should, on any objective test, have not passed on the unsafe message or should have actually done something to stop it but let it go through, could be actually guilty of an offence, and that is somewhat different from what would apply in normal criminal or other offences.

I would be interested in the government solicitors or someone responding to that because it just seems that this actually is a different type of law. It opens up the boundaries for additional successful prosecutions which aren't available for other offences. That may or may not be a bad thing, but I just make that comment.

Ms Shakespeare: I don't have section 15 of the Crimes Act in front of me, but it provides that if somebody causes a death and it doesn't amount to murder, then they can be charged with manslaughter.

THE CHAIR: Sure, and you are right about recklessness and I suppose, effectively, it is pretty gross negligence. A good example of a normal manslaughter would be if Mr Hargreaves and I had a horrible sort of set to, I pummelled him, he went to the ground, I kicked him in the head and unfortunately he died. Now I don't actually intend to—

MR HARGREAVES: It could happen.

THE CHAIR: Fairly unlikely, John. I certainly wouldn't have the mens rea to actually kill him; I am not intending to kill him. We have had a blue, we've snapped, and I've gone far too far in terms of anything there and carried it on when I should have stopped and as a result he is dead. I would be charged, and rightly so, with manslaughter, I suppose. We have had any number of cases even in the ACT Supreme Court where that has occurred. I suppose that is a normal classic criminal type of manslaughter. But that is pretty much, I suppose, an immediate action. This is a chain of negligence—it could be fairly gross negligence—which is a little bit different from, I suppose, some of the normal things we are used to.

Ms Shakespeare: It is not supposed to operate differently at all. The same standard of evidence, recklessness, negligence, still needs to be proved, as it does for general manslaughter. We are not changing the elements of the offence, the mental elements of the offence, at all. The only thing that does differ from the general manslaughter is, I suppose, the title of the offence and the penalties for corporations.

THE CHAIR: I want to look at “who is a worker?” There are some issues around that. Kerrie, do you have any more questions at this stage?

MS TUCKER: Yes. The Australian Institute of Company Directors raised the issue of the impact of this on not-for-profit organisations. Can you respond to that? Do you know what they said? Do you want me to remind you?

Ms Shakespeare: Is this fair comment that it could be applied to religious organisations and unions—

MS TUCKER: Not-profit organisations. Is that correct, that it does? Is it correct?

Ms Shakespeare: That's right, yes.

MS TUCKER: I guess what I am interested to know is are those sorts of organisations covered in exactly the same way in terms of the support from WorkCover and OH and S education and so on? Every community organisation? This applies to community organisations and charities as well? They are under the same administrative structure and pressure as a business to respect the rights of their workers?

Ms Shakespeare: Yes.

MS TUCKER: I just wanted to check that, because they seem to be implying in this submission that somehow they wouldn't be prepared for this.

Ms Gallagher: All organisations have to abide by the ACT occupational health and safety law. Anyone who has an employment relationship, who has workers, has to abide by the law of the territory.

MS TUCKER: So why was the Victorian government concerned about the effect upon the officers of not-for-profit organisations and specifically exempted them? Why would they have done that? Would that not apply to those organisations in Victoria, too? I don't quite follow it.

Ms Shakespeare: I'm sorry, I will have to get back to you on that.

Ms Gallagher: Yes, I don't know why the Victorians were concerned about it.

Ms Shakespeare: And that is something that has been asserted here. I am not sure which part of the Victorian parliament—perhaps it was raised in the upper house, but we can find out about that too, if you like.

MS TUCKER: Another point they make is related to my first question about punishment, not prevention. As I understand it, your response to that is that it is because it acts as a deterrent. That is your argument there?

Ms Gallagher: That it is about punishment, not deterrence?

MS TUCKER: They are saying this isn't about prevention, it is about punishment. You might say to me, "Yes it is, we want to punish," but you also seem to be saying you are getting some material on that, that it actually can be preventative because it can act as a deterrent, and there may be evidence to support that.

Ms Gallagher: I think it is there as a punishment because if someone dies and it is someone else's fault, and it happened at work and it shouldn't have happened, then they should be punished for it.

MS TUCKER: Yes, so there is punishment.

Ms Gallagher: So that is a strong element of it. That is where it has to be seen in line with what other measures we are taking in terms of occupational health and safety where there is a whole range of things that we are putting in to make sure that people never have to be charged under this. This is the last stop to address those sorts of workplace accidents which cause death. Penny can talk a bit more about this. She has been doing a lot of the consultations with groups that have sought advice from Chief Minister's.

But it has already raised awareness about what people's current obligations are, and just raising that awareness I am sure will act as a deterrent. How we measure that is another question and we should look at that, and we should get you some advice, as we said earlier. Perhaps Penny can talk about some of the discussions she has had with people.

Ms Shakespeare: Quite a lot of people have raised with us "Why are you just going to be imposing these large penalties on employers; why isn't the government doing more to educate people about their responsibilities?" The answer is that the government is already doing quite a lot. WorkCover have got quite extensive education programs that are already operating, and this is intended to accompany those and to complement, I suppose.

It is also supposed to complement a review that we are currently doing of the OH and S acts where we will be looking at legislation that can promote prevention through compliance measures like being able to get injunctions where people have got unsafe work practices going on, enforceable undertakings, improving the way things like prohibition improvement notices work at the moment. This is just one part of a much bigger strategy. So I think it is a bit unfair to say that the government is just punishing people rather than looking at prevention. There is quite a lot we are doing there as well.

There are two, I suppose, main purposes to the legislation—to fix up the criminal law as it can be applied to corporations but also to raise awareness. I have been out to see business groups, groups of firefighters, people who when we spoke to them thought that this was a new law coming in and that they would suddenly be subjected to manslaughter laws. When we explained to them that as an individual if you are reckless or negligent and that causes the death of another person, you can already be charged, and that includes being charged for things that happen in the workplace. They were quite surprised.

MS TUCKER: They didn't know that.

Ms Shakespeare: So I think it has been quite effective in just raising awareness about occupational health and safety responsibilities and the fairly steep penalties that people could already be facing.

THE CHAIR: I have a couple of questions about who is a worker. Before I get into that, this legislation would seem to make it very, very difficult for middle managers, not only in terms of perhaps sort of looking over their shoulder at directives that come down from above, which may be problematic, but also, I suppose, the pressure just to run efficient businesses, too; and also the practicalities, I suppose, of actually formally proving that someone further up the chain might be liable. It might be somewhat difficult to get a proper corporate culture there. Can you appreciate the difficulties this might place on middle management, who might well be the meat in the sandwich, and who are the ones who might ultimately bear the brunt of this, rightly or wrongly?

MR HARGREAVES: Or does it in fact give them a framework to protect them when they say, “No, I’m not going to do that”?

THE CHAIR: Well, how can it protect them? That is another factor. How can you prove that?

Ms Shakespeare: Middle managers don’t need to be concerned about this particular legislation. Leaving aside general manslaughter, there isn’t a penalty in here for middle managers. There is one for employers. If you were talking about middle managers, you are generally talking about an organisation or a corporation. The employer is the corporation. So that is one penalty. The other offence is for senior officers; it is not intended to cover middle managers at all.

THE CHAIR: In a smaller corporation it might, though. Surely if you have got the board, the manager, the worker.

Ms Shakespeare: The senior officer for a corporation is defined with reference to the Corporations Law and includes things like directors, secretaries, and can include another manager that has substantial management decision-making responsibility for the organisation. I suppose if you had a middle manager that met that test—I don’t think I would call them a middle manager; they are a senior manager and the senior officer offence is supposed to only apply to people in senior management areas.

THE CHAIR: Now, what is a worker? In your own paper you raise the issue of volunteers especially and the very difficult issue in relation to people like volunteer firefighters.

MS TUCKER: Before that is answered, can I follow up on your culture question?

THE CHAIR: Yes.

MS TUCKER: I would like to refer to the Australian Institute of Company Directors again. I know you did take us through how you would determine whether that culture was a problem. Is that corporate culture described in the act itself in some way?

Ms Shakespeare: The corporate culture provisions are in the criminal code, and those are the provisions that are based on the nationally agreed Standing Committee of Attorneys-General model criminal code. So these are not special provisions that have been designed just for the ACT.

MS TUCKER: I see.

Ms Shakespeare: And they are not included in this bill but they are included in the criminal code which will apply to this.

MS TUCKER: Perhaps the Australian Institute of Company Directors were not aware of that, as I wasn't, because they talk about it in language of being conversational and imprecise. So I will have to have a look, unless you have got it there and you can read it to the committee.

Ms Shakespeare: I can read out the corporate culture provisions in the criminal code.

MS TUCKER: Yes, I would appreciate that.

Ms Shakespeare: They are on page 12 of our written submission. I am sorry—this is just a reference to the corporate culture. I think the definition itself is not in our written submission but it is in the ACT Criminal Code.

MS TUCKER: We will have a look at it. We can easily do that.

Ms Shakespeare: Let me reinforce again that these provisions that the company directors are calling imprecise have been agreed throughout the country by the Standing Committee of Attorneys-General. It is part of the national model criminal code.

MS TUCKER: Thanks.

THE CHAIR: I think you said that a middle manager would be classed as a senior officer. At the third dot point on page 7 you indicate that a senior officer is another person who makes or participates in making decisions that affect the whole or a substantial part of a business or corporation. Someone who managed a wheat silo in a corporation or business and who maybe had two or three workers under them would fit that definition. Yet that person surely would only be a middle manager, wouldn't they? In a lot of fairly small businesses in the ACT you would probably have whoever is running the show, the middle manager, and then the people actually at the ground level.

Ms Shakespeare: That definition, the person who makes or participates in making decisions that affect the whole or a substantial part of the business or corporation, is drawn directly from the Corporations Law.

THE CHAIR: Yes, sure.

Ms Shakespeare: I am not sure what colloquially a person in that position would be called. But under the Corporations Law they are a senior officer.

MR HARGREAVES: But the person in the example that Bill has given is likely to be charged under the existing law because of a substantial contribution to the death anyway, wouldn't they? Regardless of where you are in the pecking order, if you have a substantial contribution to the accident that has caused death you can expect to get a charge.

Ms Shakespeare: That is right. If somebody wasn't found to be a senior officer for the purposes of section 49D proposed in this bill, they could potentially still be charged under section 15 of the Crimes Act for manslaughter if their conduct directly caused the death of another person and it was reckless or negligent conduct.

THE CHAIR: In terms of actual workers, you deal at some length with the issue of volunteer bushfire fighters. There is concern that under this the bushfire control officers could well be liable as senior officers. Obviously bushfire fighters—you say yourselves that volunteer bushfire fighters are in fact volunteers—would come under this. There would be other volunteers perhaps, other professions where risk is a very real factor, and decisions have to be taken quickly. Their lives are, by necessity, at risk and it would be very, very difficult for them, I would think, to actually go about their jobs to 100 per cent of their ability, take the necessary risks, without their immediate managers being worried about being convicted under this. So why on earth have you actually got volunteers in there, and especially people like bushfire fighters? I would assume you could probably include the normal ACT fire brigade, police and emergency services workers in that.

Ms Shakespeare: Volunteers have been included because I suppose the decision was made that there shouldn't be a lower standard of protection for somebody at work, just because they don't get paid for that work—that the same protection should be afforded to people whether or not they're paid.

The issue we've discussed in our submission really relates to the definition of a senior officer, for the purposes of a government body. Since the development of the bill, we've obtained further legal advice which says that the words "government entity" can be interpreted quite broadly.

It wasn't the intention that anybody below senior executive officer level in the public service could be covered by these offences. It may be that the drafting catches a wider net of people because "government entity" can be defined as a much smaller administrative unit. That's one government amendment to this bill we would be considering.

On the other hand, it doesn't have a lot of practical impact. As I said just prior to this question, if somebody was negligent or reckless, whilst being a volunteer firefighter, and caused the death of another person, whether or not they were a senior officer they could still be charged with manslaughter.

It's also important to point out that, under the criminal code, there is a defence for justifiable action during an emergency. There wouldn't be criminal prosecutions for people who were acting in emergency situations to contain a bushfire, or something like that, where their actions were justifiable.

THE CHAIR: Okay, that may be a defence, but I suppose that still doesn't stop a prosecution per se.

MR HARGREAVES: That's under the existing law, though. They're able to be charged under existing law.

THE CHAIR: In those circumstances, with volunteer bushfire fighters, and even police or normal firefighters in an urban environment, there are occasions when their lives will definitely be put at risk—they may in fact die. Their senior officers may well be knowingly sending them into a situation where it is quite likely that they'll die. Obviously, to avoid doing that, they avoid doing their job—to the detriment of the community. If people have it hanging over them, as to what exactly they can do, we may not have seen only four deaths in the recent local bushfires, there might have been more people killed. Similarly, in other circumstances, senior officers and commanders might be somewhat more reluctant to commit, and properly commit, their people to very dangerous situations.

MR HARGREAVES: But that's already there now, isn't it?

THE CHAIR: No.

MR HARGREAVES: Are you suggesting we take it out of the criminal code now?

THE CHAIR: No. There is a very real concern expressed by people, even in the government submission, that this might be making the job of our emergency services workers, and indeed their immediate bosses, much harder.

Ms Shakespeare: We've had some lengthy discussions with fire control organisations about the bill, to make sure that there isn't unnecessary concern amongst volunteer firefighters, in particular, about this legislation. It doesn't impose any new obligations on people who are volunteer firefighters which don't already exist under the law. I think it's just a matter of explaining those sorts of things.

We have also explained to them that, if someone was considering prosecuting a person for causing anyone else's death during an emergency situation, the Director of Public Prosecutions has to be sure that there has been recklessness or negligence in that employment, or that particular environment.

When you're looking at negligence, you're looking at the standard of a reasonable firefighter. If people are conducting their duties to a standard that's reasonably acceptable, nobody's going to be charged with manslaughter as a result. It's inherent that it is dangerous work, and you look at the standard within the context of that dangerous work.

THE CHAIR: Do we have any definitions of the standard, or any case law on that type of situation, that you're aware of, as to what is reasonably accepted? It's all very well to talk about standards. But if you're dealing with people on the spot, they may be a little uncertain as to exactly what they can and can't do. I think it needs to be terribly clear when they cross the line into something that becomes quite unreasonable.

Ms Shakespeare: I'd be very surprised if there was any case law about what is negligence in a firefighting situation. I don't think there would have been any prosecutions.

MR HARGREAVES: Essentially what you're saying is that this legislation doesn't affect that situation at all—it's already covered by the existing Crimes Act?

Ms Shakespeare: That's right.

THE CHAIR: I see with some amusement—well, not amusement, but it's interesting—that you include even ministers and chief executives in this. In what sort of scenarios would you see that happening?

Ms Shakespeare: I suppose there could be direct ministerial involvement.

MR HARGREAVES: How about a hospital going down? The hospital could have gone down.

THE CHAIR: Perhaps something could come up out of the bushfires. You could conceivably have included a former Chief Minister, and maybe the current one, depending on what comes out of the inquiries with regard to this legislation. That may, again, not be quite reasonable, as to what a normal person would expect.

MR HARGREAVES: I don't know if the Chief Minister directed a bushfire, but the other one directed a fire.

Ms Gallagher: This is related to employment relationships, which I think would be a little different from the two examples you just gave.

THE CHAIR: Yes. I read that in, but I initially thought, "My God! What are you doing here?"—but yes, I gather that.

MR HARGREAVES: Executive responsibility is what it's all about.

Ms Gallagher: That's right, and it's the same test for the public sector as the private sector. If I knowingly did something that caused the death of somebody who worked in a department that I was in charge of, then it's only right that the same test should apply to me as to a senior officer in a corporation. We shouldn't be exempting ourselves.

THE CHAIR: No, there's no drama there. I assumed that was what you meant by that.

Ms Shakespeare: The ministers are chief executives, and senior executives in public services are included for the purpose of the senior officer offence. So again it's direct conduct.

THE CHAIR: Of course. I've got no qualms about that. I'm just interested as to how you'd see that scenario working.

Ms Shakespeare: It's not aggregating responsibility for something that's happened in a department back to a minister. There would have to be some direct conduct by the minister that substantially contributed to the death of a public sector employee.

THE CHAIR: You said in your opening that there had been one death, this year, to date. What was that from?

Ms Gallagher: That was the electrocution in Fyshwick. The latest information I have is that it's still under investigation. WorkCover is involved in that.

THE CHAIR: You also mentioned there has been a case where a person was found guilty. Was that manslaughter?

Ms Gallagher: That was Australia-wide, yes.

THE CHAIR: Can you tell the committee what that was?

Ms Gallagher: It was a case in Victoria, not here.

THE CHAIR: What was that for? If it's a reported case, it would be very helpful if you could at least get us a reference. Or, if you've got a copy of the judgment, that would be helpful.

Ms Gallagher: That was in relation to a corporation—being able to establish that a person had the directing will and mind of the corporation. We'll get that for you.

THE CHAIR: Perhaps you could get the judgment, particularly. We don't want the transcript—that would probably go on for days. The judgment's usually reasonably succinct. That would obviously help the committee.

I was looking at the amendments here. Turning generally to the number of people who have, sadly, been killed in incidents in the ACT, since self-government there have been at least 20. You have included a list at the back. I take it that is attachment 1.

Ms Gallagher: On page 15?

THE CHAIR: Yes. You've have about 30 there.

Ms Gallagher: Yes.

THE CHAIR: Have you included the person who was electrocuted recently or should we add that to the list too?

Ms Shakespeare: That needs to be added to the list.

THE CHAIR: It's 31—is that right? Correct me if I'm wrong, but I note from there, going sequentially, that the first was a motor vehicle accident.

Ms Gallagher: Yes.

THE CHAIR: Then there was a motor vehicle accident during the course of work, another motor vehicle accident, a plane crash and an unknown. That's interesting. I don't know if there's any way you can find out about number five. Then there is what would appear to be a classic industrial accident, where someone was crushed by a granite slab, and then someone was crushed beneath a scraper. Then we have a motor vehicle accident; crushed by machine; another accident; someone having been shot; four cases of electrocution; a heart attack; and then heat exhaustion. It sounds like that might have been preventable. Then a heart attack; another motor vehicle accident; then an asphyxiated on vomit. On the face of it, I wouldn't be able to comment one way or the other on that. There is then another motor vehicle accident—then number 23 is someone crushed by a roller.

MR HARGREAVES: What's the point? We can read that.

THE CHAIR: I'm coming to it. There was a plane crash; another heart attack; surgery complications following an industry accident, which would appear to be medical negligence; and someone fell down stairs—that may or may not be anything. There is another vehicle accident, a heart attack and another vehicle accident.

The ones that spring to mind there which seem to jump out at you—where there might have been real industrial negligence or something wrong with the work practices—would to me seem to be numbers six, seven and eight; possibly numbers 11, 12, 13, 14 and 15; possibly number 18—heat exhaustion; and possibly number 21—asphyxiated on vomit. The other ones are largely things like heart attacks and motor vehicle accidents, which sadly happen all too frequently. I wonder, especially with those which relate to something wrong on the job, whether you've got any further details on those which would help the committee.

Ms Gallagher: In relation to whether there were penalties?

THE CHAIR: Whether there was something wrong. Not only penalties, but was something established where there were bad work practices.

MS TUCKER: Was there negligence.

THE CHAIR: Was there negligence, gross negligence or recklessness.

MR HARGREAVES: They were compensated.

THE CHAIR: Yes. Or just what the story was, basically. If someone received significant compensation, that might be a factor. I think it would assist.

My other comment there is that, when one takes out the motor vehicle accidents and heart attacks, there are 12 out of 21 which would appear to be very much workplace incidents.

Ms Shakespeare: There are also some public sector fatalities included in a different table, because they're drawn from different databases.

THE CHAIR: Okay—which is heart attack, motor vehicle accident, nasal cancer, a fall following a post-traumatic stress suicide, a heart attack, an electrocution and a fall from a height. Those two I'd be interested in—electrocution and a fall from a height.

Then you've got non-compensated fatalities, then another electrocution and a fall—suicide. I suppose that is an individual one. On table B2, number two there is the electrocution. We've probably got about 15 which are pretty dodgy sorts of deaths where, at first glance, without any other information, it would look like something might have gone awfully wrong on the job site.

Ms Gallagher: We can certainly look at what additional information we can give to you in relation to the ones you have pointed out. I would like to add that it's our strongly-held belief that you don't need statistics to justify what this bill proposes to do.

We wouldn't want to see a situation where we had so many deaths due to negligence or recklessness that we then chose to do something about it. In fact, we think this is quite a positive way. It's much better that there are no workplace deaths due to recklessness or negligent behaviour. So I'm not convinced that we need to have a certain number of deaths before we look at doing something like this.

THE CHAIR: I don't dispute that, Katy. Take something like car-jacking. That doesn't happen terribly often, but it does happen.

MR HARGREAVES: As on Melrose Drive.

THE CHAIR: Exactly, so hopefully you guys will support the part of a bill I've got. Luckily, it's not a huge sort of crime but it does happen. Even those 15 are 15 too many, if you can prevent them. So I certainly wouldn't think that's a reason not to. I suppose the real question is do we need this type of legislation? We have current legislation which could apply.

What's happening interstate? What other ways are there of dealing with the same problem? Luckily in the ACT, I suppose because of the nature of our industry, it isn't as big a problem as elsewhere. That would be true, wouldn't it?

Ms Gallagher: That's right.

THE CHAIR: We don't have the same industrial base which has traditionally led to lots of deaths.

MR HARGREAVES: But isn't the issue that the current law about holding people accountable for industrial deaths is somewhat limited to natural persons? And therein lies the issue? The issue is to make sure the legislation picks up corporate responsibility for this at senior officer and corporate level. That's what the guts is about, isn't it?

THE CHAIR: Why can't you use the current manslaughter law? There is a corporate punishment but, admittedly, that is only \$150,000. I'm all for upping penalties, but there is certainly the corporate provision.

MR HARGREAVES: We look forward to your support on this bill.

THE CHAIR: It's got to be good law. There is also the issue that that is applicable for a corporate penalty. But what, specifically, is the problem in respect of the current law, that none of the current laws can apply to this?

Ms Shakespeare: It's the directing mind and will doctrine. That's been developed at common law, to determine how corporations can be held liable for criminal offences. Like the double-barrelled test I explained earlier, you have to show that a senior manager, who was the directing mind and will of the corporation, did an action—or omitted to do something—that directly caused the death of a worker. You have to show both of those things.

Generally with larger corporations, the people who can be established to be the directing mind and will of the corporation won't be the people who have directly done something that's led to a death—there's been a series of orders that have gone down. So you can't show both elements of that directing mind and will test. That's the difficulty with prosecuting corporations—particularly large corporations. It's not such an issue where you've got a small company that has only a couple of directors.

Ms Gallagher: There's an example there of the gas explosion at Esso a couple of years ago in Victoria, when two workers died. The coroner found that it was systemic failure on behalf of the company which had contributed to that situation being able to occur. No-one was charged with manslaughter. The corporation was fined \$2 million for that.

THE CHAIR: Under what act were they fined—do you know?

Ms Gallagher: I believe it was the Occupational Health and Safety Act. Is that right, Shelley?

Ms Schreiner: There were 11 separate charges under the Occupational Health and Safety Act, which led to a cumulative fine of \$2 million.

MS TUCKER: That's the main rationale for this, isn't it—the complexities around companies?

Ms Schreiner: They were not manslaughter, but charges.

Ms Gallagher: It is, it's one of the main drivers.

MS TUCKER: Liability.

Ms Gallagher: Yes.

THE CHAIR: I don't have any more questions. We will be talking to a number of other people who have submissions. Other groups obviously have problems with this.

Ms Gallagher: There are some people who support it.

THE CHAIR: All right. We'll have a number of people come in to talk to us, and issues can come out of that both ways.

THE CHAIR: Perhaps you people could be available to come back.

Ms Gallagher: Yes sure. We're happy to come back.

THE CHAIR: I think we'd have a number of questions—I, personally, do. You've got some information which is coming to us. I don't know if anyone can come down from the Government Solicitor's Office or the DPP to talk to us. That would be highly desirable, to establish where this bill sits with regard to the general criminal law. Obviously you ladies are going to get back to us and give us information in respect of what's happening in other states, as best you can—because that's crucially important.

Ms Gallagher: On all the matters you've raised today, you've sought several things.

THE CHAIR: Yes—and steps taken in other states.

Ms Gallagher: There's a range of things we need to get back on.

THE CHAIR: Including any laws they might have introduced which are different from ours. I take it they're going down a slightly different path. They're going in parallel but via a different path. I'd be very interested to see the steps—laws and documents they've got.

Ms Gallagher: It's all to achieve the same end but taking a different path.

THE CHAIR: Certainly. There are probably a number of ways you could do that. If you could do all that, that would be great. Thank you for your attendance. We may call you back.

MR HARGREAVES: I look forward to hearing from perhaps the CFMEU and the Transport Workers Union, who may be able to put another side to the issue.

Ms Gallagher: I'm sure they will.

THE CHAIR: You look forward to hearing from everyone, John.

MR HARGREAVES: Indeed, yes.

The committee adjourned at 3.58 pm.