LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: Crimes (Industrial Manslaughter) Amendment Bill 2003)

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 3 JUNE 2003

Secretary to the committee:
Ms J Henderson (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 2.05 pm.

GABRIELLE UPTON and

TONY HULETT

were called.

THE CHAIR: I thank you both very much for coming. You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections, but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth, because giving false or misleading evidence will be treated as a serious matter.

An inquiry like this one is fairly dry and I hardly think that any of that is relevant, but I have a formal obligation to read that out. For the purposes of this hearing, please state your name, the capacity in which you appear in front of this committee and the organisation you represent.

Ms Upton: My name is Gabrielle Upton. I'm senior policy officer at the Australian Institute of Company Directors.

Mr Hulett: My name is Tony Hulett. I'm a member of the law committee of the Australian Institute of Company Directors.

THE CHAIR: You have made a submission to the inquiry. I take it that both of you have had a chance to read the bill the committee is looking at.

Ms Upton: We have.

THE CHAIR: Is there anything either of you would like to say in relation to this bill and are there any concerns or issues you have with it?

Ms Upton: I thought I might start by just explaining a little bit about the organisation that I represent, which might be helpful. The Australian Institute of Company Directors is the peak body representing the interests of company directors in Australia. Our current membership is over 17,000 and they're drawn from both small and large organisations across all industries—from private, public and not-for-profit sectors—so we have a diverse membership.

Our membership is on an individual rather than a corporate basis and 47 per cent of our members have more than 10 years experience as company directors, so they're professionals. Another thing that may be interesting in terms of the views that you will hear from us today is that our membership is primarily from small to medium business enterprises. In fact, 50 per cent of the members of our organisation are from companies or organisations that have less than 100 employees.

We have a number of key functions. They are to serve our membership, of course. The first is to promote excellence in directors' performance through education and professional development. We also initiate research, we formulate policies that facilitate improved director performance and we maintain and promote a members' code of professional and ethical conduct.

At the outset, moving to the issue that we're here today to present to you on, I want to make it clear that the Australian Institute of Company Directors believes that any workplace death is unacceptable. We support stringent occupational health and safety laws and we support corporate and personal liability for workplace death based on fair legal principles.

In terms of our presentation today, I will raise two broad concerns that the institute has about the bill and I will then defer to Tony Hulett, who is a senior member of our law committee, to talk about the more specific concerns in the bill. I'll quickly outline our two major policy concerns, our high-level policy concerns.

Our first concern is that we think there's been a failure to actually make a case for further regulation in this area. Before a major change in the law is actually brought about, the need for greater regulation, we believe, should clearly be made out and we consider that that is not the case in this instance. To put it in really plain language, it's not obvious to our membership why a new law to ensure workplace safety is necessary.

The material that we've seen to date, including the minister's presentation speech and the explanatory memorandum, has not included any data that suggests that the incidence of workplace death is increasing, nor has there been any reference to a case in which the existing law has been found to be inadequate or where law reform has been suggested. Sure, if the existing law is found to be inadequate, new legislation may well be appropriate, and that may be the appropriate way to proceed.

We compare the situation here with the situation in Victoria and Queensland and in the United Kingdom, where there was such data presented. In Victoria, as you well know, there was an extensive consultation period which the Australian Institute of Company Directors was engaged in—a period of over 12 months, if not more.

However, as you know, Victoria and Queensland abandoned their proposals, even though they had parliamentary majorities to bring about a piece of legislation of this order. We do understand that they intend to address some issues of concern through reliance on existing laws or changes to their occupational health and safety legislation. Our current information is that the United Kingdom won't proceed with their proposal either.

THE CHAIR: It won't?

Ms Upton: It won't. That's our understanding, Tony, isn't it, at this point—the United Kingdom?

Mr Hulett: My understanding is that they may proceed with it, but it will remain at a corporate level; it may not remain a personal liability, which was an issue that they raised in their discussion paper back in 2000.

MR HARGREAVES: Mr Hulett, could you give us a little bit more detail than that? Are you saying that it remains at the corporate level as opposed to the personal?

Mr Hulett: Yes.

MR HARGREAVES: Does that mean that in the United Kingdom the actual corporation itself, as a non-personal entity, can be held responsible and they're not so sure about the other bits? Is that right?

Mr Hulett: Yes. Just a bit of background there: back in, I think, 1996 their law reform commission issued a discussion paper on unlawful killing which was across the whole spectrum but dealt with the corporate issue as well. In, I think, March or May 2000 there was a formal discussion paper issued by the Home Office, together with a draft bill and there were a number of issues canvassed in that—should we do it this way or should we do it that way? One of the issues was: if we have corporate responsibility, should directors and managers also be responsible? There was a suggestion that perhaps that shouldn't be the case.

Submissions closed in September 2000 and there was a further consultation period, but there had been an intervening general election and also a change of minister. I had some contact with them last year and they were still debating what they would do, but there was some material circulating recently that they may have decided to concentrate upon corporations rather than individuals. I won't say that that's certain, but that's the indication.

MR HARGREAVES: But that is a big difference from the way that we approach it in terms of Crimes Act stuff. We don't hold corporations, as non-personal entities, responsible at the moment, as I understand it. So there is a bit of a difference there between today, as it were, and the way the UK is doing it.

Mr Hulett: Also, it is my understanding that under your present Crimes Act corporate responsibility is possible. The problem that is seen is that there is no fine available for corporations.

THE CHAIR: Continue, please, Ms Upton.

Ms Upton: Thank you, Tony. The second broad policy issue that we are concerned with is the fact that the bill has focused on punishment, and that could have unintended effects which actually work against, I suppose, the intent that brought this bill about before the Legislative Assembly.

The bill is characterised as one to prevent workplace death and yet it's more about punishment and not prevention, which really is at the heart of all occupational health and safety matters. The focus is on employers and their officers and is contrary, in our

opinion, to the mutuality of obligations approach of occupational health and safety legislation. That approach recognises, importantly, that it's a shared responsibility between employers and employees, with an emphasis on consultation, a dialogue between employer and employees and a level of cooperation, a relationship, a reciprocity.

We consider that it's going to be the responsible companies that will take this bill and its potential corporate and personal liabilities very seriously and they will organise their operations accordingly. We consider that they will see themselves at risk and they're actually likely to take steps to minimise that potential liability by introducing a high degree of workplace regimentation or surveillance and possibly paper trails.

By moving away from that culture of mutuality and reciprocity, companies and their senior officers, we consider, will see themselves as the focus of punishment. It was with some alarm that we read that the bill was introduced by the industrial relations minister of the Legislative Assembly and we would make the point that workplace health and safety is more the province of safety and workplace design than it is as an industrial relations issue. That did concern us.

The bill is likely to alter conduct, in our opinion, but probably not in the direction that's desired by the legislation. It's not going to alter the conduct of cowboys or rogue operators against whom it's purportedly directed. We consider it's going to make workplaces a lot less open and a lot less trustful. In fact, that works against the very thrust of design and legislation that's focused on workplace safety.

Those, in summary, are the two very high level policy issues that the institute is concerned with. Tony, I know, would like to talk more about the aspects of the bill. Thank you.

MS TUCKER: Can you tell me what it is in the picture you've just painted that is so critical, that is so different? You're telling us that corporations, employers, understand their responsibility; you introduced that in your presentation. I don't understand what you are so concerned about here. I mean, it's got the normal tests—recklessness, negligence, et cetera—and is very stringent, so I don't understand why you think that suddenly things have changed so much. Under the law so far, there does not appear to have been many findings, probably because of case law not being there and there not being any precedents, but if the industry or the sector that you represent is so alarmed by really just putting into law what all of us would have assumed was understood to be the case, and accepted by industry and business, I don't understand why it's so frightening. Can you explain that to me?

Mr Hulett: I think that there are a number of aspects to the bill. It's my understanding that liability presently exists under the Crimes Act for corporations. The justification for a bill such as this to attract liability to corporations—corporate criminal responsibility, for want of a better term—is one issue, but this bill goes a lot further than that, because it applies to individuals, and we're not entirely sure why that's the case when it doesn't appear to be necessary.

We're certainly comforted by the fact that there's no vicarious liability in this bill, as distinct from the Victorian bill and some other proposals that we've seen. But overall, by placing a focus upon senior officers of a corporation, as we've said in the submission, there's a logical inconsistency there in that others in the corporation, other than those who may be classified as senior, can escape responsibility, and can be effectively, if you want to take it to the worst-case scenario, as negligent as they like, although the irony is that their conduct will be attributed to the corporation. There's that aspect.

I think that the present Victorian situation, where there's this so-called mutuality of obligations approach in occupational health and safety legislation, has been particularly effective there since about 1985 in driving down the number of workplace deaths. Our concern here is that, by focusing upon companies and senior officers in terms of liability, it will move away from that approach and will make companies and senior officers somewhat concerned about liability and perhaps introduce some measures that they might not otherwise have done—paper trails, board minutes and that sort of thing—that would be useful in terms of evidence if proceedings were later introduced. They might be quite self-serving in a number of ways, but that's the sort of approach that will be taken—I suppose the them and us sort of situation—which we see as undesirable.

The other thing is that it could promote a form of workplace regimentation or surveillance. Examples were given in Victoria, such as drug and alcohol testing, which would have other consequences, of the sorts of procedures which might be introduced and which might be seen at other levels as an invasion of privacy or undesirable. They're the sorts of things that might in worst-case circumstances come about, and again are highly undesirable.

There's also the case that the workplace has changed, particularly in more recent years, Instead of a regimented workplace where you've got constant management surveillance of those for whom they're responsible, you have this concept of empowerment where you make sure that people have a great deal of responsibility for doing what they should be doing, giving them greater responsibility than they might otherwise have been accustomed to. It has certainly been a very useful tool in the development of companies, and I'm speaking in a very broad sense there. Laws like this can have that sort of counterproductive effect.

Ms Upton: Just to add to that, because of the punitive aspect of it, the way in which it's framed, it is going to create a culture where you're going to have senior management and officers—and rightly so, I suppose—worrying about their own personal liability and that will change the focus in the workplace. There might be a change from the kind of workplace environment that Tony has spoken of to one where they're going to be trying to avoid blame, and that will play out in the way that people both in senior management and the workplace actually relate to one another. Again, that's at odds with an occupational health and safety approach to workplace safety which we've seen.

MR HARGREAVES: Can I just explore that a bit with you? As I understand it, provisions already exist under the Crimes Act for those people where absolute proof of gross negligence, et cetera, can be mounted. The prosecutors wouldn't mount a case unless there was ironclad evidence that there was gross contribution to the death of a

person in the workplace under the Crimes Act. So, in fact, these provisions wouldn't be much different from that in the sense that there has to be this absolute proof bit anyway, so people in that position in a company would be no worse or better off in having two pieces of legislation, essentially, covering the same sort of response to absolute proof, except that at the moment the really big issue is that within this country we don't actually hold with sufficiently significant penalty the corporations themselves, as I mentioned, as non-personal entities.

The culture of the corporation is created and maintained by the senior officials within that corporation. If, in fact, a corporation is to be held responsible—with absolute proof, of course—for a culture which ultimately caused the death or contributed significantly to the death of a co-worker, then shouldn't we be holding the people who created and maintained that culture also responsible for that on a personal level as well?

Mr Hulett: I think there are a few issues in there.

MR HARGREAVES: Mr Hulett, you can range across that grazing paddock as far and wide as you like.

Mr Hulett: I suppose the first point is that the existing law seems to cover the field, so there's an issue as to why you need something like this, apart from the penalty issue. As for corporate culture, that's something that comes out of the criminal code and I think we've described that and a couple of other terms in there as somewhat conversational and imprecise concepts.

I have a bit of a problem with corporate culture as a concept. I've worked in a very large corporation for a long period of time, with very diverse operations domestically and internationally, and it is very difficult to say what the culture of an organisation is because it can vary from place to place. It might be different in Melbourne if you've got a different group of people. It might be a bit of a misnomer in many ways to say that a board or a group of directors sets the culture of an organisation.

I think that might be a little bit simplistic because they're not involved, at least in the larger companies, in the day-to-day operation of the company; quite a different circumstance from the smaller type of company where it's very often the case that you have a company built particularly around the personality and attributes of an individual, so I see it as a very difficult concept.

Just going back to that, the criminal code was first introduced, I think, into the Commonwealth parliament coming out of the Standing Committee of Attorneys-General, if I've got that term correct, with, if I recall, very little consultation. It was suddenly on the statute book with not many people knowing about it. I think it was immediately discovered that there were some problems with it because it was not introduced; it just lay there on the statute book and they kept delaying its introduction for a period of five or six years. I think it was only finally gazetted by the Commonwealth possibly late 2001, early 2002—my dates might be slightly wrong—and, as far as I am aware, the ACT is the only state or territory parliament that has adopted it.

As we've said in the submission, there are a couple of terms used in there—"corporate culture," leave that to one side, but "high managerial agent," which is inconsistent with the concept of senior officer coming out of the Corporations Act and these are the sorts of inconsistencies which I think should be remedied.

MS TUCKER: I think you said when you started speaking that it is covered anyway, that criminal behaviour in the workplace is covered, so why do you need this? Is that what you said?

Mr Hulett: As I understand the Crimes Act in the ACT at the moment, personal and corporate responsibility for manslaughter is possible. The argument or the point that was made in the minister's presentation speech was that, although it is possible to prosecute companies for manslaughter, there are no fines available. My point would simply be: if that's the case, introduce fines for corporate manslaughter.

MS TUCKER: What about, and I'm not just talking of the ACT, the general lack of prosecutions, successful prosecutions, for death in the workplace; why do you think that is? That's an argument that's put to the committee for needing to write the law, to take into account questions of corporate responsibility particularly, because there have not been successful prosecutions, but there has been serious negligence in the workplace. I understand the argument that you're putting to the committee—that you don't think penalties work—but, obviously, lots of people think penalties do work, and we have that applying in law right across the board.

You can argue about how much of a deterrent it is, but it's certainly something that's generally adopted as a reasonable position to take, particularly when people create a situation where someone dies, whether it's murder, manslaughter, negligence or whatever. It's a very serious thing and we know people are dying in workplaces and we know there haven't been successful prosecutions. Therefore, the committee is being told, we need to be much more explicit, so that courts have a clear understanding of where the liability lies, and we need to describe that more clearly in written law. What's your response to that?

Mr Hulett: There are several issues there. I'm not aware of how many prosecutions have been launched in the ACT over workplace death, if any.

MS TUCKER: Very few anywhere. That's one of the arguments for this legislation.

THE CHAIR: There has been one successful in Victoria.

Mr Hulett: That's another issue, but even the Victorian government, when they introduced their second bill, made the point—the minister made the point in his second reading speech and in some explanatory material—that they expected very few prosecutions under the bill. So, in a much larger environment—

MS TUCKER: That's not quite the point that the people are making, to be fair. No-one is telling the committee they're expecting a rash of prosecutions. The point being made is that over the years there has not been one, but we know that there have been deaths as a result of the negligence of employers, so there's a problem with the law.

THE CHAIR: Actually, it's fair to say that we still have to find out in this committee exactly what caused the deaths. We have had, thankfully, very few deaths in the ACT as a result of industrial accidents and we've yet to be told what actually caused the deaths, what were the circumstances in those particular incidents.

MS TUCKER: Can I get an answer to that, please, Mr Stefaniak?

Mr Hulett: I suppose that, in order to substantiate or to justify a change in law or to justify an argument that because there are workplace deaths we need this law, you'd need to analyse each of those workplace deaths. Even if there had been negligence in a number of cases, it isn't necessarily the case that it would have founded a criminal prosecution, because there are various levels of negligence. It's an emotional argument in some cases because, if you say that there had been 10 workplace deaths last year, that is not to say that there ought to have been 10 prosecutions. You've just got to look at the circumstances.

MS TUCKER: No, I realise that, but the Quinlan report tracks the separation that can occur. You don't agree that the Quinlan report tracks—

Mr Hulett: I'm not sure what you mean by the Quinlan report.

MS TUCKER: I'm sorry, it's some evidence that was given to the committee where they tracked the separation of an employer from an employee through contracting out, et cetera. It is argued that that is definitely a factor in why there aren't prosecutions, and that's why it's so important to write it down. The Quinlan report was basically putting that position through an evidence-based approach.

Mr Hulett: Well, I'm not—

MS TUCKER: You are not familiar with that.

MR HARGREAVES: Can I pursue that point, Kerrie, please, with Mr Hulett? In terms of transport deaths on the highway, in a hypothetical example—I stress the point that it is a hypothetical example because I will name a company—we could have a situation where there is an employee driver for a small company of a couple of trucks that subcontracts to a larger company that has an interstate contract with Woolies and there is, in fact, corporate insistence by Woolies across-the-board that certain targets be achieved, for example, deliveries within certain times and under certain conditions. Indeed, there was a very significant injury not long ago—I think the injury occurred in Victoria—because of this very issue, where a driver was required to work considerably longer hours than would be normally considered safe.

If, in this hypothetical example, there was a road accident due to driver fatigue and we tried to track down the reason for that, the first thing is that we've got a problem with whether it's a workplace accident or a road accident, and therein lies another issue. But, in trying to determine the cause of it, do we actually hold responsible the person's immediate boss for pressuring the person to drive the truck? Do we examine the

activities of the contractor that gave the subbie his job? Do we consider the activities or the culture of, say, the Woolies equivalent which is putting pressure on the contractor, with the threat of cessation of contract? We know that sort of environment does exist.

I'm pretty sure that, at the moment, we have no way of holding accountable for the death of that person on the highway all the people up the food chain because of their management decisions and because of the corporate culture. We can't hold them accountable for that death. As I understand the legislation—I'd be interested in your views—the criminal code certainly has reference in it to corporate culture and things like that, but the two need to be read in conjunction with each other. Without expressing it and having penalties in the draft bill that we have before us, the other one, the criminal code, unfortunately doesn't actually deliver that accountability for people up the food chain. It doesn't actually do it. It actually holds accountable in that example I gave you the person's immediate supervisor in that company for driving this guy so hard that he eventually killed himself, but doesn't actually address significantly the position up the food chain.

Do you understand where we're trying to get? We're not after the directors of the companies and those sorts of things. What the bill would appear to be trying to do, in fact, is to create an environment where those pressures don't start in the first place, so it half-addresses what you're saying about the punitive thing. Quite frankly, having punishment dished out because someone has lost their life is a fat lot of use to the person who has lost their life. The trick is, in fact, to create environments which discourage that. Anyway, I'd appreciate your view on how we actually hold accountable the originating organisation, particularly in an interstate example, because that one really worries the heck out of me, the cross-border stuff.

Ms Upton: Are your suggestions as well that that's the reason why there haven't been many prosecutions?

MR HARGREAVES: Yes, I'm suggesting to you very strongly that that is a lot of the reason, particularly with transport deaths, because they can't attribute responsibility up the food chain beyond the person's immediate employment environment. What we're doing is we're saying that these pressures coming down are certainly contributing particularly strongly to that. It can be shown that that's so, but there is no vehicle to hold people accountable for it. Unless someone can point one out to me, I'm unaware of any.

Mr Hulett: Under the bill we're considering, there's an attempt made to go through that employment chain. But even under the bill, you've got to have direct responsibility for the death, so I'm not sure. The further you're removed from the actual death, it is going to be very difficult to get a conviction under any scenario, I would think—that's just my view—because there'd be simply just not the evidence there in most cases.

MS TUCKER: There is a very stringent test.

MR HARGREAVES: Indeed.

Mr Hulett: It should be, because you are talking about putting people in jail.

MS TUCKER: Absolutely. I am interested in understanding the situation from your point of view. It is a stringent test—beyond doubt, a very high test of failing in the duty of care and it has to be foreseeable. It seems to me, just looking at it, that it is a very stringent test. I understand you're putting the argument that, if you want to fine them, fine them, put on a penalty. But we're talking about the death of a human being. You say to the committee, "If you want to have a fine, have a fine." I'm interested in understanding what you think the use of that fine would be, if you say that we should have a fine. Why do you think it would be useful to have a fine?

Mr Hulett: No, I made the point about the fine because one of the reasons for introducing the bill is that, although the present Crimes Act picks up corporate manslaughter as a potential offence, the prosecution is virtually useless, because there is no penalty attached to it—in other words, no fine. So my spot opinion was: why not simply introduce a fine at whatever level you like?

MS TUCKER: But if you're arguing that it's of no use because there's no penalty, then—

Mr Hulett: There's no point in prosecuting if there's no penalty. I'm saying that there should be a penalty.

MS TUCKER: Yes, I understand that.

Mr Hulett: I'm not trying to trivialise it at all.

MS TUCKER: No. You're arguing that there should be a penalty, so then the discussion is about what is the penalty.

Mr Hulett: Obviously, if a company is found guilty of corporate manslaughter, there ought to be a penalty, an appropriate penalty. I'm not saying that there shouldn't be. But that does raise an issue that, I think, has been raised, that is, the deterrent effect of harsh penalties in legislation like this or stringent penalties. I'm not aware of any definitive study that's ever been done about that. It's often said that we need these laws to provide the deterrent. My experience, now longer than I care to admit to, is I would have subscribed to that theory some years ago.

As time goes on, I have become less and less convinced that laws in whatever area that have very stringent penalties do have the deterrent effect at least that's made out for them or used as justification. I think it's more a matter of getting at behaviour rather than punishing. As Mr Hargreaves said, it's poor comfort for the relatives and family of someone who's lost their life for someone to be punished, whether it's jail, a fine or whatever; better that it didn't happen in the first place.

MR HARGREAVES: If I'm driving down the road in my car and barrel into somebody and kill them because I just wasn't looking—I was not drunk or anything like that; I just wasn't looking—what, in fact, I've got is driving in a manner dangerous occasioning death and, at best, I'm going to cop a fine and, at worst, I'm going to cop a custodial sentence and in the middle there probably would be a suspended sentence, as was applied

to a friend of mine who did just that. So what we've got, actually, is a penalty sitting up in there. A custodial sentence is the usual option which is dished out. It is quite often suspended, I accept that, but there is, in fact, the message to the community that, if you are grossly negligent and kill someone, you've got a custodial sentence on your hands.

It's really difficult to put a corporation in jail, physically difficult to that, so the attempt in the legislation is to do something equally to the corporation that would apply to an individual. Deprivation of liberty to an individual is a pretty significant sort of thing to happen and the imposition of significant fines would appear to me to be one of the few ways in which one can set a penalty commensurate with what's happening to an individual in terms of a corporation.

If you accept the argument that you should have some kind of penalty put down, the level of it needs to be significant to measure up against an individual facing a jail sentence. Please don't feel that I'm trying to be adversarial about this; I'm trying to pick your brains, actually.

Mr Hulett: It raises some interesting points. Obviously, you can't put a corporation in jail—it's an artificial legal entity—and can only act through agents, that is, individuals who happen to be its director or employees, so you've got that strange set of circumstances. However, there is this issue of double punishment, because if there is a workplace death and you fine the corporation and also send a director to jail, or fine a director, manager or whatever, then you've got that issue that doesn't apply personally.

MR HARGREAVES: Before you go on, Mr Hulett, and I appreciate you are making a point, could you explain how it is double punishment, because the way I see it is that we've got an individual on the one hand and a corporation on the other, so it seems to me to be, as it were, two persons being involved in the same issue, one is a real person and the other is a non-real person, so I can't get it through my head where the double penalty applies?

Mr Hulett: The double penalty could apply if you've got a heavy penalty imposed upon a corporation and its sole director sent to jail. You have effectively put it out of business. There's also the effect of fines and whatever upon shareholders, creditors, employees, that sort of thing, something that's a factor. In fact, in the Victorian bill, in both bills, there was a provision which made it clear that courts had to take into account the ability of the company to pay the fine in levying the fine. It seemed to me that that could produce an inconsistency where you put a value upon a death—it might be worth $500,000 here and $10,000 there. I had a bit of difficulty with that. But it is a very difficult thing in meting out punishment, with different circumstances and different people involved, to have what might ideally be seen as consistency of penalty or punishment.

MR HARGREAVES: One of the points put to us was that, in terms of the personal liability part of it, there are sufficient sanctions within the Crimes Act already, so the police would just walk in there and charge somebody for their contribution based on the level of proof of contribution to it. But it has been given to us in evidence that people acknowledge that, in fact, corporations are not held accountable at the moment and this bill is an attempt to bring that accountability to force.

Am I correct in assuming that, even if this bill didn't have any personal liability bits in it for the directors and all the rest of it, given the burden of proof that Ms Tucker was talking about earlier, it's quite possible that the same thing could apply, because a person could be charged under the Crimes Act and then the corporation charged under this bill, because this bill is the only mechanism we have for holding the corporation responsible?

THE CHAIR: Yes, unless you introduce a set of penalties in the Crimes Act.

MR HARGREAVES: In which case you've got, according to your theory, a double penalty, but contained within the Crimes Act instead of this bill. Is it something that you can't avoid anyway in this sense?

Mr Hulett: You may not be able to.

MR HARGREAVES: So, either one of them gets off, really.

Mr Hulett: Yes. Just by way of explanation: in making that point about double punishment, I wasn't suggesting for a minute that, in a case where it's appropriate, corporations shouldn't be punished and an individual within that company shouldn't. I just simply made the point that there was that element associated with it which seemed to have at one level a characteristic of unfairness about it.

THE CHAIR: You mentioned mutual obligation. Several other witnesses have said how important that is in terms of industrial relations and actually having a safe workplace. We had someone from Sydney saying that last time when you were stuck at Melbourne Airport. You mentioned that that's worked well in Victoria since 1985. I wrote down what you said. You said, "It's driven down workplace death." Forgive me, I have had a quick flip through your submission, but I don't know if we've actually got any details of that. Have you got details of workplace death in Victoria since 1985 which you could give to this committee to support that claim?

Mr Hulett: Yes. The responsible minister issues a press release almost annually showing that the rate is declining.

THE CHAIR: But do you have those figures yourself?

Mr Hulett: I can provide them to the committee.

THE CHAIR: If you could it would be great. Recently, I went to Queensland and had a chat with the occupational health and safety people and the attorney-general's department there. They have a number of offences under the occupational health and safety legislation. I understand that you've looked at the Queensland situation as well. They are looking at an offence which is called dangerous industrial conduct. It's an offence similar in concept to that of dangerous driving causing either death or grievous bodily harm in accordance with their criminal code. They propose to make both individuals and corporations liable for it, with a maximum fine of 6,700 penalty units or seven years imprisonment.

MR HARGREAVES: Could you translate those penalty units into a monetary form?

THE CHAIR: A maximum of $502,500—$500,000 or thereabouts. I understand that you have had some experience with the Queensland legislation. Do you have any comments or any views in relation to that as a possibility for this committee to look at? I note that it hasn't been introduced yet. I think the attorney is considering it.

Mr Hulett: No, they've officially abandoned it, as I understand it. They issued a discussion paper two or three years ago on dangerous industrial conduct and have said that they will not proceed with it. As with Victoria, they're looking at changes to their occupational health and safety legislation, as I understand it. In saying that, I'm only going on press reports which seemed to be quite authoritative.

THE CHAIR: Okay. I was just told you had fair knowledge of that.

Mr Hulett: I certainly lodged a submission under that, yes.

THE CHAIR: Your time is up. Is there anything either of you would wish to say in conclusion?

MR HARGREAVES: Can I have a couple of seconds to seek a response? I'm having a bit of difficulty with statements that we shouldn't do things because interstate jurisdictions have thought about them and decided that it would be too hard to do them or there would be too much pressure from business, mum or whatever. I don't really know, with respect to each jurisdiction, why they've done so. It just seems odd to me that we can consider death through negligent driving as being really serious and chuck people in jail for it but, in the case of someone being negligent at work, we've got some provisions whereby someone could get chucked into jail for it but we've got nothing to hold the organisation for which they work responsible for it and nobody in the interstate jurisdictions seems to be taking it seriously to hold these people accountable. I just don't understand why that's so.

Mr Hulett: I think they're going to amend their occupational health and safety legislation to provide for these sorts of penalties.

MR HARGREAVES: From where I'm looking at the provisions of this bill, we're actually talking about semantics in the titling, really. I mean, it could be an OH&S bill or anything else. It could have any number of titles. The essential elements are that there is an offence if X happens and, if there is an offence, the penalty will be Y. It matters not what you call it, even if you stick it on as an adjunct to the criminal code. Are we arguing around its placement there or are we arguing around the principle of holding people accountable? I'm not quite sure.

Mr Hulett: It's probably a little more fundamental than that. As we've said, the bill here is a considerable improvement upon the Victorian bill—there was never any Queensland bill; it was just a discussion paper—by making the directors and managers who were actually involved in the conduct causing death a party, and no vicarious liability or attribution even to events that occur outside the state that had nothing to do with it. There were very considerable difficulties associated with that.

I remember talking to a very senior silk at the Victorian bar who does a lot of criminal work, who said to me that the Victorian government could've achieved what it wanted to achieve simply by making a few amendments to the Occupational Health and Safety Act and done so quite quickly and without any fuss, but they chose not to do so. I have a view that sometimes we tend to try to overlegislate in this country.

MR HARGREAVES: I take your point. One of the things that have come to mind while we have been receiving public submissions on that is the number of times that people have said that you could achieve this in another way, but nobody has actually come up and said, "This is a section for this act that you could have and you could achieve exactly the same thing," or that if we amended the act by amending a particular section we could achieve it in another way, so that we could actually examine the pros and cons of both options and say what we're trying to achieve, which, I have to say, everybody has agreed is a great idea, but people have disagreed with it around the edges.

The point that you made earlier about vicarious liability being out of it is a great move, but we haven't had lots of people saying, "If you took the ACT OH&S Act and changed this section, this section, this section and that section you would achieve exactly the same thing," so that we could match it up against the wall. Bill is a lawyer, but Kerrie and I are not, so we need to have it in pictures, as it were, but nobody has actually done that. So, at the moment, the best bet that we've got is the bill that's before us.

Mr Hulett: Yes. We're quite happy to put up suggestions, if you want them.

THE CHAIR: Obviously, Mr Hargreaves would like some. That would be helpful. It would be helpful to the committee, I think, if you could. I thank you both very much for your attendance.

MR HARGREAVES: Thanks very much; that was great.

Mr Hulett: Thank you for the opportunity.

THE CHAIR: Chris, I haven't got the blurb here, but I can summarise it for you pretty well. You've appeared before an Assembly committee before. As you well know, you basically have certain rights and responsibilities and certain protections. As you know, you are protected against certain legal actions like defamation. That is highly unlikely in a hearing like this, I would suspect, from what you say here.

You also have a responsibility, of course, to tell the truth—because giving false or misleading evidence will be treated by the Assembly as a serious matter. For the purpose of the transcript, could you state your full name and the capacity in which you appear before this committee?

CHRISTOPHER PETERS was called.

Mr Peters: Christopher Brian Peters, chief executive, ACT and Region Chamber of Commerce and Industry.

THE CHAIR: Thank you very much, Mr Peters. You've made a submission to this committee. Please say a few words, if you wish, then talk to your submission. We'll then ask you some questions.

Mr Peters: Thank you. I express our appreciation for the opportunity of appearing before this committee.

The chamber is very aware that one death is one too many and one accident is one too many, but we are concerned about the potential of legislation such as this. As you've heard from other people appearing before you here, there's been a debate in other jurisdictions around Australia about that. We haven't been directly involved in the Victorian-Queensland one, but the Australian Chamber of Commerce and Industry, of which we are the ACT affiliate, has been. We've been dealing with them in relation to the proposed legislation in the ACT.

We are concerned that, in certain cases, the existing law in some states may not already be in use. I remember a situation in New South Wales, when I was CEO of the Printing Industry Association, where their equivalent of WorkCover had banned a piece of equipment which had caused a crushed hand in a printing factory.

The authority there had banned the equipment—they had put a banning order on it. At the change of shift later that afternoon, the incoming shift manager had instructed an employee to remove the banning tape from the equipment and to operate it. As a result of that, the employee lost his arm in the piece of equipment. We thought that would possibly lead to a jail term, or a substantial fine. We were somewhat surprised that the penalty imposed was a relatively minor fine.

It's our view that companies don't cause deaths or accidents—it's people who cause them. Even through corporate structures, it's an individual, whether it's a director or senior executive who makes the decision and gives an instruction. So it's the individual, not the organisation, that is to blame.

We're also concerned that, by their nature, some jobs are higher risk than others. One example is the private sector security guard who, by the nature of what he's doing, is more at risk of an accident or death than other people.

People make those decisions consciously when deciding to take those positions of employment. Public sector roles such as police, firefighters and people dealing with terrorism are other examples. If we were to overreact to the issue, we may put those types of private sector organisations out of business.

There are concerns about the risks for doctors and nursing staff with needle-stick injuries and the types of things that can happen—not intentionally but through what the courts may find to be negligence.

The recruitment companies in Canberra are alarmed at the prospect of this legislation, because they're in the situation that the staff they engage are legally the employees of the recruitment company. They are then being sent to your office, or my office, as temps. They are working in an environment over which the recruitment company has no direct control, and yet the executives of the recruitment company could have personal liability in those areas.

I mention in the submission that we believe the existing criminal law may be wide enough. Earlier, you heard from representatives of the Australian Institute of Company Directors. I'm a former CEO of that organisation from a little over a decade ago. I remember, at that time, being aware of a case in Victoria. I was looking at it from a director's point of view, not from an industrial point of view at that time. In an old-fashioned factory where the office was above the factory floor, the managing director of a small company came down the stairs on his way out to lunch. As he passed the factory supervisor he said, "Can you get the vat cleaned out?" He then went to lunch.

The factory supervisor asked a young apprentice, who was not trained in the area, to clean out the vat. He did not advise the apprentice that it was a cyanide vat, which had to be appropriately ventilated. The young apprentice died as a result of that. The managing director of the company went to jail for murder.

I'm not suggesting that's not a proper outcome. However, if it is a proper outcome, then the existing law has caused that type of response. We think the existing criminal law will catch those sorts of issues. Mr Hargreaves mentioned that maybe you can't go beyond the direct decision-maker. However, in that case, it was really a third one. The managing director told a supervisor, the supervisor told an employee, the employee died and the managing director went to jail, not the supervisor. So the legislation may be wide enough.

You will note that, in our submission, we've also said that for those reasons we are very concerned about the bill. Nevertheless, if the bill were to continue, our major concerns have already been addressed. With the proposed legislation we initially had a concern about vicarious liability and also about it not covering the public sector—just the private sector. Both those concerns have been dealt with. I acknowledge that.

Our one remaining concern, if the existing bill were to be debated, is about the words "negligent" or "reckless". Much of the criminal law refers to "knowingly or recklessly". The difference is the word "negligent" versus the word "knowingly". Anyone who's been involved in a public liability debate in recent years will be acutely aware of some of the decisions the courts have made over the word "negligent".

It's fairly unpredictable what the outcome of the court cases might be. One of the more notorious ones, you might recall, was along the lines that a young person, who'd had a bit too much to drink the night before, was wandering along a beach one morning, dived into the ocean, hit his head on a sandbar that hadn't been there a couple of days before and became a paraplegic or quadriplegic as a result. The local council was found liable for negligence for that nasty, horrible accident.

Those types of decisions cause us alarm in relation to this potential legislation. However, the word "knowingly" indicates that, for the person who may be charged, it was not something beyond their expectations or beyond their concern—it was something that they knew, or should have known, may happen. That's the introduction to the paper.

THE CHAIR: I'm very interested to hear your comments and concerns in relation to negligence, as opposed to recklessness, of which all of us probably have a pretty good understanding. One certainly needs a very high standard in something as serious as murder, manslaughter or whatever. There is, of course, such a thing as gross negligence. That is the standard used for culpable driving here—and, I think, effectively for manslaughter under our current Crimes Act—and several other serious crimes—as opposed to just the term "negligence".

In respect of those definitional matters, do you have any further comments? You have no problems with the terms "recklessness" or "knowingly"?

Mr Peters: No. We have no problems with those two words, but we have a concern with the word "negligence".

THE CHAIR: Would you have a problem if "negligence" was changed to say "gross negligence", which, in my understanding, is the standard for something like culpable driving?

MS TUCKER: Is this "negligence" under the criminal code?

THE CHAIR: Yes.

MS TUCKER: I've got that here.

THE CHAIR: Have you got "negligence" there?

MS TUCKER: Yes. It reads:

> A person is negligent in relation to a physical element of an offence if the person's conduct merits criminal punishment for the offence because it involves—
>
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist.

In my view, that is a very high test. My understanding, from lawyers, is that it's extremely high. There's also "reasonable foreseeability" as I understand it, associated with negligence.

Mr Peters: Ms Tucker, had we been having this conversation 10 years ago—or certainly 20 years ago—I would have agreed with you completely. However, in the intervening period, we've had courts make decisions that have not been in accordance with what people traditionally would have thought was negligent—where the circumstances have been simply unforeseen.

MS TUCKER: Are you putting the argument that a person may be negligent to the degree that there should be criminal liability there but, because you're concerned that the definition of negligence may be stretched, it shouldn't be used at all?

Mr Peters: I guess the hierarchy of concern is "negligent", "grossly negligent" and "knowingly", in that order. Our concern is not with the generally recognised use of the word "negligent", it is with the way the courts have defined "negligence".

MS TUCKER: This legislation isn't changing anything in that way. The same tests are there for negligence and recklessness. In the situation now, someone may be found to be responsible. What I understand we're really doing with this legislation is dealing with the corporate entity and the difficulties which have been met with the separation between, if you like, the corporation and where the action occurs.

What this law is doing is spelling out that corporate entity, more than the criminal code. You must also have an objection to the criminal code section—part 2.5—on corporate criminal responsibility. Do you?

Mr Peters: We do—

MS TUCKER: You don't like that either?

Mr Peters:—because of the way courts have recently been defining "negligent". There has been a swing back in some recent High Court decisions which have softened our concern. Nevertheless, in the last 20 years, our concern has increased.

Another issue about corporations is that maybe we're trying to treat them as one standard. At one end we go from the single director, one-person business, such as a trucking contractor, where the sole director is the owner of the corporation—the mind of the corporation—and is also the person driving the truck, to the other end where we've got extremely large organisations with senior management based in another jurisdiction, directors based in another jurisdiction, and everything in the middle.

The existing law appears to be wide enough to catch the smaller corporation, such as the case in Victoria, where the managing director was found to be the mind of the company. Yet it may not be wide enough to catch the very large corporation, where someone in this jurisdiction is giving an instruction and reporting to someone in another jurisdiction.

MR HARGREAVES: Perhaps I can take the opportunity to ask a question about that Victorian case. The managing director went to jail because he was determined to be the mind of the corporation. I understand and accept the point you make about the case of one director, or even a couple of directors, of a company. However, I put it to you that there are two other types of directors. There's one where there are medium-sized companies, and then we've got the big fellows.

It is difficult legislating for such a wide thing, but someone has to try some time. In the Victorian case, if the company policy, which is approved by the board of directors of such a company, did not state—they give directions of operations. In the army, they call it standing orders, and so too in other entities. "These are the ways you do things in our company."

If that instruction—which has to be approved at board level, generally speaking—did not include an explicit statement that the cleaning out of that vat had to be done in ventilated circumstances, then could you not argue that the company itself, as an entity—as a non-real person—was also negligent and contributed to the death of that worker and should have been held accountable, as well as the managing director?

Mr Peters: There are a couple of things I don't know about that case.

MR HARGREAVES: I'm using that as a decent sized hypothetical, because it's a good one.

Mr Peters: I don't recall whether that company had a two-person board or a 10-person board.

MR HARGREAVES: The point you were trying to make—I hope I took it correctly—is that, the bigger the board, the harder it is to attribute direct responsibility. It could be a medium-sized board. Using that one as a hypothetical example, let's suggest there is a six-person board.

Mr Peters: In the 30 years I've been in this business, I have not come across any boards which have gone to that level of direction from a company policy point of view—small, medium or large. That type of thing, like how to clean out the vat in the factory, is a matter that is normally left to the control of the management in charge of the plant.

Take, for example, the document which is the formal instrument of delegation to the CEO of one of the largest companies in Australia. I've been involved in that. That document consists of about three pages. It certainly doesn't go to that level of issue. It talks about major capital expenditure, the ethics of the company in broad terms, the corporate governance-type issues and the audit-type issues, but none of the operational issues.

MR HARGREAVES: Yet if you go to a Maccas or a Kentucky Fried Chicken outlet, as I understand it, the directions of operation come out of the franchise. The franchise comes out of a company far removed from here. It might say you must wear iron gloves before you stick your hand into the oil, and someone may not do that. It's quite possible to have an industrial accident at Maccas. Anyone who's ever dished up Maccas burgers on McHappy Day will attest to that. You could have a terrible accident with the ice-cream machine—I did.

Mr Peters: Or hot fat!

MR HARGREAVES: Using that as an example, I can see quite easily that the manager of the local franchise could be held responsible for the death of an employee. Yet, as we go up the franchise chain, the directions are crystal clear on how you do things.

There may be a corporate culture whereby something, through negligence, is not addressed—something which a normal person would address. The test of accountability is a tough one, so the opportunity to prosecute is probably going to be very slim indeed. I guess we're saying that, by the time you get to prosecution, you've got an act of gross negligence on your hands.

Mr Peters: I guess the Maccas example is unfortunate, because we're talking about the local outlet being owned by a corporation—not the McDonald's corporation but a franchisee. You have the owner of the company behind the counter, with his or her staff and the McDonald's company issues a franchise agreement specifying the detail of how that operation will happen. Again, that would not be approved by the board of McDonald's Australia.

MR HARGREAVES: Except that, as I understand it, they have training manuals which have come out of the franchise food chain. If that operations manual is negligent and somebody does things in accordance with the manual and still gets killed, then the person who wrote the manual, right up the food chain somewhere—

Mr Peters: They are probably in America!

MR HARGREAVES: All right. We'll go with Eagle Boys, Dominoes or Jim's Mowing—someone a bit closer to home. You get the training manuals created by the originating spot. I don't know what its name is—I'm not a corporate lawyer. We can't hold them responsible for an act of negligence in the production of that particular instruction, which has ended up—through somebody doing it according to Hoyle—with somebody getting killed in the process, can we? At the moment, we can't do that.

Mr Peters: The proposed new law won't catch them either.

MR HARGREAVES: You don't think so?

Mr Peters: It's a separate corporation. It's not the corporation that was the employer. You could catch the corporation which owns the local franchise out there.

MR HARGREAVES: We might ask the department, when they chat to us, what that can mean. I'm keen on the idea that, where the corporate cultures exist, the responsibility is attributed to wherever the negligence may be. I don't want to single anybody out on punishment and that sort of stuff. If you say that a fine, or something like that, doesn't work as a deterrent, then you might as well chuck the whole criminal code out.

The arguments are really on the significance of the fines and those sorts of things. So we're not about punishment. I think it's all about having a regime highlighting the fact that corporations and entities are going to cop a certain level of fine, which can easily put them out of business. If somebody dies because of the company's negligence, and it goes out of business, from where I'm coming from that's bad luck.

MS TUCKER: You said that some businesses are high risk—you mentioned, for example, security firms. I'm not sure what you were implying there. Would you like to elaborate on that? Are you suggesting that this sort of legislation would somehow impact more on high-risk businesses? Is that what you're saying?

Mr Peters: Yes.

MS TUCKER: How can that possibly apply, if you've got these tests which are about reasonably foreseeable things, and so on? You could have a security agent who is not trained—you have not trained him. You could put him in a situation which a reasonable person could foresee as very dangerous. However, I think that, in those industries, it is as important as in any other industry to take steps so avoid the possibility of people dying. There are ways in which you can do that, although there is a high risk, and people go knowingly into those situations. I'm interested in your comments there. I would appreciate your elaboration on that.

Mr Peters: If I run a business which provides a security guard operation to embassies, the Prime Minister or whatever, the people in the front line are more likely to be at risk of personal injury. I could go through the training mechanisms as to how they will wear the appropriate security equipment, which may protect them from a knife or a bullet, but it will not protect them from a bomb. Where do you draw the line as to what the risk is?

MS TUCKER: What's a reasonable person test? You don't have any confidence in that, obviously—through the courts.

Mr Peters: As we've seen with negligence, in some cases, courts can make decisions that the rest of the country finds difficult to understand.

MS TUCKER: In some cases, yes.

THE CHAIR: I think what you're both saying is that, if you worked at a Collins bookstore, that's probably not as inherently dangerous an occupation as the security industry. I think that's what he was saying. That's how I interpreted it. Correct me if I was wrong.

MS TUCKER: I understand that point, but I don't understand the argument against having this sort of legislation, or any sort of legislation, which is designed to ensure that employers are responsible. Some occupations are more high-risk than others, but that doesn't mean that you somehow don't have as much protection as possible. I found it a strange argument.

THE CHAIR: I understand what you're saying.

Mr Peters: That is precisely my concern. You and I can sit here now and I expect we could agree on what would be appropriate in a particular case. However, it's not what you and I agree, it's a matter of what a court, with the benefit of seven years of hindsight, believes we should have done at the time.

MS TUCKER: I have an understanding of the tests of the court. I know there are a couple of court findings you're concerned about, and I understand that. I feel that, if you're looking at the tests in this legislation, or under the criminal code, they are high tests. I haven't heard anybody say that a rash of prosecutions are expected after this, because the tests are so high. Unless you're telling me that you think there'll be a rash of prosecutions, no-one's saying that.

Mr Peters: What I'm trying to say is that the current criminal law, from cases in other jurisdictions, can catch the sorts of people you're trying to catch, like in that Victorian case. We're trying to develop a new area of law here, with all sorts of complexities about corporate structures.

MS TUCKER: But is it new law? The corporate structure is.

Mr Peters: It is completely new.

MS TUCKER: That's right. The corporate structure bit is new, but the fundamental concerns you seem to be raising are applicable across the board—they are not new. Apparently there's no vicarious liability, but you seem to be thinking that, with this legislation, which is now trying to catch up with the way employment practices have changed, the same tests that apply for an individual right now, who might be guilty of the same offence, will apply.

Trying to deal with the employment arrangements is somehow a different test, but I don't follow how it is. The same tests have to be met in the court—negligence, recklessness, the incident being foreseeable, the reasonable person test and all that. It seems to me that, whilst this law is spelling out more about liability through employment relationships, it's not changing anything about the test of negligence or recklessness as a court would pursue it. If you don't have confidence in the courts, that's fine—you can make that statement—but that isn't what we're debating.

Mr Peters: If we're debating a new piece of legislation that would apply in an area where there is perhaps no coverage now, such as corporate, there could be several outcomes from the result of this legislation. You could have businesses in Canberra

deciding to move to Queanbeyan, where they're not covered by such legislation. That's a commercial decision those businesses will make. That is particularly concerning to us because we're one of the few cities with a border running through the middle of it.

The second option is that you could find a stampede away from employment arrangements, in those types of high-risk industries, towards contracting-out arrangements. My business no longer has any employees at all. I have a team of contractors who are one-man companies.

MS TUCKER: That's exactly what this is trying to deal with.

Mr Peters: That will relieve me from that, because it will catch the particular employer, which is the company owned by the individual.

MS TUCKER: You're saying this legislation doesn't deal with that problem?

Mr Peters: I don't believe it does.

MS TUCKER: I thought that was the intention of it.

THE CHAIR: "Worker" means: (a) an employee; (b) an independent contractor; (c) an outworker; (d) an apprentice or trainee; or (e) a volunteer.

Mr Peters: But that doesn't catch the person who's in business for themselves, using their own corporate structure, who is not an individual contractor but a corporate contractor and an employee of that corporate contract.

MR HARGREAVES: I think it does.

MS TUCKER: We will have to check that with the bureaucrats, but I thought it did.

THE CHAIR: The secretary has a different view, so we'll get that defined. Does anyone have any further questions of Mr Peters? Thank you very much.

Mr Peters: Thanks very much.

Short adjournment

THE CHAIR: Ladies, you are well aware of the procedure. You should understand that these hearings are legal proceedings of the Assembly, protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation for what you say at this public hearing. It also means, as you well know, that you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a very serious matter.

Please state your full names and the capacities in which you appear before the committee.

JOCELYN PLOVITS and

MARIE MANNION

were called.

Ms Plovits: My name is Jocelyn Plovits. I'm the Occupational Health and Safety Commissioner. I have Ms Mannion with me.

Ms Mannion: Marie Mannion, manager of regulatory leadership in ACT WorkCover.

THE CHAIR: Thank you. If you wish to make a statement to start with, please do so. I'm grateful that you could come before the committee. We've been told—and we knew pretty well when we started—that, if this legislation is enacted, this would be the first jurisdiction to do so. We have our own occupational health and safety legislation—and every other state does too.

Some states are addressing the fundamental problem that everyone's seeking to affect by legislation such as this, although perhaps not in the same the way as we're doing it. Many of them are going down the path of enhancing their own occupational health and safety legislation.

I ask you to pardon my ignorance. I don't know about my two committee colleagues, but I don't have a huge knowledge of the legislation we have which covers this area. So it would be helpful if you could assist us in that regard. If there are any documents you can provide, covering the areas of negligence in the workplace, mishaps in the workplace, serious injury and deaths in the workplace, they would assist us.

Ms Plovits: I have no opening statement. I understood I was going to move straight into answering questions. Perhaps that's the most efficient way to give you the information.

THE CHAIR: It probably is.

Ms Plovits: The Occupational Health and Safety Act doesn't have an industrial manslaughter provision in it. As we know, the provisions thereof are under review, because we are getting out of alignment with the penalty levels and the types of compliance frameworks existing in other jurisdictions.

Let me set the scene for you. I refer to a question asked of the government at the last hearing. You asked how many of the deaths in the attachment to the government's submission had been prosecuted. If we talk through some of that, then you should get a feel for the problems you're up against, versus the solutions to be found at the moment.

The records we hold in WorkCover have two stages and states of goodness. One is that, since 1997, they're good and the other is that, prior to 1997, they are a treasure hunt challenge. Nevertheless, the research has been done and we've found a number of things.

Of the list in attachment 1 to the government's main submission, there were three deaths prosecuted. Perhaps I will hand you this chart. I've done only the first page of the chart because these are the only areas which have been prosecuted. As you can see, No 6—male crushed by a granite slab—was prosecuted. In tiny writing on the right-hand side, it gives you the name of the company. They were found negligent for the death, caused by a granite slab crushing the worker. The fine was $20,000 plus costs. Obviously government costs are not as high as other costs.

The second one prosecuted is No 9. The companies in that case were found negligent for the worker's death, which was caused by a moving part of a machine. They were fined $10,000. The third is No 12—an electrocution. They were found negligent for the worker's death, caused by electrocution, and were fined $10,000.

We're talking about the deaths of people. For that era, those may have been considered reasonable amounts of money for the deaths but, in today's times, they would in no way be considered reasonable. You ask: Why wouldn't others have been prosecuted for the equivalent sort of thing?

THE CHAIR: Under which act were they prosecuted?

Ms Plovits: Under the Occupational Health and Safety Act. That's where those penalties lie. I assume there's always a prosecution for manslaughter if there's enough evidence to sustain such a prosecution—but that would be under the Crimes Act. These prosecutions were done under the OH&S Act.

As you go through that chart, Nos 13, 14 and 15—which are off the page—were all electrocutions. We've prosecuted an electrocution in the past, so why didn't we prosecute those? The research shows that we didn't have a situation where a prosecution for the death of the worker was sustainable with the evidence.

Number 13 was an electrocution in a retail store. A hazard alert was issued in relation to that. As you can see, the issue was receiving a fatal shock when he was servicing a 19-year-old electric water heater. The investigation revealed the cause was partly attributable to the deterioration of insulation on the cables. There's a point at which, even with the best safety regimes in the world, you are not going to anticipate such a situation.

Sad as it is, as much as the family to which that person belonged would like to see action taken in relation to their loved one—possibly retribution—when the evidence is not there to sustain it, we don't run a prosecution. We certainly conduct an investigation, but we don't run a prosecution.

I turn now to a recent one, which isn't even in these statistics. A young man died at a supermarket in one of the regional centres. We often have coronial inquests into these things. Of course, with the coronial inquest comes an expansion of the statute time. So we have two years after the report is delivered to finalise the WorkCover investigation.

The coronial inquest in relation to that young man found that he died from asthma—from natural causes. So you are in a situation where, even though he died in the workplace, he didn't die from something the workplace had necessarily done. There was no breakdown in safety or in the emergency treatment. It was a very sad matter that he died. Nevertheless, the coroner didn't find anything other than natural causes. Thus there is no purpose—there is no evidence to sustain going down a prosecution path.

I refer to matters where there isn't a death. Obviously, in this legislation we're talking about serious injury—and it is about a culture of safety approach as well. I reflect on a matter I dealt with last year, when I wasn't satisfied with the way a company was running a contract. Vehicles were turning over. It's a miracle no-one was hurt in those circumstances. There was a matter where some equipment landed into other equipment, and so on.

I wrote to the directors of the company, who were in South Australia. I said, "There is no culture of safety at this worksite." Their immediate reaction was to email or fax me, saying, "Our lawyers will be contacting your lawyers. You are going to be done for defamation."

Unfortunately, I was right about the company. Although it didn't happen in the ACT, that weekend they lost two workers in South Australia. The matter of defamation was never raised again. They put a safety officer on site, which was what I was angling for, and the safety regime then became an appropriate one. When you're using heavy equipment—big trucks and so on—and doing work as quickly as you can, you need to have those things in place. You can establish reasonably easily whether safety is operative, just by looking at injury and accident rates.

You can go further. With a culture of safety, you could almost talk about bravado or machoism—those kinds of words. It's around, "Oh look—he's wearing his safety equipment. Ho, ho, ho—he's a sissy!" It is that type of thing. You have to seriously question what the leaders of that organisation are sustaining in the organisation, if that's what they support as the nature of what goes on in their organisation.

There are worse cases than that—although fortunately not in the ACT—that I've learned of, where they have a culture which talks about the initiation of a young apprentice, for example. There was that dreadful case in Victoria, where they put the guy in the toilet, covered him with flammable fluid and lit it. A young apprentice is now burnt—for life. Clearly, supporting an initiation program, either tacitly or openly, is enough to say that that's not a culture of safety. In that sense, there are real-time, practical ways in which to make those sorts of judgments. We are talking about the worst case.

I refer again to my strategic plan, a copy of which I'm happy to leave with the committee.

THE CHAIR: Thank you.

Ms Plovits: You might recall the diagram on page 8, which shows the nature of what is dealt with in the occupational health and safety environment. The reason I'm trying to shift this middle line as far over this way as I can is so that enforced compliance, and people who engage in alleged criminal behaviour, becomes the smallest number.

If you had a good system going—if everybody had a good OH&S system in place, the white line would be as far over this way as it can go. However, in all the jurisdictions, we find that there are about 5 per cent of employers who are unwilling to comply with legislation—for whatever reason.

I think that, in talking about this industrial manslaughter legislation, we need to take into account that we are talking about the worst forms of behaviour in the worst situations—you're not talking about the body of people across the board. For that reason, I have supported this industrial manslaughter legislation coming into place.

If a time comes when we have evidence to show that somebody—either by omission or deliberately—has such a culture that people's lives are at risk, it's appropriate that the most severe penalties are in place. That's probably enough of my non-opening statement—and answering of a question.

THE CHAIR: I take it that there were only three prosecutions.

Ms Plovits: In that list.

THE CHAIR: And that they were all successful.

Ms Plovits: Yes. Other charges were laid but then dropped.

THE CHAIR: Can you remember what the maximum fine available under the act was, at the time of those prosecutions?

Ms Mannion: I believe it was about $50,000.

Ms Plovits: These didn't attract the maximum fine.

THE CHAIR: No—they rarely do in a court. My understanding is that the maximum fine would have been fairly low at the time of these prosecutions. You think the maximum was about $50,000?

Ms Plovits: Yes. I will double-check that, to be sure—because the units change over the years.

THE CHAIR: It'd be handy if you could give us what you have in the way of penalty provisions at present, relevant to the serious injury or death question we're looking at.

Ms Plovits: They're nowhere near the level contemplated here—or that in other legislation.

THE CHAIR: Looking to interstate occupational health and safety provisions, I understand that the New South Wales provisions which apply across the board are a lot beefier than ours, when it comes to penalties and fines.

Ms Plovits: Yes.

THE CHAIR: You would have them readily available.

Ms Plovits: That is a matter I'd refer to the policy people, because they've provided you with that chart of comparative figures.

THE CHAIR: The committee doesn't have information as to what their offences and penalties are, to match with ours, so we'd appreciate that. We have heard evidence that, for example, the maximum fine for a corporation is one and a half million dollars or something, and ours is $120,000. I refer to things like that.

Ms Plovits: Yes—if indeed it can be applied to a corporation at all, at the moment.

THE CHAIR: Yes—and any other states. I've got some information from Queensland, where I believe they have penalties of hundreds of thousands of dollars and up to three years imprisonment. We would also appreciate anything from Victoria.

Ms Plovits: Yes, I believe the comparative table covers all the jurisdictions.

THE CHAIR: I don't know about my colleagues, but I certainly don't mind stiff penalties and things like that for serious offences.

MR HARGREAVES: I don't believe you!

THE CHAIR: One thing that worries me a little is that no other jurisdiction has gone down this path. At present, we have a normal criminal offence of manslaughter on the statute books. That has been successfully invoked in Victoria on at least one occasion. Mr Peters was today telling us about another one. I'm not sure if that was manslaughter or murder, but it involved a vat, with cyanide.

Ms Plovits: I'm not familiar with it.

THE CHAIR: I don't know whether that is the case or there is another one, but clearly there has been at least one case where an employer, or whatever, has been jailed for manslaughter. My concern is whether we can go down this path and achieve what you are seeking to achieve, by beefing up our OH&S legislation—much like some of our interstate colleagues have done recently.

Ms Plovits: A clear OH&S message comes from the Occupational Health and Safety Act—there is no doubt about that. However, the information I have is that the best way to manage this part of it is through the Crimes Act. That sits how it sits, but the existence of penalties and the use of penalties are two different matters.

To this day, I can't tell you whether any of those prosecutions would have gone down the path of a manslaughter prosecution. That is a different connotation from a breach of duty of care under the Occupational Health and Safety Act. We're not talking about 20 deaths a year in the ACT. Thank goodness that doesn't happen. This is one of those matters where the deterrent is an important tool for prevention.

There's an argument which says that enforcement doesn't lead to prevention activities. Nevertheless, at the end of the day, the existence of clear deterrents does assist people to understand that prevention is a good measure. It's part of the basket of strategies you need to have in the enforcement continuum—from advice through to prosecution—and we've got all our improvement notices and things in the middle. It has to be seen in that context. Because we're considering the topic in isolation, it seems to me that it's getting the flavour that this is the only punishment available under the OH&S Act—or the only enforcement. In any event, it's designed for the worst of possible cases, and it's important that we can do that for both the individual and the corporation.

THE CHAIR: It has certainly been argued that we have that already with the normal offence of manslaughter. Perhaps I could add that, whilst, thankfully, we have few deaths and we seem to have had only three prosecutions for those deaths, we do have some serious injuries. Another way of achieving what you're seeking, and to perhaps also prevent deaths, is to look at ways of preventing injuries, and beef up the occupational health and safety legislation to cover non-death situations.

Ms Plovits: You would get no argument from me about the need to beef up the existing act and bring it into line with other legislation with similar penalty regimes. The department is working on that activity. The minister has referred the matter to the council, and there's a review going on.

THE CHAIR: I have a concern that, if this were enacted, it would never be used. Yet many of the states—I'm assuming we're much the same—have effectively used mutual obligation to reduce the incidence of workplace injuries and deaths—certainly in the last decade and a half.

We heard evidence—of a fellow from New South Wales, and also from the Institute of Company Directors from Melbourne—about positive downward trends in both New South Wales and Victoria as a result of mutual obligation. First, do we do the same thing here—and has that led to improvements?

Second, their point was basically that, if this were enacted as is, it would lead a lot of workplaces, a number of employers, and directors, et cetera, to look at ways to cover their backs and make sure there are paper trails, and things like that. That might be counterproductive to some of the advances made as a result of the good OH&S practices which have developed over the past couple of decades.

Ms Plovits: There are two fundamental points I'd make in beginning to answer that question. Mutual obligation has its place, and is part of the story of the reduction in trends. It cannot possibly be the full explanation for the reduction in trends.

We can demonstrate—and I showed this in the Estimates Committee—that, with the work done by WorkCover, in combination with employers, unions and all of the stakeholders in the whole continuum process, there has been a reduction in the number of injuries in the ACT. Although we have not necessarily seen a reduction in the number of deaths, we have gained a better understanding of the deaths which properly belong on the OH&S list and those that don't.

There is now a move for some of the traffic deaths, which were previously counted as road traffic deaths, to come onto the OH&S list. That will increase the number slightly, rather than reducing it, but it's not an increased number of overall deaths.

The other fundamental point is that, at the end of the day, a mature industry can move to what you would call that mutual obligation or co-regulatory model. We have many examples of that now in the ACT. We have industries which come to us, having developed their own industry codes of practice. They don't want them declared under the OH&S Act or anything like that, but they are prepared to adhere to them as an industry. We promote that kind of approach and support it wherever it occurs.

In what you would call less mature industries, where there isn't an overall ethic of applying OH&S in that way, clearly you need a range of enforcement strategies, to assist people to understand the importance of OH&S.

Clearly, the way the bill has been constructed at this point doesn't allow people to get out of their OH&S obligations. Of course, I would say, from a heartfelt position, that it is easy to implement an OH&S system. In fact, it is often easier than working out some strategy to avoid an OH&S system. That is what we are working through.

You might be aware of our WorkCover at work program, with which we're up to 900 businesses so far. So we're slowly working our way through an enormous number of small businesses—and there is that ripple effect as they talk to their neighbours, and so on.

Ten Steps to Safety is a system suited to small businesses, to help them get to the position of having a good OH&S system in place, suited to their environment. The latest thing is the 40 new firms which have come onto the incentive scheme. They contacted us to come onto it.

Overall, businesses want to be compliant; overall, people want to have a good system in place; and overall, there is minor lack of knowledge to overcome sometimes. Conversely, we have this group, right at the end, who will always look at profit before they'll look at safety.

We often find, in the group of 16 acts we regulate, that they're not compliant with other acts either, so there may be tax problems or something else. If they are avoiding one set of laws, they're often avoiding other sets of laws as well. These are the people who need to have the hard message bought home that the stance is not to be tolerated that death is okay in the workplace.

MS TUCKER: A previous witness put to the committee that this legislation would lead to people leaving Canberra and going to Queanbeyan, and that it would be particularly difficult for high-risk industries. Security agents and firefighters were given as examples of such.

In some ways, I didn't understand that. My reading of the legislation doesn't fit with that perception, but I'm still interested. It seemed to me that this person expressed a legitimate concern. Can you see a potential for this being a problem for certain industries? What is your comment on the concern that we'll see a mass movement out of the ACT if we have this legislation?

Ms Plovits: People must make their commercial decisions as they make them. At the end of the day, you could move to New South Wales as an avoidance mechanism. New South Wales is moving down the path, in any event. They have much heavier fines in OH&S than those in the ACT. It doesn't seem logical to me that just the OH&S question would drive people out of the ACT, of itself. Some people feel that it has the potential to do that to their firm, because they can't see how to comply and still maintain a viable business. All they've got to do is come in to talk to us, and we'll help them. There are plenty of other viable businesses which are following good OH&S systems.

MS TUCKER: If my understanding of this legislation is correct, then, apart from adding the factors about linking corporations or the chains of employment with changing employment practices, basically nothing has changed, except that this connection is now being written into the statutes of law. So it won't be able to be used in a way that avoids responsibility. Nevertheless, the burden of proof, et cetera, is the same as it is now for anyone who finds themselves in this situation.

From listening to that witness, I thought that, if this legislation is passed, it might be an important role for you, or the government, to educate people about what it means. Unless my understanding of it is incorrect, it is not very different, except for that chain of employment arrangements. It seems as though there's misinformation in the community at the moment.

Ms Plovits: I think there's an apprehension of difficulty, based on the fact that there was publicity around what was put up in Victoria, for example, which is different from the legislation.

MS TUCKER: Vicarious liability and so on?

Ms Plovits: That's right. I can understand that, when people don't feel they control a workplace, they'd be fairly reluctant to see some law in place that gave them vicarious liability for what happened 100 miles away, sort of thing. However, that's not in this legislation. I think the problem is that the publicity got there before this legislation arrived. Nevertheless, I agree with you entirely. When, and if, it goes through, the education regime will go with it.

It will be part of a balanced education regime. It won't be a case of, "You've got to be good, or else we're going to get you onto industrial manslaughter-type education." It will

be, "Here is the range of enforcement tools; here is the good practice; this is what prevention is about. However, you need to understand that, at the end of the day, if you're responsible for killing somebody in the workplace, and that can be proven, then that is the penalty regime for that end of the business."

I think that's a fair way to educate people. In any event, you wouldn't place the whole emphasis there. We've achieved much in talking about prevention and advice on this side. We are, in our estimation, dealing with less than 5 per cent who don't seem to understand that they'd have better outcomes in their businesses if they paid attention to these things.

MS TUCKER: Can you answer the other part of my question, about high-risk industries?

Ms Plovits: Yes. Perhaps I can be so bold as to talk about construction, for example. If we talk about construction, we're kind of stuck—the building has to be built in the ACT, so that one can't move offshore or out of the jurisdiction, so to speak.

Many of the big construction companies are now working closely with us on their OH&S safety regimes and things like that. We still have some work to do with the middle group and the small group. WorkCover at Work is now moving through those groups as well. We could take a high tech process.

MS TUCKER: The relative impact was the bit that interested me. This witness said it would be a problem for industries where people have high-risk jobs, like firefighters, security guards or whatever. Can you see how there is a potential to impact on that area of industry?

Ms Plovits: Let's think about the legislation for a minute. When I was reading it earlier today, to refresh my mind, it was clear that, if the company or the business could prove it had put in place a system for safety, and had trained people and encouraged them to follow it, they have nothing to fear from this kind of legislation.

We've worked hard with the security industry on the cash in transit code of practice, which is coming to fruition now. Admittedly, that came out of a process in New South Wales, where there had been some lives lost in the security industry.

I am convinced that they found ways to assess the risk. We went closely through that process and managed the risk. We looked at whether, if they had to go down a dark corridor, down two steps and then knock on the door at the back of a building, for example, and were completely vulnerable in that process, they could pick up stuff from a different place.

MR HARGREAVES: What you're saying is that, given the context of the act, the burden of proof as to accountability and culpability, in the instance of manslaughter, matters not one jot. When people provide corporate instructions to their employees—whether they are electricians, chippies or security guards—it is the attention to a safe working environment which applies across the board.

Ms Plovits: I think what you're saying is right.

MS TUCKER: The example given was that a security guard is trained on how to deal with a gun and not be in dark corridors, et cetera. If he or she is killed by a bomb, is the employer responsible because they didn't protect that person from the bomb—was it foreseeable that there could be a bomb, et cetera? I hope I'm presenting his case correctly, but that was definitely the example he gave.

The way the courts are now looking at negligence concerned this witness. I guess he was saying it would be possible for the company which employed the security guard who was killed by the bomb to be somehow liable—or culpable.

Ms Plovits: Okay. Let's get down to the pragmatics of dealing with bombs. First of all, is there some intelligence which tells you that there's likely to be a bomb, as distinct from a general concern that there's likely to be a bomb? If there's intelligence and you don't communicate it, then I'd say you'd be in some trouble.

MS TUCKER: That is about the individual case.

Ms Plovits: That's right but, if you have an overall training program that shows people how to be alert, how to check vehicles; how to check their environment; to look out for parcels and all that sort of stuff, then you've done what you can as an employer to educate the individual; educate the teams; and educate the workplace.

Don't forget that security guards are often dealing with workplaces, and that the workplace has an obligation to inform the security people about what's going on. We've carefully looked at this, to try to assist in the OH&S regimes for these kinds of places. So I believe there is an easy, stepped approach which people can apply, to put a good OH&S regime in place and it is then reasonable.

It's also reasonable to think that, if you're a security guard, you're going to come up against a problem. If you're trained, and you're trained to back away instead of taking it on, then you're appropriately trained for the task. That seemed to be part of the problem in New South Wales.

You mentioned fire, for example. People have to fight fires. Well, that's not going to be able to be taken out of the state. The fire may be here. I have to ask myself whether, as the person directing the firefighters, I have put in place a good regime around how to fight fires. Have I trained them well enough? Have I provided them with the right equipment? It is that sort of thing.

If those questions can be answered, "Yes", then I think you've got your corporate culture which is a good OH&S culture, and you've done what you could in relation to it. It certainly is a high-risk profession.

There were two coronial inquests—one in Victoria and one in New South Wales—about burn overs for firefighters. After those coronial inquests, I worked with the ESB people. I asked, "What do you have in place to make sure that you're not vulnerable to that burn over type of thing for the future?" They talked to me about all the strategies they have

put in place—not the least being that they never allow a pumper to go to less than a quarter full. In that way, they've always got water to fight the immediate problem. That is one of the things that didn't happen in the other two situations.

Tell me if I'm rambling on too much, but it's important to look at the practical side, to show you how it would work. I'm infinitely fascinated by this OH&S system type of stuff. It is achievable. If you can document it, if you can show that you've done the training—as you should be doing as a good employer—then, you should have confidence, and so should your staff.

MR HARGREAVES: As the secretary has just indicated to me—and I agree with him—you're going to get somebody looking at your organisation because somebody has died at your workplace. They're going to ask whose fault it was. If you've got a good OH&S plan in place—you've had the place checked over by the inspectors; your procedures look fine; and yet it still happens—then that will be your first line of defence. Those matters would be taken into consideration by anybody contemplating prosecution—as to whether they would go forward. The odds are pretty good that they wouldn't go forward with it.

Ms Plovits: Under this legislation, you've got to have evidence to prove that it was a deliberate act.

MS TUCKER: Negligence or recklessness must be proved. It was not a deliberate act.

Ms Plovits: Looking at No 12—an electrocution—the reason that was a successful prosecution was because the firm did not take action to isolate the machine before this guy, who was not trained in maintaining the machine, slid into a narrow gap. Because he couldn't go in flat, he had to go in sideways—leaning against live electricity wires to get at the bolt or whatever he wanted out of the machine.

They didn't isolate the machine; they didn't turn it off; and they didn't turn off electricity to the area. Those are simple OH&S strategies to have in place. I think it's reasonable to find guilt, when you don't do even that much to help your workers.

MR HARGREAVES: I'm aware of the time. We could argue until the cows come home about the penalty—the amount of money for the fine, and things like that. There are a couple of issues I want to explore. One issue is penalties for corporations. I raised that point before, and sought comment on it. You can't lock up a corporation—therefore we've got to think of some other way of doing it, such as financial damage and media exposure.

However, the size of the fine must, in some way, be commensurate with the penalty paid by a real person in the same situation. For example, if a senior officer of a company is found guilty of negligence, and causing a person's death, they can be fined under normal manslaughter laws and will probably receive a custodial sentence. Whether the sentence is suspended or not doesn't matter—we're talking about the deprivation of someone's liberty.

Regarding the size of a corporation's fine, I would argue that $50,000 doesn't inflict the same level of pain, as it were, on a corporation as it does on an individual who has been charged under manslaughter laws. I'd like your view on that. I know you can't pick a figure out of the air, but surely there has to be some commensurate level of penalty?

Ms Plovits: I believe the penalty set—which is about $1.2 million—gives the courts the opportunity to take that kind of decision-making and decide that it's commensurate with the act and the level of responsibility. There are other provisions in the act in relation to the "make good" stuff. I don't know how other people describe them. I refer to the business of, "What are you, as a company, doing to promote OH&S in your own workplace—and to tell the community what you're doing?" And so forth. It is very similar to the Trade Practices Act/ACCC type of approach.

These provisions can have an effect on a company, and are a reasonable requirement on the company. Yet they also make the company an advocate for OH&S in the community, which I believe is an important part of turning around that company's culture. That's why I'm supportive of them—because I think they're appropriate.

MR HARGREAVES: That particular provision has elicited some comment on the widening of the court's discretion. My reading of it is that it applies the same discretion to the courts, with regard to corporate activity in the make-good system, as it does to individuals serving community service orders. It's the same process.

Ms Plovits: Yes, I think so. It gives the court the opportunity for a wide range of solutions.

MR HARGREAVES: As to my second question, perhaps we can use the examples you've given us. I'm making a comparison in my mind as to whether beefing up of the OH&S Act is the way to go, or whether this is the way to go.

When we talk about deaths, or near deaths, in the workplace, you go through the thought process of whether or not to put a brief to the DPP. Those three cases were pretty clear-cut. The companies were taken on, and they copped a fine at the end of the day. But those were direct employees of the company.

Ms Plovits: That's right.

MR HARGREAVES: I'm interested to explore with you how you go in your contemplation of putting a brief forward, with regard to all the companies in the food chain—for example, a contractor, a sub-contractor, or the head contractor—and on down the line.

We've had a number of examples given to us, one of which was transport. You would be aware that truck drivers are high risk, and they get killed on the highway. Pressure is brought to bear by the person who owns the truck; by the person who gave the contract to the person who owns the truck; by the person who gave that person the contract; and by the big, wider organisation that did that. When you're considering, under the OH&S Act, taking action as a result of a truck driver being killed, how far up the line does the act allow you to go?

Ms Plovits: The envelope under the OH&S Act includes everybody. It's everybody who has, to some extent, control in the workplace. So the person letting the contract has some control—and also the person receiving the contract and the person subcontracting. They all have control. A barrister for the territory, in the past, has advised me that everybody is inside that envelope for purposes of the OH&S Act. This act, of course, is the Crimes Act. I would assume that the prime investigation would be conducted by the police, and that the police would be determining whether a brief was put to the DPP or not, in relation to industrial manslaughter.

MR HARGREAVES: Are we not talking about the fact that, when you invoke the OH&S Act, you charge people for breaches against that act?

Ms Plovits: That's right.

MR HARGREAVES: It is not a crime, per se, as it is if it's under the criminal code. If it is in the Crimes Act, it's a full-on crime. Therein lies the difference between your inspectors doing the investigation and the police undertaking the investigation.

Ms Plovits: That's right.

MR HARGREAVES: Suppose a workplace is going to be investigated, on a number of levels, as a result of a person dying at the workplace. It could well be your inspectors going out, and action ensuing out of that. Conversely, it could be the police going in, and action ensuing out of that, in much the same way that, if a person gets done on a highway for badly speeding, et cetera, they get a suite of fines.

Ms Plovits: We have an agreement with the police about who has prime carriage of an investigation. In that way, we do not have investigators falling over investigators, and witnesses being interviewed four times by four different groups. It can also have implications for, say, the environment act or the Health Act. A variety of acts can be in existence in relation to one of these investigations.

Our agreement with the police is that, whilst the police are taking the lead, they take the lead. We provide questions to them, so they can elicit the information in the interviews they're holding, and so the witnesses are not further traumatised by additional stuff.

MR HARGREAVES: At the end of the day, though, they decide whether to do it, and you decide. It is not "or" Is it? Am I correct there?

Ms Plovits: Sorry?

MR HARGREAVES: In the decision as to whether to brief the DPP, for action against whatever, the police decide, from their investigations and from their perspective, whether to take action. You also make the decision as to whether to take action, having regard for what the police are doing, and everything else under the sun.

Ms Plovits: And the views of the DPP.

MR HARGREAVES: And the views of the DPP, yes.

THE CHAIR: Thank you both very much for your attendance and assistance. We look forward to getting whatever documents you are to give us.

Ms Plovits: Okay. We'll send you a letter shortly.

THE CHAIR: Especially the comparisons between what we have at present and what they've done in New South Wales, and what the penalties are.

Ms Plovits: Thank you for your time.

KELLY FOSTER,

CLAUDE MONZO,

ELIZABETH KELLY,

PENNY SHAKESPEARE and

SHELLEY SCHREINER

were called.

THE CHAIR: Ladies and gentleman, thank you for your attendance before this committee. These hearings, which are legal proceedings of the Assembly, are protected by parliamentary privilege. That gives you certain protections but it also means that you have certain responsibilities. You are protected from certain legal action, such as being sued for defamation for what you say at this public hearing. You also have a responsibility to tell the committee the truth. The committee will treat the giving of false or misleading evidence as a serious matter. In what capacity are you appearing before this committee?

Ms Foster: I am Kelly Foster, a member of the Criminal Law and Justice Group.

Mr Monzo: I am Claude Monzo, a member of the Criminal Law and Justice Group.

Ms Kelly: I am Elizabeth Kelly, executive director of the Policy and Regulatory Division of the Department of Justice and Community Safety.

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

Ms Schreiner: I am Shelley Schreiner, a member of the Work Safety and Labour Policy group, Chief Minister's Department.

THE CHAIR: We have heard a fair amount of evidence in relation to the Crimes (Industrial Manslaughter) Amendment Bill. No doubt you would all be aware that, under the Victorian Crimes Act, there has been at least one successful prosecution in relation to manslaughter per se. I am sure that you are also aware that we already have a criminal code in the ACT that includes new general principles of corporate criminal responsibility. Of those people who have already given evidence in relation to this bill, some are very much in favour of it and others have expressed a number of concerns.

I will ask a few general questions, which I think will assist the committee, about the current law relating to manslaughter as it is reflected in the Crimes Act, and about the law relating to industrial manslaughter as it is proposed in this bill. If you were present earlier you would have heard some discussion about terms such as "recklessness", "knowingly" and "negligence". Is the standard of proof that is required in this bill the same standard of proof that applies to the crime of manslaughter in the ACT Crimes Act?

Ms Kelly: Yes, beyond reasonable doubt.

THE CHAIR: Having regard to concepts such as negligence and recklessness, are the elements that are used to prove a crime of manslaughter under the current Crimes Act the same elements that will be used to prove industrial manslaughter under this proposed legislation?

Mr Monzo: Section 12 of the Crimes Act, under the title, "Murder", states:

> (1) A person commits murder if he or she causes the death of another person—
>
> (a) intending to cause the death of another person
>
> (b) with reckless indifference to the probability of causing the death of any person.

Manslaughter is any unlawful homicide that is not murder. In the ACT that would include any person who recklessly caused the death of another, who was reckless as to causing serious injury to a person, or who was negligent and caused the death of a person. In the ACT it would also be manslaughter if a person were to breach a legal requirement in circumstances that were dangerous and he or she then caused the death of a person. It would also be manslaughter if a person were provoked and relied on the defence of provocation, for example, that he or she was provoked into killing someone and the defence of provocation caused that offence of murder to be stepped down to manslaughter.

I refer now to the industrial manslaughter provisions. When a person is reckless and he or she causes serious harm to another person and it results in that person's death, or when a person is negligent about causing the death of a worker and he or she brings about that person's death, that is regarded as manslaughter in the ACT. The industrial manslaughter provisions are modelled on the model criminal code provisions in the report on fatal offences against a person.

THE CHAIR: Have those provisions been introduced, Mr Monzo, or is that part of the criminal code?

Mr Monzo: No, they have not.

THE CHAIR: When is it proposed to introduce those provisions?

Ms Kelly: The report of the Model Criminal Code Officers Committee that relates to those offences is not yet complete. We are awaiting its release before we finalise our provisions. We expect the report to be released some time this year, but that is in the hands of the Commonwealth. The Commonwealth jumped the gun and enacted offences based on the discussion paper in the extraterritorial bill. We would prefer to await the outcome of the report. An extensive consultation process is required in relation to the model criminal code. We believe that the discussion paper will benefit from that process, so we will wait until the Commonwealth report is released.

THE CHAIR: Basically this bill will include what is yet to be included in the criminal code—a code that has not yet seen the light of day in the ACT.

Ms Kelly: That is right.

THE CHAIR: Is the criminal code somewhat different from our current criminal law in relation to concepts such as negligence, et cetera?

Mr Monzo: The concepts of negligence and recklessness, which are incorporated in industrial manslaughter offences, replicate the negligence and recklessness provisions in current common law in the ACT.

Ms Kelly: The critical differences are evident in the model criminal code provisions. We have the additional element of corporate culture to prove recklessness, which is different from the current Commonwealth position. The provisions in section 21 allow us to aggregate acts in order to prove negligence, which is also different from the Commonwealth's position. Of course, the penalty provisions are also quite different.

THE CHAIR: I am more interested in the concepts of recklessness and negligence. On my understanding of current law, culpable driving causing death is an offence. Negligence alone would not be enough. In New South Wales negligent driving causing death is an offence. The offender would also be charged with culpable driving. In the ACT gross negligence that leads to a charge of manslaughter is a much worse offence than just negligence.

Mr Monzo: The concept of negligence that is incorporated in the code is taken from the case of Needham v the Queen, a Victorian case that represents the common law definition of negligence in criminal matters.

THE CHAIR: Could you quickly encapsulate the common law definition of criminal negligence?

Mr Monzo: In a charge of manslaughter by negligence a court would have to prove that the accused's behaviour fell short of the standard of care that would have been exercised by a reasonable person and that his or her actions involved such a high degree of risk that death or grievous bodily harm would follow. Such an act would merit criminal punishment. That definition and the description of negligence in section 21 of the Criminal Code Act are almost the same.

MS TUCKER: What is the difference between the definition of "recklessness" and "negligence" in the proposed criminal code and the definition in current common law?

Ms Kelly: There is no difference.

MS TUCKER: So it is the same?

Ms Kelly: The only exceptions relate to corporations and aggregations. However, there is no difference to the substance of the legislation.

THE CHAIR: Some examples of this have been given by committee members and by other people. For example, Mr Hargreaves referred earlier to truck drivers and I have no doubt that he will do so again. Some time ago I compared the law relating to manslaughter in the Crimes Act with the law that is proposed in this legislation. I am sure that it would be difficult for anyone in the legal fraternity to sustain a manslaughter charge in the ACT if, for example, a bunch of their mates were having a big boozy party and a bloke who owned one of the cars gave the keys to one of his mates to drive someone home.

It would have been obvious to all and sundry that everyone had been having a lot to drink. The person who was then given the keys and who drove badly by speeding and who then killed his or her passenger most likely would be convicted of manslaughter. He certainly would not be charged with culpable driving but I think under our current law a manslaughter conviction would be sustained against him. However, I doubt very much whether you would be able to sustain a manslaughter conviction against the person who handed over the keys.

It would appear, after looking at this legislation, that all the links in a chain could be held responsible for industrial manslaughter in a similar situation. For example, we could transfer that scenario to, say, a worksite at which everyone recklessly and negligently had been drinking. The boss might knowingly then have given the foreman the keys to take a worker somewhere and the same sort of thing might have occurred. Not only the foreman who was driving the car would be guilty of industrial manslaughter; the boss might be found guilty as well, even though that might not necessarily apply under current criminal law. I am concerned that we are enacting a different type of law that will result in people becoming convicted of industrial manslaughter rather than just manslaughter under our current criminal justice system.

Mr Monzo: Depending on the circumstances, it would be possible to attach criminal responsibility to the person who handed over the keys to the driver of the vehicle. An employer has a duty to behave with care towards his or her employees. The law places a certain duty on other people. A father has a duty to behave in a way that protects his child. Similarly, a person cannot place in danger the life of another person as a result of his or her conduct or activities. A person might become aware that a motor vehicle has a crucial defect. Let us say that it is likely that the brakes will fail after they have been depressed for the fifth time. If that person hands the keys of that car to a mate without telling him or her about the defect, there is a chance that that person could be charged with gross negligence.

Ms Kelly: We always come back to those chain of command issues. Under proposed section 49C of the Crimes (Industrial Manslaughter) Amendment Bill, a corporation can be charged with an offence if it is proved that a worker died, that the employer's conduct caused the death of the worker and that the employer was reckless or negligent. So people in the chain of command could contribute to proof of an offence against an employer.

The only way that people in the chain of command could individually be held liable would be under the senior officer offence provisions in proposed section 49D. You

would have to prove in relation to every individual that a worker died, that an individual's conduct caused the death of the worker and that a senior officer was reckless or negligent in causing such harm. So you would have to prove that against every individual. There is no piggybacking on the acts of others in relation to individual convictions.

MR HARGREAVES: So not everybody in the chain of command would automatically be convicted?

THE CHAIR: Let us say that a manager passed a message to a store manager who passed it on to a foreman on the shop floor who then passed it on to a worker and that worker died. Are you saying that not everyone in that chain of command would necessarily be convicted? On the face of it, everyone in that chain of command might have been involved.

Ms Kelly: The evidence of everyone in that chain could contribute to establishing that an offence had been committed by the employer corporation. In relation to the conduct of a particular officer we would have to determine whether passing that information on to a worker was the cause of the death of the worker. We would also have to establish whether the senior officer was reckless or negligent in causing that harm or death. We would have to establish the causation and then the mental element of the individual who passed on that information. So you make a judgment on the circumstances of each case. But you have to prove in relation to every individual the actus reus in the death of the worker, though we're not supposed to use those terms anymore.

THE CHAIR: At least I understand what you mean.

Ms Kelly: We have to prove whether the death of the worker was caused by the conduct of senior officers, the fault element being recklessness or negligence.

THE CHAIR: If this bill is enacted these provisions might never be used in the ACT. Ms Plovits kindly gave us some good statistics that show that three of the 30 or so industrial accidents or deaths that have occurred since the late 1980s in Canberra have been successfully prosecuted. That is a credit to your occupational health and safety people. On only three occasions has a worker died due to workplace negligence.

I hope that not many accidents occur in Canberra in the future. It appears to me that we might never use the provisions in this proposed legislation and that there might be other ways of achieving the same result. For example, we could improve the laws in the territory by beefing up occupational health and safety legislation, as we appear to be lagging a bit behind some of the other states. Have people in the law section looked at these other issues?

Ms Kelly: Industrial accidents are not our area of expertise. The Occupational Health and Safety Act is the responsibility of the Chief Minister's Department.

MR HARGREAVES: I seek clarification. You asked witnesses why we should not just beef up the Occupational Health and Safety Act to achieve the same result.

THE CHAIR: I asked witnesses whether they had looked at that alternative.

MR HARGREAVES: Perhaps the witnesses could also inform us whether or not these provisions could be included in the criminal code?

Ms Shakespeare: I would not mind addressing some of the issues that have been raised by other witnesses today. A few people asked why we needed these acts. For instance, representatives from the Australian Institute of Company Directors suggested that, because there was no data to prove that a number of workplace deaths could not be successfully prosecuted, there was no need for this bill.

The government's position is that workplace deaths are totally unacceptable. We need strong penalties to act as a deterrent for those employers who do not work within the 95 per cent of the compliance continuum and who are quite happy to abide by their obligations. There are workplace fatalities in the ACT. Workplace deaths are still occurring. The prosecutions that you have heard about this afternoon are prosecutions under the Occupational Health and Safety Act. We are looking at penalties under that act for non-fatal offences.

That is something that is currently being reviewed by the Occupational Health and Safety Council. I expect that council to recommend that penalties under the Occupational Health and Safety Act be increased. But there are a number of reasons why that will not be sufficient to implement the government's policy. The bill is not just necessary to introduce financial penalties or to increase financial penalties: one aspect of the bill will result in the introduction of much higher penalties for corporations. The penalty for industrial manslaughter, which is 25 years imprisonment, is consistent with the penalties in the criminal code. That equates to 2,500 penalty units or a $250,000 fine.

The government does not believe that that is necessarily high enough. Large corporations operate in the ACT, so a $250,000 fine might not be appropriate for some of those larger corporations. The bill proposes penalties of up to $5 million with a $1.25 million maximum in fines, but it also proposes community service projects that could have a financial impact on organisations. It is not just the introduction of appropriate penalties for larger corporations that makes this bill necessary; there is also the problem of prosecuting corporations under the current Crimes Act. Criminal code principles relating to corporate responsibility do not apply to fatal offences under the Crimes Act.

However, it will apply to the new offences that are created after 1 January this year. If this bill is passed the corporate responsibility provisions will apply. If we are to charge a corporation with manslaughter under the Crimes Act at the moment we need to establish that the person who caused the death of the worker substantially caused that death—which is similar to what we are proposing—and was also the directing mind and will of the corporation. That difficulty resulted in the successful prosecution of only one offence of manslaughter in Australia. Incidentally, that prosecution was against a truck driver who was instructed to drive a truck that had faulty brakes. So there has been only one successful prosecution of manslaughter.

THE CHAIR: Mr Peters told us about a different case. What you are saying would apply if those parts of the criminal code that include manslaughter were implemented. Then the provisions in this bill that relate to corporations would simply apply. Why do

we need this legislation when corporate responsibility provisions have already been enacted in the territory and federally? Our legislation dovetails into the federal legislation. We are slowly going through the process of introducing a criminal code, which will include all these offences reasonably soon. Corporate responsibility provisions will then apply to murder and manslaughter.

Ms Shakespeare: That is true. If we were to wait for fatal offences to be criminally coded, the corporate responsibility provisions would apply. But, as you have heard, there is no definite timeframe for that to occur. It is a priority of this government to introduce industrial manslaughter legislation.

THE CHAIR: You, as a public servant, have been told by the government to implement this policy. It is a priority of this government to implement this legislation before the criminal code comes into effect.

Ms Shakespeare: It is a priority.

THE CHAIR: I understand that this legislation would have much the same effect.

Ms Shakespeare: There are other provisions that I have not dealt with. The agency provisions are novel to the industrial manslaughter legislation. There is a concept of trying to catch, or codify, the law of agency. Because we have had such an increase in non-standard employment arrangements and because a number of contracting employers use labour hire and independent and dependent contractors rather than direct employees, there are provisions in this bill that will ensure that, when employers are contracting out of their normal employment relationship, they cannot use that sort of arrangement to contract out of their occupational health and safety responsibilities.

As Elizabeth said, the agency chain of command provisions in this bill would not impose vicarious liability on any individual. Individuals would be prosecuted under these manslaughter provisions if they had caused the death of a worker. If you were using corporate responsibility provisions the only entity that could be held vicariously liable for the actions of its employees would be the corporation.

MS TUCKER: So those provisions are not included in the corporate responsibility provisions? The agency chain of command provisions are included only in this industrial manslaughter legislation.

Mr Monzo: The criminal code provisions relating to manslaughter and fatal offences do not have a regime about agents, as there is in this bill. One could be held responsible for the acts of one's agents if one instructed an agent to do something and that agent was reckless about the consequences of that act and caused a person's death.

MS TUCKER: Would you explain that to me again? What is the difference between the two?

Mr Monzo: If I were to instruct my agent who was acting on my behalf to do something that I was aware carried a substantial risk and that brought about the death of somebody, I would be held liable.

MS TUCKER: You would be held liable under the provisions of the criminal code.

Mr Monzo: Under the provisions of the criminal code, that is right. But there is no regime.

MS TUCKER: What is there in the legislation that is different to the provisions in the criminal code?

Ms Shakespeare: This is specifically about people engaging contractors to perform work under a contract of service. When employers employ people under a contract of service they use external contractors. I am not sure whether that would be caught by the agency provisions in the criminal code. We designed these provisions specifically to address that problem. The emerging use of non-standard employment arrangements is leading to enforcement difficulties for occupational health and safety reasons.

MS TUCKER: I understand that. The government of the day wants to do this sooner rather than later. I want to establish whether there is a specific difference in what you call the agency chain of command. You said that, if an agent instructs someone to do something that has bad consequences and you know that the agent was negligent or reckless, that would be dealt with under the criminal code when it is implemented. You then spoke about contracting out, which I thought was the same thing. Is it the same thing?

Ms Shakespeare: I do not know whether it is necessarily the same thing.

Ms Kelly: I think these provisions clarify the application of the general rules of agency in a specific situation. It might well be that you could have achieved the same result with the general rules of agency, but these provisions put it beyond doubt.

MS TUCKER: So you are really putting in the statute a clear description of the meaning of the general rules of agency. What does the criminal code mean in relation to an industrial situation?

Ms Kelly: What is in the general law of agency.

MS TUCKER: Yes, what is in the general law of agency?

THE CHAIR: Does that not raise industrial manslaughter to a different level from everything else under the criminal code? Is there not an inherent unfairness in this? I thought that laws were meant to apply equally to everyone across the board.

Mr Monzo: That would not be the case in relation to corporations because corporations act only through their agents and employees. The situation is the same for them.

MR HARGREAVES: Is that not one of the major planks in this legislation? There is a lack of clarity in the general criminal code in relation to the accountability and responsibilities of corporations as non-legal entities, whereas it is crystal clear in this piece of legislation that corporations fit quite neatly into the definitions, as do officers of a corporation. Therein lies the uniqueness of this piece of legislation.

Ms Kelly: It certainly sets out how it would apply in a specific employment context.

Ms Shakespeare: It discusses how a person contracting another would have control over risks in a workplace for a contract and that sort of thing. It discusses concepts such as control that are applicable, in particular, in an occupational health and safety context.

MS TUCKER: Do you want to respond to any of the other points that have been raised?

Ms Shakespeare: I have gone through most of them. The government introduced this bill to act as a deterrent—an issue on which Ms Plovits touched. It is necessary to have severe penalties to act as a deterrent. It is the government's fervent hope that the penalties are not used and that there are no workplace fatalities in which employers have negligently or recklessly killed other workers. It is necessary to have penalties that are sufficiently serious to deter that kind of behaviour. I suppose that is achievable through education.

THE CHAIR: Why in this area and not in other areas?

Ms Shakespeare: I do not think it is just in this area.

THE CHAIR: In what other area is the government wanting to increase penalties to deter people?

Ms Shakespeare: As I said, we are going through occupational health and safety legislation more generally and we are looking at increasing penalties.

THE CHAIR: Any other areas?

Ms Shakespeare: I would have to refer that to other parts of government. I deal only with occupational health and safety issues.

THE CHAIR: I suppose that you cannot answer that question. I would be surprised if, for example, the Chief Minister changed his mind and supported a bill that increased penalties. Mr Monzo, I take it that we have had enacted for some months now these corporate criminal responsibility provisions?

Mr Monzo: Yes, that is correct.

THE CHAIR: An issue that was raised by a witness to this inquiry was not particularly germane. However, I want to explore a couple of points relating to it. What areas in the ACT do you think might be affected by these corporate criminal responsibility provisions? We hope that they will never be used, but could they be of benefit specifically in matters of fraud and things of that nature?

Mr Monzo: Yes, they will be. In that respect the main principle is set out in subsection (1) of section 49. The Criminal Code Act applies to corporations as well as to individuals and every offence in the code sets out fraud, blackmail and so forth. When you read the words "a person shall not" you should also read the words "a corporation shall not".

THE CHAIR: I thank witnesses for their attendance today and for their assistance to the committee.

The committee adjourned at 4.59 pm.